Abandonment of Job

When an employee disappears and makes certain that he cannot be contacted by management, he may be held to have quit his job voluntarily. The obligation to create open channels for two-way communication is that important. When an employee abandons his/her job, management has no need to apply corrective discipline; such action would be an exercise in futility. All it has to do is identify the voluntary quit, accept it as fact, and remove the employee from the payroll.

- The grievant was on disability leave. There was confusion over her calling in claiming to be injured again. The employer removed the grievant for abandonment of her job. The arbitrator reinstated the grievant; she found that the employer had an obligation to investigate whether the grievant was indeed unable to return to work.

- The grievant was fired solely because his prison sentence forced him to violate a work rule. The grievant was incarcerated for drunk driving and did not report to work for three consecutive days which the employer deemed job abandonment. The decision to execute the discipline gave no consideration to the length and quality of the grievant’s work record or any other mitigating factors. Despite the employer’s arguments to the contrary, the action was automatic. The employer argued that the rule was reasonable on its face and the arbitrator agreed. The arbitrator also decided that the demands of just cause are almost never met when discharge is based solely on a rule violation. The employer must bear in mind that just cause standards circumscribe management rights; they do not expand them. Just cause means that the employer can only remove those employees that are not salvageable.

Abandonment of Work Area

- Where grievant had previously been praised for playing basketball with patients, and where there was no clear policy stating whether the basketball court was on or off the unit, arbitrator found that there was not a preponderance of evidence that grievant had violated a staffing rule.

- There is no basis for actionable misconduct where the employee leaves his immediate work area without permission (but does not leave the site entirely) in the absence of formal rule against leaving work area without supervisory permission.

Removal is not commensurate with the offense of abandoning the work site without permission for 2 ½ hours under the circumstances of the case: employee with 7 years of good service. The removal violated 24.02 and 24.05.

It was proper for the State to terminate the grievant for repeated violations of leaving her desk unattended and taking sick leave while working her second job.

When the grievant, a flagger who was in charge of directing traffic during construction, left her post during a storm, it was deemed to be Neglect of Duty and insubordination. The grievant’s explanation for leaving her post was that she was refusing to work in a dangerous or unsafe work area (Section 11.03). The grievant was trained in her responsibilities as a flagger, she knew the storm was approaching and there were several reasonable alternatives to her action of abandoning her post. A responsible employee faced with similar circumstances would have attempted a number of reasonable alternatives rather than place the lives of co-workers and the driving public in jeopardy. She could have moved her location to under an overpass or moved closer to the work site. The responsibilities of a flagger played a critical role in the arbitrator’s determination of the grievant’s negligence.

The grievant began his pattern of absenteeism after the death of his grandmother and his divorce. The grievant entered an EAP and informed the employer. He had accumulated 104 hours of unexcused absence, 80 hours of which were incurred without notifying his supervisor, and 24 hours of which were incurred without available leave. Removal was recommended for job abandonment after he was absent for three consecutive days. The pre-
disciplinary hearing officer recommended suspension; however, the grievant was notified of his removal 52 days after the pre-disciplinary hearing. The arbitrator found that the employer violated the contract because the relevant notice dates are the hearing date and the date on which the grievant receives notice of discipline. Other arbitrators have looked to the hearing date and decision date as the relevant dates. Additionally, the employer was found to have given “negative notice” by overlooking prior offenses. The arbitrator reinstated the grievant without back pay and ordered him to enter into a last chance agreement based upon his participation in EAP: 371

– The grievant injured his back in a car accident and was off work for six months while receiving disability benefits. His doctor released him to work if no lifting was allowed. Because the position required lifting, he either left or was asked to leave work. He failed to call in for three consecutive days and was removed for job abandonment. The union requested arbitration more than 30 days after the date on the Step 3 response. The employer failed to overcome the presumption that a grievance is arbitrable. The arbitrator found just cause because: the grievant has served a 5 day suspension for failing to follow call-in procedure while on disability, his doctor’s statement that he should avoid lifting was ambiguous, and he failed to respond to the employer’s attempts to contact him. Filing for Workers’ Compensation was not found to substitute for contact with the employer: 373

– The grievant worked in a Medical Records office when a new supervisor was hired in January 1985. The supervisor changed the office location and began to strictly enforce the work rules. The office layout was also changed twice due to new equipment purchases. The supervisor also instituted a physician’s verification policy which was stricter than the previous policy. The grievant went on work related disability in February 1987. She received Disability Leave benefits and Workers’ Compensation. When these benefits expired, she began working for a private employer. She received an order to return to work in July 1987 because of her other employment. The grievant refused to return to work under her prior supervisor. The grievant appealed her denial of further Workers’ Compensation benefits and lost, after which she contacted the facility to come back to work. The arbitrator found that the grievant failed to prove supervisory harassment or constructive discharge. All the supervisor’s acts were within her scope of authority and related to efficiency. The removal was timely because the three year delay was caused by the grievant’s pursuit of her workers’ compensation claim in state court. The arbitrator held that the grievant abandoned her job and denied the grievance: 384

- The grievant was a Correction Officer who had an alcohol dependency problem of which the employer was aware. He had been charged twice for Driving Under the Influence, which caused him to miss work, and he received a verbal reprimand. The grievant was absent from work from May 18th through the 21st and was removed for job abandonment. The arbitrator found that the grievant’s removal, following a verbal reprimand, was neither progressive nor commensurate and did not give notice to the grievant of the seriousness of his situation. It was also noted that progressive discipline and the EAP provision operate together under the contract. The grievant was reinstated pursuant to a last chance agreement with no back pay; the period he was off work is to be considered a suspension: 413

Absence of Grievant from –

Arbitration Hearing

- Where grievant, having received adequate notice of the time and place of the arbitration hearing, was absent from the hearing for unknown reason, and the employer argued that the hearing should not be postponed since it had already been rescheduled once, the arbitrator directed the employer to present its case, with the understanding that the hearing would be adjourned when the presentation was finished. The parties were ordered to reconvene one week later at which time the Union was to proceed to completion or show cause why the record should not be closed. 213

- The fact that one grievant did not appear at the arbitration hearing does not require a finding that he should not be reemployed. He is a party to these grievances. He grieved in a timely fashion under the Agreement. His testimony was not necessary in order to arrive at a determination of this dispute: 311
NOTE: The Union was able to successfully argue in arbitration that the two grievants should not have been laid off because the OBES rationale for the layoff was lacking. This case was appealed by the State of Ohio to the Court of Common Pleas where a decision was made upholding the Union's position. The State appealed to the Court of Appeals which upheld the Arbitrator's award. The State did not appeal further.

- The failure of the grievant to testify in the arbitration hearing does not, in this instance, jeopardize the Union’s abolishment claim. The grievant did not waive his right to have his claim adjudicated. The arbitration step and the grievance mechanisms are voluntary processes. As such, the majority of arbitrators permit the parties significant latitude in the selection, examination, and cross-examination of witnesses, although questions of inference are sometimes drawn when a grievant refuses to testify in a disciplinary case. Similar inferences do not normally arise where the challenged action does not involve discipline or discharge matters. 34 0

NOTE: OCSEA succeeded in overturning part of these layoffs at arbitration. The State of Ohio filed a motion to vacate this award in the Court of Common Pleas. The Union prevailed in the Court of Common Pleas and the State did not appeal. The Arbitrator's original award was upheld.

The grievant was a Correction Officer who was removed for watching inmates play cards while they were outside their housing unit. The grievant admitted this act to his sergeant. The pre-disciplinary hearing had been rescheduled due to the grievant’s absence and was held without the grievant or the employer representative present. The arbitrator found that because the union representative did not object to the absence of the employer’s representative, that requirement had been waived. There was also no error by the employer in failing to produce inmates’ statements as they had not been used to support discipline. The removal order was timely as the 45 day limit does not start until a pre-disciplinary hearing is held, not merely scheduled: 377

Absence of Grievant from Arbitration Hearing

- The fact that one grievant did not appear at the arbitration hearing does not require a finding that he should not be reemployed. He is a party to these grievances. He grieved in a timely fashion under the Agreement. His testimony was not necessary in order to arrive at a determination of this dispute: 31 1

NOTE: The Union was able to successfully argue in arbitration that the two grievants should not have been laid off because the OBES rationale for the layoff was lacking. This case was appealed by the State of Ohio to the Court of Common Pleas where a decision was made upholding the Union's position. The State appealed to the Court of Appeals which upheld the Arbitrator's award. The State did not appeal further.

- The failure of the grievant to testify in the arbitration hearing does not, in this instance, jeopardize the Union’s abolishment claim. The grievant did not waive his right to have his claim adjudicated. The arbitration step and the grievance mechanisms are voluntary processes. As such, the majority of arbitrators permit the parties significant latitude in the selection, examination, and cross-examination of witnesses, although questions of inference are sometimes drawn when a grievant refuses to testify in a disciplinary case. Similar inferences do not normally arise where the challenged action does not involve discipline or discharge matters. If the grievant is absent from the hearing and evidence is omitted that only the grievant can supply this raises skepticism regarding the merits of the grievance: 34 0

NOTE: OCSEA succeeded in overturning part of these layoffs at arbitration. The State of Ohio filed a motion to vacate this award in the Court of Common Pleas. The Union prevailed in the Court of Common Pleas and the State did not appeal. The Arbitrator's original award was upheld.

- In a case where an employee was excessively absent and maintained a zero balance in her sick leave account, the arbitrator held that removal was appropriate: 5 5 5

- The grievant was disciplined eleven times previously for absenteeism during her four-year tenure as a Correction Officer. The Arbitrator concluded that the grievant’s attendance problems were the result of continuing a serious spousal abuse and reinstated the grievant, without back pay and without loss of seniority, contingent upon her participation in a Employee Assistance program: 609
Absence of the Grievant from Pre-arbitration Meetings
- Although it was not established that the absence of the grievant from all pre-arbitration meetings was the fault of the employer, the employer’s failure to give more than cursory consideration to a postponement and given her prior absences, the employer’s willingness to proceed with the Step 3 meeting gives the appearance of unfairness. This, coupled with the 18 months between the alleged incidents and the serving of papers compromised the ability of the Union to defend its member. There is a pattern of disregard for the grievant’s due process rights. Although much of the damage to the grievant’s defense was overcome, the effect of the 18 month delay is irreversible and prejudicial to the grievant.

Absence of the Grievant from Pre-disciplinary Hearing
- The employer should not be held accountable for the absence of the grievant or the grievant’s representative at the pre-disciplinary hearing when both have been properly notified.

Absence from Work Area
The Arbitrator found that the Grievant told her co-worker that she was taking a bathroom break at 6:30 a.m., left her assigned work area, and did not return until 7:30 a.m. This length of time was outside the right to take bathroom breaks, and therefore, the Grievant had a duty to notify her supervisor. Failing to notify the supervisor would have given rise to a duty to notify the grounds office supervisor who is available 24 hours a day, 7 days a week. The Grievant’s prior discipline record should have put her on notice of the seriousness of the offense.

The supervisor should have raised the matter of the absence with the Grievant sooner, but there was nothing in the record to show that this failure in any way inhibited the case presented by the Union, or enhanced the case presented by the Employer.

The Arbitrator held that there was no proof that the discharge was tainted by any claim of due process or unfairness, when the same supervisor conducted both the fact-finding and the investigation. The most damaging testimony to the Grievant was presented by her co-employees, not by the supervisor. The Arbitrator found that the Grievant exhibited disregard for the performance of her duties to care for the residents, a matter for which she had been amply warned on previous occasions.

Absenteeism
Where an employee has been offered an opportunity at rehabilitation, but has then lapsed back into his former ways, discharge is typically inevitable.

Failure to follow correct procedures in requesting sick leave and in supplying doctor’s excuses does not amount to absenteeism where employee made good faith effort to notify employer.

Four counselings, one written reprimand, and a suspension, all for absenteeism, constitute sufficient progressive discipline to justify a removal for absenteeism.

Where grievant had been given progressive discipline for absenteeism which would have justified a removal if grievant engaged in further absenteeism, grievant was not removed for just cause when he was removed for failure to follow correct procedures in supplying physician’s statements. The fact that previous violations were disciplined under the general phrase “neglect of duty” does not change this requirement.

Beyond dispute: one of the fundamental obligations of employment is that employee report to work on his schedule, unless there is a reasonable excuse for not doing so.

The seriousness of absenteeism is compounded when employee accepts compensation from the state for the time he was absent.

Extensive health problems is not an excuse where the employee, without direct supervision, did not inform employer of absences, was paid for time absent, and did not make use of contractual provision for extended medical leave.

Two instances of neglect of duty for absence without leave, within 6 months, constitute just cause for dismissal.

Section 29.02 indicates the parties contemplated that exceptions could occur to call-in requirement. Grievant’s suffering from severe upper respiratory
infection, suffering from bipolar disease with the associated depression and sleeping, give rise to such an exception. 63

A 65 year old person removed for absenteeism, tardiness, and failures to call in was reinstated without pay since she had been a good employee before being made full-time, had developed several medical problems afterwards which management had not been informed of (although they had some knowledge) when they made the removal decision. 65

It is impermissible for the state to engage in discussions with an employee concerning his discipline and work performance and then discipline the employee for attendance at those discussions. 70

When employees are expected to use flextime in a certain fashion, grievant cannot be disciplined for doing so. 70

Grievant should have been aware, either through his representative or from his employee manual from management personnel that he could possibly have received short term disability. 82

The grievant was afforded a reasonable time to arrange for childcare and neither the contract nor any other standard requires more. 91

Circumstances, such as extended illness, can mitigate against strict adherence to return to workdays. Where grievant failed to return to work as scheduled, but did act reasonably in attempting to return to work as soon as possible and at same time protecting his health so that he would be able to work when he returned, the arbitrator ruled that the employer did not have just cause for disciplining the grievant even though the employer acted properly when it charged the grievant with the violation. (The employer had not been informed of the extenuating circumstances). 95

Signed statement from grievant’s mother saying she had called in for the grievant does not overcome the evidence presented by the persons who testified at the hearing. There were at least two people available most of the morning to take calls on that day. Neither received a call. The mother’s testimony was allowed, but not given much weight. 96

Absenteeism and tardiness are not excused by grievant’s failure to own a telephone or car. The employer cannot be expected to bear the costs of the grievant’s lack of these items. 111

Absenteeism and tardiness are not excused because the grievant was experiencing domestic difficulties. 111

Section 24 .02 first states that discipline shall be commensurate with the offense and then cites the progressive discipline schedule. The obligation of the employer is to determine if the usual steps of progressive discipline can be applied in this case by weighing the two elements of 24 .02 (seriousness of offense vs. the requirement of progressive discipline). In this case, the seriousness of the offense (absence without leave and deliberate failure to call in despite knowing the procedure) takes precedence and, thus, the discipline did not violate 24 .02 even though it skipped steps of progressive discipline. 120

Where the supervisor had told grievant that she would get back to the grievant about the grievant’s request for leave of absence, but did not, that failure did not constitute an implied authorization for the grievant to take extended leave. 137

Where the grievant had been removed for taking leave without waiting for her request to be approved, the arbitrator found that the discipline did not reflect the severity of the offense in light of the circumstances which included medical problems and family problems, such as the need to care for chemically dependent child. 137

Where the grievant was on leave for military service, but was not required to report to the army for the first day because he was sick, and he failed to inform the employer, the grievant effectively placed himself on unauthorized leave. The violation was substantially inconsequential since grievant would have been entitled to sick leave or leave without pay. However, the AWOL charges are technically correct and cannot be disregarded. Nevertheless, at its worst, the grievant’s misconduct was a technical omission, less serious than most of those for which mild progressive discipline is the penalty prescribed in the Adjutant General’s Regulations. The arbitrator is forced to conclude that removal is too harsh and the most severe penalty which could have been imposed
under the just cause precept was a written warning.  

That the grievant was sick and his supervisor was occupied on the telephone does not excuse the grievant’s unauthorized absence caused by the grievant’s leaving work without obtaining permission from his supervisor. Another supervisor was in the office.

That the grievant had leave available to him was found to be immaterial where the grievant was being disciplined for an unauthorized absence. Removal is not commensurate with the offense of abandoning the work site without permission for 2 ½ hours under the circumstances of the case; employee with 7 years of good service. The removal violated 24.02 and 24.05.

Arbitrators typically distinguish between 2 broad absenteeism categories. Casual absenteeism refers to intermittent of short-term absences of one, two, or three days. Extended absenteeism, however, refers to a relatively fixed or lengthy period of absence ordinarily prompted by injury or illness.

- The grievant’s attempt to justify his absenteeism by reference to a previous injury was not accepted. The injury had occurred 2 months before the absences. The arbitrator did not believe there could be a connection.

Regular attendance is the most fundamental obligation. When an employee is effectively working as a part time employee, but being paid as a full time employee, the employer has bona fide grounds for discipline.

Only a person oblivious to the work environment could fail to comprehend that attendance is the “sine qua non” of holding a job. The employer is not required to inform employees of the obvious precondition to retention of employment, that attendance at work is mandatory.

An employer is certainly entitled to regular employee attendance as part of the employment bargain under a collective bargaining agreement. Thus, just cause includes the violation of reasonable attendance rules that are condoned by the agreement. And where attempts at progressive discipline have demonstrated that an employee’s attendance problems are incorrigible, discharge is appropriate.

It is fairly well established that discharge of an employee is justified for chronic, excessive absenteeism, even when the employee’s absences are due to illness. A point is eventually reached where a reason for the absence becomes immaterial and the question becomes simply whether the company can properly be required to retain on its own payroll an employee who cannot reasonably be relied upon to return to work.

Each of the episodes under consideration involve the linkage of “good days” and/or holidays with the absence occurrence. Such a consistent pattern of behavior seems to defy the possibility of a mere happenstance. Rather it reflects a particular irresponsible pattern behavior, over a considerable period of time, engendered by a common motive. Management does not have to post a rule or obtain contractual language to inform employees of what they already know. For example, every rational adult human being knows, without being told, that stealing from one’s employer is disciplinary misconduct. A posted rule or contractual prohibition to that effect would be surplusage; it would do nothing to enhance the employee’s understanding. By the same token, employees are presumed to know that they must be available for communications from their employer when on indefinite leaves of absence. The arbitrator upheld discipline of the employee for failing to do so.

- When an employee disappears and makes certain that he cannot be contacted by management, he may be held to have quit his job voluntarily. The obligation to create open channels for two-way communication is that important. When an employee abandons his/her job, management has no need to apply corrective discipline; such action would be an exercise in futility. All it has to do is identify the voluntary quit, accept it as fact, and remove the employee from payroll.

- The company is entitled to insist on reasonable attendance. The company is entitled to have an employee that will get the job done. If an employee has repeated absences over a long period of time, even if such absences are justified, he becomes of so little value as to justify his termination.
- Progressive discipline is a concept that represents the general rule with respect to application of discipline. It does not represent a set of standards that must be slavishly followed, irrespective of the severity of the offense which may prompt discipline. If an employee with an unblemished record and long service were found to have stolen from the employer, or perhaps to have vandalized the employer’s premises, the Union would be in an insupportable position if it argued against a discharge on grounds that progressive discipline had not occurred. There must be a balancing of the severity of the offense and the severity of discipline. Where the state had moved from written reprimand to discharge it is technically correct that progressive discipline was not followed. But the arbitrator did not find the employer had erred given that the employer had 4 disciplines in the last 12 months and that the employee’s present offense (absenteeism) was serious. 219

- The grievant was absent from work because of a conflict between his duties with the state and his duties to the family farming enterprise. Acknowledging that this conflict was real and severe, does not serve to justify the taking of leave without pay to operate the family farm. 219

- Automobile breakdown was not given mitigating weight on the ground that driving 4-5 hours after work when due at work at 7:30 the next morning is irresponsible on its face. 233

- The employer unreasonably refused the application for available leave balances. If employees have available leave balances, leaves are normally approved, except where pattern abuse has occurred. The grievant had available leave balances and his record did not evidence pattern abuse. When an employer makes a decision under these circumstances, it has an affirmative obligation to substantiate the reasonableness of its decision. In this particular instance, the decision seems arbitrary. 241

- The grievant abandoned his job by not returning to work at the end of his approved disability leave, not calling-in, and not providing adequate medical documentation. When grievant was asked to bring in medical documentation, he falsely claimed it was at home, but he never brought it in. These offenses alone would be sufficient to warrant removal. 248

- The grievant had extensive absenteeism during the four months he had worked for ODOT. Nevertheless, he had not received any corrective discipline, but was removed at the end of the four months. The employer’s lax enforcement condoned the grievant’s repeated violations, and led him to believe that nothing would happen to him when he did not report to work. Thus, the employer shares some fault for the grievant’s conduct and, consequently discharge is inappropriate. Nevertheless, the rule requiring employee attendance is reasonable and the grievant should receive a ten-day suspension. The arbitrator noted that the removal would have been sustained if the employer had only overlooked an isolated incident of unauthorized absence or failure to call-in properly. 249

- Where the grievant had reason to know he would be incarcerated, but continued to use up his available leave time, and was later removed for unauthorized absence during his 10 day incarceration, the arbitrator found that the grievant’s unauthorized absence warranted some discipline. 251

- That the state set forth, in its unilaterally promulgated guideline 16(b), that an employee would be removed for 3 consecutive days of unauthorized absence does not mean that it is imposed in each and every case. Were that so, the grievance procedure, which is part of the parties’ bargain, would be meaningless. It is the test of just cause, which is set forth in the contract that governs the propriety of the penalty imposed by the state. 251

- Guideline 16(b), which imposes removal for three days of consecutive absence is a reasonable rule. It serves the state’s goal of efficiency and its right to manage and operate its facilities and programs. These goals cannot be satisfied if employees are absent without proper authority. To be absent 1 day without proper authority is serious enough. To be absent 3 days without authority compounds the offense. The reasonableness is underscored by the provisions for progressive discipline in the rule. 251

- The arbitrator reduced the discipline for unauthorized absence to suspension from a removal because he found several mitigating factors: The supervisor who had imposed the removal had a history of hostility toward the grievant so that she might have imposed a lesser
penalty if the offense had been committed by a different employee; the grievant had 5 years of satisfactory service with only one previous discipline (a written reprimand); grievant had shown eagerness to retain his job by calling in when he was sentenced to ten days in jail, having his grandmother call in for him each day, returning to work directly after being released. 25

- In cases dealing with discharge of an incarcerated employee because of absenteeism, once it has been determined that the employer has been reasonable and evenhanded, mitigating factors are considered such as the length of employment, the dependability of the employee, the employee’s period of incarceration, the employee’s prior disciplinary record, and the difficulty of replacing an employee temporarily. 25

- The grievant’s failure to report in or call in are overcome by the mitigating circumstance that she was unable to do so because she had been abducted. 25

- The employer notified the grievant that since the grievant had a long history of excessive absenteeism any future sick leave must be verified. The grievant called in sick with diarrhea and stomach cramps. Even if the grievant did not need medical care the grievant was obliged to go to a doctor to obtain a physician’s verification: 284

- A ten-day suspension was justified by the grievant’s excessive absenteeism, an abusive habit of extending weekends with non-scheduled absences and not filling out the appropriate forms: 285

- It was proper for the State to terminate the grievant for repeated violations of leaving her desk unattended and taking sick leave while working at her second job: 291

- When the grievant, a flagger who was in charge of directing traffic during construction, left her post during a storm it was deemed to be Neglect of Duty and insubordination. The grievant’s explanation of leaving her post was that she was refusing to work in a dangerous or unsafe work area (Section 11.03). The grievant was trained in her responsibilities as a flagger, she knew the storm was approaching and there were several reasonable alternatives to her action of

abandoning her post. A responsible employee faced with similar circumstances would have attempted a number of reasonable alternatives rather than place the lives of co-workers and the driving public in jeopardy. She could have moved her location to under an overpass or moved closer to the work site. The responsibilities of a flagger played a critical role in the arbitrator’s determination of the grievant’s negligence: 304

- The grievant was involved in a check-cashing scheme involving stolen state checks from another agency, along with two other state employees. His role was that of an intermediary between the person who stole, and the person who cashed the checks. He served 45 days of a criminal sentence. The grievant was found to be deeply involved with the scheme and received a substantial portion of the proceeds. The violations were found to be connected to the grievant’s job, as theft of state property is harm to the employer. The grievant was found to be not subjected to disparate treatment when compared to other employees not removed for absenteeism while incarcerated: The other employees cited for disparate treatment purposes had not stolen state property: 370

- The grievant began his pattern of absenteeism after the death of his grandmother and his divorce. The grievant entered an EAP and informed the employer. He had accumulated 104 hours of unexcused absence, 80 hours of which were incurred without notifying his supervisor, and 24 hours of which were incurred without available leave. Removal was recommended for job abandonment after he was absent for three consecutive days. The pre-disciplinary hearing officer recommended suspension; however, the grievant was notified of his removal 52 days after the pre-disciplinary hearing. The arbitrator found that the employer violated the contract because the relevant notice dates are the hearing date and the date on which the grievant receives notice of discipline. Other arbitrators have looked to the hearing date and decision date as the relevant dates. Additionally, the employer was found to have given “negative notice” by overlooking prior offenses. The arbitrator reinstated the grievant without back pay, and ordered him to enter into a last chance agreement based upon his participation in EAP: 371
– The grievant had received up to a ten day suspension, and had been enrolled in two EAP programs. She was late to work for the third time within a pay period. The arbitrator found that just cause did exist for removal as the grievant had received four prior disciplinary actions for absenteeism and the employer had warned her of possible removal. The fact that the employer reduced the most recent discipline did not lead to the conclusion that the employer must start the progressive discipline process over: 376

– The grievant was a thirteen year employee who developed absenteeism problems. In just over one year, he received discipline up to and including a fifteen day suspension. Between December 1, 1990 and March 1, 1991, the grievant had eighteen unexplained absence-related incidents for which he was removed. The arbitrator found that the employer proved that the grievant failed to account for his activities at work and that progressive discipline was followed. The arbitrator noted that while the grievant has a great deal of freedom while working, he must follow the employer’s work rules. The grievance was denied: 381

– The grievant attended a pre-disciplinary hearing for absenteeism at which his removal was recommended, but deferred pending completion of his EAP. He failed to complete his EAP and was absent from December 28, 1990 to February 11, 1991. The grievant was then requested to attend a meeting with a union representative to discuss his absence and failure to complete his EAP. The grievant was removed for absenteeism. The arbitrator found that the grievant guilty of excessive absenteeism and prior discipline made removal the appropriate penalty. The employer was found to have committed a procedural error. Deferral because of EAP participation was found proper; however, the second meeting was not a contractually proper pre-disciplinary hearing. No waiver was found on the part of the union, thus the arbitrator held that the employer violated the grievant’s absenteeism rule. Additionally, the employer was found not to be obligated to enter into a last chance agreement nor to delay discipline until the end of the grievant’s EAP. Mitigating circumstances existed, however, to warrant a reduced penalty. The arbitrator noted the grievant’s length of service from 1981 to 1990, and the fact that he sought help himself, therefore the arbitrator reinstated the grievant with no back pay pursuant to a last chance agreement after a physical examination which must show him to be free of drugs: 391

– The grievant was removed for failing to report off, or attend a paid, mandatory four-hour training session on a Saturday. The grievant had received 2 written reprimands and three suspensions within the 3 years prior to the incident. The arbitrator found that removal would be proper but for the mitigating factors present. The arbitrator noted the surrounding circumstances of the grievance; the grievant was a mature black woman and the supervisor was a young white male and the absence was caused by an embarrassing medical condition. The removal was reduced to a 30 day suspension and the arbitrator retained jurisdiction regarding the last chance agreement: 422

– The grievant began to experience absenteeism problems and received notification of his removal on February 8, 1991. The Union’s Executive Director received a copy of the removal order on February 19. The grievance was written on February 22nd and received by the employer on March 1, twenty days after the removal order. The grievance was held to be not timely filed and thus not arbitrable. The triggering event was the grievant’s receipt of his removal order. Section 25.01 employs calendar days, not work days. Also, while the day of receipt of the removal order is not counted, the day the grievance is postmarked is counted. No basis for an extension of time was proven: 387

– The grievant was a field employee who was required to sign in and out of the office. He began to experience absenteeism in 1990 and entered drug abuse treatment. He continued to be excessively absent and was removed for periods of absence from October 2nd through the 10th and October 26th to the 30th, during which he called in sporadically but never spoke to a supervisor. The grievant was found to have violated the employer’s absenteeism rule. Additionally, the employer was found not to be obligated to enter into a last chance agreement nor to delay discipline until the end of the grievant’s EAP.

The grievant was a field employee who was required to sign in and out of the office. He began to experience absenteeism in 1990 and entered drug abuse treatment. He continued to be excessively absent and was removed for periods of absence from October 2nd through the 10th and October 26th to the 30th, during which he called in sporadically but never spoke to a supervisor. The grievant was found to have violated the employer’s absenteeism rule. Additionally, the employer was found not to be obligated to enter into a last chance agreement nor to delay discipline until the end of the grievant’s EAP. Mitigating circumstances existed, however, to warrant a reduced penalty. The arbitrator noted the grievant’s length of service from 1981 to 1990, and the fact that he sought help himself, therefore the arbitrator reinstated the grievant with no back pay pursuant to a last chance agreement after a physical examination which must show him to be free of drugs: 391

– The grievant was removed after 13 years service from her position with the Bureau of Disability Services for unapproved absence, conviction of a
drug charge, and failure to report the drug charge as required by the state’s Drug-Free Workplace policy. The Bureau is funded by the federal government and is subject to the Drug-Free Workplace Act of 1998. The grievant had a history of alcohol problems. She was also involved with a co-worker who, after the relationship ended, began to harass her at work. She filed charges with the EEOC and entered into an EAP. The former boyfriend called the State Highway Patrol and informed them of the grievant’s drug use on state property. An investigation revealed drugs and paraphernalia in her car on state property and she pleaded guilty to Drug Abuse. She became depressed and took excessive amounts of her prescription drugs and missed 2 days of work. She was admitted into the drug treatment unit of a hospital for 2 weeks. She was on approved leave for the hospital stay, but the previous 2 days were not approved and the agency sought removal. The arbitrator found that while the employer’s rules were reasonable, their application to this grievant was not. The Drug-Free Workplace policy does not call for removal for a first offense. The employer’s federal funding was not found to be threatened by the grievant’s behavior. The grievant was found to be not guilty of dishonesty for not reporting her drug conviction because she was following the advice of her attorney who told her that she had no criminal record. The arbitrator noted that the grievant must be responsible for her absenteeism, however the employer was found to have failed to consider mitigating circumstances present, possessed an unwillingness to investigate, and was found to have acted punitively by removing the grievant. The grievant’s removal was reduced to a 10 day suspension with back pay, benefits, and seniority, less normal deductions and interim earnings. The record of her two day absence was ordered changed to an excused unpaid leave. The grievant was ordered to complete an EAP and that another violation of the Drug-Free Workplace policy will be just cause for removal: 4 29

- In a case involving a grievant who had been progressively disciplined through twelve violations of work rules for absence and tardiness, the State had just cause to issue one five day suspension followed by one ten day suspension. The grievant had been put on notice prior to the five-day suspension that his problems needed to be corrected. Thus, even though most of the infractions that led to the ten day suspension occurred while the five day suspension was being processed, the grievant was not denied an opportunity to correct his behavior between the two disciplinary actions in question: 5 22

- The grievant was disciplined eleven times previously for absenteeism during her four-year tenure as a Correction Officer. The Arbitrator concluded that the grievant’s attendance problems were the result of continuing serious spousal abuse and reinstated the grievant, without back pay and without loss of seniority, contingent upon her participation in a Employee Assistance program: 609

The Arbitrator found that the Employer exercised sound discretion given the fact that the Grievant had failed to respond in a meaningful way to prior progressive corrective action steps (particularly to a fifteen day suspension) in an effort to improve her dependability. The Grievant also failed to present any convincing mitigating factors that would excuse her late call or her one hour and twenty-four minute absence from work. The Arbitrator did not agree that the Grievant was treated in a disparate manner, that a misstated year on a letter had any impact on the timing of the investigation, and that there was bias when the investigator was a witness to the Grievant’s calling in late. 928

Neither the Employer nor the Union was entirely right or wrong in the case. The Grievant’s discipline did not stand in isolation. She had 29+ years of service with the state with a satisfactory record until 2004 . In addition, she had been diagnosed with sleep apnea and begun treatment. Under the circumstances her discharge could not stand. The Employer acted properly in administering progressive discipline to the Grievant; on the other hand, the Grievant was ill. Because she had called off the two days prior to the day in question she had a reasonable belief, albeit erroneous, that the Employer knew she would not report. As a veteran of many years of service she should have known that she should call in. She had been subject to recent and increasingly serious discipline. Therefore a make-whole remedy could not be adopted. 964

The Arbitrator held that the Bureau had just cause to discipline the Grievant for a willful failure to carry out a direct order and for her failure to produce a Physician’s Verification for an absence. This also constituted an unexcused absence for the same date. The Bureau also had just cause to discipline the
Grievant for the improper call-off on a later day. The Grievant’s refusal to answer any questions in both investigatory interviews constituted separate violations of the fourth form of insubordination, in that the Grievant failed to cooperate with an official investigation. The Arbitrator held that the record did not support the mitigating factor that the Grievant’s work was placed under “microscopic” review. Nor did the record provide substantial information that the supervisors were universally committed to finding any violations of work rules by the Grievant. 1 021

Absent Without Leave (AWOL)

- Failure to follow the appropriate call off protocols and failure to follow the sick leave policy will result in a disciplinary suspension: 4 4 4

- The grievant was not AWOL, as the grievant’s incarceration was an extenuating circumstance. It was satisfactory that his father called off for him: 4 5 6

- That the grievant called in late, reported to work well after his call in, failed to complete a request for leave form for his absence, and failed to obtain a doctor’s verification is not enough to justify a seven day suspension. With just a one day suspension on the record, only a two day suspension is warranted: 4 6 8

- The employer had just cause to remove the grievant for being absent without leave (AWOL). Her two previous attendance infractions, coupled with other unrelated infractions during her short employment with the Northwest Ohio Development Center justified sustaining the State’s decision to discharge the grievant: 4 8 8

- The grievant’s request for leave to cover the June dates she was absent could not have been submitted until some time after those dates, and the leave request was not approved because the grievant did not call off on those dates. The grievant’s argument that she was out on approved leave is not persuasive: 4 8 8

- Management properly removed a grievant who (1) had failed to sign in for a break which he took during the first hour after reporting to work in violation of the agency policy and (2) was AWOL for more than three consecutive days. First, the grievant was aware of the policy, the Union never challenged it as being unreasonable and the grievant failed to provide a rational excuse for taking the unauthorized break. Second, the agency’s awareness of the grievant's incarceration in no way curtailed its right to expect employees to work their scheduled hours and be regular in their attendance: 5 2 3

- The grievant was properly suspended for submitting a falsified order to report for National Guard training even though the grievant did perform services for the National Guard during the period covered by his excuse, and he was not responsible for the forged signature on the military leave form. The arbitrator concluded that the grievant should have known that, without accompanying orders, a military leave form was insufficient to place him on active duty. Consequently, the arbitrator decided that the grievant was absent from work without proper leave and that he improperly received payment from both the State government and the Federal government for the same period of time. Even so, the arbitrator reduced the penalty from removal to a suspension because the State had not proved its entire case: 5 2 8

- In reaching a decision to terminate the grievant, the Arbitrator considered the grievant’s past disciplinary record, which included several reprimands for Neglect of Duty due to her attendance-related problems. The Arbitrator found the grievant to be a less credible witness because of her past disciplinary record: 5 4 4

- An employee was absent without leave (AWOL) after failing to call in sick for three consecutive days, which was a violation of the employer’s attendance policy as well as a violation of a Last Chance Agreement between the employer and the grievant: 5 5 9

- Based on the fact that the investigation was complete when the indictment was returned, the Arbitrator concluded, pursuant to Contract Article 24, that the employer had the option to terminate the grievant’s Administrative Leave and, if circumstances warranted, the grievant could have been returned to work. In the instant case, the grievant could not return to work. Therefore, it was appropriate for the employer to terminate the grievant’s Administrative Leave. Additionally, the employer had just cause to terminate the grievant based on the grievant’s Neglect of Duty, Absence Without Leave or Job Abandonment: 5 9 1
Management charged the grievant with being Absent Without Leave (AWOL) after discovering he had been lying on his time sheets. The Arbitrator determined that management properly discharged the grievant because he lied on his time sheets. 594

The grievant was employed by the Department of Agriculture for 21 years. After sustaining neck and back injuries in an automobile accident, the grievant received State disability benefits. However, the grievant failed to file all the forms necessary to cover his absence. The State eventually issued an AWOL notice and charged him with insubordination for failure to complete the required forms. The Arbitrator held that the discipline was justified but removal was unreasonably severe considering the unusual circumstances of the case. The Arbitrator ordered a thirty-day suspension without pay: 601

The arbitrator found that the grievant was wrong to think he could take off work the rest of the day following a two-hour examination. The employer presented credible evidence that on the day preceding the examination the grievant was told he was to return to work following his examination. The grievant’s termination was converted to a time served suspension for being absent without leave. 752

The arbitrator determined that the charges of failing to notify a supervisor of an absence or follow call-in procedure and misuse of sick leave were without merit. He found that the charge of AWOL did have merit. 765

The evidence clearly established that the grievant was 25 minutes late for work. The arbitrator noted that management’s policy did not support its position that an employee could be both tardy without mitigating circumstances and AWOL for the same period of 30 minutes or less. The grievant’s 5-day suspension was reduced to a 2-day suspension. 770

The grievant was arrested at the Department of Youth Services for failing to pay a fine for a traffic offense. The superintendent ordered him to clock-out prior to his arrest, and denied his request for emergency use of vacation time. The department placed him on unauthorized leave of absence status and the Union argued that it is not possible for him to be AWOL when he was ordered off the clock by the superintendent. However, the arbitrator concluded that it was possible for the grievant to be placed on AWOL because the superintendent was simply trying to eliminate the disruption that might result from an employee being arrested at the facility. 862

The grievant was removed from his position for being absent without proper authorization and job abandonment. The grievant had two active disciplines at the time of his removal – a one-day fine and a two-day fine. Both fines were for absence without proper authorization. At the time of removal, the grievant had no sick, vacation or personal time available. After exhausting his FMLA leave, the grievant was advised to return to work, which he failed to do. The arbitrator concluded that the grievant at least implied that he was abandoning his job by not giving proper notification. The arbitrator noted, “...one could reasonably conclude that the Grievant made either a conscious or an unconscious decision to focus on health related problems and to place his job on the “back burner”.” The arbitrator found that the grievant was in almost continual AWOL status without providing proper notification and the employer provided testimony that it encountered undue hardship due to the grievant’s absences. The arbitrator was sympathetic to the grievant’s situation with a sick parent, however, it was noted that he showed little concern for his job. The employer’s decision to remove the grievant was neither arbitrary nor capricious. 883

The arbitrator found that the grievant was wrong to think he could take off work the rest of the day following a two-hour examination. The employer presented credible evidence that on the day preceding the examination the grievant was told he was to return to work following his examination. The grievant’s termination was converted to a time served suspension for being absent without leave. 752

The arbitrator determined that the charges of failing to notify a supervisor of an absence or follow call-in procedure and misuse of sick leave were without merit. He found that the charge of AWOL did have merit. 765

The grievant was arrested at the Department of Youth Services for failing to pay a fine for a traffic offense. The superintendent ordered him to clock-out prior to his arrest, and denied his request for emergency use of vacation time. The department placed him on unauthorized leave of absence status and the Union argued that it is not
possible for him to be AWOL when he was ordered off the clock by the superintendent. However, the arbitrator concluded that it was possible for the grievant to be placed on AWOL because the superintendent was simply trying to eliminate the disruption that might result from an employee being arrested at the facility. 862

The grievant was allegedly injured by an unknown assailant who was attempting to enter the building where the grievant worked. There were no witnesses to the incident. Due to inconsistencies in the grievant’s statements, the arbitrator found that the record did not indicate that the grievant was injured at work. The arbitrator found that the grievant was well aware that he did not have leave balance accrued and that the medical choices made by the grievant were his own doing. Given the arbitrator’s finding regarding the assault, the arbitrator determined that the grievant was absent without leave for more than four days and that he misused/abused approved leave. The arbitrator stated that those violations warranted removal. The arbitrator concluded that the facts did not support a work-related injury. He stated that critical to his conclusion was the grievant’s credibility. The grievant provided no evidence to conclude that an unknown assailant injured him. The arbitrator stated that the grievant’s overall testimony was not believable and his refusal to acknowledge wrongdoing negated any mitigating factors. 925

- The Grievant had entered into a Last Chance Agreement with the agency. She then violated the Corrective Action Standard, AWOL—No approved request for leave. The Arbitrator held that the Last Chance Agreement was fair, just, and reasonable. The Grievant was knowledgeable of the corrective action standard and there was no evidence showing that those corrective action standards were not published or selectively used rather than even-handedly applied. The Arbitrator found that the Grievant’s excuse for the absence lacked corroboration in any manner or respect. The Arbitrator reminded the parties that if a termination is based upon a Last Chance Agreement the just cause provisions may not apply, but rather the application is under the Last Chance Agreement. 1 031

Abuse of Resident, Patient, or Inmate
- Modification of discharge. 1 08
- Under the Agency’s own definition of patient or resident abuse, actual administration of improper amounts of medication is required in order to establish abuse. Where filling cups with improper dosages was proven, but there was no proof that improper dosages had been administered to the patients, the arbitrator found that patient abuse had not been established. 1 4
- There was no intent of the parties as to the scope of the term abuse in section 24 .01 . 5 6
- For the purposes of the Department of Mental Health and the Department of Mental Retardation and Developmental Disabilities, the parties shall be subject to the definition of abuse contained in Ohio Revised Code 2903.33(B)(2) and their respective Ohio Administrative Code Sections 5 1 23-3-1 4 (C)(1 ) and 5 1 22-3-1 4 (C)(1 ). For the purposes of all other departments, however, all applicable state laws shall be incorporated only if the parties have traditionally employed the term “abuse” in determining the propriety of termination decisions. 5 6
- Since 24 .01 requires just cause for any discipline, the employer must establish that it had just cause to undertake the termination before it can allege that an arbitrator does not have authority to modify a penalty. 5 6, 1 1 6
- The parties to the contract herein had mutually agreed that the Dunning arbitration award was to have statewide application to all departments in determining the application and definition of the term “abuse.” 1 06
- The arbitrator found that the following was the proper definition of abuse to be applied to DYS: knowingly causing physical harm or recklessness causing serious physical harm to a person by physical contact with the person or by the inappropriate use of physical or chemical restraint, medication, or isolation of the person. 1 06
- Employees charged with the care of retarded persons have responsibilities that exceed those of employees in industrial establishments. 1 08
- An earlier arbitration determined that “abuse”, as applicable to the Department of Mental Retardation and Developmental Disabilities, is defined by ORC 2903.33(B)(2) and OAC 5 1 23-
3-1 4 (C)(1 ). Under the latter, there are four independent tests for determining if abuse occurred:

1 )Any act or absence of action inconsistent with human rights which results or could result in physical injury to a client, unless the act is accidental or done in self-defense;

2 )Sexual activity as defined by Chapter 1 907 ORC;

3 )Insulting or coarse language or gestures directed toward a client which subjects the client to humiliation or degradation;

4 )Depriving a client of real or personal property by fraudulent or illegal means.

- Before an arbitrator is barred from modifying a removal for abuse, the arbitrator must be satisfied that the abuse was of a serious enough nature to establish just cause for removal.

- Arbitrator modified the discipline of a grievant who was guilty of abuse. Relatively unblemished disciplinary record and the poor state of grievant’s health were seen as adequate mitigation against her removal. The arbitrator cited as further mitigation the grievant’s knowledge of the patient’s lack of impulse control that makes him dangerous, as evidenced by numerous previous attacks on his caretakers.

- The arbitrator disagreed with Arbitrator Pincus’ ruling that 24 .01 is intended to prevent an arbitrator from holding that an employee was terminated for proper cause on the basis of certain misconduct, but that termination for misconduct should be reduced.

- Wiring a fire exit door shut to keep a patient from running away was determined by the arbitrator as not being inconsistent with human rights. (“Inconsistency with human rights” is a test for abuse under OAC, section 5 1 23-3-1 4 (c)(1 ).

- Having found abuse, the arbitrator held that under 24 .01 , no consideration may be given to any reduction of the penalty imposed by the state.

- The arbitrator pointed out the seriousness of a charge of abuse for the grievant. Such a charge not only opened the grievant to dismissal from a career of ten years, but dismissal for such a reason would be bound to taint his employment opportunities forever. Secondly, such a charge could result in criminal charges. The arbitrator went on to sustain the grievance on the grounds that the employer had not made a fair and objective investigation before removing the employee.

- Six years of satisfactory service is not a sufficient mitigating factor to outweigh the excessive use of force and physical abuse incurred and grievant’s failure to disclose the truth to the Use of Force Committee. Furthermore, Section 24 .01 of the contract prohibits the arbitrator from modifying the termination of an employee who abuses a person in the care of the state.

- Clear and convincing evidence, and not simply a preponderance of the evidence is required to make out an “abuse” case.

- If it is an abuse case, and not simply a multiplicity of errors case, and the fact of abuse is proved, the arbitrator’s power to modify the termination for abuse is nonexistent.

- Following the Pincus decision on the subject, it has become necessary for the agency to establish that the grievant has physically abused a patient as the term “abuse” is defined in ORC 2903.33(B)(2) and the OAC, section 5 1 23-3-1 2(C)(1 ). In this arbitrator’s judgment, the two are not entirely congruent. The OAC gives the more expansive definition in that it can be satisfied by omissions or by the possibility of injury rather than actual injury. Both agree however that merely accidental conduct, even if causing physical injury, is excused and prohibits a finding of abuse. Applied to the case at hand, the arbitrator found no abuse.

- Where the arbitrator found that the grievant’s use of an improper hold to restrain the patient was accidental and thus did not constitute abuse, the arbitrator nevertheless found that the grievant was guilty of a lesser-related offense: negligent
performance of duty. The grievant should have sought help to restrain the patient, he should have known that the patient would struggle given the patient’s demeanor. He should have also known that such a struggle was likely to result in injury given that the room was crowded with several metal beds. 192

- It goes without saying that the weakest members of society who are in the custody of the State must be treated with the utmost respect. The State is charged with a high responsibility for the well-being of those who cannot fend for themselves. Those in the employ of the state who provide the necessary care are the front line representatives of the state and must be held to a high standard of conduct. 216

- The arbitrator refused to second guess the grievant as to what tactic she should have used in defending herself from the attack by the patient. Such second guessing would have been improper speculation, which must not occur in a discipline situation. 216

- In the circumstances facing the grievant, the type of discipline that was administered in this situation is inappropriate. The grievant was in a desperate situation and took the action that was available to her. Her reactions were instantaneous and instinctive. They occurred at a time she was in pain, fearful of damage to her hand, and during a physical struggle that evidenced the patient’s strength. It is impossible to find 12 hours of training, covering diverse topics, occurring over one year prior to the incident sufficient to overcome the grievant’s instinctive reaction. The grievant was engaged in self-defense rather than patient abuse. Consequently the removal must be overturned. 216

- When the parties negotiated the just-cause protection of employment, they carved out an exception. They stated in Article 24, 24.01 that an arbitrator may not modify a termination where patient abuse is the cause. Grievant is not entitled to a full blown examination for just cause. In fact, only a trace of the standard remains for him – the question of whether or not he committed patient abuse. If the evidence establishes that he did, the arbitrator will have no choice but to uphold the discharge and deny the grievance. Thus, the union can only prevail if the state fails to meet its burden of proof. 253

- Elements such as deliberation, provocation, and state of mind are likely to be material factors in a case-by-case review of abuse charges. 253

- In this case, the arbitrator need not provide a definition of “abuse” which can be used reliably in every case. He believes, however, that a simple analogy will suffice in this dispute: would grievant’s act have been abuse if it had been committed on a dog rather than a human being. 253

- Where “just cause” was not present, the grievant was summarily dismissed without any consideration of the grievant’s many years of high quality service or other mitigating circumstances, the grievance was nevertheless denied. By removing arbitral discretion to modify penalties in a case involving patient abuse, the parties either pre-defined just cause or divorced such misconduct from the protections of just cause. In either case, the removal cannot be modified once abuse has been found. Section 24 .01 prohibits an arbitrator from modifying the discharge penalty when patient abuse is the cause. Section 25.03 requires an arbitrator to apply the negotiated provisions of the agreement as they are written and intended to be applied, without additions, subtractions, amendments, or alterations. It is a mandate the arbitrator must obey; one which allows no room for individual concepts of fairness or justice. 253

Pointing out that the parties agreed to be bound by the definition of abuse set forth by Arbitrator Pincus in the Dunning Case, and that the definition had been adopted by arbitrators Michael and Cohen, the arbitrator chose to adopt the same definition which is found in ORC 2903.33(B)(2) and OAC 5123-3-14(C)(1). 261

The grievant had a previous suspension for abuse. That grievant had a caring attitude and a drill sergeant approach to cleanliness, manners, and hygiene do not sufficiently mitigate the grievant’s offense (abuse of a youth in care of the state) given his past record. 261

The youth had been messing with the grievant’s food and responded with a burst of profanity including a racial slur when confronted. The youth was forming a fist and starting to throw a punch when the grievant struck first. A vigorous fight ensued. The youth appeared to want to provoke the fight. When the grievant struck first
in the face of this extreme provocation, his act did not constitute evidence of abuse to warrant discharge, since the grievant had a bona fide fear for his safety. Cases offered by the state in favor of its argument had no weight since all of the cases involved grievants who had been removed for violations other than abuse. 262

- The grievant deliberately threw a crate in the direction of roughhousing youths in an attempt to get their attention. He was reckless and in disregard of his responsibility to protect them from physical danger. The grievant’s claim that he had lost control of the crate was not credible because he had not made the claim at earlier stages of the investigation. When one of his charges was injured, the grievant did not call for help as he was trained to do. The arbitrator upheld the grievant’s removal despite his high performance evaluations and honorable discharge because the grievant had received two previous suspensions for abuse. 272

- Even if some doubt remains, the testimony of three State witnesses with nothing to gain from testifying leads the arbitrator to conclude that the State has borne its burden of showing just cause: 281

- General arguments by the Union that the witnesses against the grievant are lying are not sufficient to rebut their testimony: 281

- Testimony is more credible when those testifying have nothing to gain: 281

A struggle between client and grievant does not equal abuse: 283

The fact that a client has a history of self-abuse and assaulted another person a few minutes after the alleged abuse incident points toward the grievant trying to restrain, not abuse the client: 283

Arbitrators are contractually directed that they cannot modify removals of employees found to have abused individuals in State custody. This limitation is found in Article 24 .01 of the Agreement. This Article significantly impairs an employee’s chances for reinstatement when he/she has been removed for abuse. There can be no mitigating factors if the grievant committed abuse: 291

The accusations against the grievant (attacking hand-cuffed inmates with nightsticks and kicking them) reveals a startling brutality which is so inconsistent with job responsibilities, Ohio law and fundamental human values that it exemplifies abuse: 291

- The Agreement does not dispose of the just cause standard in abuse cases entirely. Employees still have entitlements under the standard, and an agency that ignores them does so at its peril. If the grievant was denied contractual or elemental due process, his claim for reinstatement and monetary relief will be granted whether or not he abused prisoners: 291

- In abuse cases, the grievant is not entitled to have his/her removal measured by the traditional elements of just cause. It is common for a discharge to be modified, not because the grievant is innocent but because the penalty is too harsh to comport with just cause. Arbitrators, under Section 24 .01 have limited authority to modify discipline in abuse cases. If the grievant committed abuse and there is just cause for any discipline at all there can be no consideration of the grievant’s past work record or the length of grievant’s service. The removal must stand: 292

- While the Agreement eliminates just cause to a large extent in abuse cases, it does not dispose of it entirely. Employees still have entitlements under the standard, and an agency that ignores them does so at its own peril. If the grievant was denied contractual or elemental due process, their claim for reinstatement and monetary relief will be granted whether or not they abused prisoners: 292

- When the employer sought to admit photographs taken of the alleged victim, the Union objected on the grounds that they had not been provided at the pre-disciplinary or Step 3 meetings. There is no evidence that the employer deliberately suppressed this evidence as, for example, keeping secret their existence or refusing a request by the Union to see them. The photographs do not establish a new fact, but merely corroborate the statements of several witnesses – including a Union witness – that the youth had marks on his face. The arbitrator therefore found no undue hardship in admitting and crediting the evidence of the photographs: 300
- The charge of physical abuse is a serious one requiring a significant amount of proof to sustain the employer’s decision to discharge. Any real doubt must be resolved in favor of the employer: 300

- The arbitrator decided that the most reliable youth witnesses are those that are no longer incarcerated in the same facility where the alleged abuse incident occurred: 300

- Although the State could not prove abuse in this case, it is evident that whatever happened constituted physical force. This incident warrants a report the employer might rightfully discipline the grievant. Removal is too harsh a penalty for a first offense of failure to report the use of physical force. Without guidance in the practice of the facility, the arbitrator must see his/her judgment to determine the proper discipline: 300

- Removal from a position is the most serious workplace discipline. Removal under a charge of abusing a young person in custodial care will follow an employee for life. Such a charge must be supported by clear and convincing evidence: 301

- Because the primary reason for the grievant’s removal was prisoner abuse, a charge that was not proven by sufficient probability, the grievant will be reinstated. The arbitrator went on to add that if the employer had framed the charges differently the grievance might have been denied: 302

- Even in abuse cases the grievant continues to have rights. First, he/she is entitled to a strict construction of the burden-of-proof clause. The employer is obligated to prove its charges, and the employee has a legitimate claim to favorable findings from evidentiary inconsistencies. Second, the grievant has a right to expect the employer’s full adherence to procedural due-process requirements, especially those contained in the Agreement: 302

- The arbitrator found that issuance of a disciplinary grid does not meet the requirements of Section 24 .04. The Agreement mandates that the employees and their representatives “shall” be informed in writing of the possible form of discipline. The violation was not sufficient to set aside the grievant’s removal for abuse. The Union knew the type of discipline contemplated. The State’s technical violation of the Agreement did not affect the grievant’s rights under the Agreement or the ability of the Union to defend them: 306

- In an abuse case the arbitrator first looked at whether the procedural violations by the State were enough to set aside the grievant’s removal. The arbitrator found that the procedural violations did not affect the grievant or the Union so he proceeded to make a decision on the merits. After deciding that the State proved its charge of abuse the arbitrator could not modify the discipline under Section 24 .01 of the Agreement: 306

- When the State did not present enough evidence to prove that the grievant sexually abused the inmate, the grievant was reinstated. The evidence did give rise to justified concern by the employer for the safety and welfare of the inmates; the grievant was reinstated but deemed unqualified for any direct contact position for five years: 307

- The arbitrator found that issuance of a disciplinary grid does not meet the requirements of Section 24 .04 . The Agreement mandates that the employees and their representatives “shall” be informed in writing of the possible form of discipline. The violation was not sufficient to set aside the grievant’s removal for abuse. The Union knew the type of discipline contemplated. The State’s technical violation of the Agreement did not affect the grievant’s rights under the Agreement or the ability of the Union to defend them: 306

- Juliette Dunning (1 08) – The Union was able to win this case at the arbitration level but the State of Ohio was successful in getting the decision vacated. The Union was unsuccessful in appealing this award all the way to the Ohio Supreme Court. Thus, this decision has been vacated.

- The State cited Ohio Revised Code § 1 24 .34 in the grievant’s removal for abuse. Arbitrator Rivera quoted Arbitrator Pincus in the Dunning opinion, “Reliance on this section (the Ohio Revised Code section defining abuse), moreover, conflicts with a recent Ohio Supreme Court decision which found that the Code cannot be used to supplement and indirectly usurp provisions negotiated by the parties.” (Arb. Decision No. 5 6) The standard under the Agreement is just cause not a lesser standard defined by the Ohio Revised Code. This violation was found to be de minimis: 306

- The状务员 was excused from following the client’s individual behavior program (IBP) – a formal program that includes a plan of intervention – because the client behavior made the IBP impossible. It was also found that the grievant had not been trained in restraining a running client in a basket-hold. In restraining a client, employees are directed to use the procedure that causes the least injury and least discomfort to
a client. The client’s injury occurred by accident without the grievant being negligent: 31 6

- The arbitrator defined abuse along the lines of the Dunning decision which cited Section 2903.33 of the Ohio Revised Code. The grievant must either:
  1. Knowingly cause physical harm or
  2. Recklessly cause serious physical harm.
There was no evidence that the physical harm was serious. The youth did not require hospitalization or prolonged psychiatric treatment. There was no substantial risk of death and there was no permanent incapacity or disfigurement. There was also no temporary substantial incapacity. It is not clear whether the grievant knowingly caused harm to the youth or was merely trying to restrain the youth. The grievant did allow the situation to get out of control and is guilty of fighting: 326

Juliette Dunning (1 08) – The Union was able to win this case at the arbitration level but the State of Ohio was successful in getting the decision vacated. The Union was unsuccessful in appealing this award all the way to the Ohio Supreme Court. Thus, this decision has been vacated.

- Citation of the Ohio Revised Code section defining abuse is a technical violation and is insufficient for overturning the removal for allegedly abusing a youth: 326

- The arbitrator did not consider the Ohio Revised Code section defining abuse in his determination of just cause for the grievant’s removal. The employer citing this section is therefore not prejudicial to the grievant’s case: 328

- The grievant was in charge of roughly forty-five juvenile felons and gave his keys to one of the inmates. He purposely disabled himself by instructing the youth to lock him and another youth in the isolation room – a room that could be unlocked only from the outside. The employer fell short of proving its case of abuse against the grievant. The action of giving his keys away and being locked away in a room is a glaring violation. The discharge was modified to a suspension covering the entire period from the grievant’s removal to June 2, 1 991 : 34 2

− The grievant was a Correction Officer who was removed for abusing an inmate by restraining him in a manner not provided for in the client’s restraint program. The client was acting out while eating, and the grievant either choked or placed the client in a bear hug. The arbitrator found that the employer proved that the grievant abused the client. The grievant was shown to have engaged in acts inconsistent with clients’ human rights by restraining the client in a way not permitted by the client’s program or the agency’s policies. The testimony of the employer’s witnesses was found to be more credible than that of the grievant, and there was no evidence of coercion by the employer or collusion among the witnesses. The arbitrator recognized that if abuse was proven, then no authority exists to reduce the penalty of removal; thus, the grievance was denied: 4 09
The grievant was a Therapeutic Program Worker who was removed for abusing a client. The client was known to be violent and, while upset and being restrained, he spat in the grievant’s face. The grievant either covered or struck the client in the mouth and some swelling and a small scratch were found in the client’s mouth. The grievant had served a 70 day suspension for similar behavior. The arbitrator found that the employer committed procedural violations by not disclosing the incident report and the client’s progress report despite the employer’s claim of confidentiality. The employer’s witnesses were found to be more credible than the grievant. The grievance was denied: 4 1 4

The grievant was a custodial worker at a psychiatric hospital. The grievant asked a patient to smoke outside rather than inside a cottage. The patient told the grievant that he would not, dropped to his knees and repeated his statement, as was the patient’s habit. The patient repeated this action later in the day and grabbed the grievant’s leg. The grievant yanked his leg free. The client then accused the grievant of kicking him and the patient was found to have injuries later in the day. The grievant was removed for abuse of a patient, and criminal charges were brought. The criminal charges were dropped pursuant to a settlement with the Cuyahoga County court in which the grievant agreed not to contest his removal. When the grievance was pursued, the employer asked for criminal charges to be reinstated. The charges could not be reinstated, but the grievant agreed not to sue the employer. The grievance was held to be arbitrable despite the settlement between the grievant and the county court. Had the settlement been a three party agreement including the employer, dovetailing into the grievance process, it would have precluded arbitration. Additionally, after filing a grievance it becomes the property of the union. The grievance was sustained because the employer failed to meet its burden of proof that the grievant abused a patient. The arbitrator awarded full back pay less interim earnings, back seniority, back benefits and that the incident be expunged from the grievant’s record: 4 1 6

An inmate was involved in an incident on January 4, 1 991, in which a Correction Officer was injured. The inmate was found to have bruises on his face later in the day and an investigation ensued which was concluded on January 28th. A Use of Force Committee investigated and reported to the warden on March 4th that the grievant had struck the inmate in retaliation for the inmate’s previous incident with the other CO on January 4th. The pre-disciplinary hearing was held on April 1 5, and 1 6, and the grievant’s removal was effective on May 29, 1 991. The length of time between the incident and the grievant’s removal was found not to be a violation of the contract. The delay was caused by the investigation and was not prejudicial to the grievant. The arbitrator found that the employer met its burden of proof that the grievant abused the inmate. The employer’s witness was more credible than the grievant and the grievant was found to have motive to retaliate against the inmate. The grievance was denied: 4 2 1

- The grievant was a Therapeutic Program Worker who was removed for abusing a patient. The patient has behavioral problems which include refusing to eat and throwing food. The patient was combative during lunch, and the grievant was accused of pouring a bucket of water on him afterwards. The arbitrator found that the employer proved that the grievant did in fact pour a bucket of water on the grievant and that the act, inconsistent with the patient’s restraint program, met the standard for abuse. That others did not report the incident for several weeks and that their motive for reporting it was retaliation against the grievant was found to be irrelevant. The arbitrator applied the analysis of removal for abuse from the Dunning decision which provides that the employer must still have just cause for the removal even if abuse has been proven; Removal is not automatic. The arbitrator found no just cause for removal and because the employer’s disciplinary grid provides for suspensions for first offenses of client neglect/abuse, the arbitrator reinstated the grievant with no back pay: 4 3 1 **

The Union prevailed in arbitration. The State of Ohio moved to vacate this award in the Court of Common Pleas. The Arbitrator's award was vacated by the Court of Common Pleas. The Union did not appeal the decision by the Court of Common Pleas since the issue had already been decided by the Ohio Supreme Court in the Dunning case.

- The Arbitrator held that there was sufficient evidence to remove a grievant for patient abuse in a case where the patient had a history of physical aggression and destruction of property and based
on the fact that a witness’ testimony was not corroborated: 5 68

- The grievant was charged with fighting with another employee and patient abuse. The Union argued that there was no definition of what constitutes “abuse” of an inmate/patient. Without a definition of what constitutes "abuse," a grievant is not placed on notice of what acts are prohibited: 5 85

- The grievant, a Correction Officer, was discharged for making threatening, intimidating, coercing and abusive language toward a number of inmates. This language was found to be especially egregious because many of the inmates were either on psychotropic drugs or suffering from a wide range of mental disorders. The Arbitrator held that the nature of the speech justified the discharge because it endangered the security of the working environment: 5 89

- The Arbitrator did not concur with the employer's view regarding the application of the “abuse” language contained in Article 24 .01 . It is inappropriate to infer a charge of abuse when the employer, regardless of the reason, fails to include this charge in its own guidelines and/or removal order. If the employer was so inclined to clothe the present proceeding with an abuse allegation, it should have raised the issue at the pre-disciplinary stage. A stipulated issue containing a just cause phrase is totally inappropriate if one wishes to raise an abuse allegation: 5 95

- The Arbitrator concluded that the employer violated the Agreement when it removed the grievant for client abuse. The employer failed to provide the Arbitrator with sufficient evidence and testimony to sustain the grievant's removal. Specifically, the employer failed to prove that the grievant punched the client in the stomach. Further, the Arbitrator was inclined to believe the grievant's version over the supervisor’s version based on the fact that the supervisor only observed the tail-end of the intervention (physical restraint of a patient) and she failed to see the entire episode due to her obstructed view: 603

- The Arbitrator’s finding that the grievants abused the residents was based primarily upon the inconsistent statements of the grievants and the fact that the grievants were uncooperative during the investigation of the alleged incidents. Opportunities existed for the grievants to clarify the record, yet they basically denied any personal knowledge of and/or direct involvement in the incidents of abuse alluded to by the witness: 61 6

- The Arbitrator found no evidence to indicate that the grievant used abusive language toward his supervisor or co-workers. Though the Arbitrator found that the grievant was at fault in this incident, he found the fifteen-day suspension unreasonable. 725

The Arbitrator determined that the circumstantial evidence presented by the Employer lacked sufficient probative value to meet a “just cause” burden. He noted that there were no witnesses who could testify that the grievant was upset. He also noted that the resident was self-abusive and had a history of displaying the abuse in specific patterns. The Arbitrator pointed out that the grievant’s performance evaluations demonstrated that he met or exceeded performance requirements. The Arbitrator stated that although the grievant was loud, the conclusion that he was abusive could not be reached. The Arbitrator agreed with the Union’s position that the resident’s injuries were covered by his shirt, which the parties stated in agreement was never removed. The injuries suggested the resident had been in a scuffle, but the grievant's physical appearance did not indicate that he had been in the kind of altercation that would cause the injuries present on the resident’s body. 75 1

The arbitrator found that there was a formal program in place to handle the resident’s aggressive behavior. The arbitrator noted that even if management had been less responsive to the problem, it is a part of the duties of the caregivers to handle difficult residents without abusing them. The arbitrator concluded that on the date in question the grievant was unable to do that; therefore, she was removed for just cause. 75 4

The employer did not meet its burden of proof that what occurred in this instance could be characterized as physical abuse. The arbitrator found that there were elements of the evidence presented which supported the grievant’s testimony of what transpired. Therefore, the grievant was removed without just cause. 75 5

The grievant was accused of client abuse. The arbitrator found that the lack of evidence, including numerous blank pages in a transcript of
an interview of the State’s witness by a police officer, did not support the employer’s position in this instance. 75 7

The arbitrator determined that the grievant physically abused an inmate in a mental health residential unit. He was accused of using abusive and intimidating language towards the inmate in addition to stomping the inmate. The evidence presented and the testimonies of the witnesses supported management’s position and removal was warranted. 75 9

The grievant was removed for allegedly striking an inmate while he was handcuffed and in custody of another CO. The arbitrator found that the testimony of the inmate coupled with the testimony of a fellow CO to be credible. He concluded that the grievant’s testimony was not supported and implausible. 778

The grievant was accused of allowing/encouraging inmates to physically abuse other inmates who were sex offenders. The arbitrator found that the grievant’s testimony was not credible when weighed against the testimony of co-workers and inmates. The Union argued that the lack of an investigatory report tainted the investigation. The arbitrator concluded that despite the lack of the report, the investigation was fair fundamentally and direct testimony and circumstantial evidence proved that the grievant had knowledge of the allegations against. The arbitrator found that the grievant was removed for just cause. 779

The grievant was charged with entering the room of a mental patient and striking him in the eye. The grievant stated that any injury the patient suffered was not the result of an intentional act by him. It was determined that the employer provided the only plausible explanation of what occurred. The arbitrator based this determination of the facts that the grievant failed to report the incident until the next day and that the patient’s testimony was consistent with the statement he made during the investigation seven months earlier. The arbitrator found the grievant’s intervention in the incident suspicious considering the fact that the grievant’s duties were custodial in nature and did not include patient care responsibilities. 788

The grievant was removed for physical abuse of an inmate. The arbitrator concluded that the grievant committed the act based on testimony and injuries suffered by the inmate. The nurse who examined the inmate noted the several injuries which included superficial cuts, minor swelling and minimal bleeding. The arbitrator viewed most of these injuries as a direct result of the grievant’s misconduct. Evidence included a telephone conversation with another CO in which the grievant discussed damage he done to and inmate. Based on the totality of circumstantial evidence, the arbitrator found that the grievant physically abused the inmate. 800

The grievant was charged with using a hammerlock to restrain an aggressive and violent resident. During the struggle with the resident, both individuals fell and the resident was injured. The arbitrator did not view the grievant’s actions as improper. The arbitrator noted that the hold used by the grievant seemed no worse than any of the holds included in the facility’s training manual. He concluded that the injuries were not caused by the hold but by the fall to the floor and that the fall would have occurred regardless of the hold used to restrain the resident. The arbitrator rejected the notion that the use of a hold that was not facility-approved or included in the training of employees is abusive. He noted that there are situations in which the employees must react quickly to control an individual or situation, or to protect themselves. The arbitrator found no just cause for removal of the grievant. 804

The grievant was charged with failing to utilize the proper techniques to diffuse a physical attack against her by a patient. The patient was a much larger person than the grievant and was known to be aggressive. She allegedly punched the patient several times in an attempt to get him to release her hair. The arbitrator determined that while it was clear the grievant placed herself in a position to be a target of the patient and her judgment was very suspect, a lapse in common sense, the failure to flee and the improper use of hair release did not equal abuse of a patient. The arbitrator noted that there was no evidence that the patient sustained any physical injuries. The arbitrator found that “…it is not reasonable to fire an employee for employing immediate and reasonable defensive measures that come to the fore to avoid serious injury”. 85 2

The burden of proof for the employer where a correction officer is charged with misconduct of a criminal nature is clear and convincing of which
The arbitrator must be pretty certain the grievant is guilty. The use of polygraph testing will be given weight to their results when they corroborate direct evidence of innocence. The grievant’s guilty plea in court and the use of the polygraph test results were not persuasive enough to deny the grievance, but other evidence did support the charge that grievant physically abused an inmate. The arbitrator sites to the following evidence of grievant’s guilt: (1) the grievant’s disappearance with the inmate for a length of time, although the parties disputed the approximate length, while en-route to the captain’s office, did provide enough time for the abuse to take place; (2) the grievant could not explain the procedure he took in transporting the inmate with two other correction officers and his description of what happened between himself and the inmate was unreliable; (3) the grievant was untruthful in his testimony about what happened at the polygraph examination because evidence did not support his contention that the questions were too personal, that the examiner was not professional and that he was not told he could quit without admitting guilt.

85 6

The grievant was employed as a Therapeutic Program Worker and she periodically escorted clients on shopping field trips. Each client had a personal fund of approximately $75 to spend on clothing or other items. The grievant, as the designated personal shopper, was responsible for these funds. She was required to document the spent funds, return any unused portion, and submit receipts for every item purchased. On March 5, 2003, a manager at Target alerted the center about the grievant’s possible fraudulent behavior and an investigation was undertaken. It found that the grievant had returned previously purchased items, received cash disbursements, but never returned the funds to the center nor re-shopped for replacement items. There were seven shopping trips in question with unaccounted for resident funds totaling $797.96. As a result, the center removed the grievant from her position for Misappropriation/ Exploitation and Failure to Follow Policy. The Union argued that the employer did not have just cause for this removal, but the arbitrator ruled to the contrary. He found that the Target manager offered credible testimony about the grievant’s unusual shopping habits. She had a pattern of returning the most expensive items bought on the shopping trips, receiving a cash refund, and after a short period of time, returning and re-shopping. On the other hand, the grievant’s testimony was inconsistent and unbelievable. Receipts for the repurchased items were not submitted to the facility and the grievant offered conflicting statements concerning her management of the receipts. In addition, there was no conclusive evidence of any clearly identifiable re-shopped for clothing purchases nor was there evidence of any receipts. As a result, the arbitrator stated that no other reasonable conclusion was possible; the grievant had stolen the funds for her own personal use. 85 8

The grievant was a Therapeutic Program Worker who worked part-time for MRDD and part-time for a county-level supported-living provider. The grievant was criminally charged with resident abuse at the county facility and terminated without an administrative hearing. The investigator reported the allegations to the state facility which, in turn, placed the grievant on administrative leave and subsequently removed him. The county’s investigator did not speak to the grievant about the violations, nor did the grievant have the opportunity to face his accusers or present his position until his trial. Neither a jury nor the hearing officer who heard the grievant’s unemployment compensation appeal found sufficient evidence to warrant termination. The Union presented testimony at arbitration that the definition for “substantiated” in regards to evidence did not exist in the Ohio Revised Code, or in the Medicaid regulations. It was the Union’s position that the arbitrator must use the ordinary definition of “substantiated”, as well definitions included in other jurisdictions to determine the meaning of the word. It further noted that in the absence of a definitive substantial evidence, the State relied on one investigator’s declaration that the grievant was guilty of the allegations. The arbitrator found that the allegations of physical abuse were not substantiated that the grievant was removed without just cause. 870

The grievant was charged with using her fist to strike or punch a client on her upper arm approximately three times. The arbitrator found the testimony of the witness to be more credible than that of grievant. He found that the testimony and evidence regarding grievant’s actions supported the agency’s position that the grievant physically abused a client, which is against agency policy. The arbitrator noted that Article 24 .01 prohibited him from modifying or otherwise changing the agency’s discipline once client abuse has been established. 876
It is the Arbitrator’s opinion based on the evidence presented that the State cannot prove that the Grievant acted as the Employer claimed. It could not be concluded with any degree of confidence that the abuse reference in Section 24.01 of the Agreement occurred. There was no rational basis for preferring the testimony of the sole witness over the Grievance testimony. The arbitrator concluded that in such situations the case of the Employer must fail. 892

The Agency failed to produce even a preponderance of evidence (more likely than not) that the Grievant abused the Client. The Agency produced virtually no circumstantial evidence to support its charge in this dispute, so its case rested entirely on witness testimony and investigatory statements. The outcome of this case, therefore, rested entirely on two witnesses. Neither of the witnesses ultimately proved to be credible. 894

The employer failed to support the Grievant’s removal for abuse. Nothing in the record provides significant proof that the Grievant was guilty as charged. Improperly supported allegations, regardless of the employer’s well-intentioned purpose, require a ruling in the Grievant’s favor. Mere innuendo, without proper support in the form of consistent and valid evidence and testimony, will lead to similar findings in the future. This finding was fashioned primarily by the overwhelmingly consistent testimony provided by the Grievant and her co-workers. 895

The grievant was escorting a resident to the dining room at her facility. The resident was known to grab individuals by the shirt and throat, falling to the floor with the individual in tow. The grievant was suddenly grabbed by the patient who pulled the grievant to the floor and began choking her. There was no one in the area to assist her. The grievant used a training maneuver (knuckle pressure) to loosen the patient’s grip. The action failed. The grievant who was loosing her ability to breathe tapped the resident on the side of his face to get him to release her. As the episode was ending and the resident was releasing his grip on the grievant, an M.R. Professional came upon the situation. The grievant was accused of abusing the resident. Management contended that the grievant abused the resident and there is never justification for “slapping” a resident in the face. The agency representative went so far as to state at arbitration that staff are expected to die or suffer serious injury rather than use unauthorized force against residents. The arbitrator noted that “neither regulation, nor contractual provision requires the Grievant to suffer death or serious bodily injury rather than to use unauthorized force, as a last resort, to repel the Customer’s life threatening attack.”. The arbitrator found that the grievant faced a life-threatening situation and only after the unsuccessful attempt to use an authorized technique to free herself, was forced to strike the resident. 896

The arbitrator determined that the circumstantial evidence presented by the Employer lacked sufficient probative value to meet a “just cause” burden. He noted that there were no witnesses who could testify that the grievant was upset. He also noted that the resident was self-abusive and had a history of displaying the abuse in specific patterns. The Arbitrator pointed out that the grievant’s performance evaluations demonstrated that he met or exceeded performance requirements. The Arbitrator stated that although the grievant was loud, the conclusion that he was abusive could not be reached. The Arbitrator agreed with the Union’s position that the resident’s injuries were covered by his shirt, which the parties stated in agreement was never removed. The injuries suggested the resident had been in a scuffle, but the grievant’s physical appearance did not indicate that he had been in the kind of altercation that would cause the injuries present on the resident’s body. 75 1

The arbitrator found that there was a formal program in place to handle the resident’s aggressive behavior. The arbitrator noted that even if management had been less responsive to the problem, it is a part of the duties of the caregivers to handle difficult residents without abusing them. The arbitrator concluded that on the date in question the grievant was unable to do that; therefore, she was removed for just cause. 75 4

The employer did not meet its burden of proof that what occurred in this instance could be characterized as physical abuse. The arbitrator found that there were elements of the evidence presented which supported the grievant’s testimony of what transpired. Therefore, the grievant was removed without just cause. 75 5

The grievant was accused of client abuse. The arbitrator found that the lack of evidence,
including numerous blank pages in a transcript of an interview of the State’s witness by a police officer, did not support the employer’s position in this instance. 757

The arbitrator determined that the grievant physically abused an inmate in a mental health residential unit. He was accused of using abusive and intimidating language towards the inmate in addition to stomping the inmate. The evidence presented and the testimonies of the witnesses supported management’s position and removal was warranted. 759

The grievant was removed for allegedly striking an inmate while he was handcuffed and in custody of another CO. The arbitrator found that the testimony of the inmate coupled with the testimony of a fellow CO to be credible. He concluded that the grievant’s testimony was not supported and implausible. 778

The grievant was accused of allowing/encouraging inmates to physically abuse other inmates who were sex offenders. The arbitrator found that the grievant’s testimony was not credible when weighed against the testimony of co-workers and inmates. The Union argued that the lack of an investigatory report tainted the investigation. The arbitrator concluded that despite the lack of the report, the investigation was fair fundamentally and direct testimony and circumstantial evidence proved that the grievant had knowledge of the allegations against. The arbitrator found that the grievant was removed for just cause. 779

The grievant was charged with entering the room of a mental patient and striking him in the eye. The grievant stated that any injury the patient suffered was not the result of an intentional act by him. It was determined that the employer provided the only plausible explanation of what occurred. The arbitrator based this determination of the facts that the grievant failed to report the incident until the next day and that the patient’s testimony was consistent with the statement he made during the investigation seven months earlier. The arbitrator found the grievant’s intervention in the incident suspicious considering the fact that the grievant’s duties were custodial in nature and did not include patient care responsibilities. 788

The grievant was removed for physical abuse of an inmate. The arbitrator concluded that the grievant committed the act based on testimony and injuries suffered by the inmate. The nurse who examined the inmate noted the several injuries which included superficial cuts, minor swelling and minimal bleeding. The arbitrator viewed most of these injuries as a direct result of the grievant’s misconduct. Evidence included a telephone conversation with another CO in which the grievant discussed damage he done to an inmate. Based on the totality of circumstantial evidence, the arbitrator found that the grievant physically abused the inmate. 800

The grievant was charged with using a hammerlock to restrain an aggressive and violent resident. During the struggle with the resident, both individuals fell and the resident was injured. The arbitrator did not view the grievant’s actions as improper. The arbitrator noted that the hold used by the grievant seemed no worse than any of the holds included in the facility’s training manual. He concluded that the injuries were not caused by the hold but by the fall to the floor and that the fall would have occurred regardless of the hold used to restrain the resident. The arbitrator rejected the notion that the use of a hold that was not facility-approved or included in the training of employees is abusive. He noted that there are situations in which the employees must react quickly to control an individual or situation, or to protect themselves. The arbitrator found no just cause for removal of the grievant. 804

The grievant was charged with failing to utilize the proper techniques to diffuse a physical attack against her by a patient. The patient was a much larger person than the grievant and was known to be aggressive. She allegedly punched the patient several times in an attempt to get him to release her hair. The arbitrator determined that while it was clear the grievant placed herself in a position to be a target of the patient and her judgment was very suspect, a lapse in common sense, the failure to flee and the improper use of hair release did not equal abuse of a patient. The arbitrator noted that there was no evidence that the patient sustained any physical injuries. The arbitrator found that “...it is not reasonable to fire an employee for employing immediate and reasonable defensive measures that come to the fore to avoid serious injury”. 852

The burden of proof for the employer where a correction officer is charged with misconduct of a criminal nature is clear and convincing of which the arbitrator must be pretty certain the grievant is
The arbitrator sites to the following evidence of grievant’s guilt: (1) the grievant’s disappearance with the inmate for a length of time, although the parties disputed the approximate length, while en-route to the captain’s office, did provide enough time for the abuse to take place; (2) the grievant could not explain the procedure he took in transporting the inmate with two other correction officers and his description of what happened between himself and the inmate was unreliable; (3) the grievant was untruthful in his testimony about what happened at the polygraph examination because evidence did not support his contention that the questions were too personal, that the examiner was not professional and that he was not told he could quit without admitting guilt. 85

The grievant was employed as a Therapeutic Program Worker and she periodically escorted clients on shopping field trips. Each client had a personal fund of approximately $75 to spend on clothing or other items. The grievant, as the designated personal shopper, was responsible for these funds. She was required to document the spent funds, return any unused portion, and submit receipts for every item purchased. On March 5, 2003, a manager at Target alerted the center about the grievant’s possible fraudulent behavior and an investigation was undertaken. It found that the grievant had returned previously purchased items, received cash disbursements, but never returned the funds to the center nor re-shopped for replacement items. There were seven shopping trips in question with unaccounted for resident funds totaling $797.96. As a result, the center removed the grievant from her position for Misappropriation/Exploitation and Failure to Follow Policy. The Union argued that the employer did not have just cause for this removal, but the arbitrator ruled to the contrary. He found that the Target manager offered credible testimony about the grievant’s unusual shopping habits. She had a pattern of returning the most expensive items bought on the shopping trips, receiving a cash refund, and after a short period of time, returning and re-shopping. On the other hand, the grievant’s testimony was inconsistent and unbelievable. Receipts for the repurchased items were not submitted to the facility and the grievant offered conflicting statements concerning her management of the receipts. In addition, there was no conclusive evidence of any clearly identifiable re-shopped for clothing purchases nor was there evidence of any receipts. As a result, the arbitrator stated that no other reasonable conclusion was possible; the grievant had stolen the funds for her own personal use. 85

The grievant was a Therapeutic Program Worker who worked part-time for MRDD and part-time for a county-level supported-living provider. The grievant was criminally charged with resident abuse at the county facility and terminated without an administrative hearing. The investigator reported the allegations to the state facility which, in turn, placed the grievant on administrative leave and subsequently removed him. The county’s investigator did not speak to the grievant about the violations, nor did the grievant have the opportunity to face his accusers or present his position until his trial. Neither a jury nor the hearing officer who heard the grievant’s unemployment compensation appeal found sufficient evidence to warrant termination. The Union presented testimony at arbitration that the definition for “substantiated” in regards to evidence did not exist in the Ohio Revised Code, or in the Medicaid regulations. It was the Union’s position that the arbitrator must use the ordinary definition of “substantiated”, as well definitions included in other jurisdictions to determine the meaning of the word. It further noted that in the absence of a definitive substantial evidence, the State relied on one investigator’s declaration that the grievant was guilty of the allegations. The arbitrator found that the allegations of physical abuse were not substantiated that the grievant was removed without just cause. 870

The grievant was charged with using her fist to strike or punch a client on her upper arm approximately three times. The arbitrator found the testimony of the witness to be more credible than that of grievant. He found that the testimony and evidence regarding grievant’s actions supported the agency’s position that the grievant physically abused a client, which is against agency policy. The arbitrator noted that Article 24 .01 prohibited him from modifying or otherwise changing the agency’s discipline once client abuse has been established. 876
It is the Arbitrator’s opinion based on the evidence presented that the State cannot prove that the Grievant acted as the Employer claimed. It could not be concluded with any degree of confidence that the abuse reference in Section 24 .01 of the Agreement occurred. There was no rational basis for preferring the testimony of the sole witness over the Grievance testimony. The arbitrator concluded that in such situations the case of the Employer must fail. 892

The Agency failed to produce even a preponderance of evidence (more likely than not) that the Grievant abused the Client. The Agency produced virtually no circumstantial evidence to support its charge in this dispute, so its case rested entirely on witness testimony and investigatory statements. The outcome of this case, therefore, rested entirely on two witnesses. Neither of the witnesses ultimately proved to be credible. 894

The employer failed to support the Grievant’s removal for abuse. Nothing in the record provides significant proof that the Grievant was guilty as charged. Improperly supported allegations, regardless of the employer’s well-intentioned purpose, require a ruling in the Grievant’s favor. Mere innuendo, without proper support in the form of consistent and valid evidence and testimony, will lead to similar findings in the future. This finding was fashioned primarily by the overwhelmingly consistent testimony provided by the Grievant and her co-workers. 895

The grievant was escorting a resident to the dining room at her facility. The resident was known to grab individuals by the shirt and throat, falling to the floor with the individual in tow. The grievant was suddenly grabbed by the patient who pulled the grievant to the floor and began choking her. There was no one in the area to assist her. The grievant used a training maneuver (knuckle pressure) to loosen the patient’s grip. The action failed. The grievant who was loosing her ability to breathe tapped the resident on the side of his face to get him to release her. As the episode was ending and the resident was releasing his grip on the grievant, an M.R. Professional came upon the situation. The grievant was accused of abusing the resident. Management contended that the grievant abused the resident and there is never justification for “slapping” a resident in the face. The agency representative went so far as to state at arbitration that staff are expected to die or suffer serious injury rather than use unauthorized force against residents. The arbitrator noted that “neither regulation, nor contractual provision requires the Grievant to suffer death or serious bodily injury rather than to use unauthorized force, as a last resort, to repel the Customer’s life threatening attack.”. The arbitrator found that the grievant faced a life-threatening situation and only after the unsuccessful attempt to use an authorized technique to free herself, was forced to strike the resident. 896

The grievant was involved in a response to a “Signal 1 4 ” call for assistance at the institution. The State charged the grievant with dishonesty in regards to the incident. Neither the grievant nor the Union was informed of the “abuse” charge prior to the imposition of discipline. The Agency also refused to allow the Union to review the video tape of the incident prior to arbitration. Both of these procedural issues were presented at arbitration. Following the State’s presentation of its case at arbitration, the Union Representative requested a directed verdict. The arbitrator found that the grievance was sustained in part and denied in part. The grievant’s removal was reduced to a one (1 ) day suspension. The grievant received all straight time pay he would have incurred if he had not been removed. Deductions for any interim earnings were to be made, except for any earnings received from a pre-existing part-time job. All leave balances and seniority were to be restored. The grievant was to be given the opportunity to repurchase leave balances. The grievant was to be reimbursed for all health-related expenses incurred that would have been paid through health insurance. The grievant was to be restored to his shift and post and his personnel record was to be changed to reflect the suspension. 95

In accordance with Section 24 .01 the Arbitrator found the Grievant abused another in the care and custody of the State of Ohio. The force used by the Grievant was excessive and unjustified under the circumstances. The inmate’s documented injuries were a direct result of the Grievant’s actions. The Grievant admitted the entire situation could have been avoided if he had walked toward the crash gate and asked for assistance. Since abuse was found, the Arbitrator did not have the authority to modify the termination. This provision precluded the Arbitrator from reviewing the reasonableness of
the imposed penalty by applying mitigating factors. 967

The Arbitrator held that the Employer properly terminated the Grievant for abuse. Section 24.01 limits the scope of an arbitrator’s authority when dealing with abuse cases. The threshold issue becomes a factual determination of whether abuse can be supported by the record. The record here supported three abuse incidents. Any one of these events in isolation could have led to proper termination; therefore the Employer was able to establish sufficient proof that abuse took place. The Grievant’s inconsistent observations of the incidents led to a lack of credibility. The Arbitrator held that the self-inflicted injuries defense was not adequately supported. The Arbitrator found that the Grievant did not initiate a time out by removing the resident to “a separate non-reinforcing room” because no evidence helped to distinguish or equate the resident’s bedroom from a “non-reinforcing room.”

Abusive Language

The grievant was charged with allegedly using profanity, being disrespectful to a superior and using excessive force in his attempt to break up a fight between two youths. The arbitrator held that the agency established that the grievant used the “F” word in referring to how he would handle any further improper physical contact by a youth. It was determined that the grievant was disrespectful towards his superior. The arbitrator found that the employer did not provide sufficient evidence to support the excessive force charge. Because the employer proved that the grievant had committed two of the charges leveled against him, the arbitrator found that some measure of discipline was warranted. The aggravating factors in this case were the grievant’s decision to use threatening, abusive language instead of allowing his Youth Behavior Incident Report to go through the process and his decision to insult his superior. He also continued to deny that he used profanity. The arbitrator noted that his decisions were unfortunate because as a JCO, he had the responsibility to be a role model for the Youth at the facility. The mitigating factors included the grievant’s thirteen years of satisfactory state service and the fact that there were no active disciplines on his record. 907

The grievant was involved in a verbal altercation with an inmate at the facility. At arbitration the employer attempted to introduce an enhanced recording of a taped conversation which also contained the argument between the grievant and the inmate. The arbitrator found that the enhanced tape did not exist during the investigation and could not be presented. He determined that all other evidence – the original tape, interviews of both the grievant and the inmate and the grievant’s lack of remorse or acknowledgment of what occurred during the confrontation - supported management’s position that the grievant was removed for just cause. The grievant threatened the security and safety of the inmate by challenging the inmate to engage in a physical confrontation. The arbitrator stated, “…the evidence of the egregious conduct by the Grievant under the three rules—24, 38, and 44—stands alone as a basis for the justification for the removal in this case.” The Union’s allegation that the grievant’s removal was in retaliation for a sexual harassment suit filed against the institution was unfounded. The arbitrator noted there was no evidence connecting this grievance to the suit. The warden was not charged with any liability in the suit and the investigating superior in this grievance was not connected to the suit. 945

Abusive Language Toward a Supervisor

The grievant was a Correction Officer charged with threatening an inmate and using abusive language towards the inmate. The arbitrator found that the grievant’s conduct warranted discipline; however, the Union demonstrated that a co-worker who previously committed a similar offense was treated differently. The employer offered no explanation for the disparate treatment. The removal was ruled excessive and the grievant was reinstated. 957

Abusive Language Toward a Supervisor

The grievant’s supervisor had orders which he passed on to the grievant. The grievant had planned the work for the day such that the new order was inconsistent with his plan. One party had to yield. Given the grievant’s position in the hierarchy it was his duty to yield and to do so respectfully. He violated that duty by uttering some swear words together with the statement “you are afraid of your job.” While shop talk is common in highway maintenance work, even between crewmen and supervisors, and is usually harmless, language directed specifically at another human being, if said in anger and contempt, crosses the line into abuse. Abusive language
directed at a subordinate or at a supervisor undermines the hierarchy and order giving. 277

Accepting Money

- The Arbitrator found that the grievant violated the spirit of Rules 4 6(b) and 1 6 by accepting a $260.00 money order. The Employer failed to prove that grievant had culpable knowledge, but grievant should have known or reasonably suspected that the money order was tainted. Although that is not the same as actual culpable knowledge, it is more than the employer can or should be asked to reasonably tolerate in its correction officers. 736

The grievant was charged with allegedly using profanity, being disrespectful to a superior, and using excessive force in his attempt to break up a fight between two youths. The arbitrator held that the agency established that the grievant used the “F” word in referring to how he would handle any further improper physical contact by a youth. It was determined that the grievant was disrespectful towards his superior. The arbitrator found that the employer did not provide sufficient evidence to support the excessive force charge. Because the employer proved that the grievant had committed two of the charges leveled against him, the arbitrator found that some measure of discipline was warranted. The aggravating factors in this case were the grievant’s decision to use threatening, abusive language instead of allowing his Youth Behavior Incident Report to go through the process and his decision to insult his superior. He also continued to deny that he used profanity. The arbitrator noted that his decisions were unfortunate because as a JCO, he had the responsibility to be a role model for the Youth at the facility. The mitigating factors included the grievant’s thirteen years of satisfactory state service and the fact that there were no active disciplines on his record. 907

Accident, Traffic

- While grievant was driving 10 miles per hour faster than state deemed reasonable when plowing berm and approaching railroad track, the discipline could not be sustained on this basis, especially since (1) equipment was faulty and (2) the grievant did not exceed the speed limit for plowing a two lane highway. 1 6

- Arbitrator sustained grievance on the grounds that faulty equipment was a likely cause of the accident. 1 6

- Reasonable to find accident preventable where driver was officially cited and safety inspector found driver error the key factor in the accident. 30

- That vehicle was unsafe to drive is not a defense if driver had opportunity and knew he can use contract to refuse to drive unsafe vehicle. 30

- If only one preventable traffic accident had occurred, the arbitrator might not have upheld the removal. Unfortunately, the totality of the grievant’s conduct (3 preventable accidents and failure to report one of them) over 3 month period, and his inability to correct egregiously similar behavior, leave this arbitrator with no other alternative but to uphold the employer’s decision. 1 84

- The danger of the intersection where the traffic accident occurred does not mitigate the grievant’s conduct (a preventable accident). The grievant frequented the intersection which should have sensitized him to the hazards. 1 84

- Whether the grievant received a formal citation by the State Highway Patrol is irrelevant. 1 84

- The grievant’s failure to file the appropriate accident reports taints his version of the events and dampens his credibility. If he were in the right, he should not have hesitated to file. 1 84

- Where the grievant had an accident when attempting to back between two illegally parked cars in a parking lot, the arbitrator said the conduct evidenced bad judgment. The grievant should have attempted other more reasonable options such as waiting for the drivers or soliciting their assistance. 1 84

Actions That Could Compromise the Carrying Out of Duties

The grievant was charged with conducting a pay-for-parole scheme, which resulted in at least two inmates inappropriately placed on parole. The arbitrator determined that this matter was based
on circumstantial evidence that had not been corroborated by the investigation. The employer’s case was inconclusive. The arbitrator found one exception to his findings. The grievant raised suspicion of his activities by the volume of phone calls made to him by one of the inmates during an 18-month period. This suspicion compromised the grievant ability to perform his duties as a hearing officer. 783

The grievant was charged with conducting a pay-for-parole scheme, which resulted in at least two inmates inappropriately placed on parole. The arbitrator determined that this matter was based on circumstantial evidence that had not been corroborated by the investigation. The employer’s case was inconclusive. The arbitrator found one exception to his findings. The grievant raised suspicion of his activities by the volume of phone calls made to him by one of the inmates during an 18-month period. This suspicion compromised the grievant ability to perform his duties as a hearing officer. 783

Additional Minimum Qualifications

- The grievant was not awarded a position she applied for, because she did not meet minimum qualifications contained in the classification specification and position description. The individual who was awarded the position had “demonstrably superior” qualifications: 5 4 5

Administrative Leave

The Grievant admitted that he failed to make all of the required 30-minute hallway checks and a 2:00 a.m. headcount and then made entries in the unit log indicating he had done so. The Arbitrator held that just cause existed for discipline. Since the Grievant committed a serious offense less than two years after being suspended for six days for the same offense, the Arbitrator held that the principles of progressive discipline had been followed. In addition, the Arbitrator held that long service cannot excuse serious and repeated misconduct. It could be argued that an employee with long service should have understood the importance of the hallway checks and headcount more than a less senior employee. The Union argued that since the Grievant was not put on administrative leave, it suggested that his offense was not regarded as serious. The employer, however, reserved the use of administrative leave for cases where an employee is accused of abuse. The Union also argued that the time it took to discipline the Grievant should mitigate against his termination. The Arbitrator held that the investigation and pre-disciplinary hearing contributed to the delay and the state made its final decision regarding the Grievant’s discipline within the 45 days allowed. 978

-The Arbitrator found that the language of Article 34.07 is clear and unambiguous. The language specifically allows a one-time payment for one hearing before the Industrial Commission. The Arbitrator held that since the Grievant was never paid administrative leave for any hearing before the Industrial Commission, the grievance was granted. The Grievant shall be credited for loss of vacation time, and be paid one day administrative leave, less appropriate deductions. 1 035

Admission of Evidence

- See Evidence – Admission of

Affirmative Action

In a case involving a senior male employee who applied for a position alongside a junior female employee, the State's decision to promote the junior female employee because she was demonstrably superior due to affirmative action considerations was consistent with the language in contract Article 17.06. The language in Article 17.06 is clear. Affirmative action is a criterion for demonstrably superior. So long as the employee meets the minimum qualifications, considerations based on affirmative action, by themselves, can justify the promotion. At such point, the burden of proof shifts to the Union to demonstrate that the standard was improperly applied: 5 4 1

Article 17.06 is silent as to the definition of "affirmative action." Therefore, the common meaning of the term applies, especially since the bargaining history of this Article seems to indicate such an intention. The common meaning of affirmative action is understood to be a policy which attempts to promote the members of groups who, because of past discrimination, are under-represented at the level of employment at issue: 5 4 1

– The State failed to prove its burden that the junior employee was "demonstrably superior." The grievant and his co-worker were not remotely similar in terms of seniority. The grievant had thirteen years of service and his co-worker carried eleven months of service. Affirmative action tips
the scales only if the candidates are "equally proficient": 5 83

Agency Rules

- An office closing agreement that addressed staff relocations cannot be applied outside the scope of office closings: 297

- Unilateral agency rules do not define just cause. Agency rules are designed to give fair warning to employees of what types of behavior are deemed unacceptable. Agency rules may be entitled to a measure of arbitral deference, but they may never take the place of just cause: 305

- An agency rule may be fair on its face but unjust in its particular application, especially when the employer applies the rule without attention to mitigating factors. If the discipline falls outside the scope of just cause the arbitrator must intervene: 305

The arbitrator’s authority is solely to determine whether the Agreement has been breached. The presence of an agency search policy is not part of the Collective Bargaining Agreement. The Warden’s order for the grievant to submit to drug testing must withstand scrutiny not in terms of the search policy, but solely in terms of the Agreement: 323

- The arbitrator was disturbed that no interview of the grievant was conducted during the investigation of the possible abuse. The grievant’s reports and presence at the pre-disciplinary meeting mitigate this lapse to some extent. For an employer to be fair and have credibility in its disciplinary actions it must conform not only to the contractual procedures but also to the rules and guidelines it, itself, has established: 326

ODOT agency rules pertaining to witnesses in the pre-disciplinary hearing are more specific than the language of the Agreement, Section 24 .04 . Witnesses might have helped the Union in the pre-disciplinary hearing. The hearing officer even commented that the grievant’s side of the story had no corroboration. The hearing officer indicated that he discounted the grievant’s testimony because it was not supported by witnesses – the same witnesses that the agency would not permit the Union to call. It follows that this was not entirely fair. This does not call for the arbitrator to annul the discipline. The only objective of the hearing was to determine if just cause for discipline existed. It is not the officer’s place to determine the severity of the discipline. Grievant’s testimony, even if entirely true, would not have made a difference. The grievant’s testimony was pregnant with admissions of misconduct: 35 7

- The grievant was a Correction Officer and had received and signed for a copy of the agency’s work rules which prohibit relationships with inmates. The grievant told the warden that she had been in a relationship with an inmate prior to her hiring as a CO. Telephone records showed that the grievant had received 197 calls from the inmate which lasted over 1 34 hours. Although the grievant extended no favoritism toward the inmate, just cause was found for the removal: 374

- The grievant was a Youth Leader 2 who had forgotten that his son’s BB gun was put into his work bag to be taken to be repaired. While at work a youth entered the grievant’s office, took the BB gun and hid it in the facility. Management was informed by another youth and the grievant was informed the next day. He was removed for failure of good behavior, bringing contraband into an institution, and possessing a weapon or a facsimile on state property. It was proven that the grievant committed the acts alleged but removal was found to be too severe. The grievant’s work record also warranted a reduction to a thirty day suspension: 388

- The grievant, a Therapeutic Program Worker, received a ten-day suspension for sleeping on duty. A supervisor tried to awaken the grievant but was not successful, although the grievant had been heard talking to another employee shortly before the incident. The grievant had no prior discipline up to the time she had become a steward; then she received two verbal reprimands. Also, her performance evaluations had been above average until the same time, at which point she was evaluated below average in several categories. Lastly, a paddle had been hanging in the supervisor’s lounge with the words “Union Buster” written on it. The arbitrator found that the grievant may have dozed off, but that the employer’s anti-union animus was the cause for the suspension. The paddle in the lounge was evidence of this and the employer had demonstrated reckless disregard for union relations. The arbitrator held that the employer
failed to properly apply its rules, thus, there was no just cause for the 10 day suspension. The discipline was reduced to a 1 day suspension: 400

– The grievant was removed for misuse of his position for personal gain after his supervisor noticed that the grievant, an investigator for the Bureau of Employment Services, had received an excessive number of personal telephone calls from a private investigator. The Ohio Highway Patrol conducted an investigation in which the supervisor turned over 130-150 notes from the grievant’s work area and it was discovered that the grievant had disclosed information to three private individuals, one of whom admitted paying the grievant. The arbitrator found that the employer proved that the grievant violated Ohio Revised Code section 4141.21 by disclosing confidential information for personal gain. The agency policy for this violation calls for removal. The employer’s evidence was uncontroverted and consisted of the investigating patrolman’s testimony, transcribed interviews of those who received the information, and the grievant’s supervisor’s testimony. The grievant’s 13 year seniority was an insufficient mitigating circumstance and the grievance was denied: 408

– The grievant was a Therapeutic Program Worker who was removed for abusing a patient by restraining him in a manner not provided for in the client’s restraint program. The client was acting out while eating and the grievant either choked or placed the client in a bear hug. The arbitrator found that the employer proved that the grievant abused the client. The grievant was shown to have engaged in acts inconsistent with clients’ human rights by restraining the client in a way not permitted by the client’s program or the agency’s policies. The testimony of the employer’s witnesses was found to be more credible than that of the grievant, and there was no evidence of coercion by the employer or collusion among the witnesses. The arbitrator recognized that if abuse was proven, then no authority exists to reduce the penalty of removal, thus the grievance was denied: 409

– The grievant took a magnetic tape containing public information home, which was against agency rules. She intended to return the tape but it became lost, and she was charged with theft of state property. The tape was later recovered by the Highway Patrol during an unrelated investigation. The grievant was transferred to another position without loss of pay or reduction in rank and suspended for 30 days. The arbitrator held that the employer failed to prove that the grievant intended to steal the tape (Hurst arbitration test applied) rather than borrow it. Taking the tape home without authorization was found to be a violation of the employer’s rules. The employer was found not to have applied double jeopardy to the grievant as only one disciplinary proceeding had been brought and the transfer was found not to be disciplinary in nature. The 30 day suspension was found not to be reasonably related to the offense, nor corrective and was reduced to a 1 day suspension with full back pay for the remaining 29 days: 417

– The grievant was an employee of the Lottery Commission who was removed for theft. The agency’s rules prohibit commission employees from receiving lottery prizes, however the grievant admitted redeeming lottery tickets, but not to receiving notice of the rule. The arbitrator noted that while the employer may have suspected the grievant of stealing the tickets, there was no evidence supporting that suspicion and it cannot be a basis for discipline. The arbitrator found that the grievant did redeem lottery coupons in violation of the employer’s rules and Ohio Revised Code section 3770.07(A) but that he had no notice of the prohibition either through counseling or orientation. The grievant was reinstated without back pay but with no loss of seniority: 425

– The grievant was removed after 13 years service from her position with the Bureau of Disability Services for unapproved absence, conviction of a drug charge, and failure to report the drug charge as required by the state’s Drug-Free Workplace policy. The Bureau is funded by the federal government and is subject to the Drug-Free Workplace Act of 1988. The grievant had a history of alcohol problems. She was also involved with a co-worker who, after the relationship ended, began to harass her at work. She filed charges with the EEOC and entered an EAP. The former boyfriend called the State Highway Patrol and informed them of the grievant’s drug use on state property. An investigation revealed drugs and paraphernalia in her car on state property and she pleaded guilty to Drug Abuse. She became depressed and took excessive amounts of her prescription drugs and
missed 2 days of work. She was admitted into the drug treatment unit of a hospital for 2 weeks. She was on approved leave for the hospital stay, but the previous 2 days were not approved and the agency sought removal. The arbitrator found that while the employer’s rules were reasonable, their application to this grievant was not. The Drug-Free Workplace policy does not call for removal for a first offense. The employer’s federal funding was not found to be threatened by the grievant’s behavior. The arbitrator found that while the grievant was not guilty of dishonesty for not reporting her drug conviction because she was following the advice of her attorney who told her that she had no criminal record. The arbitrator noted that the grievant must be responsible for her absenteeism, however the employer was found to have failed to consider mitigating circumstances present, possessed an unwillingness to investigate, and to have acted punitively by removing the grievant. The grievant’s removal was reduced to a 10 day suspension with back pay, benefits, and seniority, less normal deductions and interim earnings. The record of her two day absence was ordered changed to an excused unpaid leave. The grievant was ordered to complete an EAP and that another violation of the Drug-Free Workplace policy will be just cause for removal.

The grievant was an Investigator with the Department of Commerce who had been suspended for 5 days for failing to follow his itinerary for travel and filing incorrect expense vouchers. The grievant’s itinerary indicated that he would be in Toledo on a Friday, and he submitted expense vouchers for the trip, however it was discovered that he worked at home during the day in question. The arbitrator found that the employer violated Section 24.04 by failing to provide witness lists and documents and not answering the grievant’s letters. Section 25.08 was not found to be violated. The employer’s selection of the pre-disciplinary hearing officer was unwise because she had an interest in the outcome and that the investigation was incomplete and unfair. The arbitrator also found that the grievant’s itinerary was a contemplated itinerary and that he had informed his supervisor of schedule changes, however the grievant was AWOL as there was no provision for working at home. Disparate treatment was suspected by the arbitrator, who also noted that the grievant exhibited a contemptuous attitude towards management. The suspension was reduced to a 1 day suspension.

The Union filed a motion in the Court of Common Pleas to vacate the Arbitrator’s award. The Union received a decision by the Court of Common Pleas upholding the Arbitrator's award.

The grieverant was removed for unauthorized possession of state property when marking tape worth $96.00 was found in his trunk. The Columbus police discovered the tape, notified the employer and found that the tape was missing from storage. The arbitrator found that the late Step 3 response was insufficient to warrant a reduced penalty. The arbitrator also rejected the argument that the grievant obtained the property by “trash picking” with permission, and stated that the grievant was required to obtain consent to possess state property. It was also found that while the employer’s rules did not specifically address “trash picking”, the grievant was on notice of the rule concerning possession of state property. The grievance was denied.

The grievant, a Therapeutic Program Worker, took $150 of client money for a field trip with the clients. The grievant was arrested en route and used the money for bail in order to return to work for his next shift. The grievant was questioned about the money before he could repay it, he offered to repay it when he was paid on Friday, but failed to offer payment until the next Monday. He was removed for Failure of Good Behavior. While the employer was found to have poorly communicated its rules concerning use of client funds, the grievant was found to have notice of its provision. The arbitrator found that the grievant lacked the intent to steal the money, however the grievant’s failure to repay was not excused, thus just cause was found for discipline. Because of the grievant’s prior disciplinary record, removal was held commensurate with the offense and the grievance was denied.

Management bears the burden of proving the charge of patient abuse with a high degree of proof. The Arbitrator found the grievant violated an agency policy against resident abuse when he grabbed a patient by the neck and slammed his head against a concrete block wall. The evidence allowed the Arbitrator to conclude that the grievant engaged in patient abuse with a high degree of proof. Therefore, management properly removed the grievant from his position.

Affirmative Defense – Burden of Proof
The Arbitrator concluded that more likely than not the Grievant transported a cell phone into the institution within the period in question, violating Rule 30, by using it to photograph her fellow officers. The Arbitrator held that the Agency clearly had probable cause to subpoena and search 13 months of the Grievant’s prior cell phone records. The prospect of serious present consequences from prior, easily perpetrated violations supported the probable cause. The Arbitrator held that the Grievant violated Rule 38 by transporting the cell phone into the institution and by using it to telephone inmates’ relatives. The Arbitrator held that the Grievant did not violate Rule 46(A) since the Grievant did not have a “relationship” with the inmates, using the restricted definition in the language of the rule. The Arbitrator held that the Grievant did not violate Rule 24. The Agency’s interpretation of the rule infringed on the Grievant’s right to develop her defenses and to assert her constitutional rights. The mitigating factors included: the Agency established only two of the four charges against the Grievant; the Grievant’s almost thirteen years of experience; and her record of satisfactory job performance and the absence of active discipline. However, the balance of aggravative and mitigative factors indicated that the Grievant deserved a heavy dose of discipline. Just cause is not violated by removal for a first violation of Rules 30 and 38. 1003

Agency Policies

It is the Arbitrator’s opinion that the employer had just cause to remove the Grievant for violating Standards of Employee Conduct Rule 46 (B). The Grievant was engaged in an unauthorized personal relationship with Parolee Young who was at the time under the custody or supervision of the Department. The Arbitrator also noted that evidence discovered post-discharge is admissible as long as it does not deal with subsequently discovered grounds for removal. Furthermore, the Arbitrator concluded that Article 25.08 was not violated in this circumstance because the Union’s information request did not meet the specificity requirement contained in the provision. Finally, the Union failed to plead and prove its disparate treatment claim since it did not raise the issue at Third Stage or Mediation Stage. 893

The Agency failed to produce even a preponderance of evidence (more likely than not) that the Grievant abused the Client. The Agency produced virtually no circumstantial evidence to support its charge in this dispute, so its case rested entirely on witness testimony and investigatory statements. The outcome of this case, therefore, rested entirely on two witnesses. Neither of the witnesses ultimately proved to be credible. 894

The employer failed to support the Grievant’s removal for abuse. Nothing in the record provides significant proof that the Grievant was guilty as charged. Improperly supported allegations, regardless of the employer’s well-intentioned purpose, require a ruling in the Grievant’s favor. Mere innuendo, without proper support in the form of consistent and valid evidence and testimony, will lead to similar findings in the future. This finding was fashioned primarily by the overwhelmingly consistent testimony provided by the Grievant and her co-workers. 895

Agency Policies

It is the Arbitrator’s opinion that the employer had just cause to remove the Grievant for violating Standards of Employee Conduct Rule 46 (B). The Grievant was engaged in an unauthorized personal relationship with Parolee Young who was at the time under the custody or supervision of the Department. The Arbitrator also noted that evidence discovered post-discharge is admissible as long as it does not deal with subsequently discovered grounds for removal. Furthermore, the Arbitrator concluded that Article 25.08 was not violated in this circumstance because the Union’s information request did not meet the specificity requirement contained in the provision. Finally, the Union failed to plead and prove its disparate treatment claim since it did not raise the issue at Third Stage or Mediation Stage. 893

The Agency failed to produce even a preponderance of evidence (more likely than not) that the Grievant abused the Client. The Agency produced virtually no circumstantial evidence to support its charge in this dispute, so its case rested entirely on witness testimony and investigatory statements. The outcome of this case, therefore, rested entirely on two witnesses. Neither of the witnesses ultimately proved to be credible. 894

The employer failed to support the Grievant’s removal for abuse. Nothing in the record provides significant proof that the Grievant was guilty as charged. Improperly supported allegations, regardless of the employer’s well-intentioned purpose, require a ruling in the Grievant’s favor. Mere innuendo, without proper support in the
form of consistent and valid evidence and testimony, will lead to similar findings in the future. This finding was fashioned primarily by the overwhelmingly consistent testimony provided by the Grievant and her co-workers. 895

Aggravating Circumstances

- See also mitigation
- Offense is especially abhorrent where employer had previously provided employee with the benefit of the doubt with regard to similar alleged offenses in the past which employee had denied. 7

- The seriousness of absenteeism is compounded when employee accepts compensation from the state for the time he was absent. 36
- Of critical importance to the arbitrator is the fact that no resident was the subject of any physical harm. However, the injury to the supervisor, albeit minor, requires a significant increase in the severity of the discipline against the grievant. 1

- The credibility of the grievant’s testimony was harmed by the selectiveness of his memory. When it was in grievant’s interest to remember, he had clear memories. When asked damaging questions however, the grievant claimed not to be able to remember. The arbitrator regarded this testimony as not only damaging the grievant’s credibility but also as an aggravating circumstance which calls for a more severe punishment than the grievant otherwise would have received. The arbitrator said the grievant would be better off if he had just openly admitted his fault. 1 85

- There are several aggravating factors: the severity of the injury required six stitches and the grievant directly participated in the incident. The failure to file an incident report resulted in over six hours elapsing between the injury and the proper medical care. The physical health of a patient entrusted to the care of the State was endangered: 296

- Another aggravating factor in this case is that the grievant hid the evidence of a patient’s injury. He cleaned up the patient’s wound and hid the clean-up materials in order to disguise the occurrence: 296

- A disciplinary record weighs against mitigation even though the grievant had 1 7 years of service. Mitigation is further disfavored by the grievant’s repeated violent threats against the witnesses. While such behavior is not part of the removal decision, it does go to the issue of mitigation: 298

- The grievant’s stubborn insistence that nothing happened and his lack of contrition by not cooperating with supervision lead the arbitrator to find that the grievant would receive no back pay or lost benefits. The practical result of this decision was that the grievant was suspended without pay for almost a year: 302

- There were also aggravating factors. In the commission of the theft the grievant used both the department’s truck and time without authorization: 362

- The grievant was a Psychiatric Attendant who had been mandated to work overtime. The grievant notified the employer that he would be unable to work over because he had to meet his children’s school bus and was unable to find a substitute, and he signed out at his normal time. The grievant had two prior suspensions for failure to work mandatory overtime. Ordinarily, the “work now grieve later” doctrine applies to such situations, however the arbitrator noted that certain situations alter that policy. The grievant gave a legitimate reason for refusing to overtime and the employer was found to have abused its discretion in not finding a substitute. The grievant was found to have a history of insubordination and inability to arrange alternate child-care. Upon a balancing of the parties’ actions, the arbitrator held that there was no just cause for removal, but reduced the penalty to a 60 day suspension: 4 1 5

- The grievant, a Therapeutic Program Worker, received a ten day suspension for sleeping on duty. A supervisor tried to awaken the grievant but was not successful, although the grievant had been heard talking to another employee shortly before the incident. The grievant had no prior discipline up to the time she had become a steward, then she received two verbal reprimands. Also her performance evaluations had been above average until the same time, at which point she was evaluated below average in several categories. Lastly, a paddle had been hanging in the supervisor’s lounge with the words “Union Buster” written on it. The arbitrator found that the grievant may have dozed off, but that the employer’s anti-union animus was the cause for the suspension. The paddle in the lounge was
evidence of this and the employer had demonstrated reckless disregard for union relations. The arbitrator held that the employer failed to properly apply its rules, thus there was no just cause for the 10 day suspension. The discipline was reduced to a 1 day suspension. 400

- The grievant had been a Driver’s License Examiner for 13 months. He was removed for falsification when he changed an applicant’s score from failing to passing on a Commercial Drivers’ License examination. The arbitrator found that the grievant knew he was violating the employer’s rules and rejected the union’s mitigating factors that the grievant had no prior discipline and did not benefit from his acts. Falsification of license examination scores was found serious enough to warrant removal for the first offense. The arbitrator also rejected arguments of disparate treatment. The grievance was denied: 403

- The grievant was removed after 13 years service from her position with the Bureau of Disability Services for unapproved absence, conviction of a drug charge, and failure to report the drug charge as required by the state’s Drug-Free Workplace policy. The Bureau is funded by the federal government and is subject to the Drug-Free Workplace Act of 1988. The grievant had a history of alcohol problems. She was also involved with a co-worker who, after the relationship ended, began to harass her at work. She filed charges with the EEOC and entered an EAP. The former boyfriend called the State Highway Patrol and informed them of the grievant’s drug use on state property. An investigation revealed drugs and paraphernalia in her car on state property and she pleaded guilty to Drug Abuse. She became depressed and took excessive amounts of her prescription drugs and missed 2 days of work. She was admitted into the drug treatment unit of a hospital for 2 weeks. She was on approved leave for the hospital stay, but the previous 2 days were not approved and the agency sought removal. The arbitrator found that while the employer’s rules were reasonable, their application to this grievant was not. The Drug-Free Workplace policy does not call for removal for a first offense. The arbitrator held that the removal lacked just cause and must be set aside. In a related case Arbitrator Murphy held that lax enforcement of the employee-resident personal relationship ban undermines enforcement of other provisions of the policy including the ban on accepting money from residents. This arbitrator agreed. Management’s actions have to be consistent with the published policy and rules, and similar cases have to be treated in a like manner for them to have value in guiding employee conduct. Because of lax enforcement of far more serious infractions elsewhere in the agency, the Grievant could not have expected removal for borrowing money from a resident. The Grievant had previous counseling for receiving a bag of gratuities from a resident. She should have learned that accepting gratuities from residents makes her subject to discipline. Her case is aggravated by her contact and attempted contacts with witnesses against her pending the arbitration. For this

criminal record. The arbitrator noted that the grievant must be responsible for her absenteeism, however the employer was found to have failed to consider mitigating circumstances present, possessed an unwillingness to investigate, and to have acted punitively by removing the grievant. The grievant’s removal was reduced to a 10 day suspension with back pay, benefits, and seniority, less normal deductions and interim earnings. The record of her two day absence was ordered changed to an excused unpaid leave. The grievant was ordered to complete an EAP and that another violation of the Drug-Free Workplace policy will be just cause for removal: 429

- Prior incidents of similar violations were considered by the Employer in determining appropriate disciplinary action. The grievant had a history of verbal abuse, insubordination and neglect of duty prior to the final disciplinary hearing. 701

- Prior incidents involving similar violations were considered by the Employer in weighing the importance of the verbal abuse violation. The verbal comment made by the grievant to his co-worker marked the sixth time the grievant had violated Rule 12 - “making abusive statements to another employee.” While the statement alone may warrant suspension or written reprimand, the Arbitrator determined that this violation, coupled with the striking of a supervising officer, which is in violation of Rule 19, should and did result in removal. 721

The Arbitrator held that the removal lacked just cause and must be set aside. In a related case Arbitrator Murphy held that lax enforcement of the employee-resident personal relationship ban undermines enforcement of other provisions of the policy including the ban on accepting money from residents. This Arbitrator agreed. Management’s actions have to be consistent with the published policy and rules, and similar cases have to be treated in a like manner for them to have value in guiding employee conduct. Because of lax enforcement of far more serious infractions elsewhere in the agency, the Grievant could not have expected removal for borrowing money from a resident. The Grievant had previous counseling for receiving a bag of gratuities from a resident. She should have learned that accepting gratuities from residents makes her subject to discipline. Her case is aggravated by her contact and attempted contacts with witnesses against her pending the arbitration. For this
reason she is reinstated, but without back pay and benefits. 991

**Alcohol and Substance Abuse**

- Drinking on duty. 66, 195, 196
- Substance abuse. 23, 61

- The grievant, improperly terminated for incidents related to his alcohol abuse, was reinstated with full seniority and benefits to his former position on a conditional last chance basis. As a condition of his reemployment, the grievant was to continue to participate in individual after-care counseling as well as self-help support groups to the extent determined by the Employee Assistance Program (EAP) or its designee: 577

**Alcoholism**

- Where an employee has been offered an opportunity at rehabilitation, but has then lapsed back into his former ways, discharge is typically inevitable. 23
- Continued alcohol induced violations do not obligate employer to provide ever-increasing treatment. 23
- The employer cannot treat alcoholism-induced violations as ordinary violations subject to the ordinary progressive discipline procedures. 23
- The employer is obligated to respond to alcoholism-induced violations with a variant of the normal progressive disciplinary procedure: to the ordinary procedures, one last chance must be offered in which the employee is given an opportunity for treatment. 23
- Where an employee was suffering from alcoholism and committed tardiness and absenteeism type offenses, failure to formally issue reprimands on several occasions does not imply bad faith or negligence, but only a patience and willingness to help the grievant. Failure to formally issue reprimands on several occasions was not treated by the arbitrator as defeating the notice function of the other progressive discipline actions taken. 23
- Failure to improve performance despite several formal and informal warnings renders removal just and reasonable. 47
- Post termination actions are not germane to the issue of just cause as of the date of termination. 47
- Where alcoholic rehabilitated after being fired for just cause, decision to rehire is voluntary and not required by the contract. 47
- Removal reduced because of disparate treatment when grievant’s punishment compared to other persons with alcohol problems. 66
- Even though the arbitrator thought the grievant’s rehabilitation activities are highly commendable, the arbitrator did not feel that sufficient grounds for mitigation. 145

The grievant reported for work under the influence of alcohol. He signed a Last Chance Agreement (LCA) which held his removal in abeyance pending his participation in, and completion of, an EAP program. Random drug/alcohol testing was a component of the LCA. He was told to report for a random test. He failed to comply and was removed. The arbitrator found that the employer’s failure to notify the chapter president of a change in the LCA was a violation of good faith but did not negate the grievant’s obligation to adhere to the agreement. The grievant had ample opportunity to confer with his union representative prior to signing the agreement and without specific reason for the necessity to speak to his representative prior to the test, the grievant’s procedural arguments did not justify his refusal to submit to the test. The grievant had the option to “obey now and grieve later” and he did not elect to do so. The arbitrator also determined that the affirmative decision of the commission which reviewed his unemployment compensation application had no bearing in this matter because different criteria was applied in making that decision. 838

The grievant reported for work under the influence of alcohol. He signed a Last Chance Agreement (LCA) which held his removal in abeyance pending his participation in, and completion of, an EAP program. Random drug/alcohol testing was a component of the LCA. He was told to report for a random test. He failed to comply and was removed. The arbitrator found that the employer’s failure to notify the chapter president of a change in the LCA was a violation of good faith but did not negate the grievant’s...
obligation to adhere to the agreement. The grievant had ample opportunity to confer with his union representative prior to signing the agreement and without specific reason for the necessity to speak to his representative prior to the test, the grievant’s procedural arguments did not justify his refusal to submit to the test. The grievant had the option to “obey now and grieve later” and he did not elect to do so. The arbitrator also determined that the affirmative decision of the commission which reviewed his unemployment compensation application had no bearing in this matter because different criteria was applied in making that decision. 838

Alford Plea\(^1\)

The Grievant was indicted on criminal charges, but entered an *Alford* plea to the lesser charges of criminal Assault and Falsification. As part of the *Alford* plea the Grievant agreed not to work in an environment with juveniles, which precluded his being reinstated at Scioto. The Union subsequently modified the grievance to exclude the demand for the Grievant’s reinstatement and that he only sought monetary relief and a clean record. The Arbitrator was not persuaded that there was clear and convincing evidence that the Grievant used excessive force against the Youth. The Arbitrator held that for constitutional purposes an *Alford* Plea was equivalent to a guilty plea; however, for the purposes of arbitration the Grievant’s *Alford* Plea did not establish that the Grievant used excessive force. In addition, the Arbitrator held that the Grievant did not violate any duty to report the use of force. The Grievant did have a clear and present duty to submit statements from youth when requested and violated Rule 3.8 and 5.1 when refusing to do so. The Arbitrator found that the termination of the Grievant was unreasonable. Under ordinary circumstances he would have reinstated the Grievant without back pay, but reinstatement could not occur due to the *Alford* plea. However, because of the number of violations and the defiant nature of his misconduct, the Grievant was not entitled to any monetary or non-monetary employment benefits. The grievance was denied. 968

Allegation of Records

- See also falsifying documents
- The grievant received a three day suspension for altering payroll records. This suspension constituted notice of the possible consequences of a similar violation: 31 8**

*OCSEA was successful in getting the grievant's removal reduced to a suspension at arbitration. The State moved to vacate the Arbitrator's decision in the Court of Common Pleas. The Court of Common Pleas dismissed the State's appeal on the basis of late filing by the State. The State then appealed this case to the Court of Appeals. While the case was pending in the Court of Appeals, the parties reached a settlement agreement.*

- Although alteration of payroll records is a serious offense one for which the grievant received a three day suspension in the past, removal is neither commensurate nor progressive. There were mitigating factors. The grievant was a nine-year employee who does quality work and is highly skilled. The grievant also trained others and received various citations for his work: 31 8**

*OCSEA was successful in getting the grievant's removal reduced to a suspension at arbitration. The State moved to vacate the Arbitrator's decision in the Court of Common Pleas. The Court of Common Pleas dismissed the State's appeal on the basis of late filing by the State. The State then appealed this case to the Court of Appeals. While the case was pending in the Court of Appeals, the parties reached a settlement agreement.*

Ambiguity of Work Rules

- Employer's tardiness policy was too ambiguous. The manner in which tardiness was approved or disapproved was also ambiguous. The Employer failed to provide time keeping records to show consistency of enforcement. Although the employer has the right to establish reasonable rules, in this case the Employer failed to spell out the conditions of the rules. The Grievant could have expected that no action would result because the Employer had used comp time to dock employees. Failure to reprimand Grievant for some tardiness incidents gave Grievant "negative notice" that such conduct was acceptable: 8

\(^1\) In the law of the United States, an *Alford* plea is a plea in criminal court. In this plea, the defendant does not admit the act and asserts innocence, but admits that sufficient evidence exists with which the prosecution could likely convince a judge or jury to find the defendant guilty.

Alteration of Records

- See also falsifying documents
- The grievant received a three day suspension for altering payroll records. This suspension constituted notice of the possible consequences of a similar violation: 31 8**

*OCSEA was successful in getting the grievant's removal reduced to a suspension at arbitration. The State moved to vacate the Arbitrator's decision in the Court of Common Pleas. The Court of Common Pleas dismissed the State's appeal on the basis of late filing by the State. The State then appealed this case to the Court of Appeals. While the case was pending in the Court of Appeals, the parties reached a settlement agreement.*

- Although alteration of payroll records is a serious offense one for which the grievant received a three day suspension in the past, removal is neither commensurate nor progressive. There were mitigating factors. The grievant was a nine-year employee who does quality work and is highly skilled. The grievant also trained others and received various citations for his work: 31 8**

*OCSEA was successful in getting the grievant's removal reduced to a suspension at arbitration. The State moved to vacate the Arbitrator's decision in the Court of Common Pleas. The Court of Common Pleas dismissed the State's appeal on the basis of late filing by the State. The State then appealed this case to the Court of Appeals. While the case was pending in the Court of Appeals, the parties reached a settlement agreement.*

Ambiguity of Work Rules

- Employer's tardiness policy was too ambiguous. The manner in which tardiness was approved or disapproved was also ambiguous. The Employer failed to provide time keeping records to show consistency of enforcement. Although the employer has the right to establish reasonable rules, in this case the Employer failed to spell out the conditions of the rules. The Grievant could have expected that no action would result because the Employer had used comp time to dock employees. Failure to reprimand Grievant for some tardiness incidents gave Grievant "negative notice" that such conduct was acceptable: 8
Animus Toward Employees, Union

Apparent Authority

- See also emergency pay

In the case at hand the first line supervisor used the word and had the apparent authority to declare an emergency. The supervisor’s actions were ratified by his superiors when the second shift was held over, thus violating the overtime rules: 299

- In discussing the issue of emergency pay, the first question is whether the event is “normal or reasonably foreseeable to the place of employment and/or position description of the employee.” The next step is did the employer declare the emergency. The last consideration is whether the employer, through its actions, is estopped from claiming the situation was not an emergency. For example, did the employer follow the correct call out procedure for voluntary overtime? Did anyone in a position of authority or apparent authority characterize the situation as an emergency? Interoffice communications written after the alleged emergency cannot be relied upon and so are not evidence of the concept of estoppel: 337

- The arbitrator found that the grievants were not entitled to emergency pay since the State has never declared an emergency. The fact that a Sergeant at Marion Correctional Institution used the word emergency does not mean that the employer declared an emergency: 34 3

Appeal to Arbitration

- Arbitrator Rivera’s appropriate observation concerning the concept of notice finds strong support in an arbitral (and legal) consensus on the point. Actual receipt of “written notice” is not required; proof of mailing will suffice to establish the presumption that the written notice was received, notwithstanding the inability of the recipient to produce it. 1 87

Appendix K

- The grievant was conducting union business at the Warrensville Development Center when a client pushed her and injured her back. Her Occupational Injury Leave was denied because she was conducting union business. A settlement was reached concerning a grievance filed over the employer’s refusal to pay, in which the employer agreed to withdraw its objection to her OIL application based on the fact that she was performing union business. Her application was then denied because her injury was an aggravation of a pre-existing condition. The arbitrator found the grievance arbitrable because the settlement was mistakenly entered into. The grievant believed that her OIL would be approved while the employer believed that it was merely removing one basis for denial. The arbitrator interpreted Appendix K to vest discretion in DAS to make OIL application decisions. The employee’s attending physician, however, was found to have authority to release employees back to work. Additionally, Appendix K was found not to limit OIL to new injuries only. The grievant’s OIL claim was ordered to be paid: 4 20

Application for Employment

- See falsification of job application

- The removal of the grievant was upheld where she had willfully falsified the application for her present employment and her previous employment with the state. An omission of clearly requested information is a falsification. While the grievant had not yet received a copy of the rules when she filled out the application, she was put on notice that falsification could result in severe penalty including removal, by the fact that she was required to sign an oath personally administered by a notary. While the person helping her with the application advised the grievant to focus on her good points, he did not advise her to omit information. An institution which houses felons requires a higher level of trust, honesty and confidence than is normally necessary in other work settings. In addition to falsification of her employment application, the grievant failed to cooperate with the investigation but answered with half-truths, omitting the important facts. Disparate treatment was not established because no evidence was given as to whether the examples for comparison involved willfulness, prior patterns of falsification, or mitigating factors. One of the cases could be distinguished on the grounds that the employee had cooperated with the investigation and her falsification was not willful. 268

- While the arbitrator endorsed Arbitrator Dworkin’s analysis of 24 .06 which prevented the admission of evidence about discipline prior to the
contract, he held that the analysis did not anticipate the circumstances surrounding the present case where the grievant had falsified her employment application by omitting that she had previously been removed from employment with the state. The arbitrator held that evidence of that removal, obtained by an investigation, was admissible in such a situation. To preclude such an investigation would frustrate the employer’s selection and appointment process. Without additional evidence of the intent of the parties regarding 24.06, the arbitrator was unwilling to find that the employer had violated 24.06. 268

- Where there was a pattern of falsification and deceit, the arbitrator upheld the grievant’s removal from employment as a Correction officer since the employer should not have to assume the risk of further dishonesty, especially when an honest disclosure would preclude hiring, and since Correction facilities are clothed with numerous security considerations requiring honesty and forthrightness. 268

- The employer removed the grievant for two reasons: 1) The grievant committed theft because he had been named as the supplier of checks that had been returned to the Bureau of Workers’ Compensation, to another state employee in order to cash the checks (see arbitration decision #370); 2) falsification of his job application because he admitted during the investigation that he had prior felony convictions which he failed to report on his employment application. The arbitrator held that the employer could not use the falsification charge as a basis for removal because the grievant had sought assistance when he completed his application and lacked intent to falsify the application. The employer was also stopped from using the falsification because the grievant had been employed for 8 years, and had been removed once before, thus the employer was found to have had ample time to have discovered the falsification prior to this point. The employer was not permitted to introduce the Bureau of Criminal Investigation’s report into evidence at arbitration because the employer failed to disclose it upon request by the union. The fact that the investigation was ongoing was irrelevant. Just cause was proven through the investigator’s testimony and testimony of others involved in the scheme. The grievance was denied: 401

- Applicants (and grievants) for vacant positions must demonstrate that they actually meet each requirement set forth in a job posting and/or position description to meet the minimum qualifications which will secure them an interview for a promotion: 511

Application for Promotion

- The burden is on the employee to initiate the application process. Where applications must be “timely” to be valid, there should be a policy to provide a method of validating “timeliness” and a method to validate and acknowledge receipt of the application. While the Employee has the burden of filing a timely application, the burden of establishing reasonable and fair office procedures which ensure safety and accuracy of application filings falls on the employer: 548

Appointing Authority

- Civil service laws define “appointing authority” as “the officer, commission, board or body having power of appointment to, or removal from, positions in any office, department, commission, board or institution.” Within the Department of Rehabilitation and Correction, the appointing authorities are the managing officer of each penitentiary or reformatory. 207

Arbitrability

- The contract does not distinguish between provisional and non-provisional employees. The limitation on grieving in the contract is against probationary employees. It would be difficult for the arbitrator to find that a union dues paying person employed by the state for more than six months but less than 2 years cannot avail himself or herself of the benefits of the collective bargaining agreement when attempting to arbitrate his/her termination. 89

- An employer impairs the integrity of a bargaining unit by assigning duties traditionally performed by supervisors to bargaining unit members. Such duties dilute management authority as well as the integrity of the bargaining unit. Assignment of supervisory work is a grievable, and thus arbitrable, issue under §25.01, since §1.03 says the employer will not take action for the purpose of eroding the bargaining units. Section 1.03 does not prevent arbitration of the issue because the job audit process is not designed to be dispositive of the issue of whether grievant had been assigned some supervisory work. 127
- Section 25 .03 provides that questions of arbitrability shall be decided by the arbitrator. 158

- The contract says that grievances not appealed within the designated time limits will be treated as withdrawn grievances (25 .05 ). It would be an injustice to both parties for the arbitrator to allow the language of the contract to be outweighed on the grounds of a clerical error by a temporary employee. 164

- Where the State argued that the grievance was not arbitrable because it was sent to the wrong “agency head” in violation of 25 .02, the arbitrator ruled that the grievance was arbitrable because the grievant and the union reasonably believed that they had complied with Section 25 .02 and the proper agency received the grievance within the time limits of 25 .02. 172

- Issues of timeliness can be raised for the first time at arbitration. Arbitrators are creatures of the contract and may not expand their jurisdiction to consider matters outside their authority. Contractual limitations periods are jurisdictional, and arbitrators typically hold, in the absence of waivers, that such matters may be raised for the first time at the hearing. An added factor in this case is that the parties did not significantly discuss the grievance prior to arbitration. 172

- In a previous decision, an arbitrator held that if a disability separation was a pretext for discipline, it would be arbitrable. But if it was for health reasons, it was not arbitrable. The union now argues that the ruling was incorrect since it puts an impossible burden upon the union of proving what the employer’s motivation was. The arbitrator rejects the union’s argument saying that it was clear in this case that the grievant’s medical problems justified an involuntary disability separation.

- Where arbitration hearing was postponed several times and the employer claimed that the union was either estopped by the doctrine of laches or because it had waived the right to arbitration the arbitrator found that both parties were at fault and that the union had not intentionally relinquished the grievance. Given the employer’s fault and the grievant’s right to a day in court, the arbitrator found the grievance arbitrable. But since the union was also at fault, and this fault hurt the employer by affecting the availability of witnesses and the clarity of memories, the arbitrator announced that if the grievance was sustained, the award would be diminished. 236

- Since the grievant knowingly and voluntarily resigned, the grievance is not properly before the arbitrator. As an ex-employee, grievant has no standing to grieve: 315

- A grievance dealing with job abolishments and layoffs is arbitrable. The jurisdiction of an arbitrator extends only to those matters which the parties by their Agreement empower the arbitrator to hear. Article 5 is not without limitations, “Such rights shall be exercised in a manner which is not inconsistent with this Agreement.” Section 25 .01 enables an arbitrator to decide any difference, complaint or dispute affecting terms and/or conditions of employment regarding the application, meaning or interpretation of the Agreement. The procedural and/or substantive underpinnings of an abolishment decision dramatically impact employee’s terms and conditions of employment. A limitation on the powers of an arbitrator need to be clearly and unequivocally articulated; a reserved rights clause does not serve as an adequate bar: 340

OCSEA succeeded in overturning part of these layoffs at arbitration. The State of Ohio filed a motion to vacate this award in the Court of Common Pleas. The Union prevailed in the Court of Common Pleas and the State did not appeal. The Arbitrator's original award was upheld.

- The grievant had a thirty day time limit on filing her grievance, starting from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance. The event giving rise to the grievance occurred when the grievant continued to be carried as a probationary employee after sixty days of employment. The grievant had thirty days from the date when she was wrongfully listed as a probationary employee. The Union's argument that the grievant was not harmed until she was later removed was dismissed. The arbitrator found that as soon as the grievant was kept on probationary status and did not receive the full protection and rights of seniority status the grievant’s time for filing the grievance was running. The employer is also not liable for the training of the employee in her right to bring a grievance. The employer did not act in bad faith
to keep the grievant in the dark as to her rights. The employee also had worked for the State previously and had adequate time to discover the issue of her probationary status and raise it in a timely fashion, the grievance was not arbitrable since it was untimely: 344

- The timeliness of the Agreement is clear and mandatory. A grievance filed at Third Step must be filed within fourteen days of notification. In the event the deadline is missed, the grievance is deemed withdrawn: 347

- The untimely Step 3 grievance is deemed withdrawn and is not arbitrable. The arbitrator was reluctant to summarily dismiss grievances on purely technical grounds. At the same time, he recognizes his limitations. The arbitrator does not have the power to dispense justice or fairness, if doing so would violate the Agreement: 353

- It is unclear on what basis the Arbitrator found the grievance to be timely. The grievant waited almost six months to grieve the issue. The grievant was given advice by her steward not to gripe within her probationary period or she would be fired. The grievant relied on this advice and did not grieve until after the probationary period. Another basis on which the arbitrator could have ruled that the grievance was arbitrable was that the employer’s action can be categorized as a continuing violation: 360

- ODOT posted a vacant Equipment Operator 2 position. The grievant and others bid on the vacancy, however two applicants also had filed job audits which were awarded prior to the filling of the vacancy. The vacancy was canceled because of the job audits. The arbitrator found the union’s pre-positioning argument arbitrable because the grievant would otherwise have no standing to grieve. Managerial intent to pre-position was found to be possible even if committed by a lead worker. The arbitrator also found that job audits are a second avenue to promotions and not subordinate to Article 17 Promotions. The grievance was, thus, denied: 367

- The grievant injured his back in car accident and was off work for six months while receiving disability benefits. His doctor released him to work if no lifting was allowed. Because the position required lifting, he either left or was asked to leave work. He failed to call in for three consecutive days and was removed for job abandonment. The union requested arbitration more than 30 days after the date on the Step 3 response. No evidence was offered on the interpretation of 25.02, and as to when the union received the Step 3 response. The employer failed to overcome the presumption that a grievance is arbitrable. The arbitrator found just cause because: the grievant has served a 5 day suspension for failing to follow call-in procedure while on disability, his doctor’s statement that he should avoid lifting was ambiguous, and he failed to respond to the employer’s attempts to contact him. Filing for Workers’ Compensation was found not to substitute for contact with the employer: 373

- The grievant had been on a disability separation and had been refused when he requested reinstatement. The arbitrator found the grievance arbitrable because section 4 3.02 incorporated Ohio Administrative Code section 1 23:1 -33.03 as it conferred a benefit upon state employees not found within the contract. The grievant thus had three years from his separation to request reinstatement, which he did. The grievance was also found to be timely filed because there was no clear point at which the employer finally denied the grievant’s request for reinstatement and the union was not notified of the events by the employer. Additionally, the employer was estopped from asserting timeliness arguments because the employer was found to have delayed processing the grievant’s request for reinstatement. The physician who performed a state-ordered examination released the grievant to work, thus the employer improperly refused the grievant’s reinstatement request. The grievant was reinstated with back pay less other income for the period, holiday pay, leave balances credited with amounts he had when separated, restoration of seniority and service credits, medical expenses which would have been covered by state insurance, PERS contributions, and he was to receive orientation and training upon reinstatement: 375

- When a grievant has resigned, and is no longer a bargaining unit member, the grievance is not arbitrable: 445

- Disputed dealing with job abolishments and layoffs are arbitrable: 454
- The employer has not shown that even though the retirement of public employees is a matter of law and because an early retirement plan benefit is not specifically a contractual benefit, there are sufficient reasons to preclude the grievances from being arbitrable: 4 5 8

- The filing window commenced each time a violation occurred. Therefore, if the grievance was filed within the appropriate time after another violation, then the filing was timely and thus arbitrable: 4 6 4

- Unless there is express, exclusionary language limiting the grievability and/or arbitrability of any contract provision, that provision is grievable and arbitrable: 4 6 9

- Because the nature of the grievance deals with the grievant’s standing within Bargaining Unit 1 4 , the statutorily defined unit, the matter is arbitrable: 4 7 2

- The class modernization back pay grievance is arbitrable because certain employee rights may have vested before the employees left service. The rights here vested or accrued at the time of the back pay agreement: 4 8 4

- At a minimum, the Union had to show that the grievance was put in an envelope, properly addressed, properly stamped, and properly placed in a U.S. Mail box. Insufficient proof existed that any grievance with regard to the grievant had ever been filed, and therefore, the grievance failed to meet the contractual standards under 25 .02: 4 9 0

- A grievance which was filed over one year after the event giving rise to the grievance is not arbitrable in accordance with the Contract language of Article 25 .02: 5 1 5

- In a case involving a grievance filed over a year after the event giving rise to the grievance, the State did not waive its right to raise the timeliness issue at the arbitration hearing due to its failure to identify the issue during the grievance process: 5 1 5

- The arbitrator ruled that a steward with seven years experience should have known "not to rely upon a receptionist to provide advice about the proper filing of a grievance." The contract language is clear and unambiguous as to the time and place of filing the step 3 grievance and, although a change in policy was made concerning where a grievance number is obtained, this policy change does not in any way modify the express terms of the contract. The arbitrator concluded that, for at least two years before the present grievance was filed, OCB had made it clear that any delay in returning an improperly filed grievance would count against the time for filing a grievance. Therefore, the case is not arbitrable: 5 3 8

- The continuing violation argument is widely recognized as an exception to time limits for filing, however, it is generally narrowly construed. The present case did not involve a “new violation. The continuing failure to enter the vacation leave on the Grievant’s account was a consequence of the original failure to credit him. The Arbitrator found the grievance to be timely filed where the grievant had been assured by the Personnel office that the problem would be corrected. The grievant filed the grievance when he learned that nothing was going to be done to correct the problem. The grievant’s belief that the problem would be corrected was reasonable: 5 4 6

- In a case where six grievants who were displaced filed claims in an effort to challenge the abolishment of the positions of Air Quality Technicians 1 and Electrician 1 , the Arbitrator held that the grievance could not be used as a means of challenging the rationale for the original abolishments: 5 5 4

- The Arbitrator held that a grievance filed pursuant to a Last Chance Agreement involving patient abuse/neglect was arbitrable because the grievant did not waive any rights to just cause and due process when she signed the agreement: 5 6 0

- Even when a grievance does not specify the sections of the Agreement allegedly violated and the relief sought, the grievance is still arbitrable. Had the Arbitrator determined that the grievant had been improperly removed, sanctions for the contract violations would have been applied in terms of remedy requested: 5 7 5

- The Union contended that the employer waived its rights to argue arbitrability by accepting and processing a grievance that was untimely filed. However, the Arbitrator concluded that the Union's waiver argument was not valid because the Department of Rehabilitation and Correction clearly raised its procedural objection at the third
step meeting. Thereafter, the Department discussed the case on its merits and that does not constitute a waiver: 5 82

- Arbitrability in the event of an untimely presentation of a grievance is dependent on when the grievant became aware or should have become aware of the event giving rise to the grievance: 5 84

- The Arbitrator found that “if the Employer receives a timely appeal, it is not appropriate for the Employer to judge whether the Union is appealing the grievance.” Thus, he found no grounds for dismissing the case based on procedure. 71 1

The arbitrator found that the grievance was not filed properly – it was not filed on the proper form nor filed within 1 4 days of notification pursuant to the Collective Bargaining Agreement. The arbitrator stated that if the grievance had been properly filed, it would have been denied on its merits. 805

The grievant was charged with sexual harassment of a co-worker. The record indicated that no action taken during investigation was sufficient to modify or vacate the suspension, however some of the statements the investigator collected could not be relied upon because they were hearsay or rebutted by the witness. The arbitrator noted that the matter came down to the testimony of one person against another and there was no substantial evidence to sustain the charge. The arbitrator determined that the matter was properly before her because it was appealed within ninety days of the Step 3 response. The arbitrator noted that the fact that it was appealed before the mediation meeting did not invalidate the appeal. 807

The Arbitrator rejected the Employer’s contention that the grievance was not arbitrable because it was untimely. It was unclear when the Grievant was removed. A notice of removal without an effective date has no force or effect. When the Grievant did not respond to the Employer he appeared to have been acting in accord with his doctor’s instructions. While the Grievant was informed by payroll that he had been removed, the collective bargaining agreement requires that the notice be in writing and provided to both the employee and the union. The allegation of misconduct arose from three incidents involving a coworker. In the first the Grievant was joking and it should have been obvious to the coworker. Given the questions about the coworker’s view of the first incident and her failure to report the alleged misconduct until the next day, the Arbitrator could not accept the coworker’s testimony on the second incident. Because he was out of line when he confronted the coworker in a rude and aggressive manner, the Grievant merited some disciplinary action for the third incident. In addition, the Arbitrator did not believe the Employer established that the Grievant made false or abusive statements regarding the coworker. The strict adherence to the schedule of penalties in the Standards of Employee Conduct sometimes results in a penalty that is not commensurate with the offense and the employee’s overall record. The Grievant was a 1 2-year employee with good job evaluations and his offense was minor. The Arbitrator believed the employer was prepared to return the Grievant to work on a last chance agreement. The Arbitrator denied the request for full back pay based on the Grievant’s failure to contact the employer or to authorize the union to contact the employer on his behalf. Back pay was granted from the date of the third step grievance meeting where the employer should have attempted to implement the alternative to removal it had proposed earlier. 932
The Grievant had accepted an inter-agency transfer, demotion, and headquarter county change. The Department sent her a letter that erroneously stated that she would “serve a probationary period of 60 days in this position.” A month later the Department issued a “Corrected Letter” informing her that she would serve a probationary period of 20 days, provided by Article 6.01 D. The Grievant’s Final Probationary Evaluation rated her performance as unsatisfactory and she was probationarily removed. The Arbitrator held that the Grievant was in an initial probationary period and not a trial period when she was removed. The Acknowledgment she signed explicitly referenced Article 6.01 D, used the term “initial probationary period”, and placed her on notice that she could be removed during that period without recourse. The Grievant neither consulted the Collective Bargaining Agreement or Union before signing the Acknowledgment; nor did she inquire about the change or file a grievance when she got the corrected letter. Trial periods differ from probationary periods in that they are one-half the regular probationary period and employees in trial periods are not prohibited from using the grievance procedure to protest discipline and discharge actions. The Arbitrator held that regardless of the mistake made by the Department (but later rectified) she had no authority to review the Department’s removal decision. Therefore, the matter of the Grievant’s removal was not arbitrable. 936

The Arbitrator agreed with the state that the grievance was not properly filed. It was filed as a class action grievance on behalf of all employees at OVH; however, the dispute appeared to be limited to two employees, who were brought into an investigatory interview to provide evidence and requested union representation. That request was denied. However, the Arbitrator did not believe the grievance should be dismissed. Failure to list the members of the class by the Step Three hearing meeting did not require the dismissal of the grievance. Communication from the staff representative to the state indicates that the union identified the potential witnesses and the nature of their testimony. The fact that the union may have requested an improper remedy does not mean that the Arbitrator could not consider whether there was a contract violation and, if necessary, devise a proper remedy. The Arbitrator held that the two Grievants were not entitled to union representation. Their meetings with management were not investigatory interviews. They met with management as a result of a union complaint regarding the conduct of a supervisor. The supervisor was the object of the investigation, not the Grievants. The Grievants had no reason to believe that they could be subject to discipline; they were simply asked to write statements regarding what they saw or heard. The Arbitrator rejected the claim that an employee is entitled to union representation at a meeting with management where the employee feels uncomfortable or feels that he/she needs representation. This position is inconsistent with the standard adopted by SERB and the NLRB which requires employees to reasonably believe that they could be subject to discipline before they are entitled to union representation. 1 01 1

A Criminal Justice Policy Specialist (CJPS) bargaining unit position was eliminated on December 1, 2006. A grievance was filed on November 28, 2007. The Union argued that they were led to believe the DMC bargaining unit work had been distributed to other bargaining unit employees and that the occurrences giving rise to the grievance still existed today as they did in 2006. The Arbitrator held that the Union knew or should have known as of December 1, 2006 that the CJPS position had been eliminated, thereby putting the Union on notice of that position’s duties being distributed to other employees. The Arbitrator held that the record established that the grievance was not filed pursuant to Article 25.02 (Step One); therefore, she was without authority to hear the merits of the grievance. 1 038

Arbitration Hearing, Failure to Appear

- With regard to the grievant’s failure to appear at the arbitration hearing, the arbitrator said, “All concerned waited fruitlessly for him to appear. Obviously, his failure to appear is held against him. The Union should not expect that when its principal witness does not testify in his own behalf that it could prevail in this dispute. 1 66

Arbitrator's Authority

- No authority to consider independent contract violation together with disciplinary grievance. 1

- It is a well-established arbitral principle that arbitrators have the authority to modify a penalty when the agreement between the parties fails to expressly prohibit such modification and the arbitrator has found the penalty to be improper or too severe. The collective bargaining agreement does not, in this case, contain such a prohibition. 7
- Where the employer moved to have the scope of arbitration limited to the procedural aspects of grievant’s removal on the ground that the written grievance relates only to the procedures used, the arbitrator denied the motion since the grievance alleged a violation of Article 24, Section 24.01 which requires the employer to demonstrate just cause for any action, an issue which requires consideration of all relevant facts. 10

- In layoff grievance, parties agreed to expand arbitrator’s authority to include technically unorthodox remedies. An award was issued in accordance with that stipulation of authority. 12

- Provision against arbitrator modifying discharge where abuse is found, was held not to apply where there was no abuse under the department’s definition of abuse. 14

- Arbitrator modified discharge where abuse was not proven but a very closely related offense was proven. 14

- Arbitrator cannot resolve factual issues where the arbitration is brought before him by way of briefs rather than by oral hearing. 21

- Arbitrator is allowed to provide a just and fair result without adherence to legal concepts such as default. 44

- Arbitrator does not have authority to order the employer to bargain with the union. “Grievance” is defined in 25.01. Issue of whether employer must bargain over non-smoking policy does not fall under the definition. 48

- Article 25 does not prevent arbitrator from enforcing Article 13. 55

- Despite the fiscal difficulties that implementation will cause employer, arbitrator is bound by the language of the agreement. 55

- Once the arbitrator finds just cause, she must leave to the employer the issue of balancing a human concern for the individual employee as against the needs of the institution and its patients. 58

- The arbitrator’s authority to modify a penalty if too severe is inherent in the concept of “just cause.” However, where management rules provided under the contract are reasonable and fair and where disciplined behavior falls squarely within those rules, the Arbitrator’s discretion is limited solely to her sense of justice being egregiously offended. 58

- Modification of the employer’s penalty can only take place if the arbitrator determines that the penalty exceeds the range of reasonableness and is unduly severe. 59

- Arbitrator has jurisdiction to order production of evidence from agency of the state that made an investigation, where that investigation was relied upon for disciplinary action even though the investigating agency’s employees are not represented by the union. 75

- That tapes are physically with specific employing agency’s agent does not place them beyond the jurisdiction of the arbitrator. 75

- The parties mutually agreed to language in the agreement dealing with notice requirements. To minimize the importance of this language would be in effect to subtract from or modify the terms of this agreement. 108

- Even though the agreement does not provide a specific penalty for the violation (failure to furnish documents) the arbitrator cannot in clear conscience disregard language mutually agreed to by the parties. To minimize the importance of this language would subtract from or modify the terms of this agreement, which is clearly outside the scope of this arbitrator’s authority. 118

- Where the arbitrator was sympathetic to grievant’s illness, his decision is controlled by the agreement. His sympathies are immaterial. 123

- Before an arbitrator is barred from modifying a removal for abuse, the arbitrator must be satisfied that the abuse was of a serious enough nature to establish just cause for removal. 130

- The arbitrator disagreed with Arbitrator Pincus’ ruling that 24.01 is intended to prevent an arbitrator from holding that an employee was terminated for proper cause on the basis of certain misconduct, but that termination for misconduct should be reduced. 130

- The arbitrator’s power is only to modify penalties which are beyond the range of reasonableness,
and are unduly severe. If the penalty is within that range, it may not be modified. 1 4 5

- It is clear that the union and the employer made a mutually undesirable agreement when they agreed to the concluding sentence in 36.05. But the arbitrator is powerless to rescue either party from its bargain. His job is to interpret and apply the agreement, and the fact that the result proves to be unfair and detrimental to both the union and the state is irrelevant. 1 5 2

- Arbitration is not "an equitable forum," (except perhaps, in discipline cases where the arbitrator is licensed to interpret "just cause). The arbitral task in contract disputes is to interpret and apply the contract. Equity is a bargaining-table issue, not a foundation for arbitral awards. The U.S. Supreme Court has so held: [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." This is the universally recognized principle governing arbitral authority in the private employment sector, and is equally applicable to the public sector: 1 5 2

- Where the arbitrator had ruled that the employer had violated the contract by having supervisors perform bargaining unit work, the arbitrator declined to order the employer to assign the work to a specific bargaining unit member stating that such a determination was "within the purview of the employer." The arbitrator did order that supervisors stop doing the work: 1 5 6

- Much as this arbitrator may be sympathetic toward the argument that the grievant has been deprived of a hearing because of the technical application of contractual terms, the circumstances of this case (untimely appeal to arbitration following an untimely response by the employer from an earlier step in the grievance process) do not enable this neutral to order an arbitration hearing on the merits on equitable grounds: 1 5 8

- While the arbitrator agreed with the general principle that where there are reasonable doubts about time limits they should be resolved in favor of arbitrability, he held that in this case another principle was more appropriate: "An arbitrator does not have an unfettered discretion in such matters. His primary duty of interpreting a contract requires him to reject an untimely grievance unless some basis exists for waiving the prescribed time limits": 1 5 8

- Section 25 .02 indicates that an unsettled grievance may be appealed to arbitration by the union as long as written notice is given to the Director of the Office of Collective Bargaining within (30) days of the answer, or the due date of the answer if no answer is given, in step 4: 1 6 4

- The contract says that grievances not appealed within the designated time limits will be treated as withdrawn grievances (25 .05). It would be an injustice to both parties for the arbitrator to allow the language of the contract to be outweighed on the grounds of a clerical error by a temporary employee: 1 6 4

- The arbitrator reads Section 25 .03 as directing the parties to attempt to stipulate to the facts and issues in a submission to the arbitrator. By implication the arbitrator will find the facts and determine the issues that are in dispute, where they cannot be agreed upon. That section does not give the arbitrator jurisdiction over matters beyond the scope of arbitration: 1 9 1 A

- While 25 .03 gives the arbitrator the authority to decide questions of arbitrability, in making such decisions the arbitrator is bound by the following scope of arbitration clause, found later in the same section: "Only disputes involving the interpretation, application or alleged violation of a provision of the agreement shall be subject to arbitration." Thus, even though the parties have authorized the arbitrator to interpret the arbitrability provision, that authority does not negate the limitations on arbitral jurisdiction found in section 25 .03: 1 9 1 A

- The choice to remove the grievant in this case was not unreasonable. While the arbitrator might have chosen suspension, the arbitrator cannot substitute her judgment for that of management in this instance: 1 9 6

- A neutral should be circumspect in modifying discipline when discipline is clearly warranted. If the discipline is progressive, and if it is supported by the circumstances giving rise to it, a neutral should hesitate to modify a penalty. 201

- Before the arbitrator will substitute his judgment for that of trained, long experienced professionals in the field of Correction including the
superintendent of the prison, there must be a great deal of evidence that the employer acted incorrectly: 203

- Where the application of discipline shocks the proverbial "reasonable man", the discipline may be modified. While an arbitrator who finds discipline to be appropriate should be circumspect in substituting his judgment for that of management, the arbitration process itself contemplates that such substitution will occur when the employer has acted in a harsh and overly severe fashion: 210

- While the arbitrator does have the authority to interpret the Hazardous Waste Facilities Board's rules and applicable statutes, nonetheless the admonition to in essence "stick to the contract" is a sound viewpoint. The arbitrator noted that he was leery of interpreting statutes and regulations in the absence of judicial precedents on the issues since the losing party would surely appeal, thus depriving arbitration of its contractually intended status as final and binding: 211

- Reasonable people may differ over the propriety of a specific discipline. Arbitrators should be careful not to usurp managerial authority when it has been correctly utilized: 214

- It is a time honored maxim that a party will not be permitted to gain something in arbitration which it lost at the bargaining table. The agreement provides no supervisory discretion to deny personal leave requests submitted a day in advance, and the arbitrator cannot create an extra-contractual management right: 228

- While arbitrators generally do not have the authority to give summary judgment when the employer rests, the arbitrator does have such authority under our contract since the contract places the burden of proof upon the employer. The employee’s right to cross-examine the grievant arises only when the grievant testifies. Since grievant did not testify, the employees right to cross-examine the grievant does not prevent the arbitrator from issuing a summary judgment when the employer rests its case: 234

- The arbitrator decided that an award of interest on a back pay award is not beyond the scope of an arbitrator’s authority: 252(B)

- Where the arbitrator found the accusing witness' testimony very credible, he noted that it is possible that she made up the story and that she did so to carry out a secret vendetta against the grievant. But it is improbable. There is no evidence to support such a finding. Essentially, the arbitrator would have to indulge in rank speculation, without a scintilla of confirming documentation or testimony, to discredit her accusation. It is not an arbitrator's task or right to base an award on speculation. His/her job is to weigh and apply the evidence: 253

- Where the arbitrator's interpretation of a contract involved the denial of a right, and the denial was inconsistent with a SERB ruling, the arbitrator pointed out that his authority under 25.03 is limited to interpretation of the contractual intent. He is powerless to substitute SERB doctrine for contractual meaning. If there is a question about the legality of the intent, it is for SERB or the courts to resolve: 269

- The arbitrator may review layoffs: 280

- The arbitrator does not have the authority to indicate to the State Highway Police where it may or may not conduct its investigations: 325

- Arbitrators are generally reluctant to issue advisory opinions or “declaratory judgment.” Elkouri How Arbitration Works and Trans World Air Lines 47 LA 1127 (Platt 1967). It is best to draw conclusions based on facts and not hypothetical situations: 325

- The arbitrator could not modify the discipline since the employer showed by clear and convincing evidence that the grievant abused a youth: 328

- For the Union to ask the arbitrator to interpret and apply the Fair Labor Standards act, when possible violation was not brought up until the arbitration hearing smacks of unfairness. The carefully drawn class grievance has been in the pipeline for two years and the possible FLSA violation by the employer should have been brought up before the hearing. The arbitrator does not wish to categorically hold that every issue must always be explicitly raised in the initial grievance. Many times grievances are drawn by persons who are untutored in specificity. Holding such persons to highly formalistic rules is unfair; pleading by inference in such cases is just: 345
- Even if the Union’s charge that the employer violated the FLSA was timely, the arbitrator would still decline to rule on that issue. The interpretation and the incorporation of the FLSA is beyond the competence of the arbitration process. FLSA rights are “better protected in a judicial rather than an arbitral forum.” Barrentine v. Arkansas Best Freight Systems J. Brennan: 34

- The way in which the agency controlled the hearing and the speed with which it imposed the removal indicate a cavalier approach to just-cause requirements. The question the employer was obliged to ask and answer before deciding on discipline was: In view of the misconduct, its aggravating and mitigating factors, what amount of discipline is likely to be corrective? When an employer acts against an employee precipitously, in knee-jerk fashion, its actions become suspect. Summary discipline opens the door for arbitral intrusion. It licenses the arbitrator to substitute his/her judgment for management’s. It is up to the arbitrator to perform the employer’s job when the employer fails to perform it. Second-guessing by an arbitrator should be expected when management neglects its disciplinary duties: 35

- The case was determined to be arbitrable since the notifying event was purging of the overtime rosters which caused the grievant to become aware of any inequity in the past overtime opportunities. Until the grievant saw the posting he relied on assurances by management that his overtime would be equalized with other employees. The arbitrator found that she was restricted to considering only those overtime opportunities which occurred within ten days prior to the filing of the grievance. Without the initiation of formal grievances during the period complained of, the recovery of lost overtime cannot be permitted, especially in view of the fact that the agreement to purge the overtime rosters was a joint decision: 36

- The arbitrator stated that, in evaluating an employer's disciplinary action, he must look only to whether the Employer took into account all items necessary to render the discipline. The arbitrator may not alter the Employer's decision based on his own subjective opinion. The discipline in this case was found to be well within that provided for by the work rules and required by the standards of progressive discipline: 5

- The arbitrator is not bound to the contents of the job abolishment rationale because of the review of the substantive justification of the abolishment is a trial de novo before the Arbitrator, where the Employer shall demonstrate by a preponderance of the evidence that the job abolishment meets the standards imposed by the Ohio Revised Code: 4

- The arbitrator rejected the proposition that the Arbitrator cannot rule on the procedural propriety but can rule on the substantive propriety, stating that this flies in the face of logic and common sense: 4

- The arbitrator rejected the State’s argument that awarding back pay for missed overtime opportunities violates the Contract by going outside the authority of the arbitrator: 4

- The rules of evidence are not strictly adhered to in arbitration, therefore the arbitrator has far more discretion than a trial judge with regard to what can and cannot be admitted into the record. In this case, the arbitrator admitted a memo from the Director of the Office of Collective Bargaining advising the agency to settle immediately for fear of losing in arbitration: 5

- Article 24 of the Contract limits the scope of an Arbitrator's authority when dealing with abuse cases. If the charge of abuse is properly supported, this section precludes an Arbitrator from modifying the imposed termination based on any procedural defects or any other type of potentially mitigating evidence or testimony: 5

- The State’s position was that Article 1 of the Contract limits the scope of an Arbitrator’s authority when dealing with the classifications system in that Article 1 held the Arbitrator to only consider OCSEA bargaining unit positions with regard to working-out-of-classification grievances. The Arbitrator concluded that the Arbitrator at a Working Out of Classification hearing is

- Holdings of courts are not binding upon an arbitrator: 4

- The parties have negotiated how many steps are in each pay range, and so it is outside the authority granted by Article 25 of the Contract to create an additional step in any pay range: 4
specifically authorized to direct a monetary award in accordance with Section 19.02, Step 1 of the Contract and that the language “[i]f the higher level duties are of a permanent nature...” does not serve to prevent an Arbitrator from issuing a monetary award in the circumstances at issue in this proceeding. If the parties had desired to put such a limitation on the Arbitrator, they would have done so explicitly. 5 99

The Agency issued an announcement that an employee in an Administrative Assistant 3 classified exempt position had been selected as the EEO Officer for the Agency. A hearing was waived and the parties presented written briefs with largely undisputed facts. Then the arbitrator had a telephone conference with representatives from each party combined. To uphold the fairness of the procedure, the Grievant submitted a sworn affidavit waiving his right to have the grievance heard in person. Classification language was the first issue. The Agency’s announcement that an exempt employee would serve as EEO Officer does not constitute an announcement that the employee is occupying a class title belonging to the bargaining unit. The duties assigned by the Agency are similar to the EEO Manager class title, one of the four exempt class titles that are within the DAS classification Series 691 entitled “EEO Officer.” The second issue was a policy consideration: Who should be the “EEO Officer—a bargaining unit member or an exempt employee? The questions of who should perform the duties and to whom they should be assigned were beyond the scope of an arbitrator’s duties. The contract limits the arbitrator to “disputes involving the interpretation, application or alleged violation of a provision of the Agreement.” The contract does not give the arbitrator the authority to consider and answer questions that appeal only to the arbitrator’s personal sense of what is fair or just. The third issue was bargaining unit erosion. The part-time duties of the EEO Officer at the Agency had always been performed by management personnel. Therefore, the assignment of duties to an exempt employee as EEO Officer was the same action that the Agency had taken over the past several years. Since the amount of bargaining unit work performed by supervisors did not increase, the arbitrator found no basis for claim that the Agency took action for the purpose of eroding bargaining unit work. The grievance was denied. 963

In accordance with Section 24 .01 the Arbitrator found the Grievant abused another in the care and custody of the State of Ohio. The force used by the Grievant was excessive and unjustified under the circumstances. The inmate’s documented injuries were a direct result of the Grievant’s actions. The Grievant admitted the entire situation could have been avoided if he had walked toward the crash gate and asked for assistance. Since abuse was found, the Arbitrator did not have the authority to modify the termination. This provision precluded the Arbitrator from reviewing the reasonableness of the imposed penalty by applying mitigating factors. 967

The Arbitrator held that the Employer properly terminated the Grievant for abuse. Section 24 .01 limits the scope of an arbitrator’s authority when dealing with abuse cases. The threshold issue becomes a factual determination of whether abuse can be supported by the record. The record here supported three abuse incidents. Any one of these events in isolation could have led to proper termination; therefore the Employer was able to establish sufficient proof that abuse took place. The Grievant’s inconsistent observations of the incidents led to a lack of credibility. The Arbitrator held that the self-inflicted injuries defense was not adequately supported. The Arbitrator found that the Grievant did not initiate a time out by removing the resident to “a separate non-reinforcing room” because no evidence helped to distinguish or equate the resident’s bedroom from a “non-reinforcing room.” 1 027

A Criminal Justice Policy Specialist (CJPS) bargaining unit position was eliminated on December 13, 2006. A grievance was filed on November 28, 2007. The Union argued that they were led to believe the DMC bargaining unit work had been distributed to other bargaining unit employees and that the occurrences giving rise to the grievance still existed today as they did in 2006. The Arbitrator held that the Union knew or should have known as of December 13, 2006 that the CJPS position had been eliminated, thereby putting the Union on notice of that position’s duties being distributed to other employees. The Arbitrator held that the record established that the grievance was not filed pursuant to Article 25 .02 (Step One); therefore, she was without authority to hear the merits of the grievance. 1 038

**Arbitrator’s Method for Dealing with Disciplinary Grievances**
Proof that the grievant is guilty as charged does not automatically justify the penalty. The arbitrator is required to weigh the discipline against 3 interrelated contractual standards:

1) Discipline must follow the principles of progressive discipline.

2) Discipline must be commensurate with the offense and not solely for punishment.

3) Discipline must be for just cause: 1 23

**Article 19**

The Arbitrator held that the state properly assigned points to the applicants for the Computer Operator 4 position and selected the appropriate applicant for the job. The Grievant was not selected because her score was more than ten points below that of the top scorer. The Union argued the Grievant should have been selected because she was within ten points of the selected candidate and therefore, should have been chosen because she had more seniority credits than he did. The language could be clearer, but the intent is clear. If one applicant has a score of ten or more points higher than the other applicants, he or she is awarded the job. If one or more applicants have scores within ten points of the highest scoring applicant, the one with the most state seniority is selected for the position. The Arbitrator pointed out that the union’s position could result in the lowest scoring person being granted a job. If that person was awarded the job, someone within ten points of him or her could argue that he or she should have gotten the job. The Arbitrator commented on the union’s complaint that the state violated Article 25 .09 when management refused to provide notes of the applicants’ interviews. The issue submitted to the Arbitrator was simply the violation of Article 1 7. The state provided the requested material at the arbitration hearing and the Union had the opportunity to address the notes at the hearing and in its written closing statement. 976

**Assault**

- See fighting, self-defense

- Of supervisor. 1 73

- Given the severity of the assault committed by the grievant and his prior disciplinary record, the arbitrator found just cause for his removal: 5 06**

The State prevailed in arbitration in this case involving a removal for physical assault. The Union then moved to vacate this decision in the Court of Common Pleas. The decision of the Arbitrator was upheld by the Court of Common Pleas. Julius Ferguson appealed to the Court of Appeals. The Court of Appeals dismissed the appeal on the basis of its finding that the employee did not have standing since he was not a party to the original action filed. Only OCSEA and the State were parties.

- The Arbitrator did not concur with the State’s view regarding the application of the abuse language contained in Article 24 .01 . It is inappropriate to infer a charge of abuse when the employer, regardless of the reasons, fails to include this charge in its own guidelines and/or removal order. If the employer was so inclined to clothe the present proceeding with an abuse allegation, it should have raised the issue at the pre-disciplinary stage. A stipulated issue containing a just cause phrase is totally inappropriate if one wishes to raise an abuse allegation: 5 95

The Arbitrator upheld the grievant’s removal because the Arbitrator found that the grievant assaulted a co-worker on September 1 5 , 1 995 . The Arbitrator found no evidence to contradict the grievant’s accuser’s testimony that the grievant had maliciously sprayed the grievant’s accuser with hot water from a dishwashing hose: 61 5

**Assessment**

The 2006 DCS Assessment is content valid. The union is not limited in grieving content validity for a new DCS Assessment. The union and employees will be notified if a new assessment is implemented. Betsy Stewart and Robert Watts will be placed at management’s discretion into a DCS position once OBM gives approval. They will begin their probationary period then. They will begin receiving compensation as a DCS beginning with the pay period 04 /1 3/08. The placement of Betsy Stewart and Robert Watts is not precedent setting nor does it violate Article 1 7. 994

**Attendance**

The grievant was charged with a pattern of tardiness on multiple occasions after a 30-day suspension for similar offenses. The arbitrator found that the employer made every effort to
assist the grievant in correcting her attendance issues. Management changed the grievant’s supervisor, changed her starting time repeatedly, allowed her to receive donated leave and allowed her to bring her children to work on at least two occasions. The arbitrator was particularly disturbed that the grievant returned to her old pattern of tardiness within days of returning to work from a 30-day suspension. The grievant was unable to correct an obvious problem, even in the face of losing her position. She took no responsibility for her actions and did not admit that her employer had the right to expect her to come to work on time. The arbitrator doubted that another suspension of any length would correct the problem. 906

**Automobile Breakdown**

It was unreasonable to apply the 90 minute call in requirement of 29.02 to the grievant, where the grievant called in as soon as he became aware that he would be unable to get to work on time because his wife’s car had broken down. The towing receipt shows that the grievant was forced to call off because of extenuating and mitigating circumstances: 1 91

**AWOL**

The Arbitrator found that no discipline was warranted because the grievant should not have been placed in AWOL status; therefore, his termination was without just cause. 728

The evidence clearly established that the grievant was 25 minutes late for work. The arbitrator noted that management’s policy did not support its position that an employee could be both tardy without mitigating circumstances and AWOL for the same period of 30 minutes or less. The grievant’s 5-day suspension was reduced to a 2-day suspension. 770

The grievant was removed from his position for being absent without proper authorization and job abandonment. The grievant had two active disciplines at the time of his removal – a one-day fine and a two-day fine. Both fines were for absence without proper authorization. At the time of removal, the grievant had no sick, vacation or personal time available. After exhausting his FMLA leave, the grievant was advised to return to work, which he failed to do. The arbitrator concluded that the grievant at least implied that he was abandoning his job by not giving proper notification. The arbitrator noted, “...one could reasonably conclude that the Grievant made either a conscious or an unconscious decision to focus on health related problems and to place his job on the “back burner”.” The arbitrator found that the grievant was in almost continual AWOL status without providing proper notification and the employer provided testimony that it encountered undue hardship due to the grievant’s absences. The arbitrator was sympathetic to the grievant’s situation with a sick parent, however, it was noted that he showed little concern for his job. The employer’s decision to remove the grievant was neither arbitrary nor capricious. 883

**Awards**

- Suspension upheld but last chance proviso rescinded because too harsh and did not specify what kind of offenses would cause removal: 1

- Where the employer filled a vacancy with a non-bargaining unit employee and without following contractual job bidding procedures, the arbitrator determined that the remedy should be that the employer pay, to the most senior person in category (A) of 1 7.05 , the difference between that person's earnings and the earnings that person would have collected if the person had been promoted to the position for the period that the position was wrongfully filled: 24 2

- Where the arbitrator reinstated the grievant because of lax enforcement, but the arbitrator believed the underlying cause of the grievant's absenteeism was substance abuse, she reinstated the grievant contingent upon his following the advice of his Employee Assistance Program counselor: 24 9

– B –

**Back Pay**

The arbitrator determined that the facts that the grievant had received ADC (welfare benefits) during the period she was off work due to the state’s improper removal, should not be offset against the back pay due the employee. Welfare benefits are different than unemployment compensation. Unemployment compensation can be offset against back pay due because there is an employer contribution to unemployment
compensation. Welfare benefits are not compensation, but rather is a minimal public benefit due the grievant being a taxpayer: 25 2(A)

- This is a decision dealing with the initial arbitration of decision 25 2. The Union argued that the employer should pay interest on the grievant's back pay. The grievant was first discharged on 1 2/1 5 /89. At the conclusion of the initial arbitration hearing on 4 /1 7/90, the arbitrator put the employer on notice that the grievant would be reinstated. The employer requested a delay to effectuate a face saving settlement. When such a settlement was not forthcoming the arbitrator awarded the grievant to be reinstated in a written opinion on 4 /3/90. The employer did not reinstate the grievant until 5 /20/90 and the grievant did not receive her back pay until 6/1 /90. The arbitrator first found that she did have the authority to award interest on a back pay award. The arbitrator decided that the interest award was not a type of punitive damages as argued by the employer, but only a part of a make whole remedy. As such, the arbitrator was entitled to decide the issue of interest payments. The arbitrator found that the employer’s delay did not rise to the level of egregious conduct which would allow an award of prejudgment interest. The employer’s delay from 4 /30/90 to 6/1 /90 (post judgment) does warrant an award of interest. A post judgment interest is clearly part of a make whole remedy. The employer should not benefit from its bureaucratic inefficiency. The arbitrator decided to award an interest rate of the adjusted prime rate in effect on 4 /30/90 compounded daily: 25 2(B)

Even though there was not a nexus between the off duty misconduct and criminal conviction for drug trafficking such that the arbitrator could uphold the employer's discipline of the grievant, the arbitrator refused to award back pay, saying that the employer's actions were not egregious in any sense and that the employer can expect reasonable behavior on or off the job and for that reason, no back pay is awarded: 1 4 1

- The purpose of back pay is to make the employee whole for losses that have been caused by the employer's breach of contract. Such losses include non-speculative wages and benefits, including holiday pay, that the grievant would have received in the absence of the employer's breach. The arbitrator cited several cases on this point). The foregoing cases demonstrate that it is common for holiday pay to be part of a make whole remedy. 1 91 A

- Where the award ordered reinstatement "with full back pay and benefits’ the state is obligated to pay the appropriate straight time and premium holiday benefit as part of back pay: 1 91 A

- Even though the state's claim that holiday pay has never been included in the parties' computation of back pay was not rebutted. the State admitted that inclusion of back pay has never been disputed. The disputes regarding back pay have centered upon the number of days on which to compute back pay. The grievant is not precluded from raising the issue of holiday pay in this case, particularly where the parties have never specifically addressed the issue: 1 91 A

- The State's concern that including Holiday pay in back pay will open the flood gates to expanded claims for back pay including lost overtime, call-in pay opportunities, interest, missed promotions, and attorney's fees is not well founded, since such claims are often defeated as speculative, not traditionally included in back pay awards, not warranted by egregious management conduct, or are otherwise unjustified: 1 91 A

- The losses incurred by grievant because of a wrongful discharge do not include interim earnings or willful losses incurred by the employee's failure to attempt to mitigate damages. Breach of the duty to mitigate damages is an affirmative defense to the payment of back pay, and the employer has the burden of proving that the employee did not make a good faith effort to mitigate damages: 1 91 A

- The arbitrator determined that the grievant had met his duty to mitigate damages where:

  (1 ) the grievant attempted to secure work through the

  Ohio Bureau of Employment Services, and

- Where one of the Union's witnesses could not be present at the initial arbitration hearing, and the arbitrator agreed that justice required a second hearing to get the witness' testimony, the arbitrator said that it would be inappropriate to award back pay for the period between the two hearings, since it was the union's obligation to see that it's witnesses were present to provide testimony: 1 88
when that was unsuccessful, entered full-time self-employment that failed to be profitable (the grievant worked 7 days a week, 8 hours a day).

- These efforts at mitigation were reasonable even though they involved self-employment. The duty to mitigate does not hold the Grievant to the highest standard of diligence. It requires only a good faith effort and not success: 191A

- The employer's case rested upon the testimony and written statements of 3 inmates. It is crucial that inmate's testimony be supported. It was not the written statement of one inmate which was credited because the inmate testified he had been forced to write the statement. The written statement of another inmate was discredited because the inmate refused to testify. The arbitrator gave some credence to the written statement of the third inmate, even though he too refused to testify, because he provided so much information that it was hard to believe he had been forced to write the statement. While the evidence was not sufficient to support the discharge, the arbitrator held that it was sufficient to rule against back pay: 265

- The employee initiated his own resignation and must bear a large part of the blame for all that followed. It would be grossly unreasonable to reward him and punish the employer by upholding his claim for lost wages: 278

- Since the grievant claims she could not return to work until a certain date, she is estopped from any back pay before that time. The grievant also must produce a physician’s statement about her current ability to work: 295

- The grievant’s claim that he has remained disabled from the time of the removal precludes any award of back pay: 310

- Due to the grievant’s negligence in responding to the employer’s demand for evidence of his inability to work, the grievant will receive no back pay for the period of his absence: 356

- The grievant had been on a disability separation and had been refused when he requested reinstatement. The arbitrator found the grievance arbitrable because section 4 3.02 incorporated Ohio Administrative Code section 1 23:1 -33.03 as it conferred a benefit upon state employees not found within the contract. The grievant thus had three years from his separation to request reinstatement, which he did. The grievance was also found to be timely filed because there was no clear point at which the employer finally denied the grievant’s request for reinstatement and the union was not notified of the events by the employer. Additionally, the employer was estopped from asserting timeliness arguments because the employer was found to have delayed processing the grievant’s request for reinstatement. The physician who performed a state-ordered examination released the grievant to work, thus the employer improperly refused the grievant’s reinstatement request. The grievant was reinstated with back pay less other income for the period, holiday pay, leave balances he had when separated, restoration of seniority and service credits, medical expenses which would have been covered by state insurance, PERS contributions, and he was to receive orientation and training upon reinstatement: 375

- The resignation of an OBES Claims Examiner 2 created a vacancy which the employer did not post, but instead transferred in a Claims Examiner 2 from an office outside the district. The transferred employee received a new Position Control Number, but not the one vacated by the employee who resigned. A violation of the contract was conceded by the employer and the sole issue was the appropriate remedy. The arbitrator ordered the position in question to be vacated and posted for bids. The transferred employee was allowed to remain in the position until the status of her application was determined. If she fails to obtain the position she occupied, the employer was ordered to place her back into the office which she had left so as to prevent any lost wages due to the transfers. If a person other than the transferred employee receives the position, that employee must be made whole for any lost wages and benefits: 399

- The grievant had over 7 years seniority and applied for a posted vacancy. She did not receive the promotion which was given to a more senior employee from the agency, despite the fact that she was in Section 1 7.04 applicant group A (1 7.05 of 1989 contract) and the successful bidder was in group D. The employer stated that the grievant failed to meet the minimum qualifications and the successful bidder was demonstrably superior. The arbitrator held that
Article 17 established groupings which must be viewed independently. Additionally, the contract applies the demonstrably superior exception only to junior employees. The employer violated the contract by considering, simultaneously, employees from different applicant groups and applying demonstrable superiority to a senior employee. The arbitrator found that the grievant met the minimum qualifications for the vacant position, but she had since left state service. The grievance was sustained and the remedy was the lost wages from the time the grievant would have been awarded the position until she left state service: 405

- The grievant was a Youth Leader who had been removed for abusing a youth. He was accused of pushing and choking the youth. The grievant testified that he had other youths present leave the room so that he could talk to the complaining youth. The employer’s witness testified that the grievant told the youths to leave so he could kick the complaining youth’s “ass.” The arbitrator held that the employer failed to prove that the grievant abused a youth because that he did not intentionally cause excessive physical harm. The grievant was found to have used excessive force in restraining the youth and the removal was reduced to a one month suspension with back pay, less outside earnings: 407

- The grievant was hired as a Tax Commissioner Agent and had received a written reprimand for poor performance while still in his probationary period. He was assigned a new supervisor who developed a plan to improve his performance, however the grievant continued to receive discipline for poor performance and absenteeism, including a ten day suspension which was reduced pursuant to a last chance agreement. It was discovered after the last chance agreement had been made, that prior to the signing of the last chance agreement, the grievant had committed other acts of neglect of duty. The grievant was removed for neglect of duty. The arbitrator held that a valid last chance agreement would preclude arbitration. Additionally, after filing a grievance it becomes the property of the union. The grievance was sustained because the employer failed to meet its burden of proof that the grievant abused a patient. The arbitrator awarded full back pay less interim earnings, back seniority, back benefits and that the incident be expunged from the grievant’s record: 416

- A General Activity Therapist 2 position was posted for which the grievant bid. The posting listed a valid water safety instructor’s certificate as a minimum qualification. The grievant did not possess the certificate and an outside applicant was selected. The arbitrator found that the employer improperly posted the position by using a worker characteristic which doesn’t have to be acquired until after the employee receives the job. While the arbitrator cautioned that employees must act timely to become qualified, the employer can only hold bidders to minimum qualifications required by the contract. The grievance was sustained and the grievant was awarded the position with back pay: 418
The grievant was removed after 13 years service from her position with the Bureau of Disability Services for unapproved absence, conviction of a drug charge, and failure to report the drug charge as required by the state's Drug-Free Workplace policy. The Bureau is funded by the federal government and is subject to the Drug-Free Workplace Act of 1998. The grievant had a history of alcohol problems. She was also involved with a co-worker who, after the relationship ended, began to harass her at work. She filed charges with the EEOC and entered an EAP. The former boyfriend called the State Highway Patrol and informed them of the grievant's drug use on state property. An investigation revealed drugs and paraphernalia in her car on state property and she pleaded guilty to Drug Abuse. She became depressed and took excessive amounts of her prescription drugs and missed 2 days of work. She was admitted into the drug treatment unit of a hospital for 2 weeks. She was on approved leave for the hospital stay, but the previous 2 days were not approved and the agency sought removal. The arbitrator found that while the employer's rules were reasonable, their application to this grievant was not. The Drug-Free Workplace policy does not call for removal for a first offense. The employer's federal funding was not found to be threatened by the grievant's behavior. The grievant must be responsible for her absenteeism, however the employer was found to have failed to consider mitigating circumstances present, possessed an unwillingness to investigate, and to have acted punitively by removing the grievant. The grievant's removal was reduced to a 10 day suspension with back pay, benefits, and seniority, less normal deductions and interim earnings.

The parties agreed in writing that retroactive payments were to be paid to employees affected by class modernization and were to be included in the employee's normal paycheck. Persons employed on October 22, 1990, when this agreement was signed, were the beneficiaries of this agreement. To allow the State to refuse them payment because they left employment prior to receiving the money would be to reward the state for delay.

Where the grievant was improperly removed for using poor judgment and for falsifying a document, some sort of discipline short of removal was found to be proper and the grievant was restored to her job without an award for back pay or benefits.

The grievant was reinstated and awarded full back pay and benefits, less any interim earnings, because his removal was improper. The Employer could not establish by clear and convincing evidence that the charging party's claims of sexual harassment and sexual imposition were more credible than the grievant's denials.

The arbitrator reserved jurisdiction to resolve all matters of back pay and benefits which cannot be agreed upon between the parties.

The grievant was removed from her position with the Department of Rehabilitation and Correction for dishonesty and failure to cooperate with an official investigation. The arbitrator felt that removal was inappropriate for a first offense so the grievant was reinstated with no loss of seniority, but without back pay due to the serious nature of the offense.

The grievant was awarded back pay, less sums earned from other sources, and all benefits associated with the radio operator's position from the date she filed her grievance through the date the Ohio Department of Transportation posted the vacancy for the radio technician's position.
- Where the grievant was improperly removed from his position as a Licensed Practical Nurse, the grievant was reinstated with back pay and no loss of benefits, less any sums earned from other employment. The grievant was originally removed for alleged patient abuse, but the State failed to meet its burden of proof: 5 1 0

- Payment for missed overtime opportunities is not included in back pay calculations: 5 3 1

- The Employer wrongfully revised the positions of DHO 1 and 2 in violation of contract Articles 6.01 and 36.05, therefore back pay, vacation and/or other benefits were awarded to the grievants: 5 5 3

- This arbitration decision is a clarification of a prior arbitration award. The Arbitrator found that the grievant did not lose any disability pay because of the change in suspension dates. Furthermore, she had no leave balances during this suspension period. As a result, the length of the grievant’s suspension period (20 days or 1 3 days) had no effect on the grievant losing any money. The Arbitrator held, however, that if the entire reduction in suspension is nullified, management is not penalized for its procedural misconduct which prejudiced the grievant. Therefore, the grievant is entitled to two days back pay, not as a make whole remedy, but as a penalty to management: 5 6 2(A)

- This was a statewide grievance filed on behalf of the Union. The Union alleged that OCSEA-represented employees who grieved they were performing duties contained in a classification receiving higher pay. The Arbitrator held that the contract language clearly specifies that money shall be the remedy if a person is working in a higher job classification. The Contract is silent concerning the back pay remedy applicable when the position in which the employee is or has been working is within a bargaining unit represented by a union other than OCSEA/AFSCME Local 1 1 . Thus, the Arbitrator concluded that the decisive factor is the class specification. The labor organization that represents the higher classification is irrelevant to a determination of back pay under the working-out-of-classification procedure: 5 9 9

The Arbitrator held that the Grievant was neither eligible for, nor entitled to, reinstatement. Based on the degrees of fault the Grievant was entitled to twenty-five (25 ) percent of the back pay from the date of his removal to the date of the Arbitrator’s opinion. In addition, the Agency shall compensate the Grievant for twenty-five (25 ) percent of all medical costs he incurred and paid for out-of-pocket, as a direct result of his removal. The triggering event for the removal was the failure to extend the Grievant’s visa. The following factors contributed to the untimely effort to extend the visa: (1 ) the Agency’s failure to monitor the visa’s expiration, leading to a belated attempt to extend the visa; (2) the Agency’s failure to monitor the Grievant’s job movements; (3) the Grievant’s decision to transfer to the Network Services Technician position, which stripped him of proper status under his visa; and (4) the Grievant’s decision not to notify his attorney about the transfer to the NST position. The Grievant’s violation of a statutory duty, together with his silence, looms larger in the lapse of the visa than the Agency’s violation of its implicit duties. The Arbitrator held that the Agency failed to establish that the Grievant violated Rule 28. Because the Grievant was out of status with an expired visa, the Arbitrator held that he was not entitled to reinstatement. As to comparative fault, the Agency and the Grievant displayed poor judgment in this dispute and neither Party’s fault absolves the other. 9 8 0

The Arbitrator held that the procedure used by the division was not a valid method for selecting the employee to be promoted to Customer Service Assistant 2. However, simply placing the Grievant in the position would be unfair to the selected applicant. Thus, a valid method must be used to choose between the Grievant and the selected applicant. While it might be desirable for the union to have input into developing the process, the test prepared and administered by DAS would provide a speedier resolution. The Arbitrator saw nothing that would justify denying the grievant back pay if he was wrongly denied a promotion because of the invalid selection method used by the employer. 1 0 0 4

Bargaining History

- Prior to the 1 9 8 9 negotiations, the contract language was ambiguously silent on whether there is a right of representation at appeals of performance evaluations. In the 1 9 8 9 negotiations the union sought to make the right explicit in the contract. When the union dropped the demand for explicit language, the union negotiator called it a "major movement," demanding an equivalent movement from the employer. The arbitrator took this "major movement" to be an adoption of management's
view that there is no right to representation, rather than a return to the status quo. Given that the arbitrator found that the union had relinquished the right during negotiations in return for some quid pro quo concession from the state, he held that the union cannot retrieve in arbitration what it purposely gave up in negotiations: 269

The grievance involved the implementation of terms of an agreement that placed some Attorney classifications into the bargaining unit as of March 5, 2006 after they had been removed on May 17, 2003. As a result of the Agreement, 24 7 Attorneys were placed into the bargaining unit. This Grievance consolidated all individual issues that arose into one Union grievance. The Arbitrator held that the Employer did not consider the automatic probationary advancement for some District Hearing Officers 1 ’s and 2’s. Six employees had adjustments made and were paid back pay ranging from $15 8.40-$231 9.20. The Employer did not consider step movement that would have occurred between July 1, 2005 and March 5, 2006 for 17 attorneys. Back pay was paid ranging from $9.60 to $24 24 4. 0. Employees who had vacation balances reduced but were not compensated for those hours were paid for the removed hours at the rate of pay applicable as of the date of the removal. The Arbitrator found that the Agreement did not address the issue of recalculating yearend cash-in balances for sick and personal leave; did not address the issue of employees who may have separated from service with the State of Ohio during or subsequent to the implementation of the Agreement; and, the Agreement did not address the issue of the use of advance step placement as a remedy to place an employee at a bargaining unit step that is closer to the exempt step at which the employee was hired. 959

Bargaining Unit Erosion

- An employer impairs the integrity of a bargaining unit by assigning duties traditionally performed by supervisors to members of the bargaining unit. Such duties dilute management authority as well as the integrity of the bargaining unit. Assignment of supervisory work is a grievable, and thus arbitrable, issue under §1.01 since 1.03 says the employer will not take action for the purpose of eroding the bargaining units. 1 9.03 does not prevent arbitration of the issue because the job audit process is not designed to be dispositive of the issue of whether grievant had been assigned some supervisory work: 1 27

- Section 1.03 permits supervisors to do bargaining unit work ONLY if they previously performed such work AND one of the circumstances listed in paragraph 2 of 1.03 exists: 1 4 2

- In section 1.03, with the absence of any definitive definition of "bargaining unit work" common sense dictates that "bargaining unit work" encompasses that work performed by the bargaining unit employees at the time the parties entered into their agreement. There is no basis to infer that the parties’ reference was to work exclusively performed by bargaining unit employees: 1 4 2

- If one of the circumstances listed in §1.03 is not present, then supervisors cannot do bargaining unit work. That supervisors did the work prior to the agreement, is not one of the listed circumstances. The mention of this circumstance in 1.03 is to limit the application of the circumstances that are listed rather than to indicate an additional circumstance in which supervisors can do bargaining unit work: 1 4 2

- In a case involving the Division of Computer Services at the Department of Administrative Services, the arbitrator held that Section 1.03 precludes the performance by supervisors of the bargaining unit work of operating the main console of the computer. Such work must be performed by bargaining unit members: 1 4 2

- In general, arbitrators have construed work preservation clauses strictly. This view of contract language is of long duration. Job security is an inherent element of a labor contract, a part of its very being. If wages are the heart of a labor agreement, job security may be considered to be its soul. Those eligible to share in the degree of job security the contract affords are those to whom the contract applies. The transfer of work customarily performed by employees in the bargaining unit to others outside the unit must therefore be regarded as an attack on the job security of the employees who the agreement covers and therefore on one of the contract’s basic purposes: 1 5 6

- The parties carefully negotiated circumstances under which supervisors may perform bargaining unit work. Among other enumerated
circumstances is included the situation where "the classification specification provides that the supervisor does, as part of his/her job, some of the duties of bargaining unit employees." That language should be read in conjunction with language found elsewhere in Section 1.03; "supervisors shall only perform bargaining unit work to the extent that they have previously performed such work." Arbitrator Keenan has determined in an earlier arbitration that one looks to the date that the contract became effective to determine if supervisors were doing bargaining unit work at that time: 1 5 6

- The contract states that the state will make every reasonable effort to decrease the amount of bargaining unit work done by supervisors. This provision was violated where a supervisory position which included bargaining unit work in the classification specification was vacant when the contract went into effect, but was later filled by a supervisor who went on to do the bargaining unit work required by his classification specification: 1 5 6

- The mutual intention of the parties will be violated where a non-bargaining unit person performs the tasks once done by members of the bargaining unit: 1 5 6

- To the extent a supervisor did not do bargaining unit tasks on July 1, 1986 which he now does, the agreement has been violated by the employer: 1 5 6

- Section 1.03 of the Agreement concerns itself with the integrity of the bargaining unit represented by the Union. In essence it provides that the employer may not act in such a fashion as to erode the bargaining unit by improperly removing work from bargaining unit employees. In this case a Mental Health Technician 1 was performing the duties of a Computer Operator 2. The employer improperly sanctioned the diminution of the bargaining unit: 280

- The State may not erode the bargaining unit through the layoff procedure. Supervisors and other employees working out of class may not take over the laid off employee’s duties: 280

- The Ohio Penal Industries operates shops in which inmates work and bargaining unit employees supervise them. Prior to June 1, 1989 three bargaining unit members and two management employees were assigned to the shop. One bargaining unit member then retired, but his vacancy was not posted but rather the duties were assumed by a management employee. The arbitrator rejected the employer’s argument that there had been no increase in bargaining unit work performed by management. It was found that, despite general inmate supervision performed by management, the duties assumed after the bargaining unit member’s retirement were a material and substantial increase. This increase in the amount of bargaining unit work done by management was held to be a violation of Section 1.03, the grievance was sustained and the employer was ordered to cease performing bargaining unit work and post the vacancy in the shop: 4 06**

OCSEA filed a motion in the Court of Common Pleas to confirm and enforce the Arbitrator's award. The State then posted a vacancy in the sheet metal shop in order to comply with the Arbitrator's decision. The Union did not appeal this decision further.

- Despite the fact that there existed at least 1 6 bargaining unit project inspector positions which remained unfilled at the time the Employer decided to subcontract and that staffing is under the sole discretion of the Employer, the arbitrator held that the practice of contracting out per se did not erode the bargaining unit. Because the Union was unable to prove that the Employer intended to erode the bargaining unit, the arbitrator was unwilling to find a violation of Article 1.03. The arbitrator held that the first misuse of a contractually permitted practice does not constitute a pattern or indicate a bad motive: 5 1 4 **

The Arbitrator in this case held that the State violated the Contract by improperly contracting out project inspection work. The State moved to vacate this decision in the Court of Common Pleas. The Court of Common Pleas upheld the Arbitrator's decision and the State elected not to appeal it further.

The Agency issued an announcement that an employee in an Administrative Assistant 3 classified exempt position had been selected as the EEO Officer for the Agency. A hearing was waived and the parties presented written briefs with largely undisputed facts. Then the arbitrator had a telephone conference with representatives from each party combined. To uphold the fairness of the procedure, the Grievant submitted a sworn
affidavit waiving his right to have the grievance heard in person. Classification language was the first issue. The Agency’s announcement that an exempt employee would serve as EEO Officer does not constitute an announcement that the employee was occupying a class title belonging to the bargaining unit. The duties assigned by the Agency were similar to the EEO Manager class title, one of the four exempt class titles that were within the DAS classification Series 691 entitled “EEO Officer.” The second issue was a policy consideration: Who should be the EEO Officer—a bargaining unit member or an exempt employee? The questions of who should perform the duties and to whom they should be assigned were beyond the scope of an arbitrator’s duties. The contract limits the arbitrator to “disputes involving the interpretation, application or alleged violation of a provision of the Agreement.” The contract does not give the arbitrator the authority to consider and answer questions that appeal only to the arbitrator’s personal sense of what is fair or just. The third issue was bargaining unit erosion. The part-time duties of the EEO Officer at the Agency had always been performed by management personnel. Therefore, the assignment of duties to an exempt employee as EEO Officer was the same action that the Agency had taken over the past several years. Since the amount of bargaining unit work performed by supervisors did not increase, the arbitrator found no basis for the claim that the Agency took action for the purpose of eroding bargaining unit work. The grievance was denied. 963

Management argued that the grievance was considerably untimely, since the cause of action had occurred fifteen years earlier, when a resident worker started working as a short order cook. The grievance was filed on the same day the cooks were ordered to report to the new location. The Arbitrator held that the grievance was timely. The Arbitrator found there was insufficient evidence that the reason for giving the Veterans Hall Kitchen cooking duties to the Ohio Veterans Home Resident Workers and changing the work area of the union cooks to Secrest Kitchen was to erode the bargaining unit. Members of the bargaining unit were not displaced. There were no layoffs. Members were not deprived of jobs that were normally available to them. It appears that the only change was the work assignment. There was no evidence of any deprivation of any economic benefit to membership. The Arbitrator held that the 1994 grievance settlement had not been violated. No bad faith was established. Further, the short order grilling was de minis in nature when compared to production quantity work performed by the union cooks. The subcontracting in these circumstances had little or no effect on the bargaining unit, and was permissible under Article 39.01. 1 009. The issue was previously found arbitrable in Arbitration Decision 989. The Arbitrator held that the evidence did not demonstrate that the Agency possessed the intent to erode the bargaining unit. Nothing in the arbitral record suggested that the Agency exerted less than reasonable effort to preserve the bargaining unit. The Arbitrator also held that the record did not demonstrate that the Agency intended to withdraw the vacancy to circumvent the agreement. Constructive erosion occurs where a new position is erroneously labeled exempt when it should have been labeled nonexempt. Constructive erosion restricts the future size of a bargaining unit; direct erosion reduces the present size of a bargaining unit. The Arbitrator used the label “hybrid” to explain the nature of the contested position, reflecting the presence of both exempt and nonexempt duties in one position. Furthermore, he posed that the fundamental issue of the grievance was: Whether the contested position was exempt or nonexempt? Consequently, the Arbitrator proposed a screening device for hybrid positions that might be useful in resolving subsequent classification disputes. This screening test puts the focus on essential duties (“Essence Test”): whether exempt or nonexempt duties are required in (essential to) daily job performance. A hybrid position is exempt if daily job performance entails exempt duties; a hybrid position is nonexempt if daily job performance necessitates nonexempt duties. The Arbitrator held that exempt duties do not somehow become nonexempt merely because bargaining-unit employees have performed them; nor do nonexempt duties become exempt because supervisors perform them. The Arbitrator’s application of the “Essence Test” indicated that the contested position was exempt. Although the duties were not fiduciary, many of the duties were central to managerial decision-making authority. 1 024

A Criminal Justice Policy Specialist (CJPS) bargaining unit position was eliminated on December 1, 2006. A grievance was filed on November 28, 2007. The Union argued that they were led to believe the DMC bargaining unit work had been distributed to other bargaining unit employees and that the occurrences giving rise to the grievance still existed today as they did in 2006. The Arbitrator held that the Union knew or should have known as of December 1, 2006 that the CJPS position had been eliminated, thereby putting the Union on notice of that position’s duties being distributed to other employees. The Arbitrator held that the record established that the grievance was not
filed pursuant to Article 25 .02 (Step One); therefore, she was without authority to hear the merits of the grievance. 1 038

**Bargaining Unit Work**

A supervisor rather than the Safety and Health Inspector conducted a safety training to a group involved in an Adopt-A-Highway program. The District had a practice in which bargaining unit members conducted the training. The arbitrator found that the practice did not guarantee the work to the bargaining unit in perpetuity when the duty was not included in the classification specification. 81 7

The grievant bid on a Storekeeper 1 position. He won the bid but was never placed in the position. The arbitrator found that the State’s failure to place the grievant into the position was immediately apparent. “If the union believed that the work was being done by others in violation of the collective bargaining agreement, it would have been obvious at that time and it could not wait two and one-half years to file a grievance.” The arbitrator found the grievance to be filed in an untimely manner and did not rule on its merits. 903

**Bargaining Unit Status**

- The grievant was improperly designated a “fiduciary” and therefore, maintained her bargaining unit status. The Employer, therefore, violated Section 24 .01 of the Contract when it terminated the grievant without just cause: 4 72

- The grievant’s medical defense was rejected. The employer required the grievant to be clean-shaven to properly wear a respirator. The grievant’s skin condition of “pseudo folliculitis barbae” can, as shown by medical testimony, be managed by shaving with barber clippers instead of a razor. This manner of shaving would have been acceptable to the State. The fact that the grievant passed a respirator fit test does not have a great deal of bearing on this case. The test is conducted in the most ideal conditions. The manufacturer of the respirator and OSHA advised against bearded employees using a respirator. The requirement by the State that the grievant be clean shaven is a reasonable one: 31 9

- The grievant was removed for insubordination for failing to shave his beard to wear a respirator. The OSHA recommendation that the grievant be reinstated is entitled to little weight. The grievance procedure is the exclusive method for resolving this dispute. OSHA did not conduct the sort of evidentiary hearing required by the elementary considerations of due process. The conclusion of the Director of the Industrial Relations is not controlling and does not serve to bind the arbitrator: 31 9

- There was the requisite just cause for the grievant’s removal. The grievant would not shave his beard. The rule that employees who wear respirators in asbestos filled areas must be clean-shaven is reasonable. The employer progressively disciplined the grievant for insubordination finally resulting in discharge: 31 9

- There was no evidence that supervisors were performing the renovation work at issue. In addition, while members of Bargaining Unit 6 could perform the tasks involved, such extensive renovations were not part of the normal workload of the Maintenance Department. The decision to allow a training opportunity for inmates involved the assignment of new work, not a transfer of work customarily done by the bargaining unit: 4 67

- The use of inmates to do the renovation work at issue in no way eroded the bargaining unit since Unit 6 increased by almost 1 00 employees between 1 986 and 1 990: 4 67

**Bargaining Unit Work**

- Supervisor performing. 1 5 6

A supervisor rather than the Safety and Health Inspector conducted a safety training to a group involved in an Adopt-A-Highway program. The District had a practice in which bargaining unit members conducted the training. The arbitrator found that the practice did not guarantee the work to the bargaining unit in perpetuity when the duty was not included in the classification specification. 81 7
- The Arbitrator rejected the Union’s argument that the tasks consolidated in the Research Staff position were bargaining unit work, violating Section 1.03 of the Contract. Those functions represented less than 10 percent of the supervisor’s yearly tasks: 4 76

- The Union provided no standard for the Arbitrator to judge what is inherently bargaining unit work nor did the Union present any evidence that bargaining work had been usurped: 4 76

- The secretary and Administrative Assistant Positions were abolished, but all of the work remained, and a substantial part of it was reassigned to non-Union personnel, violating Article 1.03 of the Agreement: 4 78

- Laying off five of nine psychiatric attendant coordinators left none scheduled for the third shift, further eroding the bargaining unit: 4 78

- The Union was unable to show that the abolishment of the Administrative Assistant I position was done for the purpose of eroding the bargaining unit, that the work was being performed by those outside the bargaining unit, that bias or some other impermissible rationale was used, or that the budgetary assessment underlying the abolishment was flawed: 4 85

- Given the commitment of the State to utilize bargaining unit employees to perform work they were performing when the Contract came into effect, the second sentence of Article 39 places upon the State the burden of demonstrating to the Arbitrator that the contract with Miller Pipeline Company to do loop repair work met the contractual criteria of “greater efficiency, economy or efficiency standards established by the contract: 4 89

- Actual layoff of the bargaining unit members does not have to occur in order for an employer to be found to have compromised the integrity of the bargaining unit through subcontracting. In this situation, there exists passive reduction of the bargaining unit: 4 89

- Supervisors are only allowed to perform bargaining unit work to the extent they previously performed it. Classification modernization differentiates between supervisor’s work and bargaining unit work. After the state completes the classification modernization process, an exempt supervisor cannot perform the bargaining unit duties without violating section 1.03 even if they previously performed those duties: 4 98

**Bed Check**

- The need for a bed check in a mental institution is obviously essential, and the failure to observe this policy could endanger both patients and staff: 27

**Bereavement Leave**

- The fundamental question in deciding whether the grievants would be allowed bereavement leave for the death of their stepfathers, is whether the stepparent “stands in the place of a real parent.” One grievant indicated that her father had died when she was three or four years old and she had no father until 1976 when her mother married again. It is clear that the grievant viewed her stepfather as a surrogate father. The fact that her real father had died and her mother had married her stepfather certainly allows the conclusion that her stepfather stood in the place of a parent and, in fact acted as a parent. This grievant was awarded bereavement leave: 322

- One grievant lived with her stepfather and had more contact with him than her real father but her real father was still living. The grievant’s mother had married her stepfather and then divorced him and although the stepfather and mother were now living together they did not remarry. The grievant’s claim for bereavement leave is not appropriate given that her step-father was not married to her mother and that her real father is still living. The stepfather in this instance, under the Agreement, did not stand in the place of a parent: 322

- The grievant requested bereavement leave upon the death of the son of the grievant’s former “significant other.” There is nothing in the Agreement to support the grievant’s request. The Agreement does not cover a deceased who “stands in the place of a son or daughter” without being a legal stepchild. Section 30.03 must be interpreted literally and precisely. It is impossible to base bereavement leave considerations on the quality of a particular personal relationship. These decisions must rest primarily on legal and narrow definitions of the relationship between the employee and the deceased: 322
The arbitrator noted that this matter was in many ways identical to arbitration no. 1 1 -05 (89-1 1 - 22)005 2-01 -09, Arbitrator John Drotning in which a grievant’s stepfather acted as a parent for the grievant. In this matter, the grievant’s husband’s biological mother was deceased. His aunt performed all aspects of motherhood for him, becoming his defacto mother. When the grievant married her husband, his aunt became her defacto mother-in-law. The deceased aunt fulfilled tests established in the Collective Bargaining Agreement: 1) she was the grievant’s mother-in-law and 2) she stood in the place of a parent. 764

**Bias of Supervisor**

- The employer transferred an employee to another area that was understaffed. The position was permanent and full-time. When filling such positions the Agreement clearly, unmistakably unreservedly requires that the position be posted. Then employees are permitted to bid. The qualified employee with the most State seniority was deprived of the opportunity of being awarded the position under Section 1 7.05 of the Agreement. Employees must be provided the opportunity to exercise their rights to bid on a vacancy before a transfer is effected: 34 9

- The transfer without posting is different from the situation were the employer may use managerial discretion (#329). In this situation there is specific language governing and limiting the rights of management in Article 1 7 of the Agreement: 34 9

- The grievant, a Therapeutic Program Worker, received a ten day suspension for sleeping on duty. A supervisor tried to awaken the grievant but was not successful, although the grievant had been heard talking to another employee shortly before the incident. The grievant had no prior discipline up to the time she had become a steward, then she received two verbal reprimands. Also her performance evaluations had been above average until the same time, at which point she was evaluated below average in several categories. Lastly, a paddle had been hanging in the supervisor’s lounge with the words “Union Buster” written on it. The arbitrator found that the grievant may have dozed off, but that the employer’s anti-union animus was the cause for the suspension. The paddle in the lounge was evidence of this and the employer had demonstrated reckless disregard for union relations. The arbitrator held that the employer failed to properly apply its rules, thus there was no just cause for the 1 0 day suspension. The discipline was reduced to a 1 day suspension: 4 00

- The grievant was removed for failing to report off, or attend a paid, mandatory four-hour training session on a Saturday. The grievant had received 2 written reprimands and three suspensions within the 3 years prior to the incident. The arbitrator found that removal would be proper but for the mitigating factors present. The grievant had 23 years of service, and her supervisors testified that she was a competent employee. The arbitrator noted the surrounding circumstances of the grievance; the grievant was a mature black woman and the supervisor was a young white male and the absence was caused by an embarrassing medical condition. The removal was reduced to a 30 day suspension and the grievant was ordered to enroll into an EAP and the arbitrator retained jurisdiction regarding the last chance agreement: 4 22

- The Union alleged that the grievant’s supervisor selected the other applicant for the available job posting based on his bias against the grievant. The Union introduced testimony showing that the grievant’s supervisor made disparaging comments about the grievant. However, the Arbitrator held that the Union failed to demonstrate that the supervisor’s comments played any role in the selection process: 61 7

**Bidding Rights**

- During the processing of several grievances concerning minimum qualifications, (393 and 397), a core issue regarding the union’s right to grieve the employer’s established minimum qualifications was identified. The arbitrator interpreted section 36.05 of the contract as permitting the union to grieve the establishment of minimum qualifications. He explained that the minimum qualifications must be reasonably related to the position, and that the employer cannot set standards which bear no demonstrable relationship to the position: 392**

**Minimum Qualifications (392 – 397)** – The State filed in the Court of Common Pleas to vacate this series of related arbitration decisions. The State later withdrew its motion to vacate these awards.
The grievant applied for a posted Tax Commissioner Agent 2 position but was denied the promotion. She was told that she failed to meet the minimum qualifications, specifically 9 months experience preparing 10 column accounting work papers. The grievant was found to have experience in 12 column accounting work papers which were found to encompass 10 column papers. Additionally, the employer was found to have used Worker Characteristics, which are to be developed after employment, in the selection process. The grievant was found to possess the minimum qualifications and was awarded the position as well as any lost wages: 393** (see 392**)  

Minimum Qualifications (392 – 397) – The State filed in the Court of Common Pleas to vacate this series of related arbitration decisions. The State later withdrew its motion to vacate these awards.

The grievant applied for a posted Word Processing Specialist 2 position and was denied the promotion. The employer claimed that she did not meet the minimum qualifications because she had not completed 2 courses in word processing. The grievant was found not to possess the minimum qualifications at the time she submitted her application. The fact that she was taking her second word processing class cannot count toward her application; she must have completed it at the time of her application. Additionally, business data processing course work cannot substitute for word processing as the position is a word processing position: 394 ** (see 392**)  

Minimum Qualifications (392 – 397) – The State filed in the Court of Common Pleas to vacate this series of related arbitration decisions. The State later withdrew its motion to vacate these awards.

The grievant applied for a posted Programmer Analyst 2 position and was denied the promotion. The employer claimed that she did not possess the required algebra course work or the equivalent. The arbitrator found that because the grievant completed a FORTRAN computer programming course, she did possess the required knowledge of algebra. The minimum qualifications allow alternate ways of being met, either through course work, work experience, or training. The grievance was sustained and the grievant was awarded the position along with lost wages: 395 ** (see 392**)  

Minimum Qualifications (392 – 397) – The State filed in the Court of Common Pleas to vacate this series of related arbitration decisions. The State later withdrew its motion to vacate these awards.

The grievant applied for a posted Microbiologist 3 position in the AIDS section position and was denied the promotion because she failed to meet the minimum qualifications. The successful applicant was a junior employee who was alleged to have met the minimum qualifications. The arbitrator found that the junior applicant should not have been considered because the application had not been notarized, and it was thus incomplete at the time of its submission. The arbitrator also found that the employer used worker characteristics which are to be developed after employment (marked with an asterisk) to determine minimum qualifications of applicants. Lastly, neither the successful applicant nor the grievant possessed the minimum qualifications, however the employer was found to have held this against only the grievant. The arbitrator stated that the employer must treat all applicants equally. The grievant was awarded the position along with any lost wages: 396** (see 392**)  

Minimum Qualifications (392 – 397) – The State filed in the Court of Common Pleas to vacate this series of related arbitration decisions. The State later withdrew its motion to vacate these awards.

The grievant applied for a posted Microbiologist 3 position in the Rabies section and was denied the promotion because the employer found that she failed to possess the minimum qualifications. Neither the successful applicant nor the grievant possess the minimum qualifications for the position but this fact was held only against the grievant. The arbitrator stated that the employer must treat all applicants equally. The arbitrator found that the grievant did possess the minimum qualifications and that the required rabies immunization and other abilities could be acquired after being awarded the position. The grievant was awarded the position along with any lost wages: 397** (see 392**)  

Minimum Qualifications (392 – 397) – The State filed in the Court of Common Pleas to vacate this series of related arbitration decisions. The State later withdrew its motion to vacate these awards.
The grievant had over 7 years seniority and applied for a posted vacancy. She did not receive the promotion which was given to a more senior employee from the agency, despite the fact that she was in Section 1 7.04 applicant group A (1 7.05 of 1 989 contract) and the successful bidder was in group D. The employer stated that the grievant failed to meet the minimum qualifications and the successful bidder was demonstrably superior. The arbitrator held that Article 1 7 established groupings which must be viewed independently. Additionally, the contract applies the demonstrably superior exception only to junior employees. The employer violated the contract by considering, simultaneously, employees from different applicant groups and applying demonstrable superiority to a senior employee. The arbitrator found that the grievant met the minimum qualifications for the vacant position, but she had since left state service. The grievance was sustained and the remedy was the lost wages from the time the grievant would have been awarded the position until she left state service: 4 05

The Department of Natural Resources posted a vacancy and accepted applications through June 28, 1 989. The applications were evaluated through August, and a selection was made in September 1 989. The grievant would have no grievance rights if the 1 986 agreement controlled the entire process, but would if the 1 989 agreement controlled due to his section 1 7.05 (1 989 agreement) applicant group status. The arbitrator found that critical elements of the selection process were performed under the 1 989 agreement, thus it controlled the matter and the grievance was held arbitrable, (the right to grieve arose under the 1 989 agreement upon notification of non-selection). The employer was ordered to select from applicants grouped pursuant to the 1 989 agreement: 4 23

The State improperly commingled bidders categorized under both Article 1 7.05 (A) and (E) in the interview process for two Systems Analyst I positions. Those in (A) must be evaluated and determined unqualified before consideration of applicants under (E) takes place. Agency discretion in scheduling interviews only exists within each subsection’s group of bidders: 4 5 7

Senior applicants do not have to be equally or better qualified than other applicants. They must merely be qualified. Therefore, if there are one or more qualified bidders within the subsection pool under consideration, the Employer has the obligation to select the most senior, even if he or she is not the best qualified, except where the Employer can show that a junior bidder from the same subsection is demonstrably superior: 4 5 7

Despite the State's admission of its violation of Article 1 7 of the contract, the arbitrator determined that the entire matter turned on whether or not Management made proper use of the 1 ,000-hour employee in lieu of hiring a permanent employee after posting the permanent vacancy. The arbitrator decided that the grievant was entitled to the position because Management improperly denied her employment under Articles 1 7 and 1 8 of the contract in favor on a 1 ,000 hour employee: 5 05

### Bidding Rights, Supervisors

- It is the Union’s burden to show that senior bidders are qualified: 4 5 7

### Bidding Rights, Waiver

- The grievant signed a letter accepting his current position which stated that he did not have the right to bid for a position in District 1 1 : 290
- There are at least two plausible interpretations of Article 1 7.04. Appendix J was virtually undiscussed in negotiations. The majority of the exhibits support the State’s position that the grievant was a Central Office staff member and not a member of the Northeast office that would allow him to bid on a job posting or promotion there. Since the interpretation of “within” can be read several different ways the arbitrator fell back on the past practice of the agency. In the past an employee given bidding rights in the central Office, District 1 3 would not be allowed to bid for a position in District 6. The grievant was only assigned to the Central Office, not permanently placed in this District so the grievant was not “within” either District 1 1 or the Northeast region permanently. The grievant was also given notice that his position was no longer a District 1 1 position. On the original acceptance form he wrote in his own hand the condition “with bidding rights in District 1 1.” This condition was not approved and the grievant later signed an acceptance form that did not include this condition. There have been no changes since the grievant signed this form that would lead the
grievant to believe he now has a right to bid in District 1

**Binding Past Practice**

Article 28 is clear in that permanent part-time employees earn and are to be credited with paid vacation leave the same as permanent full-time employees but pro-rated for the hours worked. The Agency has complied with column one of the schedule; however, it has ignored the second column in the milestone years, thus denying these employees their entitlement to the full pro-rata amount earned in the milestone year. While it was true that neither the CBA nor the part-time policy mention “vacation dump”, this was the method used for years for other public employees in Ohio in the milestone years. A “vacation dump” is a lump sum credit of earned vacation that has not accrued on a bi weekly basis by virtue of the fact that accrual rate increases lag increases in earned annual vacation leave by one year. The mere fact that there has been a practice of not making similar adjustments for most part-time State employees does not evince a binding past practice. A past practice is binding only when it rests on a mutual agreement. There was no such evidence here. 973

**Bumping**

The Arbitrator determined that had the Department reclassified the position at issue to Personal Services Worker prior to the paper layoff, the grievant would not have been entitled to the duties because the position would have been out of her classification. She found that when an employee moves into a new position, s/he assumes the duties of the position, not necessarily the duties being performed by the person s/he bumped. 714

**Bumping, Adjustment Period After**

- The arbitrator noted that the contract was silent as to the length of adjustment period for movement between jobs. He recognized that shifts in personnel result in a temporary loss of efficiency, that employees are not interchangeable, and that a learning period is unavoidable, even if not provided for in the contract: 5 29

**Bumping Rights**

- The Union grieved the fact that displaced supervisors bumped into the bargaining unit. The arbitrator analyzed the bumping rights of displaced supervisors by narrowing the issue into one pivotal question: Whether or not the Union obtained contractual language restricting bumping to covered employees. If the Agreement is silent or the State negotiators preserved Civil Service bumping rights for displaced supervisors, the grievance will be denied: 336

- Nothing in any of the Article 1 8 sections .02 through .08 contradict, modify or eliminate the Five Year Rule. The Arbitrator rejected the argument that Article 1 8 supersedes the Ohio Revised Code and the Ohio Administrative Rules. The Article specifically states that the ORC and OAC sections are included. If the parties intend that Sections 1 8.02 through 1 8.05 should completely supersede the OAC and OAC, the Contract would so state on these rights: 450

- According to the contract, layoffs must be made in inverse order of seniority to protect the bargaining unit employees. Intermittent personnel are to be laid off prior to the layoff of fulltime employees: 471

- When layoff is proper, bargaining unit employees will first exhaust all bumping rights under the Contract. If no bumps are available, they may bump outside the bargaining unit into the lesser appointment category according to the order of layoff provisions found in the Ohio Revised Code and the Ohio Administrative Code and incorporated by reference into the Contract: 4 71 (A)

- Bargaining unit employees who bump employees in lesser appointment categories that are outside the bargaining unit shall be given the maximum retention points available for their performance evaluations. This award shall be calculated according to the Code provisions: 4 71 (A)

- Once bargaining unit employees bump outside the bargaining unit, subsequent displacements shall occur according to the appropriate provisions of the ORC and the OAC: 4 71 (A)

- The arbitrator held that an employee who was laid-off could exercise his displacement rights (bumping rights). An employee exercising these rights under Article 1 8.04 need not be more qualified than the incumbent, but must be qualified to perform the duties of the new position: 5 29
Burden of Proof

- See also the specific charge or issue i.e., abuse, neglect of duty, layoffs

- Negligence: 1 6

- On abuse definition: 5 6

- State has the burden of establishing that the facts constituting the violation occurred and that the standard of conduct to which the grievant was held was reasonable: 9

- Arbitrator quoted the Elkouri treatise* There are two areas of proof in the arbitration of discharge and discipline cases: proof of wrongdoing and proof that punishment assessed by management should be upheld or modified: 1 4

- Where there was a valid past discipline, the "employer nevertheless bears the burden of proving that just cause exists for any ensuing disciplinary action": 39

- When an employer produces convincing evidence of misconduct, the burden of proof shifts to the union to prove that anti-union discrimination was the actual reason for the grievant's discipline: 5 9

- By contract, the employer has the burden of proof to establish just cause for termination of the grievant: 66, 1 1 6

- The employer has the burden of proof to establish just cause for termination: 71

- Under 24 .01 , the employer has the burden of proof to establish just cause for the removal of the grievant from employment. Termination constitutes "economic capital punishment" and heightens the burden of proof on the employer to produce at least a preponderance of evidence sufficient to warrant discharge: 91

- The employer has the burden of proof to establish just cause for termination: 1 0 6

- By contract the employer bears the burden of proof to establish just cause for the thirty-day suspension levied against the grievant: 1 3 6

- The contract imposes the burden of proof on the Employer to establish just cause: 1 5 3

- Notions of burden of proof are not helpful in determining contract interpretation cases and that position is reaffirmed in the context of this case: 1 5 8

- The employer has the burden of proof to establish just cause for termination of the grievant: 1 6 3

- It is foreseeable that the employer's burden of proof will occasionally permit a guilty employee to escape justice. That risk is inherent in 24 .01 : 1 8 3

- The union has the burden of proving by a preponderance of the evidence that a timely demand for arbitration was sent: 1 8 7

- Since the state raised the issue of timeliness, it has the burden of proof, whether in the sense of going forward with the evidence or establishing its case by a preponderance of the evidence: 1 8 8

- Breach of the duty to mitigate damages is an affirmative defense to the payment of back pay, and the employer has the burden of proving that the employee did not make a good faith effort to mitigate damages: 1 9 1 A

- While the burden is initially on the employer, it does not always stay there. The burden is on the union when it asserts an affirmative defense (a defense which asserts that there are factors beyond the ordinary reasons for discipline which ought to be considered. Included in affirmative defenses are claims of procedural defects, absence of due process, or disparate treatment): 23 2

- There was no witness to the grievant's movements; he did not keep a log, his memory was incomplete, and many of his statements were vague. Nevertheless, while the employee must cooperate with the employer's investigation of escape attempts, it is not his responsibility to establish his innocence in arbitration unless the employer first proves him guilty: 24 0

- The arbitrator frankly cannot define "beyond a reasonable doubt"; he does not know exactly what it means. Other arbitrators do not know either. The literature of arbitration reveals that legalistic terms such as, "proof by a preponderance of evidence," "proof by clear and convincing
evidence." and "proof beyond a reasonable doubt" are used interchangeably by arbitrators. There is almost always a doubt as to an aggrieved employee's culpability in a removal dispute where facts are in disagreement, and that doubt may never be resolved. Nonetheless, such grievances are as often denied as they are sustained. The reason is that arbitrators make judgments based on probabilities; that is all they can do since they cannot know the truth. The State's burden in this case was to establish, to a high degree of probability, that the grievant committed the misconduct which led to his removal: 253

- The usual discussion at arbitration about the burden of proof for discharge cases is sterile. They obscure the fundamental nature of a discharge proceeding. In such a case the ultimate burden placed upon the Employer is production of sufficient evidence to convince the Arbitrator that the dischargee committed the act and that the penalty is appropriate: 266

- See also the specific charge or issue i.e. abuse neglect of duty, layoffs

- The charge of physical abuse is a serious one requiring a significant amount of proof to sustain the employer’s decision to discharge. Any real doubt must be resolved in favor of the employee: 300

- Removal from a position is the most serious workplace discipline. Removal under a charge of abusing a young person in custodial care will follow an employee for life. Such a charge must be supported by clear and convincing evidence: 301

- The grievant was a Correction Officer who had been accused of requesting sexual favors from inmates and accused of having sex with an inmate three times. The inmates were placed in security control pending the investigation. During this time statements were taken and later introduced at arbitration. The arbitrator found that the employer failed to prove by clear and convincing evidence that the grievant committed the acts alleged and management had stacked the charges against the grievant by citing to a general rule when a specific rule applied. The primary evidence against the grievant, the inmates’ statements, were not subject to cross examination and the inmate who testified was not credible. The grievant was reinstated with full back pay, benefits, and seniority. The arbitrator recommended that the grievant be transferred to a male institution: 379

- The employer posted a Statistician 3 position which the grievants and other individuals bid for. The two grievants had eighteen and thirteen years seniority, while the successful applicant had only one year seniority. The employer contended that the grievants did not meet the minimum qualifications for the position and the successful applicant was demonstrably superior. The employer was found to have the burden of proving demonstrable superiority which was interpreted as a “substantial difference.” Demonstrable superiority was found only to apply after the applicants have been found to possess the minimum qualification. Also, the arbitrator stated that if no applicant brings “precisely the relevant qualifications” to the position, the employer may promote the junior applicant if a greater potential for success was found. The arbitrator found that the employer proved that the junior employee was demonstrably superior and the grievance was denied: 382

- The federal government created, established hiring criteria, and funded job training positions within the Ohio Bureau of Employment Services for Disabled Veterans’ Employment Representatives (DVOPS). The OBES and Department of Labor negotiated changes in the locations of these employees which resulted in layoffs which were not done pursuant to Article 18. Title 38 of the United States Code was found to conflict with contract Article 18. There is no federal statute analogous to Ohio Revised Code section 4117 which allows conflicting contract sections to supersede the law, thus federal law was found to supersede the contract. As the arbitrator’s authority extends only to the contract and state law incorporated into it, the DVOPS and LVERS’ claims were held not arbitrable. Other resulting layoffs were found to be controlled by the contract and Ohio Revised Code sections incorporated into the contract (see, Broadview layoff arbitration #340). The grievance was sustained in part. The non-federally created positions had not been properly abolished and the affected employees were awarded lost wages for the period of their improper abolishment: 390

- The grievant was employed as a Salvage Processor who was responsible for signing off on forms after dangerous goods had been destroyed. He was removed for falsification of documents
after it was found that he had signed off on forms for which the goods had not been destroyed. The arbitrator found that despite minor differences, the signature on the forms was that of the grievant. The employer was found to have violated just cause by not investigating the grievant’s allegation that the signature was forged, and by failing to provide information to the union so that it could investigate the incidents. The employer was found not to have met its burden of proof despite the grievant’s prior discipline: 398

- The employer removed the grievant for two reasons: 1 ) The grievant committed theft because he had been named as the supplier of checks that had been returned to the Bureau of Workers’ Compensation, to another state employee in order to cash the checks (see arbitration decision #370); 2) falsification of his job application because he admitted during the investigation that he had prior felony convictions which he failed to report on his employment application. The arbitrator held that the employer could not use the falsification charge as a basis for removal because the grievant had sought assistance when he completed his application and lacked intent to falsify the application. The employer was also stopped from using the falsification because the grievant had been employed for 8 years, and had been removed once before, thus the employer was found to have had ample time to have discovered the falsification prior to this point. The employer was not permitted to introduce the Bureau of Criminal Investigation’s report into evidence at arbitration because the employer failed to disclose it upon request by the union. The fact that the investigation was ongoing was irrelevant. Just cause was proven through the investigator’s testimony and testimony of others involved in the scheme. The grievance was denied: 4 01

- The grievant was a Youth Leader who had been removed for abusing a youth. He was accused of pushing and choking the youth. The grievant testified that he had other youths present leave the room so that he could talk to the complaining youth. The employer’s witness testified that the grievant told the youths to leave so he could kick the complaining youth’s “ass.” The arbitrator held that the employer failed to prove that the grievant abused a youth because that he did not intentionally cause excessive physical harm. The grievant was found to have used excessive force in restraining the youth and the removal was reduced to a one month suspension with back pay, less outside earnings: 4 07

- The grievant was removed for misuse of his position for personal gain after his supervisor noticed that the grievant, an investigator for the Bureau of Employment Services, had received an excessive number of personal telephone calls from a private investigator. The Ohio Highway Patrol conducted an investigation in which the supervisor turned over 1 30-1 5 0 notes from the grievant’s work area and it was discovered that the grievant had disclosed information to three private individuals, one of whom admitted paying the grievant. The arbitrator found that the employer proved that the grievant violated Ohio Revised Code section 4 1 4 1 .21 by disclosing confidential information for personal gain. The agency policy for this violation calls for removal. The employer’s evidence was uncontroverted and consisted of the investigating patrolman’s testimony, transcribed interviews of those who received the information, and the grievant’s supervisor’s testimony. The grievant’s 1.3 years seniority was an insufficient mitigating circumstance and the grievance was denied: 4 08

- The grievant was a custodial worker at a psychiatric hospital. The grievant asked a patient to smoke outside rather than inside a cottage. The patient told the grievant that he would not, dropped to his knees and repeated his statement as was the patient’s habit. The patient repeated this action later in the day and grabbed the grievant’s leg. The grievant yanked his leg free, the client accused the grievant of kicking him and the patient was found to have injuries later in the day. The grievant was removed for abuse of a patient, and criminal charges were brought. The criminal charges were dropped pursuant to a settlement with the Cuyahoga County court in which the grievant agreed not to contest his removal. When the grievance was pursued, the employer asked for criminal charges to be reinstated. The charges could not be reinstated, but the grievant agreed not to sue the employer. The grievance was held to be arbitrable despite the settlement between the grievant and the county court. Had the settlement been a three party agreement including the employer, dovetailing into the grievance process, it would have precluded arbitration. Additionally, after filing a grievance it becomes the property of the union. The grievance was sustained because the employer failed to meet its burden of proof that the grievant abused a patient. The arbitrator awarded full back pay less interim earnings, back
seniority, back benefits, and that the incident be expunged from the grievant’s record: 4 1 6

- The grievant took a magnetic tape containing public information home, which was against agency rules. She intended to return the tape but it became lost, and she was charged with theft of state property. The tape was later recovered by the Highway Patrol during an unrelated investigation. The grievant was transferred to another position without loss of pay or reduction in rank and suspended for 30 days. The arbitrator held that the employer failed to prove that the grievant intended to steal the tape (Hurst arbitration test applied) rather than borrow it. Taking the tape home without authorization was found to be a violation of the employers’ rules. The employer was found not to have applied double jeopardy to the grievant as only one disciplinary proceeding had been brought and the transfer was found not to be disciplinary in nature. The 30 day suspension was found not to be reasonably related to the offense, nor corrective and was reduced to a 1 day suspension with full back pay for the remaining 29 days: 4 1 7

- An inmate was involved in an incident on January 4, 1 991, in which a Correction Officer was injured. The inmate was found to have bruises on his face later in the day and an investigation ensued which was concluded on January 28th. A Use of Force Committee investigated and reported to the warden on March 4th that the grievant had struck the inmate in retaliation for the inmate’s previous incident with the other CO on January 4th. The pre-disciplinary hearing was held on April 1 5, and 1 6, and the grievant’s removal was effective on May 29, 1 991. The length of time between the incident and the grievant’s removal was found not to be a violation of the contract. The delay was caused by the investigation and was not prejudicial to the grievant. The arbitrator found that the employer met its burden of proof that the grievant abused the inmate. The employer’s witness was more credible than the grievant and the grievant was found to have motive to retaliate against the inmate. The grievance was denied: 4 2 1

- The grievant was a custodian for the Ohio School for the Blind who was removed for the theft of a track suit. The arbitrator looked to the Hurst decision for the standards applicable to cases of theft. It was found that while the grievant did carry the item out of the facility, no intent to steal was proven; removal of state property was proven, not theft. The arbitrator found no procedural error in that the same person recommended discipline and acted as the Step 3 designee. Because the employer failed to meet its burden of proof, the removal was reduced to a 30 day suspension with the arbitrator retaining jurisdiction to resolve differences over back pay and benefits: 4 3 9

- The Union has not met the level of proof sufficient to overcome the abolishment on the basis of procedural error. While the Employer has the burden to show substantive justification for the job abolishment, the Union has the burden of raising any procedural defect: 4 7 6

- The Employer has the burden of proof to establish just cause for any disciplinary action. When there is a charge of serious misconduct, such as sexual harassment and sexual imposition, the Employer must show by clear and convincing evidence that the charging party’s claim is more credible than the grievant’s denials. Since the charging party’s claim was not more credible than the grievant’s denials, removal was improper: 5 0 3

- The burden is on the employee to initiate the application process. Where applications must be “timely” to be valid, there should be a policy to provide a method of validating “timeliness” and a method to validate and acknowledge receipt of the application. While the employee has the burden of filing a timely application, the burden of establishing reasonable and fair office procedures which ensure safety and accuracy of application filings falls on the employer: 5 4 8

- The burden of proof in cases such as this, in which there are allegations of serious misconduct, should be higher than proof by a preponderance of the evidence. The correct standard was clear and convincing evidence.

- When the circumstantial evidence was considered, along with the testimony of the State’s witness relating to the admissions of the grievant, there was no reasonable conclusion other than to find in favor of the employer and against the grievant: 5 5 7

- There is no hard and fast rule about the quantum of proof arbitrators should utilize in discharge cases. The Agreement between the parties places the burden of proof for discharge cases on the State, but is silent as to what quantum of proof is
needed. Since there is no standard included in the contract, the Arbitrator would not impose one.

The Arbitrator held that since there was no standard included in the contract between the parties for removal, the standard of “clear and convincing” evidence was not to be imposed upon the state. Rather, what is required is “a heavy burden to present sufficient evidence that discharge is warranted”: 5 73

Management bears the burden of proving the charge of patient abuse with a high degree of proof. The Arbitrator found the grievant violated a hospital policy against resident abuse when he grabbed a patient by the neck and slammed his head against a concrete block wall. The evidence allowed the Arbitrator to conclude that the grievant engaged in patient abuse with a high degree of proof. Therefore, management properly removed the grievant from his position: 5 79

The grievant, an Activity Therapist at a youth facility, was removed for unauthorized use of an employer credit card. The Arbitrator held that an employer satisfies its burden of proof in an action for forgery when the investigation is conducted in a reasonable manner and the testimony of an expert witness is positive, well-grounded, and unchallenged by anyone qualified to do so, where those elements are satisfied an employer is not required to collect writing samples from all the suspects: 5 87

- The Arbitrator emphasized that in cases where a removal is based on off-duty misconduct, the Employer bears the burden of not only proving that the misconduct occurred but also that there is a nexus between the off-duty misconduct and the grievant’s job: 608

- The Union contended that the State must prove by clear and convincing evidence that the grievant’s removal was for just cause. The Union further asserted that the standard “by a preponderance of the evidence” was too weak to meet the just cause standard for removal. The Arbitrator held that the just cause standard was not met by the State in order to adequately justify the grievant’s discharge: 61 3

- The Arbitrator stated that although there were no witnesses to the incident reported by the grievant’s accuser, the grievant did not provide any proof that the grievant had not assaulted the grievant’s accuser: 61 5

The Arbitrator held that the burden of proof needed in this case to support the removal was absent. DYS removed the Grievant for two distinct reasons: use of excessive force with a youth and lying to an investigator regarding an incident in the laundry room. The evidence, even if viewed in light most favorable to DYS, failed to establish that the Grievant’s inability to recall the laundry room matter was designed purposely to deceive. Both parties agreed that nothing occurred in the laundry room that would warrant discipline. The record failed to support a violation of Rule 3.1 for deliberately withholding or giving false information to an investigator, or for Rule 3.8-interfering with the investigation. The Grievant’s misstatement of fact was nothing more than an oversight, caused by normal memory lapses—a trait common to JCOs. He handles movement of multiple juveniles each day, and the investigatory interview occurred eight days after the incident in question. No evidence existed to infer that the Grievant exhibited dishonest conduct in the past or had a propensity for untruthfulness. The evidence did not support that the Grievant violated Rules 4.1, 4 and 5.1. The use of force by the Grievant was in accord with JCO policy aimed at preventing the youthful offender from causing imminent harm to himself or others. The grievance was granted. 94 3

C –

Calculation of Disability Leave

The Arbitrator found that a contractually mandated event had not transpired in this case because the grievant was not denied his benefits. A determination regarding this matter was not issued. 709

Call Back Pay

- The distinction between being on stand-by and being on call is that an employee on stand-by is required to keep himself available for work. An employee who is "on call" is not required to respond when contacted by beeper, nor is he required to accept the work. In differentiating the two statuses the important questions are (1) is the employee free to use his time for his own benefit and (2) are the call backs so frequent that the employee is not really free to use the time for his own benefit: 1 00
- The wording of 1 3.08 indicates that call-back pay was established to deal with unforeseen and/or emergency situations: 1 00
- Where the grievant had been called in to work the hour prior to his shift, the arbitrator held that 1 3.08 requires the payment of 4 hours call back pay. The past practice of paying only overtime if the extra time worked abuts the regular shift was irrelevant since the contract language was unambiguous in requiring call back pay, the language was different than the language in the previous agreements under which the past practice had occurred, and the employer had an opportunity to negotiate language which would have been more specific and narrowed the scope of 1 3.08, but did not: 1 99

Call In Procedure

- See Absenteeism

- Employee meets the call-in requirement by making a good faith effort and using " a means of reporting which was reasonable and calculated to result in actual notice. (Arbitrator cites 1 1 LA 4 1 9): 24

- Section 29.02 indicates the parties contemplated that exceptions could occur to call-in requirement. Grievant's suffering from severe upper respiratory infection and bipolar disease with the associated depression and sleeping give rise to such an exception: 63

- Taken for what it was worth, signed statement from grievant's mother saying she had called in for grievant does not overcome the evidence presented by the persons who testified at the hearing. There were at least two people available most of the morning to take calls on that day. None received a call: 96

- Section 24 .02 first states that discipline shall be commensurate with the offense and then cites the progressive discipline schedule. The obligation of the employer is to determine if the usual steps of progressive discipline can be applied in this case by weighing the two elements of 24 .02 (seriousness of the offense vs. the requirement of progressive discipline). In this case, the seriousness of the offense (absence without leave and deliberate failure to call in despite knowing the procedure) takes precedence and, thus, the discipline did not violate 24 .02 even though it skipped steps of progressive discipline: 1 20

- That White had neither a telephone nor car and relied on a fellow employee who was frequently late to pick him up are excuses which cannot be considered as mitigating. While these circumstances are no doubt true and the reason for White being tardy and unable to call in a timely fashion, the fact that an employee has no phone or car does not lessen his obligation to follow attendance rules and procedures for calling in. Grievant has been disciplined for tardiness in the past and had ample opportunities to correct the problems: 1 5 1

- A responsible employee would not place his job in jeopardy by asking others to fulfill certain employee specific obligations such as abiding by properly promulgated and clearly understood call-in procedures. Where grievant solicited such aid, failure of his agents does not reduce his obligations or responsibilities to the employer or the patients in his care: 1 7 6

- Management has authority to monitor sick-leave usage. The fact that the right exists is clear; it is not open to reasonable debate. Article 29 establishes that the allowance of sick leave is a limited one, available only for defined, limited purposes. Having achieved the limitations during the negotiation of the contract, management is entitled to enforce them. One of the means of enforcement set forth in 29.02 is the requirement that person-to-person report offs occur between the employee and the immediate supervisor or the supervisor's designee: 1 7 8

- There was a discrepancy between ODOT's call in rule and 29.02 to the extent that ODOT's rule did not provide for an exception to the personal call in requirement in the case where the employee is unable to personally call in. Strict application of ODOT's rule would therefore constitute an overreaching of management rights. However, the arbitrator denied that the defect in the rule was a ground for sustaining a grievance when the employee had been able to call-in personally: 1 7 8

- The argument that the employer can never deny earned sick leave because sick leave was a bargained for benefit was rejected by the arbitrator. If the argument were correct, then the employer would have to grant sick leave applications even if call in requirements were not
followed. This would practically abolish employee responsibilities set forth in Article 29. The arbitrator held that the contractual call in requirement sets forth a contractual prerequisite to the contractual sick leave benefit: 1 78

- In this case, the grievant did not report to work and failed to call off within the appropriate time frame. The attempt to clothe this infraction as a tardiness occurrence seems totally unwarranted. The specific violation did not deal with a traditional tardiness occurrence. Tardiness takes place when an employee arrives at work at a time which exceeds the required reporting time: 1 81

- Charging an employee with a specific infraction dealing with an unauthorized absence, and then charging the same employee with a violation of failing to follow administrative regulations and/or written policies smacks of pyramiding (stacking charges): 1 81

- Where grievant claimed his father called-in for him, but management had no record of the call-in, and the father could neither identify the person receiving the call nor the sequence number attached to the call off slip, the arbitrator denied the grievance but said that presentation of such a critical piece of information could have possibly swayed the ruling in the union's favor: 1 91

- It was unreasonable to apply the 90 minute call in requirement of 29.02 to the grievant where the grievant called in as soon as he became aware that he would be unable to get to work on time because his wife's car had broke down. The towing receipt shows that the grievant was forced to call off because of extenuating and mitigating circumstances: 1 91

- The grievant cannot be said to have failed to call in simply because his supervisor initiated the call: 1 91

- The grievant overslept inadvertently and through no fault of her own. She attended to her domestic duties and hurried to work. That she failed to call-in under these circumstances is understandable. It is not indicative of an employee acting in disregard of the employer's interests. Rather, it is indicative of an employee doing her utmost to get to work quickly. Section 24 .05 provides that discipline will be "reasonable and commensurate with the offense and shall not be used solely for punishment." In this situation the increase in suspension from 1 to 6 days is unreasonable and is not commensurate with the offense. 21 0

- The grievant abandoned his job by not returning to work at the end of his approved disability leave, not calling-in, and not providing adequate medical documentation. When grievant was asked to bring in medical documentation he falsely claimed it was at home, but he never brought it in. These offenses alone would be sufficient to warrant removal: 24 8

- The grievant's failure to report in or call-in are overcome by the mitigating circumstance that she was unable to do so because she had been abducted. The grievant was not AWOL one of the days at all because her husband had called in for her and when the supervisor asked to speak to her, the husband truthfully replied. "she cannot come to the phone": 25 2

- The grievant failed to call-in each of the days between May 6 and June 20 except for 2 days. He was specifically told he must call in each day on June 1 . He also failed to provide a physician's statement, as required. He finally produced a statement at the pre-disciplinary meeting, but the statement did not explain why the grievant could not return on June 1 2 which was the return date specified by the physician on his "statement of disability." The arbitrator ruled that the statement was too little, too late and did not excuse the grievant's blatant disregard of the employer's policies regarding calling in and physician's statements. That grievant was granted disability leave benefits does not excuse the grievant's conduct either. That the grievant received a grant of leave without pay for part of the period also does not excuse his conduct: 271

- A 60-day suspension was warranted where the grievant, a Correction Officer, failed to call in or report for scheduled overtime, failed to follow an order to report to the Captain's office, and made an unauthorized personal phone call: 4 4 4

- The grievant’s incarceration was an extenuating circumstance which would allow the grievant’s father to report him off, rather than the grievant doing it himself: 4 5 6

- Considering the grievant’s past discipline for the same violation, a two-day suspension for a late call-off, and the fact that she had just been
retrained regarding the call-off policy three days before the first of several calling off late infractions, the Employer had just cause to issue a six-day suspension: 4 63

- The grievant knowingly violated call-off rules and sick policy, but those violations did not rise to the level of job abandonment. Once apprised of the Employer’s concerns, she responded immediately: 4 77

- The fact that the grievant submitted a request for leave form with a doctor’s verification did not excuse her from her call off responsibilities. The grievant also failed to call off on five dates in August, after being explicitly directed to do so: 4 88

The grievant was allegedly injured by an unknown assailant who was attempting to enter the building where the grievant worked. There were no witnesses to the incident. Due to inconsistency in the grievant’s statements the arbitrator found that the record did not indicate that the grievant was injured. The arbitrator found that the grievant was well aware that he did not have leave balance accrued and that the medical choices made by the grievant were his own doing. Given the arbitrator’s finding regarding the assault, the arbitrator determined that the grievant was absent without leave for more than four days and that he misused/abused approved leave. The arbitrator stated that those violations warranted removal. The arbitrator concluded that the facts did not support a work-related injury. He stated that critical to his conclusion was the grievant’s credibility. The grievant provided no evidence to conclude that an unknown assailant injured him. The arbitrator stated that the grievant’s overall testimony was not believable and his refusal to acknowledge wrongdoing negated any mitigating factors. 925

Careless workmanship

- Written reprimand was the appropriate next step in progressive discipline when, at most, grievant had two prior oral counseling for careless workmanship: 80

Carelessness

- Carelessness was not proved where there was no rule against backing snow plow on a highway, where doing so was a common practice, and where collision probably would have occurred even if grievant had not backed the snow plow but only stopped it: 1 3

- The grievant (a bridge lock tender) was found guilty of carelessness where (1) the operating procedures required that all obstructions be removed before operating the gate and that the gate be observed continuously while being moved, and (2) the truck would not have been struck by the gate if the grievant had followed those procedures: 202

Grievant was a Penal Workshop Supervisor and Grievant Paige was a Penal Workshop Specialist, both at the Trumbull Correctional Institute. Both supervised the Ohio Penal Industries (OPI) division where inmates dismantled donated personal computers, upgraded and fixed them before sending them to schools and other locations. Johnson served as the “group leader” which involved supervising Paige’s activities. A finding of pornographic material in an inmate’s cell that was determined to have come from OPI led to a search of the OPI area on December 19, 2000. Numerous security violations were found in OPI as the result of the search including telephone splitters, cellular phones and 3.5 floppy disks in unauthorized areas, keys lying in unsecured areas, hidden laptop computers with charged battery packs, inmates legal papers and personal letters, unauthorized tools, among many others including a finding that several personal phone calls were made daily on the phone without authorization. The arbitrator found that while the Employer failed to substantiate all of the proposed rule violations, the cumulative effect of the security breaches allowed by Grievant Johnson was so egregious to the safety, health, and security of the institution that her removal was justified. The arbitrator found Rule 5 (b), which is the purposeful or careless act resulting in damage, loss or misuse of property of the state was violated due to the illegal computer, fax, and printer use and allowing of such activity, even if only negligent was a dischargeable offense. The arbitrator found many other rule violations including Rule #7 for failure to properly inventory equipment and tools, and Rule #28 for the grievant’s failure to control the keys thereby jeopardizing the security of others. The arbitrator further found that Grievant Paige’s removal was not justified in that she was not similarly situated as Grievant Johnson. Grievant Paige was on probationary status at the time of the search and
had spent a limited time in the area since she had been on sick leave. Grievant Paige was trained and under the direct supervision of Grievant Johnson, and therefore the arbitrator found that any shortcoming in Grievant Paige’s performance was directly attributable to Grievant Johnson’s interventions.

Grievant was a Penal Workshop Supervisor and Grievant Paige was a Penal Workshop Specialist, both at the Trumbull Correctional Institute. Both supervised the Ohio Penal Industries (OPI) division where inmates dismantled donated personal computers, upgraded and fixed them before sending them to schools and other locations. Johnson served as the “group leader” which involved supervising Paige’s activities. A finding of pornographic material in an inmate’s cell that was determined to have come from OPI led to a search of the OPI area on December 1, 2000. Numerous security violations were found in OPI as the result of the search including telephone splitters, cellular phones and 3.5 floppy disks in unauthorized areas, keys lying in unsecured areas, hidden laptop computers with charged battery packs, inmates legal papers and personal letters, unauthorized tools, among many others including a finding that several personal phone calls were made daily on the phone without authorization. The arbitrator found that while the Employer failed to substantiate all of the proposed rule violations, the cumulative effect of the security breaches allowed by Grievant Johnson was so egregious to the safety, health, and security of the institution that her removal was justified. The arbitrator found that the purposeful or careless act resulting in damage, loss or misuse of property of the state was violated due to the illegal computer, fax, and printer use and allowing of such activity, even if only negligent was a dischargeable offense. The arbitrator found many other rule violations including Rule #7 for failure to properly inventory equipment and tools, and Rule #28 for the grievant’s failure to control the keys thereby jeopardizing the security of others. The arbitrator further found that Grievant Paige’s removal was not justified in that she was not similarly situated as Grievant Johnson. Grievant Paige was on probationary status at the time of the search and had spent a limited time in the area since she had been on sick leave. Grievant Paige was trained and under the direct supervision of Grievant Johnson, and therefore the arbitrator found that any shortcoming in Grievant Paige’s performance was directly attributable to Grievant Johnson’s interventions.

Certified Against

Change in Policy After a Violation

- Where the state changed its policy, perhaps in response to the grievant's offense, the arbitrator found no grounds for modifying the grievant's discipline since the defect in the previous policy did not contribute to or cause the grievant's conduct: 267

- To determine what the grievant had been removed for the arbitrator looked to the documents generated during the disciplinary process rather than to a post-arbitration brief which stated a different basis for the discipline: 192

Child Care

- An individual may have triggered two events that could lead to discharge, one having been discovered and the other not. If either would sustain the discharge then the discharge is proper: 6

- Where grievant had not been disciplined for violating a procedure in the Snow Plow Operator's manual, arbitrator refused to uphold discipline issued for other alleged violations on the basis of “any violation of the manual”: 13

- Where grievant had been removed for absenteeism after his request for leave without pay had been denied, the arbitrator said that the grievant was afforded a reasonable time to arrange for child care and neither the contract nor any other standard requires more: 91

Child Care Workers

- When Child care workers were assigned the duty of supervising recreation periods which they had not done before, this had allowed management to combine the recreation director's position with another supervisory position, and the number of recreation aides had dropped from two to none. The arbitrator still held that the Child Care Workers were not being required to work out of their positions. She gave the following reasons:
Exercising its rights under article 5, management determined that it was necessary to have child care workers (CCW's) present during recreational activity periods to monitor the children's conduct and insure the safety of those entrusted to their care.

(2) No evidence was presented showing that CCW's had to plan or implement recreation programs, nor were they actively required to participate. CCWs were only instructed to supervise the conduct of the children and encourage the children to participate. Thus they did not assume the duties of the Recreation Aide.

(3) The classification specification ranks the overseeing and monitoring of social and recreational activities as one of the most important functions of a CCW.

(4) The arbitrator determined that supervision of recreation periods was also implicitly included in the position description which required supervision and guidance of children and perforating other duties as required when directed by the immediate supervisor in regard to care and needs of children in the home.

(5) Combining the recreation director's position with another supervisory position does not violate the contract.

(6) The recreation aide position has not been absorbed by the CCW position since an interim recreation aide has been hired while one of the original aides was on disability leave and management is actively seeking to fill the other position.

(7) While the CCWs are not given as much opportunity to seek to build the children's character and self-esteem within the private environment of the cottage situation, they now have an opportunity to pursue the same goals in the recreational situation.

Circumstantial Evidence

- Numerous arbitrators have concluded that circumstantial evidence has great validity and can be used to determine whether known facts raise reasonable concerns about the occurrence under investigation.

- The arbitrator recognizes that circumstantial evidence casts an evidentiary responsibility on the employer which sometimes will be impossible to meet. Many incidents of employee misconduct are committed in secrecy to escape detection. Often, the employees' "proof" consists only of circumstantial evidence. Circumstantial evidence is not "bad" evidence. More often than not, it is enough to establish requisite proof. But sometimes (as in the present case) it may not be enough, particularly when direct evidence is available to supplement circumstantial.

- Circumstantial evidence is not necessarily weak evidence.

- The State conceded that all of its evidence against the grievant was circumstantial, but argued that "circumstantial but cumulative evidence can persuade the fact finder." The Union contended that the evidence presented was contradictory and emphasized that the evidence was merely circumstantial at best and not enough to prove just cause. The Arbitrator noted that although the evidence presented was strong circumstantial evidence, it was based on an investigation that was neither full nor fair. Therefore, the evidence did not clearly demonstrate that the grievant was guilty of the offense charged.

Civil Service Exam

- Failing an exam is not, in itself, just cause for removal. The exam did not accurately test for the skills actually needed by grievant's position (if the classification description requires abilities not actually used, then failure of an exam that tests for those unneeded abilities is not just cause for dismissal). The critical factor is whether the employee is performing up to snuff as indicated by employer evaluations. The contractual requirement that the employer must have just cause to remove an employee is not overridden by Civil Service law. It is the employer's responsibility to make the implementation of civil service law consistent with contractual requirements. Removal for failing a civil service exam could be just cause for removal if the exam tested for the abilities actually used on the job.

- The parties agreed in 4 3.01 that the Agreement takes precedence and supersedes conflicting state laws except ORC Chapter 4 1 1 7 and the rules, regulations, and directives in that statute.
statute in section 417.1 provides that the public employer and employees are bound to state and local laws pertaining to wages, hours, and terms and conditions of employment for public employees only in situations where there is no agreement or when an agreement exists but it makes no specifications about a matter. If an agreement exists and it specifies a matter, the contract takes precedence. Terminating an employee after his probationary period is a term and condition of employment subject to final and binding arbitration for grievances. The contract is specific about this term and condition of employment. An employee cannot be terminated for any reason except just cause. In the case of applying civil service laws concerning employees who have failed a civil service exam, the employer has the burden of taking actions to follow civil service laws within the constraints of the contract: 175

Clarification of Arbitration Award

- Because the grievant failed to comply with the arbitration award by failing to obtain a modification of his driver’s license suspension, the Employer had just cause to remove him. The grievant allowed his driver’s license to expire, preventing him from obtaining a modification order, and thereby making it impossible for him to perform his job duties, which consisted largely of driving state vehicles: 41(A)

- Where a removal was modified to a 60-day suspension, the grievant was to be compensated for certain paid holidays; the Employer was required to canvas first shift and allow the grievant to bid on any position within her job classification and in accordance with her seniority; the Employer was required to compensate the grievant for all legitimate benefits and related expenses incurred between her removal and reinstatement dates; and the Employer was ordered to compensate the grievant for uniform hemming and sewing: 44(A)

In this clarification, the Arbitrator clarified his earlier holding. The Arbitrator stated that because there was no language in the Contract which specifically defined ERI plans, the 1989-1991 Contract did not support the claim that people outside the PASO unit have contractual right to be offered the ERI: 458(A)

- When the arbitrator used the phrase “full-time intermittent,” it was inappropriate, and she did not modify the contractual definition of “intermittent” employees as defined in Article 7.03 of the contract. The purpose of the remedy was to award the grievant the pay and benefits that an intermittent Claims Examiner 2 in the Sandusky OBES Office earned from 10/5/91 to 11/1/91: 471 (A)

Appointment categories are irrelevant within the bargaining unit with regard to the order of layoff because the seniority provisions of the Contract take precedence: 471 (A)

- This arbitration decision is a clarification of a prior arbitration award. The Arbitrator found that the grievant did not lose any disability pay because of the change in suspension dates. Furthermore, the grievant had no leave balances during this suspension period. As a result, the length of the grievant’s suspension period (20 days or 13 days) had no effect on the grievant losing any money. The Arbitrator held, however, that if the entire reduction in suspension is nullified, management is not penalized for its procedural misconduct which prejudiced the grievant. Therefore, the grievant is entitled to two days back pay, not as a make whole remedy, but as a penalty to management: 562(A)

Class/Union Grievance

- The grievant was a custodial worker at a psychiatric hospital. The grievant asked a patient to smoke outside rather than inside a cottage. The patient told the grievant that he would not, dropped to his knees and repeated his statement as was the patient’s habit. The patient repeated this action later in the day and grabbed the grievant’s leg. The grievant yanked his leg free, the client accused the grievant of kicking him and the patient was found to have injuries later in the day. The grievant was removed for abuse of a patient, and criminal charges were brought. The criminal charges were dropped pursuant to a settlement with the Cuyahoga County court in which the grievant agreed not to contest his removal. When the grievance was pursued, the employer asked for criminal charges to be reinstated. The charges could not be reinstated, but the grievant agreed not to sue the employer. The grievance was held to be arbitrable despite the settlement between the grievant and the county court. Had the settlement been a three party agreement including the employer, dovetailing into the grievance process, it would have precluded arbitration. Additionally,
after filing a grievance it becomes the property of the union. The grievance was sustained because the employer failed to meet its burden of proof that the grievant abused a patient. The arbitrator awarded full back pay less interim earnings, back seniority, back benefits, and that the incident be expunged from the grievant’s record: 4 1 6

A grievance processed as an individual complaint will be treated as an individual grievance, not as a class grievance: 4 75

The Arbitrator determined that the Class Modernization Back Pay grievance was a state wide class grievance under Article 25. The State recognized this as a state wide issue and reacted accordingly by admitting that the Department of Health could not resolve this issue at the Department level: 4 84

**Class Grievance vs. Individual Grievance**

- See Scope of Grievance

- Article 25, Section 25.01 (B) specifically contemplates the possibility of a class action grievance and of one grievant representing a group. The language of the grievance itself clearly indicates an intent for it to be handled as a group grievance. While the grievance is signed by one grievant in this case, by its specific terms it is filed on behalf of all members that are affected. On its face, it is clearly brought on behalf of the group and cannot be seen as referring to an individual grievant: 297

**Class Modernization**

- The parties agreed in writing that retroactive payments were to be paid to employees affected by class modernization and were to be included in the employee’s normal paycheck. Persons employed on October 22, 1990, when this agreement was signed, were the beneficiaries of this agreement. To allow the state to refuse them payment because they left employment prior to receiving the money would be to reward the State for delay: 4 84

- Supervisors are only allowed to perform bargaining unit work to the extent they previously performed it. Classification modernization differentiates between supervisor’s work and bargaining unit work. After the state completes the classification modernization process, an exempt supervisor cannot perform the bargaining unit duties without violating section 1.03 even if they previously performed those duties: 4 98

**Classifications**

There was limited bargaining history surrounding the disputed portion of Article 36/05. It was clear to the arbitrator that the Union was able to get a guarantee, agreed to by the employer, that a point factoring analysis and/or a market wage study could result in an increase to an existing assigned pay range, but could never result in a decrease in the assigned pay range. A reduction in an existing pay range does not take place when the employer overrides a point factor analysis with a market wage study and retains the existing assigned pay range. The parties never negotiated a specific exception to the general understanding previously articulated. In fact, the language is Article 36.05 contemplates the adjustments made by the employer. “Just because the employer has the right to apply the previously articulated procedure does not mean that is had done so properly in any particular instance.” 869

**Clemency**

- Once the arbitrator finds just cause, she must leave to the employer the issue of balancing a human concern (or the individual employee as against the needs of the institution and its patients): 5 8

**Client Abuse**

- The Arbitrator noted that the witness could have misinterpreted the situation due to her lack of knowledge of the client’s mental retardation, nonverbal communication, and self-injurious behavior. 708

**Client Neglect**

- See neglect of duty, negligence
- See also corrective discipline, just cause, progressive discipline

- Although the State could not prove abuse in this case, it is evident that whatever happened constituted physical force. This incident warrants a report and since the grievant did not fill out a report the employer might rightfully discipline the grievant. Removal is too harsh a penalty for a first offense of failure to report the use of physical
force. Without guidance in the practice of the facility the arbitrator must use his/her own judgment to determine the proper discipline: 300

- The Arbitrator held that the grievant did not engage in client abuse based on the fact that there was insufficient evidence linking the grievant's activities to the client's facial injuries: 5 80

**Cocaine Possession**

The Arbitrator found that the charge of giving cocaine to an inmate was unproven. She stated that the only evidence presented by the State was circumstantial or hearsay. She found that the evidence did not convincingly prove that the grievant carried drugs into the institution; therefore, the removal was without just cause. 720

**Combative Resistance**

The Arbitrator found that the Grievant was removed without just cause. Management did not satisfy its burden of proving that he acted outside the Response to Resistance Continuum and engaged in the conduct for which he was removed. The Youth’s level of resistance was identified as combative resistance. The Grievant’s response was an emergency defense, which he had utilized one week earlier with the same Youth and without disciplinary action by Management. A fundamental element of just cause is notice. Management cannot discharge for a technique where no discipline was issued earlier. In addition there was no self-defense tactic taught for the situation the Grievant found himself in. 1 032

**“Code of Silence”**

The Arbitrator held that the discipline was for just cause and was not excessive. TPW’s are required to report any incident of known or suspected abuse they observe or become aware of, to ensure that a proper and timely response occurs, while considering the unique circumstances of each client. The Grievant had a duty to report and did not comply. Three incidents were not timely reported on a UIR, but were disclosed by the Grievant during an official investigation by CDC’s Police Department into alleged abuse. The Grievant admitted a UIR was incomplete, but attempted to justify his actions by alleging that: a.) he had been employed only seven months; b.) he did not want to be viewed as a “snitch” among his peers; c.) he has a passive personality; d.) he was concerned other TPWs might retaliate against him; and e.) an unwritten “code of silence” was used by his co-workers which encouraged TPWs not to report unusual conduct. The Arbitrator determined that the Grievant’s overall testimony was not credible and believable. This was buttressed by the Grievant’s failure to provide any specific facts or verifiable supportive evidence to support claims that alleged abuse, unknown to CDC, occurred during his employment. An affirmative defense of disparate treatment could not be supported. Evidence offered was insufficient for a finding that one employee’s and the Grievant’s behavior were closely aligned or that another employee was similarly situated. 965

**Coercion**

The grievant was a Correction Officer charged with threatening an inmate and using abusive language towards the inmate. The arbitrator found that the grievant’s conduct warranted discipline; however, the Union demonstrated that a co-worker who previously committed a similar offense was treated differently. The employer offered no explanation for the disparate treatment. The removal was ruled excessive and the grievant was reinstated. 95 7

**Commensurate Discipline**

- See also corrective discipline, just cause, progressive discipline

- Last chance proviso attached to thirty day disciplinary suspension was found too harsh because it was not restricted as to tune and was not restricted to require offense of the same kind that grievant has had problems with: 1

- Discharge is too severe a penalty for refusing an assignment, even though disciplined twice for same type of offense in the past year, where employee had 20 years of past service and evaluations which indicated his performance had been more than satisfactory: 3

- Discharge justified where grievant had failed to follow proper procedures in opening an unruly inmate's cell and had also used excessive force: 4

- Removal would be justified for a third occasion of serious discipline for tardiness in approximately one year’s time: 1 1
- Removal is the most serious remedy available in the arsenal of disciplinary tools and should only be used as a last resort: 27

- Where grievant had a record of several minor offenses, arbitrator selected the harshest penalty available on the disciplinary grid for the particular offense and the number of times grievant had committed the particular offense: 27

- Removal is not commensurate with the offenses of failing to make vital record of bed check and failing to sign-out properly. If grievant had been proven to have been absent, removal would have been appropriate: 27

- Where a single error gives rise to several violations, employer can only discipline for most severe violation: 30

- Proper to give cumulative discipline where different errors or acts gave rise to different violations: 30

- 3-day suspension commensurate with offense of smoking in prohibited area where reasons for policy against smoking were sound. (In this case to prevent fires and to prevent patients from ingesting cigarette butts and other smoking paraphernalia.): 4 1

- Safety perils and hazards are considerably heightened when a correction officer sleeps on duty and thus sleeping on duty is an extremely grave offense for a correction officer: 4 2

- Where correction officer had slept on duty on four separate occasions, grievant was discharged for just cause: 4 2

- Where grievant had history of disciplines for sleeping on duty, 5 -day suspension was not unreasonable or excessive: 5 0

- Given the depression associated with Bipolar Disease and the sleeping attendant upon such depression, administration of a two day suspension for failure to call-in is of such magnitude as to be considered impermissible: 63

- Given grievant's satisfactory work record of five years, that other employee's with less serious political activity offenses were given 5 day suspensions, discharge was not commensurate with the offense, 20 day suspension is: 81

- Under the just cause standard, it is inappropriate to link the severity of the discipline to the degree of harm suffered by the client. The just cause standard requires one to review the foreseeable consequences of the type of negligence in question: 90

- Even where grievant has received verbal reprimands for tardiness, a two-day suspension for being 1 minute late is not commensurate. A One-day suspension is commensurate: 97

- 1 -day suspension is commensurate with the offense of uttering profanity to patient: 1 04

- Where some of the charges on which the discipline had originally been based had not been proved, the arbitrator concluded that the discipline was not commensurate with the offenses that had been proved: 1 1 7

- §24 .02 first states that discipline shall be commensurate with the offense and then cites the progressive discipline schedule. The obligation of the employer is to determine if the usual steps of progressive discipline can be applied in this case by weighing the two elements of §24 .02 (seriousness of the offense vs. the requirement of progressive discipline). In this case, the seriousness of the offense (absence without leave and deliberate failure to call in despite knowing the procedure) takes precedence and, thus, the discipline did not violate §24 .02 even though it skipped steps of progressive discipline: 1 2 0

- Proof that the grievant is guilty as charged does not automatically justify the penalty. The arbitrator is required to weigh the discipline against 3 interrelated contractual standards:

  1) It must follow the principles of progressive discipline.

  2) Discipline must be commensurate with the offense and not solely for punishment.

  3) Discipline must be for just cause: 1 2 3

- Punitive discipline not allowed: 1 3 1

- When one of the charges was not proved at arbitration, the arbitrator said he must assume that
the charge played some role in determining the length of the suspension. Consequently, he reduced the length of the suspension: 139

- Where grievant was on leave for military service, but was not required to report to the army for the first day because he was sick, and he failed to inform the employer, the grievant effectively placed himself on unauthorized leave. The violation was substantively inconsequential since grievant would have been entitled to sick leave or leave without pay. However, the AWOL charges are technically correct and cannot be disregarded. Nevertheless, at its worst, the grievant's misconduct was a technical omission, less serious than most of those for which mild progressive discipline is the penalty prescribed in the Adjutant General's Regulations. The arbitrator is forced to conclude that removal is too harsh and the most severe penalty which could have been imposed under the just cause precept was a written warning: 140

- An employer must be permitted a range of reasonableness in fashioning disciplinary penalties. Where employee's record was "indifferent", having received a 3 day suspension 6 months ago, the arbitrator found that a 10 day suspension for leaving work while sick without authorization was within the range of reasonableness: 148

- Where the grievant had been absent 31% of the time, the arbitrator ruled that a 5 day suspension was warranted even if grievant was not guilty of certain paperwork violations which the discipline had also been based upon: 153

- Although all fights may be serious, they are not equal qualitatively or in penalty deserved. The arbitrator noted that the fight in the present case was about the least serious fight one could imagine: a single blow with no other blows attempted. In addition grievant had a good record with 4 years of service and had apologized for the incident and promised to avoid such incidents in the future. Since the grievant received the second most severe punishment out of seven available under the department's guidelines, the arbitrator held that the penalty was not commensurate with the offense. The arbitrator found that there was just cause only for the least severe penalty for fighting, based on the employer's guidelines: 154

- The arbitrator is not to substitute her judgment for management's on the question of whether punishment is commensurate with the offense unless management's judgment is unreasonable. In this case, the superintendent could reasonably have found an intentional, unremorseful, willful action on the part of the grievant justifying dismissal. While the grievant's conduct, trading sunglasses for cigarettes with an inmate, is not as serious as dealing drugs or weapons, the grievant had several previous disciplines: 155

- If employer had a disciplinary grid calling for removal on the first fighting offense, the arbitrator would have upheld the removal. Without such a grid, the arbitrator had to look to the contract to determine what an appropriate penalty would be. While fighting is a serious charge and the fact that a supervisor received a minor injury requires a significant increase in discipline, there were mitigating factors. The employer must bear some of the responsibility for the fight since it assigned spouses, which it knew were having marital difficulties, to work together: 163

- The arbitrator found that a 15 day suspension was not commensurate with the offense or progressive where (1) the grievant was guilty of both wearing headphones and engaging in an act which constitutes a threat to the security of the institution when he made a false report that a fence was secured without visibly checking the site; (2) the headphone offense by itself would only carry a verbal counseling if it were the only offense; (3) The employee had no previous disciplines; (4) there was some evidence that the employee's training was less than rigorous; (5) there was a lack of on site post orders; (6) the grievant failed to fully comprehend either that his conduct constituted a false report or the limits of his discretion in a paramilitary organization: 171

- Removal is not commensurate with the offense of abandoning the work site without permission for 2 ½ hours under the circumstances of the case: employee with 7 years of good service. The removal violated §24.02 and §24.05: 173

- Grievant had received 2 ten-day suspensions, one for falsification of a physician's statement and the other for unauthorized absence. Given that the penalty for the falsification charge was a ten-day suspension, the arbitrator concluded that an equal penalty for unauthorized absence was outside the range of reasonableness: 181
- The arbitrator held that it was especially important that there was such a short period between the first set of infractions and the second set of infractions. The grievant had been put on notice of the disciplinary consequences of his conduct but still did not modify his conduct: 181

- The grievant was an 11-year employee with no prior discipline. While the arbitrator must hesitate to substitute her judgment for management's the imposition of a ten day suspension in this incident is not commensurate with the offense nor progressive with regard to this grievant. On the other hand, horseplay is dangerous on the job and abusive language beyond shoptalk can provoke reactions which also cause unsafe conditions and potential injury: 182

- If only one preventable traffic accident had occurred, the arbitrator might not have upheld the removal. Unfortunately, the totality of the grievant's conduct (3 preventable accidents and failure to report one of them) over a 3 month period, and his inability to correct egregiously similar behavior, leave this arbitrator with no other alternative but to uphold the employer's decision: 184

- Removal of an employee after 28 years of good service with no prior discipline is unreasonable, arbitrary and capricious: 190

- A discharge grounded in a "multiplicity of errors" may well not stand up under the applicable just cause standard if but one of the multiple "errors" relied on is not made out: 192

- Even though removal would not normally be commensurate with such an offense, removal was commensurate with the offense in this case when the offense was viewed in light of the grievant's 2 recent previous offenses, both of which were sufficient for removal: 205

- Where grievant had failed to maintain lines of communication while on an extended leave of absence, the Arbitrator found that the grievant’s conduct was extreme and deliberate, and concludes that the three-day suspension was fully warranted even though it skipped one of the contractual steps. The Arbitrator noted that 24.02 requires that discipline be commensurate with the offense. The Arbitrator found that a three-day suspension was commensurate with the offense: 213

- A six day suspension for a total of 8 minutes tardiness over four days is unusual, to say the least. If that suspension were to be considered in isolation it would most certainly be determined to be excessive. However, the tardiness takes on greater significance when viewed in the context of the grievant's extensive record of tardiness which extends over his entire employment history with the State. The true issue here is not the amount of time the grievant was late for work but rather his continued pattern of tardiness: 214

- Reasonable people may differ over the propriety of a specific discipline. Arbitrators should be careful not to usurp managerial authority when it has been correctly utilized: 214

- Where there was a question of whether removal was commensurate with the offense of fraternization with an inmate, the arbitrator relied on the fact that the grievant had perjured himself, in order to uphold the grievant's removal: 224

- Where the arbitrator found that the number of absenteeism violations in such a short period reflect a serious problem, she found that while a number of shorter suspensions were possible before imposition of the 15 day suspension, the 15 day suspension was not clearly unreasonable given the events: 236

- The removal was commensurate with the offense, even though the two incidents added up to only 3 minutes of unauthorized leave, because these violations were only the last straw in a history of attendance problems and demonstrate that further efforts at corrective discipline would be useless. The grievant had been progressively disciplined, had signed a last chance agreement, had been properly forewarned that further violations would result in termination, and had received a great deal of patience when given a 5 day suspension in lieu of discharge for the previous violation: 258

- Where the grievant called in late, and was going to be tardy before he called in again saying he would not be in at all because of a fall (for which he never supplied a suitable physician's statement), the arbitrator determined that a ten day suspension was fair and progressive since the grievant's last punishment for tardiness was a 3 day suspension and the "watch period" had not passed: 274
- Although the State could not prove abuse in this case, it is evident that whatever happened constituted physical force. This incident warrants a report and since the grievant did not fill out a report the employer might rightfully discipline the grievant. Removal is too harsh a penalty for a first offense of failure to report the use of physical force. Without guidance in the practice of the facility the arbitrator must use his/her own judgment to determine the proper discipline: 300

- Although alteration of payroll records is a serious offense one for which the grievant received a three day suspension in the past, removal is neither commensurate nor progressive. There were mitigating factors. The grievant was a nine-year employee who does quality work and is highly skilled. The grievant also trained others and received various citations for his work: 31

OCSEA was successful in getting the grievant's removal reduced to a suspension at arbitration. The State moved to vacate the Arbitrator's decision in the Court of Common Pleas. The Court of Common Pleas dismissed the State's appeal on the basis of late filing by the State. The State then appealed this case to the Court of Appeals. While the case was pending in the Court of Appeals, the parties reached a settlement agreement.

- The other charge against the grievant of insubordination does justify a suspension since the employee does have prior discipline. The rude behavior by the grievant towards his supervisor does not support a fifteen-day suspension. Given the grievant’s record a five-day suspension is justified: 362

- The charge that the grievant failed to carry out work assignments was based on the grievant’s inability to complete a one-day turn around on warrants. Witness testimony showed that it is always possible to complete the warrants on time. The supervisor even said that she did not always issue discipline to those employees that did not complete this work. This charge justifies only a written warning: 363

- The grievant was a Correction Officer and had received and signed for a copy of the agency’s work rules which prohibit relationships with inmates. The grievant told the warden that she had been in a relationship with an inmate prior to her hiring as a CO. Telephone records showed that the grievant had received 197 calls from the inmate which lasted over 134 hours. Although the grievant extended no favoritism toward the inmate, just cause was found for the removal: 374

- The grievant attended a pre-disciplinary hearing for absenteeism at which his removal was recommended, but deferred pending completion of his EAP. He failed to complete his EAP and was absent from December 28, 1990 to February 11, 1991. The grievant was then requested to attend a meeting with a union representative to discuss his absence and failure to complete his EAP. The grievant was removed for absenteeism. The arbitrator found the grievant guilty of excessive absenteeism and prior discipline made removal the appropriate penalty. The employer was found to have committed a procedural error. Deferral because of EAP participation was found proper, however the second meeting was not a contractually proper pre-disciplinary hearing. No waiver was found on the part of the union, thus the arbitrator held that the employer violated the contract and reinstated the grievant without back pay: 383

- The grievant was a Youth Leader 2 who had forgotten that his son’s BB gun was put into his work bag to be taken to be repaired. While at work a youth entered the grievant’s office, took the BB gun and hid it in the facility. Management was informed by another youth and the grievant was informed the next day. He was removed for failure of good behavior, bringing contraband into an institution, and possessing a weapon or a facsimile on state property. It was proven that the grievant committed the acts alleged but removal was found to be too severe. The grievant had no intent to violate work rules, the BB gun was not operational, and the employer withdrew the act of leaving the office door open as a basis of discipline. The grievant’s work record also warranted a reduction to a thirty day suspension: 388

- The grievant, a Therapeutic Program Worker, received a ten day suspension for sleeping on duty. A supervisor tried to awaken the grievant but was not successful, although the grievant had been heard talking to another employee shortly before the incident. The grievant had no prior discipline up to the time she had become a steward, then she received two verbal reprimands. Also her performance evaluations had been above average until the same time, at which point she
was evaluated below average in several categories. Lastly, a paddle had been hanging in the supervisor’s lounge with the words “Union Buster” written on it. The arbitrator found that the grievant may have dozed off, but that the employer’s anti-union animus was the cause for the suspension. The paddle in the lounge was evidence of this and the employer had demonstrated reckless disregard for union relations. The arbitrator held that the employer failed to properly apply its rules, thus, there was no just cause for the 10 day suspension. The discipline was reduced to a 1 day suspension.

- The grievant had failed to complete several projects properly and on time and another employee had to complete them. She had also been instructed to set projects aside and focus on one, but she continued to work on several projects. The grievant had prior discipline for poor performance including a 7 day suspension. The arbitrator found that the employer had proven just cause for the removal. The grievant was proven unable to perform her job over a period of years despite prior discipline. The fact that another employee completed the projects was found to be irrelevant. Removal was found to be commensurate with the offense because of the prior discipline and the work was found to have been within the grievant’s job description and she had been offered training. Thus, the grievance was denied: 4 02

- The grievant had been a Drivers’ License Examiner for 13 months. He was removed for falsification when he changed an applicant’s score from failing to passing on a Commercial Drivers’ License examination. The arbitrator found that the grievant knew he was violating the employer’s rules and rejected the union’s mitigating factors that the grievant had no prior discipline and did not benefit from his acts. Falsification of license examination scores was found serious enough to warrant removal for the first offense. The arbitrator also rejected arguments of disparate treatment. The grievance was denied: 4 03

- The grievant was a Psychiatric Attendant who had received prior discipline for refusing overtime and sleeping on duty. He refused mandatory overtime and a pre-disciplinary hearing was scheduled. Before the meeting occurred, the grievant was found sleeping on duty. A 6 day suspension was ordered based on both incidents. The arbitrator found that despite the fact that the grievant had valid family obligations, he had a duty to inform the employer rather than merely refuse mandated overtime and, thus was insubordinate. The employer failed to meet its burden of proof as to the sleeping incident, however due to the grievant’s prior discipline a 6 day suspension was warranted for insubordination. The grievance was denied: 4 04

- The grievant was removed for misuse of his position for personal gain after his supervisor noticed that the grievant, an investigator for the Bureau of Employment Services, had received an excessive number of personal telephone calls from a private investigator. The Ohio Highway Patrol conducted an investigation in which the supervisor turned over 130-150 notes from the grievant’s work area and it was discovered that the grievant had disclosed information to three private individuals, one of whom admitted paying the grievant. The arbitrator found that the employer proved that the grievant violated Ohio Revised Code section 4141.21 by disclosing confidential information for personal gain. The agency policy for this violation calls for removal. The employer’s evidence was uncontroverted and consisted of the investigating patrolman’s testimony, transcribed interviews of those who received the information, and the grievant’s supervisor’s testimony. The grievant’s 13 years seniority was an insufficient mitigating circumstance and the grievance was denied: 4 08

- While on disability leave in October 1990 the grievant, a Youth Leader, was arrested in Texas for possession of cocaine. After his return to work, he was sentenced to probation and he was fined. He was then arrested in Ohio for drug-related domestic violence for which he pleaded guilty in June 1991 and received treatment in lieu of a conviction. The grievant was removed for his off-duty conduct. The grievant’s guilty plea in Texas was taken as an admission against interest by the arbitrator and the arbitrator also considered the grievant’s guilty plea to drug related domestic violence. The arbitrator found that the grievant’s job as a Youth Leader was affected by his off-duty drug offences because of his co-workers’ knowledge of the incidents. The employer was found not to have violated the contract by delaying discipline until after the proceedings in Texas had concluded, as the contract permits delays pending criminal proceedings. No procedural errors were found.
despite the fact that the employer did not inform the grievant of its investigation of him, nor permit him to enter an EAP to avoid discipline. No disparate treatment was proven as the employees compared to the grievant were involved in alcohol related incidents which were found to be different than drug related offenses. Thus, the grievance was denied: 4 1 0

- The grievant was a Correction Officer who had an alcohol dependency problem of which the employer was aware. He had been charged twice for Driving Under the Influence, which caused him to miss work and he received a verbal reprimand. The grievant was absent from work from May 18th through the 21st and was removed for job abandonment. The arbitrator found that the grievant’s removal following a verbal reprimand was neither progressive nor commensurate and did not give notice to the grievant of the seriousness of his situation. It was also noted that progressive discipline and the EAP provision operate together under the contract. The grievant was reinstated pursuant to a last chance agreement with no back pay and the period he was off work is to be considered a suspension: 4 1 3

- The grievant was removed for failing to report off, or attend a paid, mandatory four-hour training session on a Saturday. The grievant had received 2 written reprimands and three suspensions within the 3 years prior to the incident. The arbitrator found that removal would be proper but for the mitigating factors present. The grievant had 23 years of service, and her supervisors testified that she was a competent employee. The arbitrator noted the surrounding circumstances of the grievance: the grievant was a mature black woman and the supervisor was a young white male and the absence was caused by an embarrassing medical condition. The removal was reduced to a 30 day suspension and the grievant was ordered to enroll into an EAP and the arbitrator retained jurisdiction regarding the last chance agreement: 4 2 2

- The grievant was a Therapeutic Program Worker, took $1,500 of client money for a field trip with the clients. The grievant was arrested en route and used the money for bail in order to return to work for his next shift. The grievant was questioned about the money before he could repay it, he offered to repay it when he was paid on Friday, but failed to offer payment until the next Monday. He was removed for Failure of Good Behavior. While the employer was found to have poorly communicated its rules concerning use of client funds, the grievant was found to have notice of its provisions. The arbitrator found that the grievant lacked the intent to steal the money, however the grievant’s failure to repay was not excused, thus just cause was found for discipline. Because of the grievant’s prior disciplinary record, removal was held commensurate with the offense and the grievance was denied: 4 3 2

- The grievant was a Mail Clerk messenger whose responsibilities included making deliveries outside the office. The grievant had bought a bottle of vodka, was involved in a traffic accident, failed to complete a breathalyzer test and was charged with Driving Under the Influence of Alcohol. The grievant’s guilt was uncontested and the arbitrator found that no valid mitigating circumstances existed to warrant a reduction of the penalty. The grievant’s denial of responsibility for her drinking problem and failure to enroll into an EAP were noted by the arbitrator. The arbitrator stated that the grievant’s improved behavior after her removal cannot be considered in the just cause analysis. Only the facts known to the person imposing discipline may be considered at arbitration. The arbitrator found no disparate treatment as the employees compared with the grievant had different prior discipline than the grievant, thus, there was just cause for her removal: 4 3 3

- The grievant was employed by the Bureau of Workers’ Compensation as a Data Technician 2. He had been disciplined repeatedly for sleeping at work and he brought in medication he was taking for a sleeping disorder to show management. The
grievant was removed for sleeping at work. The grievant had valid medical excuses for his sleeping, which the employer was aware of. The arbitrator stated that the grievant was ill and should have been placed on disability leave rather than being disciplined. No just cause for removal was found, however the grievant was ordered to go on disability leave if it is available, otherwise he must resign: 4 36

- The grievant was a custodian for the Ohio School for the Blind who was removed for the theft of a track suit. The arbitrator looked to the Hurst decision for the standards applicable to cases of theft. It was found that while the grievant did carry the item out of the facility, no intent to steal was proven; removal of state property was proven, not theft. The arbitrator found no procedural error in that the same person recommended discipline and acted as the Step 3 designee. Because the employer failed to meet its burden of proof, that removal was reduced to a 30 day suspension with the arbitrator retaining jurisdiction to resolve differences over back pay and benefits: 4 39

- The arbitrator ruled that removal of the grievant was commensurate with the severity of his misconduct and did not violate the principles of progressive discipline due to the grievant's relatively short-term work history, failure to immediately confess, and the malicious intent underlying his actions: 5 33

- Under Article 24 of the Contract “disciplinary action shall not be imposed upon an employee except for just cause.” Furthermore, the discipline shall be progressive and it “shall be commensurate with the offense.” However, if the offense is of a very serious nature, progressive discipline may not be appropriate. When the employer removes an employee, an Arbitrator cannot overrule this employer’s decision unless there is a good and sufficient reason to do so. In this case there were such reasons: 5 71

- The Arbitrator believed that the grievant engaged in a verbal outburst and heated argument with his supervisor. Some sort of discipline was justified by the grievant’s failure of good behavior. The grievant had been suspended for 6 days for similar behavior. Therefore, the Arbitrator concluded that a 30 working day suspension was just and commensurate with the grievant’s conduct: 5 76

- The Arbitrator determined that the discipline was not commensurate with the offense. Based on the circumstances of this case, the 25 years of service and lack of prior severe discipline, a two-week suspension with a loss of pay adequately addressed the seriousness of the grievant’s offense: 6 1 3

- The Arbitrator held that the grievant’s actions did constitute sexual harassment and did create a hostile work environment. Because sexual harassment is deemed to be a “malum in se” offense—i.e. an act that is implicitly wrong—and because of the detrimental effect is has on the work place, the Arbitrator ruled that removal was the appropriate discipline for this charge: 6 1 8

- The Union argued that removal of the grievant from his job was not commensurate with the alleged offense. Considering that the evidence was circumstantial and that the grievant was a long-term employee, the Arbitrator held that the removal was extreme and made without just cause. Further, the Arbitrator emphasized the concept for discipline was to rehabilitate individuals. Therefore, the Arbitrator held that the grievant should be given an opportunity to improve his conduct: 6 1 9

- The grievance involved two separate incidents. The Arbitrator found that the evidence was overwhelming that the Grievant used inappropriate and unwarranted force in both incidents. The Grievant was interviewed twice. The second time he changed his story and said it was the correct version. The Grievant also failed to file correct reports for one of the incidents. The Arbitrator held that the discipline was commensurate with the offense and consistent with ODYS’s work rules and past practice: 1 0 2 6

**Commercial Driver's License (CDL)**

- In addition to having his driver’s license suspended, and being unable to perform his job which included driving state vehicles, it was unlikely that the grievant could obtain the newly required commercial driver’s license by the specified deadline: 4 6 6

- Under Article 37.08 of the Agreement the employer must move an employee to another position if that employee fails to meet the licensing or certification requirements of a position. However, this is only required if the license or certification requirements of a position
change while the employee is serving in that position: 5 5 0

Commercial Driver’s License, Falsification of

- The grievant intentionally misrepresented the status of his CDL. He obtained time off work to take a skills test. Then he falsified his CDL application to obtain an exemption from taking the test. Consequently, the Bureau of Motor Vehicles issued the grievant a CDL in error. Upon returning to his worksite, the grievant lied by telling his supervisor that he did not need to take the test because he already possessed a valid CDL: 5 08

The employer alleged that the grievant provided an invalid commercial driver’s license (CDL) to an individual for the payment of $200. The Arbitrator found the testimony of the individual who received the invalid CDL was evasive, inconsistent, and unconvincing. He also found that the witness’s testimony does not prove the grievant was the person who approached him in the nightclub; however, the witness did not exonerate the grievant. Following review of all the evidence the Arbitrator concluded that there was no doubt that the grievant has regularly been associated with individuals who have been involved in criminal activities creating an air of suspicion around her. However, the Arbitrator found that the appearance of impropriety did not support the conclusion arrived at by the Employer. 786

Communicable Diseases

Health physicists were assigned on a rotating basis to respond to incidents, including those at landfills. The Grievant sought pre-exposure vaccinations and protective gear for onsite inspections. OSHA guidelines state that vaccine is to be offered to employees who have occupational exposure to the hepatitis B virus. Occupational exposure has the same definition as in the OSHA guidelines. The expert witness, a PERRP program administrator, reviewed the Bureau’s written policy and the duties of health physicists and testified that these employees were not reasonably expected to have contact with blood or other potentially infectious materials and were not required to have pre-exposure vaccinations. The incident of falling in the muck at the landfill, as related by the grievant, was an accident for which the right to post-exposure evaluation and treatment was created. The Arbitrator concluded that Health Physicists did not have “occupational exposure” and therefore were not entitled to hepatitis B vaccine pre-exposure. The grievance was denied. 962

Competency

The grievant was an Elevator Inspector who was subsequently promoted to Elevator Inspector as a result of a settlement even though management had reservations regarding the grievant’s ability to perform his duties. He had two active disciplines – a written reprimand for carelessness after leaving a state credit card as a gas station which he did not promptly report, and a second written reprimand for carelessness when his state vehicle was destroyed by flooding. The arbitrator found that this was not a discipline case. It was a competency case in which the correction for inadequate performance is reassignment, training or separation. The grievant was a short-term employee who never met the employer’s expectations in the performance of his duties. The only classification lower than the one he was in was Elevator Inspector Trainee. The arbitrator stated that the employer could not be expected to keep an employee in perpetual training when that employee “shows little or no evidence of ever achieving at least a minimum level of competency “. The employer produced substantial evidence that the grievant was unable to perform his job safely and made reasonable efforts to help the grievant reach that a satisfactory level of competency. The arbitrator determined that the employer’s assessment was reasonable. Removal was not excessive because there were no reasonable alternatives. 833

Computer Use Policy

- The Arbitrator found that the evidence and testimony clearly established that the Grievant committed numerous violations of the computer use policy on a regular basis. These included:
  a. installing a Palm Pilot on her work computer.
  b. maintaining non-work related files on her department computer.
  c. accessing two non-departmental email accounts from her computer
  d. using the computer to actively access shopping sites

The Arbitrator rejected the charge of insubordination. The Arbitrator held that
"dishonesty" was not a proper charge. It implies serious misconduct where an employee’s motive is often to obtain pay that he/she is not entitled to receive. The Grievant’s timesheets suggest that she simply recorded her regular starting, lunch, and ending times regardless of the actual times and none involved a claim for extra compensation. Furthermore, all the timesheets were approved by her supervisor. The prior five-day suspension for computer misuse suggests that the Grievant was familiar with the computer use policy and knew that further discipline would result from continued computer misuse. It also indicates that she failed to take advantage of the opportunity to correct her behavior. Despite the Grievant’s 13 years of state service, the Arbitrator held that the state had the right to remove her. The Grievant’s extensive violations of the computer use policy combined with the other less serious offenses support the state’s actions. Her prior five-day suspension for computer misuse removes any doubt that the state acted pursuant to its contractual authority.

Confession

Even though grievant was afraid and the police officer had informed him of the possible consequences of his situation, the arbitrator found no evidence of promises, threats, or physical or mental coercion which might lower the credibility of the confession.

Confidential Information

The grievant was properly removed because he admitted that he unethically and intentionally used the Bureau's facilities and confidential client records for personal profit. Moreover, the grievant's offer to make restitution, which was motivated more by a desire to avoid criminal prosecution than by any real feelings of remorse, did not serve to mitigate the offense. Given the severity of the offense, the grievant's long history of service and discipline-free work record were insufficient to mitigate the misconduct in the instant case, and the State did not violate the principle of progressive discipline.

Conflict of Interest

While some discipline was called for when the grievant, an administrative law judge, created the appearance of a conflict of interest, discharge was excessive. The conduct did not, as the employer argues go "to the very heart of his employment . . . and impede his ability to perform his duties as hearing examiner," or constitute "a total breach in his relationship with his employer." Given the grievant's prior (albeit uncharacteristic) misconduct, and the peculiar needs of the board for the highest standards of probity and propriety, the grievant's lapse of cautious judgment (as in the instance of his prior discipline) in creating a situation which could be perceived as a conflict of interest giving rise to the appearance of an impropriety, is worthy of a 60 day suspension without pay: 218

Completion of unemployment compensation contribution reports for one's own businesses when one is an OBES Field Examiner skirts the edge of conflict of interest. The arbitrator refused to modify the discipline, however, where the grievant had signed an agreement saying he would cease such activities but did not: 226

Conflicting Rules

- Where departmental rule was stricter than institutional directive, arbitrator refused to uphold punishment on the basis of the departmental rule: 35

Constructive Discharge

- The grievant worked in a Medical Records office when a new supervisor was hired in January 1985. The supervisor changed the office location and began to strictly enforce the work rules. The office layout was also changed twice due to new equipment purchases. The supervisor also instituted a physician’s verification policy which was stricter than the previous policy. The grievant went on work related disability in February 1987. She received Disability Leave benefits and Workers’ Compensation. When these benefits expired she began working for a private employer. She received an order to return to work in July 1987 because of her other employment. The grievant refused to return to work under her prior supervisor. The grievant appealed her denial of further Workers’ Compensation benefits and lost, after which she contacted the facility to come back to work. The arbitrator found that the grievant failed to prove supervisory harassment or constructive discharge. All the supervisor’s acts were within her scope of authority and related to efficiency. The removal was timely because the three year delay was caused by the grievant’s pursuit of her workers’
compensation claim in state court. The arbitrator held that the grievant abandoned her job and denied the grievance: 384

- To be constructively discharged, the employer must have forced the employee to quit by making the work situation unbearable. The grievant’s voluntary resignation from a work environment that is friendly and supportive does not constitute constructive discharge: 4 4 5

- The grievant argued that she was constructively discharged in violation of Article 24 of the Contract. Based on the circumstances of this case, the grievant believed that she was being fired due to problematic performance. However, the grievant refused to sign a written resignation. Since the Warden merely relied on the statement of others that the grievant resigned and since the State did not present any evidence to contradict the grievant’s contention that she was fired, the Arbitrator held that the Employer did violate the contract by discharging the grievant without just cause: 620

Three grievances with a factual connection were combined. The Arbitrator held that the events of August 23, 2006 clearly indicated an intention on the part of the Grievant to resign. The Grievant and her supervisor met in the supervisor’s office. At some point in time the Grievant threw the lanyard that held her ID card and her key card onto the supervisor’s desk and said “I’m out of here.” She left to go home. The Union argued that the comment “I’m out of here.” was the result of a panic attack and the Grievant was suffering from safety concerns arising out of the performance of her work. The Arbitrator found that the Grievant’s panic or anxiety arose in part from her decision to challenge her supervisor “to burn in hell.” She then learned that this challenge had been reported by the supervisor. The Arbitrator held that there was no retaliatory discipline against the Grievant for expressing safety concerns about where she was assigned to work; nor was she denied emergency personal leave. 981

Continuing Violation

- See arbitrability, timeliness
- The arbitrator rejected the employer’s position that since the grievants accepted their employer’s mileage limitation policy for four months they therefore waived their right to grieve. Each time the grievants were not reimbursed for their mileage a new grievable event occurred. That nearly four months of these events took place before a grievance was filed does not make a reoccurrence in the fourth month nonarbitrable. What matters is whether the grievance was filed within the time limitations of any one of the events. The denial of mileage reimbursement is held to be a continuing act and since the grievant filed ten days following the last denial in the series, it was timely and therefore arbitrable: 35 5

- It is a continuing violation of the contract each time the grievant is on-call and not compensated with stand-by pay. The filing window for a continuing violation commences each time the infraction occurs: 4 64

Continuous Service

- Section 1 6.02 defines seniority and continuous service. Service is continuous unless certain enumerated events have occurred. A layoff is not one of the events. Thus, the grievant’s seniority and continuous service must include the period of the layoff and of the employment prior to the layoff. Contract language signifies that seniority can be adjusted retroactively for periods prior to the contract. The arbitrator ordered that the grievant’s longevity pay and vacation accrual be calculated on the basis of the grievant’s seniority which includes the layoff and the time prior to the layoff: 21 5

Contract Interpretation

An Arbitrator’s job is to give the meaning the parties intended to their words. The Arbitrator can neither add nor subtract. In the case of the Five Year Rule, the parties explicitly referred the reader to specific Ohio Revised Code and Administrative Rules sections in Article 1 8 of the Contract. Where the Contract modifies the rules and procedures, the OAC and OAC govern. Where the Contract does NOT modify those rules and procedures, the OAC and OAC govern. Article 1 8, unlike other Articles in the Contract, makes documents other than the Contract the basis of substantive rules and only modifies those rules by the Contract enumerations: 4 5 0

- Just because the contract does not mention a minimum one-year length of service as a prerequisite to the State’s obligation to pay life
insurance benefits does not suggest that a one-year service requirement is in violation of the contract. A length of service requirement is a valid policy if it was explicitly explained to the employees and clearly set forth in the employee handbook. Additionally, this policy was an established past practice and it was in effect long before the first Collective Bargaining Agreement: 4 69

- Section 27.04 contains clear and unambiguous language, and thus, its meaning must be determined from the Agreement without resort to evidence to it: 4 75

- The Arbitrator found that the contract does not provide for vacation leave to accrue while the grievant is on Worker’s Compensation leave. Article 27 and 29 both contain language which provide for employees to accrue benefits while on Worker’s Compensation leave. Article 28, dealing with vacations, does not provide for this. The failure of the contract to provide similar entitlements of vacation time as it does in Article 27 and 29, is evidence that no entitlement was intended: 5 4 6

- There is no hard and fast rule about the quantum of proof arbitrators should utilize in discharge cases. The Agreement between the parties places the burden of proof for discharge cases on the State, but is silent as to what quantum of proof is needed. Since there is no standard included in the contract, the Arbitrator would not impose one. The arbitrator held that since there was no standard included in the contract between the parties for removal, the standard of “clear and convincing” evidence was not to be imposed upon the State. Rather, what is required is “a heavy burden to present sufficient evidence that discharge is warranted”: 5 73

- The Arbitrator concluded that the Arbitrator at a Working Out of Classification hearing is specifically authorized to direct a monetary award in accordance with Section 1 9.02, Step 1 of the Contract. The language “[i]f the higher level duties are of a permanent nature...”does not serve to prevent an Arbitrator from issuing a monetary award if the higher level duties are found in a classification represented by another union. If the parties had desired to put such a limitation on the Arbitrator, they would have done so. However, they did not: 5 99

- The Arbitrator determined that the State had violated Section 1 7.05 (A)1 of the contract by failing to award the grievant the position of Claims Service Specialist. The Arbitrator found that the grievant met the minimum class qualifications to be awarded the aforementioned position, and therefore remedied the damage done by the violation by awarding the grievant the position of Claims Service Specialist and the appropriate backpay: 6 1 4

- Although the Arbitrator declined to interpret the ODRC/OSU Contract, there is language that could be read to permit problem resolution by ODRC independently when presented with an OSU request that a CO be removed from a post. The Union did not agree that OSU would exercise “good management judgment” regarding post assignments, but that ODRC would do so. Being unable to agree with OSU on a solution other than reassignment, ODRC than has to decide whether it, ODRC, has “good management reason” to reassign. The Arbitrator is unable to find the due process right to a pre-deprivation meeting with management in the 1 994 Agreement. The fact that “consultation” language did not appear until the 1 997 Parameters implies that the parties knew “good management reasons” did not demand pre-reassignment and pre-bid-denial conferences. 737

The grievant was removed from MANCI as a CO and transferred to OSP. A settlement agreement was entered into by the parties on December 4, 2001 granting the transfer to OSP but also allowing for the grievant to carry his institutional seniority with him to OSP under paragraph 5 of the settlement agreement. The OCSEA then intervened declaring the settlement agreement violated Art. §1 6.01 (B)- Institutional Seniority of the CBA. Subsequently, the OCSEA with the OCB’s consent amended the settlement agreement to remove paragraph 5 (the transferring of institutional seniority). The arbitrator found that the failure to transfer the institutional seniority as proscribed in the settlement agreement did not violate the rights of the grievant since settlement agreements can only work within the confines of the CBA, in which this particular agreement did not. No other provisions in the CBA allowed such a settlement agreement by the parties to work outside of the provisions provided by the CBA. The arbitrator further found that the settlement agreement did not need to be executed by the grievant unless a waiver of individual right’s was at issue, which was not at issue in this case.
Therefore, the amending of the settlement agreement without the grievant consenting was valid. 81

**Controlling Contract**

- The Department of Natural Resources posted a vacancy and accepted applications through June 28, 1989. The applications were evaluated through August, and a selection was made in September 1989. The grievant would have no grievance rights if the 1986 agreement controlled the entire process, but would if the 1989 agreement controlled due to his section 17.05 (1989 agreement) applicant group status. The arbitrator found that critical elements of the selection process were performed under the 1989 agreement, thus it controlled the matter and the grievance was held arbitrable, (the right to grieve arose under the 1989 agreement upon notification of non-selection). The employer was ordered to select from applicants grouped pursuant to the 1989 agreement: 423

**Conveyance of Contraband**

- The Arbitrator stated that evidence that the grievant transported the marijuana seed into the institution was circumstantial and weak. However, the fact that the grievant was arrested for marijuana created suspicion that the grievant may have had knowledge regarding how the seed got into his briefcase. 71

**Conveyance of Drugs**

- The Arbitrator stated that evidence that the grievant transported the marijuana seed into the institution was circumstantial and weak. However, the fact that the grievant was arrested for marijuana created suspicion that the grievant may have had knowledge regarding how the seed got into his briefcase. 71

**Corpus Delecti**

- Given the fungibility of money, the arbitrator was unwilling to draw any adverse inferences from the Agency's failure to provide the Corpus delecti, i.e., the actual monies purportedly given to the inmate by the grievant: 157

**Correction Employees**

- An institution which houses felons requires a higher level of trust, honesty and confidence than is normally necessary in other work setting: 268

- Where there was a pattern of falsification and deceit, the arbitrator upheld the grievant's removal from employment as a Correction officer since the employer should not have to assume the risk of further dishonesty, especially when an honest disclosure would have precluded hiring, and since Correction facilities are clothed with numerous security considerations requiring honesty and forthrightness: 268

- The grievant’s negligence in not following the proper inmate-counting procedure is a serious work rule violation: 282

- The grievant, a Correction Officer, was found to have intentionally exposed himself to a busload of female inmates. This behavior occurred while the grievant was off duty. Off-duty behavior is normally not the employer’s business. To allow discipline, a clear nexus must exist between the behavior and the job. The arbitrator found that nexus in this case. The grievant charged with the safekeeping of inmates deliberately chose, while in uniform, a group of female inmates as the victims of his indecent behavior. The end result would be that female inmates, not knowing which male Correction Officer was involved, could justifiably fear that the Officer in question might have power over them. Sexual abuse of prisoners by Correction Officers is not unknown. Although the removal was the harshest penalty in the disciplinary grid, the factors weighed by the Warden were reasonable and fair. The grievant’s lack of remorse or any indication that the grievant understood and was seeking help for his problem ruled against mitigation: 309

- Even if the unauthorized relationship is not extensive it could give the appearance of wrongdoing and leave the employee open to manipulation by inmates and distrust by fellow coworkers. An officer’s reputation influences his/her ability to perform his/her job through its impact on relationships with inmates and coworkers. The rule prohibiting unauthorized off-duty relationships has a nexus with employment: 313

- When a Correction Officer may have learned of a rowboat for sale from an inmate and went to the inmate’s wife’s house to purchase the boat, the
Officer did violate work rule 40 by having an unauthorized relationship but this did not warrant termination: 313

- The past cases of different treatment for work rule 40 violations (unauthorized relationships) show the flexibility of discipline. The arbitrator found that there should have been flexibility in this case. The grievant should not have been removed. His violation involved a single financial transaction with only a tenuous and limited connection to an inmate or his family member. The grievant was also a three-year employee with a good work record: 313

- The arbitrator had already decided in favor of the grievant but wanted to educate the employer in the proper use of the phrase “commission of a felony.” If the employer has a work rule that the employee will be dismissed if he or she has committed a felony—the presumption is that he or she has been found guilty of a felony. To determine guilt by a judge or jury must find the employee guilty. The arbitrator suggested that the employer could have a work rule of aiding escape without using a criminal law term: 314

- The employer argued that the Officer would never be trusted again in the prison system. The arbitrator cautioned that when the grievant is returned to work he is to be treated like any other employee. Overzealous supervision could result in disparate treatment with regard to discipline. The grievant is to be treated like any other productive 10-year employee: 314

- The grievant’s friendliness and naïve compassion for fellow human beings, including inmates, puts her out of place as an employee of a prison. The arbitrator found that the grievant lacked the coolness and detachment that permits Correction employees to distance themselves from their charges. The grievant understood the work rules against unauthorized relationships and still befriended inmates. She sent one inmate a Valentine’s Day card. The Arbitrator agrees that the grievant is entitled to compassion, but finds the removal was for just cause. For that reason the arbitrator is powerless to overturn the discipline. Once just cause is established, an arbitrator has no authority to embellish job security by interposing their personal sympathies. The most the arbitrator can do for the grievant is to permit the grievant to leave the institution with a clean record. The grievant will be permitted to resign voluntarily and if she does the employer will required to expunge her record and give no less than a neutral recommendation to potential future employers: 320

- All employees working in a correction environment are responsible for safety: 320

- While progressive discipline is the general goal, the Union and the employer both know that certain offenses are so serious that progressive discipline is unwarranted. Drug related offenses in the prison setting fit this criteria. The claim that bringing drugs onto state property lacks the proper nexus between the job and the offense is dismissed. The drugs were readily available to the grievants from the parking lot and thus readily available to the inmates. Grievants had a clear opportunity to transport drugs inside the prison walls: 334

- The grievant was a Correction Officer and had received and signed for a copy of the agency’s work rules which prohibit relationships with inmates. The grievant told the warden that she had been in a relationship with an inmate prior to her hiring as a CO. Telephone records showed that the grievant had received 197 calls from the inmate which lasted over 134 hours. Although the grievant extended no favoritism toward the inmate, just cause was found for the removal: 374

- The grievant was a Correction Officer who was removed for watching inmates play cards while they were outside their housing unit. The grievant admitted this act to his sergeant. The pre-disciplinary hearing had been rescheduled due to the grievant’s absence and was held without the grievant or the employer representative present. The arbitrator found that because the union representative did not object to the absence of the employer’s representative that requirement had been waived. There was also no error by the employer in failing to produce inmates’ statements as they had not been used to support discipline. The removal order was timely as the 45 day limit does not start until a pre-disciplinary hearing is held, not merely scheduled: 377

- The grievant was a Correction Officer who had been accused of requesting sexual favors from inmates and accused of having sex with one inmate three times. The inmates were placed in security control pending the investigation. During this time statements were taken and later
introduced at arbitration. The arbitrator found that the employer failed to prove by clear and convincing evidence that the grievant committed the acts alleged and management had stacked the charges against the grievant by citing to a general rule when a specific rule applied. The primary evidence against the grievant, the inmates’ statements, were not subject to cross examination and the inmate who testified was not credible. The grievant was reinstated with full back pay, benefits, and seniority. The arbitrator recommended that the grievant be transferred to a male institution: 379

**Correction Officer**

- To paraphrase a noted jurist, "bravery is not required of a police officer in the face of an uplifted knife"; nor, it might be added, in the face of a loaded weapon. The arbitrator made the forgoing statement in reference to a correction officer: 223

- The grievant, a Correction Officer, was removed for striking an inmate during an altercation. The inmate accused another officer and a criminal trial resulted in the grievant’s acquittal. However, three other Correction Officers testified that the grievant did indeed unjustly strike the inmate. Therefore, the Arbitrator determined that management met the just cause standard and the grievant was properly dismissed: 600

**Corrective Discipline**

- See also commensurate discipline, just cause, progressive discipline

- The short times between disciplines was not held against the employer on the grounds that the employee had not had opportunity to change his behavior. The grievant had received notice of the possible disciplinary consequences of his conduct. It was not the employer's actions that engendered the disciplinary action but the grievant's activity which necessitated immediate action. Although corrective discipline is an admirable goal, the circumstances surrounding this case forced a procedural overlapping of the disciplinary process. The employer did not, however, overlap the offenses and the associated consequences: 1 81

- Where the arbitrator thought discharge was overly harsh in response to the grievant's use of abusive language, and the grievant had been guilty of insubordination 4 days later, the arbitrator held that discharge was inappropriate. "It would have been more appropriate to have imposed a lesser discipline and then afforded the grievant an opportunity to correct his behavior." The employee should be given a chance to demonstrate an intent to improve his behavior. It appears to the arbitrator that removal for these incidents was more punitive than corrective: 202

- Under §24.01, all discipline of any nature whatsoever is to be measured against just cause. Under 24.02, most discipline must be progressive and follow four steps. The requirements are separate and distinct, but just cause is the overriding consideration. Progressive discipline cannot subsume just cause. The disciplinary priorities are the other way around. In other words, the fact that the employer strictly follows progressive-discipline steps does not automatically assure that any or all of the disciplinary impositions will be for just cause; and discipline is not for just cause unless it is corrective. Progressive penalties which are demonstrably punitive and non-corrective will be set aside by arbitrators: 213

- Where grievant's misconduct, failing to make himself available for communication from the employer while on an extended leave of absence, was the misconduct he was being disciplined for, but also prevented the discipline from being corrective, the arbitrator held that" In the final analysis, the Employer's right and obligation were to use discipline to correct grievant's misbehavior. It is the Arbitrator's opinion that the multiple impositions, none of which Grievant learned about until shortly before he returned to work, crossed the line between correction and punishment." Two of the three disciplines "will be dismissed because grievant's violation consisted of a single, unbroken element of misconduct": 213

- An arbitrator is not bound by the outcome of a proceeding collateral to arbitration, but may admit and afford weight to facts and issues established elsewhere as they relate to the issue at bar. In the case at hand, the arbitrator admitted only those portions of the transcript of the grievant's criminal trial which served to impeach a witness because his testimony at trial was inconsistent with his testimony at arbitration. The arbitrator gave three
reasons why she was not bound by the results of the criminal trial:

(1) The policies and rules governing the two methods of decision making are different;

(2) The parties do not have control over the collateral proceeding or the qualifications of the trier of fact;

(3) The parties did not bargain for any such restraint upon the arbitrator. 25

- The grievant was not issued a warning regarding an earlier incident in which he was seen sleeping. That failure precluded the employee's opportunity to correct his conduct: 270

- The arbitrator ruled that the 10-day suspension was excessive and punitive rather than corrective and progressive given the grievant's 9-year record as a good employee. The arbitrator stated that the purpose of discipline is not to punish arbitrarily but to correct: 277

- The contractual philosophy is to conserve jobs and require the employer to exercise every reasonable effort to correct misconduct: 287

- The most important question to be answered in any discipline case involving just cause is this: What amount of discipline is likely to correct the employer's behavior and restore him/her to an acceptable level of performance?: 302

- The grievant sexually harassed two women when he exposed himself and grabbed one woman near her genitals and rubbed her crotch. The grievant's defense was unclear. At the hearing the grievant claimed he only touched the one woman on the thigh yet in the closing the advocate for the Union said that the grievant apologized for his actions. The arbitrator could not find evidence of the grievant's apology. The grievant’s claim that the women consented was also dismissed. Prior consent to sexual events is not perpetual consent. Both women testified that they neither consented to nor solicited the grievant’s behavior. There was no evidence that the grievant wanted or was amenable to correction. There are aggravating factors. At the hearing the grievant lied, blamed others and steadfastly refused to take responsibility for his acts. There is no evidence that corrective discipline would in fact “correct” his behavior: 324

- The grievant’s misconduct was turned up almost two years after the incident. The Union argued that this discipline, a thirty-day suspension, violated Section 24.04 of the Agreement. The discipline may not be used as a punishment. The arbitrator decided that it is reasonable to presume that a penalty issued years after the occurrence will not correct the behavior which is sought to be changed; its sole or predominant effect will be retribution. The presumption, however, is a rebuttable one. Grievant’s testimony revealed that her violation was never corrected; she believed she was entitled to recommend her unqualified relatives because the boss did it. The discipline continued to have a corrective element: 35

- The grievant, a Therapeutic Program Worker, received a ten day suspension for sleeping on duty. A supervisor tried to awaken the grievant but was not successful, although the grievant had been heard talking to another employee shortly before the incident. The grievant had no prior discipline up to the time she had become a steward, then she received two verbal reprimands. Also her performance evaluations had been above average until the same time, at which point she was evaluated below average in several categories. Lastly, a paddle had been hanging in the supervisor’s lounge with the words “Union Buster” written on it. The arbitrator found that the grievant may have dozed off, but that the employer’s anti-union animus was the cause for the suspension. The paddle in the lounge was evidence of this and the employer had demonstrated reckless disregard for union relations. The arbitrator held that the employer failed to properly apply its rules, thus, there was no just cause for the 10 day suspension. The discipline was reduced to a 1 day suspension: 400

- The grievant was hired as a Tax Commissioner Agent and had received a written reprimand for poor performance while still in his probationary period. He was assigned a new supervisor who developed a plan to improve his performance, however the grievant continued to receive discipline for poor performance and absenteeism, including a ten day suspension which was reduced pursuant to a last chance agreement. It was discovered after the last chance agreement had been made, that prior to the signing of the last chance agreement, the grievant had committed other acts of neglect of duty. The arbitrator held that a valid last chance agreement would bar an
- The grievant was a Correction Officer who had an alcohol dependency problem of which the employer was aware. He had been charged twice for Driving Under the Influence, which caused him to miss work and he received a verbal reprimand. The grievant was absent from work from May 18th through the 21st and was removed for job abandonment. The arbitrator found that the grievant’s removal following a verbal reprimand was neither progressive nor commensurate and did not give notice to the grievant of the seriousness of his situation. It was also noted that progressive discipline and EAP provision operate together under the contract. The grievant was reinstated pursuant to a last chance agreement with no back pay and the period he was off work is to be considered a suspension: 4 1 3

- The grievant took a magnetic tape containing public information home, which was against agency rules. She intended to return the tape but it became lost, and she was charged with theft of state property. The tape was later recovered by the Highway Patrol during an unrelated investigation. The grievant was transferred to another position without loss of pay or reduction in rank and suspended for 30 days. The arbitrator held that the employer failed to prove that the grievant intended to steal the tape (Hurst arbitration test applied) rather than borrow it. Taking the tape home without authorization was found to be a violation of the employers’ rules. The employer was found not to have applied double jeopardy to the grievant as only one disciplinary proceeding had been brought and the transfer was found not to be disciplinary in nature. The 30 day suspension was found not to be reasonably related to the offense, nor corrective and was reduced to a 1 day suspension with full back pay for the remaining 29 days: 4 1 7

- The grievant was removed after 1 3 years service from her position with the Bureau of Disability Services for unapproved absence, conviction of a drug charge, and failure to report the drug charge as required by the state’s Drug-Free Workplace policy. The Bureau is funded by the federal government and is subject to the Drug-Free Workplace Act of 1 988. The grievant had a history of alcohol problems. She was also involved with a co-worker who, after the relationship ended, began to harass her at work. She filed charges with the EEOC and entered an EAP. The former boyfriend called the State Highway Patrol and informed them of the grievant’s drug use on state property. An investigation revealed drugs and paraphernalia in her car on state property and she pleaded guilty to Drug Abuse. She became depressed and took excessive amounts of her prescription drugs and missed 2 days of work. She was admitted into the drug treatment unit of a hospital for 2 weeks. She was on approved leave for the hospital stay, but the previous 2 days were not approved and the agency sought removal. The arbitrator found that while the employer’s rules were reasonable, their application to this grievant was not. The Drug-Free Workplace policy does not call for removal for a first offense. The employer’s federal funding was not found to be threatened by the grievant’s behavior. The grievant was found to be not guilty of dishonesty for not reporting her drug conviction because she was following the advice of her attorney who told her that she had no criminal record. The arbitrator noted that the grievant must be responsible for her absenteeism, however the employer was found to have failed to consider mitigating circumstances present, possessed an unwillingness to investigate, and to have acted punitively by removing the grievant. The grievant’s removal was reduced to a 1 0 day suspension with back pay, benefits, and seniority, less normal deductions and interim earnings. The record of her two day absence was ordered changed to an excused unpaid leave. The grievant was ordered to complete an EAP and that another violation of the Drug-Free Workplace policy will be just cause for removal: 4 2 9

- The short times between disciplines was not held against the employer on the grounds that the employee had not had opportunity to change his behavior. The grievant had received notice of the possible disciplinary consequences of his conduct. It was not the employer's actions that engendered
the disciplinary action but the grievant's activity which necessitated immediate action. Although corrective discipline is an admirable goal, the circumstances surrounding this case forced a procedural overlapping of the disciplinary process. The employer did not, however, overlap the offenses and the associated consequences. 1

- Where the arbitrator thought discharge was overly harsh in response to the grievant's use of abusive language, and the grievant had been guilty of insubordination 4 days later, the arbitrator held that discharge was inappropriate. "It would have been more appropriate to have imposed a lesser discipline and then afforded the grievant an opportunity to correct his behavior." 'The employee should be given a chance to demonstrate an intent to improve his behavior. It appears to the arbitrator that removal for these incidents was more punitive than corrective: 202

- Under §24.01, all discipline of any nature whatsoever is to be measured against just cause. Under §24.02, most discipline must be progressive and follow four steps. The requirements are separate and distinct, but just cause is the overriding consideration. Progressive discipline cannot subsume just cause. The disciplinary priorities are the other way around. In other words, the fact that the employer strictly follows progressive-discipline steps does not automatically assure that any or all of the disciplinary impositions will be for just cause; and discipline is not for just cause unless it is corrective. Progressive penalties which are demonstrably punitive and non-corrective will be set aside by arbitrators: 213

- An arbitrator is not bound by the outcome of a proceeding collateral to arbitration, but may admit and afford weight to facts and issues established elsewhere as they relate to the issue at bar. In the case at hand, the arbitrator admitted only those portions of the transcript of the grievant's criminal trial which served to impeach a witness because his testimony at trial was inconsistent with his testimony at arbitration. The arbitrator gave three reasons why she was not bound by the results of the criminal trial:

  (1) The policies and rules governing the two methods of decision making are different;

  (2) The parties do not have control over the collateral proceeding or the qualifications of the trier of fact;

  (3) The parties did not bargain for any such restraint upon the arbitrator. 254

- The grievant was not issued a warning regarding an earlier incident in which he was seen sleeping. That failure precluded the employee's opportunity to correct his conduct: 270

- The arbitrator ruled that the 10-day suspension was excessive and punitive rather than corrective and progressive given the grievant's 9-year record as a good employee. The arbitrator stated that the purpose of discipline is not to punish arbitrarily but to correct: 277

In the period leading up to his dismissal the Grievant was having issues with members of his household and his own health. The Grievant did not call in or show up for work for three consecutive days. The Arbitrator held that employers unquestionably have the right to expect employees to come to work ready to work when scheduled. However, just cause also demands consideration for the surrounding circumstances of a violation, both mitigating and aggravating. The Arbitrator found the circumstances in this case did not indicate a “troubled employee” such as one suffering from addiction or serious mental illness. Rather, the Grievant was an otherwise good employee temporarily in crisis (because of circumstances beyond his control) and unable to help himself. This case, in which professional intervention may eventually rehabilitate the employee, was ripe for corrective discipline rather than discharge. The Grievant received a thirty-day suspension to impress upon him his responsibility to inform his employer of his status. 983
Counseling

- Even though there were personality conflicts between the supervisor and the grievant, the objective facts show that the grievant was unable to process the invoices on time. Because deficiencies in grievant’s performance are plainly demonstrated by objective data, neither the suspension decision nor the termination decision can be attributed to personal bias. Whether or not people like each other is not necessarily related to the question of just cause. The just cause standard is violated only when personal dislikes are the basis for employment decisions which otherwise lack a legitimate, job-related rationale. One way to make this determination is to ask whether the challenged employment decision would have been the same had there been no personality conflict: 288

Credibility

- The notion that the grievant, a Correction Officer, was entering into a drug purchase transaction involving three pounds of marijuana as part of an investigation smacks of an ex-post-facto effort to find a plausible excuse for his activity. As no such investigation had been authorized nor any report of its existence made, this rationale is viewed with skepticism: 4 4 0

- The testimony of the State’s witnesses, many of whom have criminal records, was inconsistent, and in some cases, not credible: 4 8 1

- Credible and unbiased testimony implicating a hospital aide’s involvement in patient abuse is sufficient to warrant discipline of the hospital aide. Appropriate discipline may be dismissal. Unauthorized breaks, although indicative of an employee’s lack of responsibility, have no bearing on the severity of discipline imposed for patient abuse: 4 9 6

- Where the case involved a grievant who had no discipline on his record in his ten years of service and who was being accused by a felon who has spent the bulk of his adult life in prison and who, after accusing the grievant, was awarded parole, skepticism in the credibility of the testimony is warranted: 5 0 7

- The State failed to meet its burden of proof in a removal case because the two witnesses' testimonies were inconsistent throughout time and the witnesses had ulterior motives for siding with the State. The arbitrator rejected their stories as substantial evidence of just cause for removal: 5 1 0

- In a case involving a grievant who engaged in physical and verbal abuse of co-workers, the arbitrator held that the essential question was one of credibility. The grievant claimed no responsibility for his actions. The arbitrator noted that the grievant’s reactions were hostile and inappropriate and that his actions during the arbitration lacked the insight that his behavior was something that cannot be tolerated. Therefore, the arbitrator did not find the grievant to be credible: 5 3 4

- An inmate’s account was worthless and did not support the grievant’s version of events, because the inmate offered two different stories on the events that occurred concerning the grievance: 5 4 3

- In reaching a decision to terminate the grievant, the Arbitrator considered the grievant’s past disciplinary record which included several reprimands for Neglect of Duty due to her attendance-related problems. The Arbitrator found the grievant to be a less credible witness because of her past disciplinary record: 5 4 4

- The patient’s testimony was not credible. Therefore, his testimony did not warrant the removal of the grievants: 5 4 7

- To resolve this matter of which party to believe, the Arbitrator looked to the court proceedings related to the misdemeanor charges filed against the grievant for her actions. She noted particularly that (1) the grievant was represented by counsel in those proceeding; and (2) no evidence or testimony was presented at the hearing that a failure to afford Miranda rights was a consideration in the court’s assessment of the case before it. The ruling was, therefore, that the grievant’s testimony that she was denied Miranda rights is not credible and is unsupported by any evidence or testimony on the record: 5 4 9

- The Arbitrator found the testimony of the employer’s witnesses more credible than that of the grievant. The Arbitrator felt that the grievant tailored his testimony to fit the most self-serving
purposes. The Arbitrator gave no weight to the testimony of the Union witness because her testimony changed from the time of the investigation to the hearing. Also, the witness had a personal relationship with the grievant and thus had a motive to fabricate testimony on his behalf: 5 5 6

- This case came down to a resolution of the credibility of two opposing witnesses, the grievant and the State’s witness. The circumstantial evidence pointed toward the grievant, the person with the responsibility for the care of the resident, and the person with the access and possession of alcohol products. The testimony of her co-worker was very credible. The Union could not establish any ulterior motive on the part of the co-worker to make untruthful statements. The grievant, of course, was motivated to protect her job security and to protect her reputation: 5 5 7

- It is apparent from the record of this case that there was good and sufficient evidence from both testifying nurses, one supporting the other, that the grievant’s activity was as alleged by them. The Arbitrator found the grievant’s testimony not to be credible, because the Arbitrator held that it was self-serving: 5 72

- Conditions to be met in accepting a witness’ statements: 1) lack of animus toward the accused; 2) no interest to benefit from the prosecution of the allegations; and 3) absence of known characteristics that should cause a reasonably prudent person to question the motivations of the accuser: 5 73

- This case turns on the credibility of the grievant and his supervisor. The most important issue in determining if there was just cause for the grievant’s removal was whether or not the grievant threatened his supervisor. If there was clear and convincing evidence that the grievant did threaten his supervisor, then the removal would be justified. The Arbitrator concluded that there was not clear and convincing evidence in this case that the grievant genuinely threatened his supervisor: 5 76

- The Arbitrator concluded that there was reliable corroborating evidence and testimony regarding the abuse charge and a causally linked injury. Furthermore, the Arbitrator concluded that the Unit Director's testimony was more credible than the grievant's testimony due to the consistency of the Unit Director's testimony with other corroborating testimony. In sum, the Arbitrator believed the Unit Director's version of the incident over the grievant's version: 5 81

- The Arbitrator held that the charges hinged upon the credibility of the witnesses. The grievant's supervisor's written statement and testimony regarding this second incident contradicted one another. However, the Arbitrator held that these inaccuracies regarding the incident were not fatal to the employer's position because the grievant was not credible. Therefore, the Arbitrator sustained the charge of falsification of an official document: 5 88

- In order to resolve the question of whether the grievant was guilty of theft, the Arbitrator determined the credibility of the witnesses. The Arbitrator found that the State’s primary witness, the grievant’s co-worker, was forthright, consistent, had a good demeanor on the witness stand, and had other reliable evidence supporting his testimony. The Arbitrator relied upon the well settled rule that an accused employee is presumed to have an incentive for not telling the truth and that when his testimony is contradicted by that of another who has nothing to gain or lose, as did the co-worker in this case, the latter is to be believed. The Arbitrator found that there was clear and convincing evidence that the grievant was involved in the theft of the two snow blowers: 5 92

- The Arbitrator found that the grievant’s testimony as to the incident lacked credibility due to the grievant’s history of denying guilt when the grievant had been accused of misconduct in the past: 6 1 5

The Arbitrator held that the Employer did not meet its quantum of proof that the Grievant was guilty as charged. None of the charges were properly supported by the record. Other investigation-related factors, those within the Employer’s control, raised sufficient doubts regarding the credibility of the Employer’s decision. The Youth Offender had never filed one formal complaint regarding general allegations about the Grievant’s actions. The allegations only came to the Employer’s attention when the Youth Offender’s cell mate raised concerns. However, the cell mate was never interviewed nor was she brought forth to testify at the arbitration hearing. The Youth Offender suffered an untimely death prior to the arbitration hearing. Her sole link to
the dispute, her cell mate, should have been made available for direct and cross-examination. Specific incidents of sexually related misconduct were raised by the Youth Offender and the Employer. One incident allegedly took place on a medical trip. The transport log never surfaced at the hearing. The other incident allegedly took place outside a cottage. The allegations were not supported by something or someone other than the deceased Youth Offender. A security camera existed in the exact location; however, the Employer never attempted to determine whether an archival copy existed. An impartial investigation requires such an effort; anything less jeopardizes any just cause determination. The Employer did not have just cause to terminate the Grievant. The grievance was sustained. 94

Central to the issue was the credibility of the Grievant. There was evidence to contradict the Grievant’s statement that the youth threatened to harm himself. Reliable evidence existed to conclude that the youth was not suicidal and did not state that he was going to harm himself. Even though the Grievant claimed the youth was going to harm himself, he did not implement a planned use of physical response per DYS policy 301.05. The physical response utilized by the Grievant was unwarranted under the facts, and it constituted a violation of Rule 4.1.2. The Grievant escalated the situation by removing items from the youth’s room—an action that was not required. The Grievant could have utilized other options, but did not. After physically restraining the youth, the Grievant contacted two operations managers. If he was able to contact his supervisors after the restraint, what was the imminent intervention that precluded his contacting them prior to the altercation? The Arbitrator held that DYS had just cause to discipline the Grievant and given his prior discipline of record, their actions were not arbitrary, unreasonable, or capricious. 1002

Credibility of Documents

- Letters written after the contract took effect and during the grievance process are objectionable as self-serving (when offered as evidence of the intent of the parties during negotiation): 107

- Internal inconsistencies were a factor in arbitrator's decision to place no weight on letters as evidence: 107

- An employer's log, contemporaneous with the events was found to be more credible than the grievant where there was no showing that the information in the log was false. There was no showing that the log had been made later or that it had been altered: 201

- The employer's case rested upon the testimony and written statements of 3 inmates. It is crucial that inmates’ testimony be supported. It was not. The written statement of one inmate was discredited because the inmate testified he had been forced to write the statement. The written statement of another inmate was discredited because the inmate refused to testify. The arbitrator gave some credence to the written statement of the third inmate, even though he too refused to testify, because he provided so much information that it was hard to believe he had been forced to write the statement. While the evidence was not sufficient to support the discharge, the arbitrator held that it was sufficient to rule against back pay: 265

Credibility of Witnesses

- Management found to be more credible when grievant's testimony at arbitration conflicted with his testimony before the use of force committee and also conflicted with testimony of another Correction officer: 4

- Grievant's version of the events lacked credibility because his testimony was inconsistent on a number of relevant issues: 7

- Testimony by other employees that employer failed to follow proper procedure on other occasions was found insufficient to rebut management's evidence where the testimony was not supported by grievance submissions or labor-management agenda minutes: 7

- Grievant's allegation that management had lost his request for leave slips was found to be not credible where grievant had made such allegations more often than any other employee: 7

- Where the arbitrator could not see the "necessity of attaching doctor's statement to vacation leave slips," the arbitrator discounted grievant's credibility since grievant testified he had attached them: 7

- Arbitrator discounted grievant's credibility when grievant acknowledged, after cross-examination, additional enclosures which he had not identified
when originally asked about the contents of a document: 7

- Arbitrator discounted testimony where truth of testimony would entail an improbable time lag in the delivery of certified mail to 2 addresses: 7

- Where grievant had told another person what he was going to do, but the other person testifies she did not remember the conversation but is not sure that it never occurred, the arbitrator concluded that there is no reason to refuse to believe the grievant's version: 9

- Where sole eyewitness did not make the accusation until several days after the alleged incident, then recanted his accusation at the pre-disciplinary hearing, but later alleged he had recanted because threatened by the grievant, arbitrator held that the testimony of the witness did not rise to the level of preponderance of the evidence that the incident occurred: 10

- Teenager's testimony found credible because given confidently, unschooled as a witness, and readily gave evidence that could only serve to make his and his mother's testimony less credible: 29

- Factors that argue against credibility

1) Being a resident at a mental health center.

2) Resisting police

3) Going by false name

4) Waiting two days before making serious charges.

5) Discrepancies between testimony given by same witness at different hearings.

6) Testimony contrary to observations by arbitrator that grievant had a speech defect: 38

- Where there was conflicting testimony the arbitrator found that nevertheless, both persons were testifying honestly and in good faith: 40

- Where written statements were given by persons with a personal vendetta against grievant where persons did not work with the same clients as grievant, were found to be not credible: 45

- Witness who had been "less than completely truthful in a separate incident was nevertheless found to be credible because

1) there was no reason for witness to fabricate a story such as a history of animosity or discord with grievant,

2) the conduct of the witness on the day of the incident was consistent with his testimony, and

3) the grievant had a history of offenses of the same sort witness accused him of: 52

- Inconsistencies between accuser's oral testimony and his previous written statement placed enough doubt on the reliability of his unverified observations to prevent the arbitrator from concluding that the accuser's perceptions were correct: 71

- Taken for what it was worth, signed statement from grievant's mother saying she had called in for grievant does not overcome the evidence presented by the persons who testified at the hearing: 96

- In resolving issues of credibility, arbitrators often focus on existence or non-existence of bias, interest, or other motive: 108

- Where employer's witness and grievant give conflicting testimony, weight may be given to the fact that the accused employee has a personal interest in the outcome; especially where the accusers have nothing to gain from the outcome: 108

- Arbitrator concluded that where recent hires had minimal contact or interaction with the rest of the staff and residents, their depiction of the events were not tainted by any personal bias: 108

- Typically, interest, by itself, should not be considered as the decisive factor for discrediting a witness' testimony: 108

- The arbitrator did not find testimony that grievant had a knife credible when in a previous written statement the witness had disclaimed her ability to swear that the grievant had a knife: 116

- The arbitrator viewed as contrived the grievant's claim he had permission for his activity from a particular manager, since the union did not have
the manager testify on grievant's behalf and did not introduce a statement from the manager. Such a critical feature of the grievant's defense requires documentation or testimony if it is to be given any weight by this arbitrator: 1 1 8

- The arbitrator did not find the testimony of the main witness against grievant to be credible since the witness was a convicted felon whose testimony was not consistent with testimony given at an earlier hearing, and since there was a substantial delay in raising the charges. Polygraph evidence that witness was telling the truth was admitted but given little weight on the grounds that the accuracy of polygraphs has not been established to a scientific degree sufficient to justify reliance on them for the most important of our everyday affairs: 1 2 4

- The arbitrator expressly avoided allowing his knowledge of the witness' sexual orientation to have any affect on his judgment of the witness' credibility: 1 2 4

- A witness' testimony was found to be not credible when that witness had altered her testimony on cross-examination on whether she had received a particular phone call: 1 3 0

- Arbitrator discounted the value of hearsay statements by patients at Millcreek in an abuse case because the patients had a history of having been intimidated by the patient who had allegedly been abused: 1 3 2

- Where

(1) witness A had no reason to color her testimony in favor of the grievant and was fully credible,

(2) witness A's testimony contradicted parts of witness B's testimony.

(3) witness A's testimony was consistent with the grievant's testimony, and

(4) witness B's testimony had some internal inconsistencies,

the arbitrator discounted B's testimony. 1 3 2

- The witness' testimonial approach was a self-interested selection of information. He was deliberately careful to implicate no other inmates.

Given his felon status and his self-seeking motivation, coupled with some clear manifestation of intelligence, the Arbitrator can only accept as "true" those parts of his testimony that are independently corroborated. Interestingly, much of his testimony was so corroborated: 1 5 5

- Where a witness was motivated to testify in any way to hurt the prison system (the employer), having admitted his animosity on the stand, the arbitrator discounted his testimony, except to the extent it supported the testimony of others: 1 5 5

- Grievant's characterization of an inmate giving him cigarettes after he had given the inmate sunglasses as an attempt to frame him was found not to be credible since the grievant's reasons for why he did not call in higher officials to witness what was going on were, according to the arbitrator, not believable. The grievant's excuse was that "they probably already knew and he did not want to get caught.": 1 5 5

- The arbitrator assigned no weight to the undocumented hearsay testimony to the effect that some unnamed youth complained of physical abuse by the Grievant. If the employer considered such charges worthy of investigation and disciplinary action, they should have been the subject of another disciplinary proceeding: 1 6 3

- The grievant's testimony was discounted since it was in her interest to deny the violation. The arbitrator found to be credible the testimony of the mentally- retarded residents because, given the consistency of their story over a long period of time, the arbitrator did not believe he could have fabricated it as a lie: 1 6 5

- Criminal convictions are held against witnesses. However, this does not mean that their testimony will automatically be discredited. Here, the testimony of three convicted criminals was held to be more credible than the grievant's testimony. The testimony of the criminals was consistent. They did not all have motives for antagonism towards the grievant. While some had motive to testify against the grievant, the grievant also had motive to testify in a manner favorable to himself. Finally, the felons would not have voluntarily offered information against the grievant unless it was true since the offering of such information was likely to spark an investigation that could have adverse consequences for themselves: 1 7 9
- The arbitrator found that the officer who testified against the grievant is credible in spite of the fact that the officer had originally testified that no force was used. While an inconsistent story weakens the credibility of a witness, there were other considerations. First, The officer's account was confirmed by the fact that two inmates gave similar accounts. Second, the officer had nothing to gain but much to lose by saying that force had been used. The officer testified that his superior had told him to report that no force had been used. Also, the officer testified that another officer had run him off the road after work in order to enforce a "code of silence" among Correction officers, and he had eventually quit to avoid harassment by other Correction officers. Third, the officer had no grudge against the grievant and the grievant failed to offer any reason why the officer would lie: 1 80

- The grievant's testimony that the inmate slipped in spilled milk was not convincing since grievant was an interested party: 1 80

- A nurse's testimony was found not to be credible since she had testified that she did not get angry when the inmate had thrown some liquid on her. The arbitrator claimed that a reasonable person would have been angry. Also, the nurse failed to observe bruises that were readily apparent on grievant's face: 1 80

- The grievant's failure to file the appropriate accident report's taints his version of the events and dampens his credibility. If he were in the right, he should not have hesitated to file: 1 84

- The credibility of the grievant's testimony was harmed by the selectiveness of his memory. When it was in grievant's interest to remember, he had clear memories. When asked damaging questions, however, the grievant claimed not to be able to remember. The arbitrator regarded this testimony as not only damaging the grievant's credibility but also as an aggravating circumstance which calls for a more severe punishment than the grievant otherwise would have received. The arbitrator said the grievant would be better off if he had just openly admitted his fault: 1 85

- With regard to the self serving nature of the Union witnesses' testimony, the very nature of the issue here makes such inevitable. The circumstances here simply require reliance on the sanctity of the oath taken, and the demeanor of the witnesses: 1 87

- The arbitrator found the grievant's testimony credible in an abuse case in spite of the grievant's strong self-interest and bias because of the grievant's demeanor, his unblemished work record, the extent of his training, and his length employment in similar fields: 1 92

- One would have to be very cautious in crediting accusations levied by patients of the institution who are disturbed and troubled youths when those accusations are aimed of persons having authority over them. This is especially so where, as here, motivations to discredit the authority figure exist: 1 92

- The grievant asserted that she was misguided by two individuals regarding the nature of her responses to specific questions contained on her employment documents. This assertion, without some additional form of documentation, was viewed as self-serving and thus cannot he given much weight. Even if these individuals could not attend the hearing, documented attempts to contact these individuals, regardless of the results, might have swayed the arbitrator's perceptions. A sworn deposition or statement might have filled this critical void in the evidence: 1 97

- The grievant's credibility was found to be lacking since the grievant's version of the events changed somewhat at the different steps and his powers of recollection on the stand did not appear to be sharp, e.g. having no idea who said what at which meeting and not being sure whether he made the statement or not: 200

- An employer's log, made contemporaneous with the events, was found to be more credible than the grievant, where there was no showing that the information in the log was false. There was no showing that the log had been made later or that it had been altered; 201

- The grievant's claim that the bridge gate did not strike the truck was "simply unbelievable"; the supervisor and an employee of an outside contractor confirmed that the truck was struck by the gate: 202

- Where the only witness to an alleged racial slur was a person who was very angry at the grievant for other reasons, the arbitrator held that there is simply no way to determine, with any confidence, whether the grievant made the remark: 203
Where the grievant made two conflicting statements at different times, the arbitrator favored the statement that most benefited the grievant, seeing the other statement as an afterthought. "The grievant's recollection is influenced by the events that occurred, which is different than the perceptions at the moment that the event takes place." Thus, it is said that "in retrospect, we are much wiser." In reconstructing a past experience, it is reasonable for the grievant to be influenced by the experience. After an experience has had a serious impact on us, we go through the agonizing reappraisal of the events filled with self guilt on what 'could have,' 'would have', or 'should have happened'.

The arbitrator gave greater weight to the grievant's testimony than the State's main witness because the State failed to present a key witness that could have resolved some of the conflicts in testimony between the State's main witness and the grievant. Arbitrator gave more weight to statements at investigatory interview than to testimony at arbitration, since investigatory interview was much closer in time to the events.

Display of animosity and history of conflict with grievant would have undermined witnesses' credibility if further evidence had not supported her testimony. Testimony was found to be incredible where the witness testified she always had the resident under her eye no matter what else she was doing. The arbitrator found that it was impossible for the witness to carry out her tasks as she maintained. A witness' testimony in favor of the grievant was found to be irrevocably tainted where the witness admitted a long standing, intimate relationship with the grievant. The testimony of two witnesses that the grievant was sleeping outweighs that of the grievant. To conclude otherwise is to decide that the grievant's self-serving testimony is true and that of Rosati and McCarthy is false, even though there is no evidence or reason to find that the latter two employees were out to get the grievant. The only reasonable conclusion is that the grievant was sleeping.

The arbitrator found the witness' testimony highly credible because it was free of doubts, contained no equivocations, described the incident in precise detail, and because she was resolute in recounting what she observed and why she reported it. She dispelled any suspicion she might have fabricated the story out of malice. She hardly knew the grievant except as an employee who seemed to do his job well. She had no anger toward him or desire to take away his livelihood. It was the grievant's act, not his personality or presence, that angered her. Of course, it is possible that she made up the story; that she did so to carry out a secret vendetta against the grievant. But it is improbable. There is no evidence to support such a finding. Essentially, the arbitrator would have to indulge in rank speculation, without a scintilla of supporting documentation or testimony, to discredit her accusation. R is not an arbitrator's task or right to base an award on speculation. His/her job is to weigh and apply the evidence.

Where the witness gave a different account of the incident immediately afterwards than she gave at arbitration, the arbitrator was unwilling to give credence to either. The earlier account might have been untruthful because the witness feared she might be considered an accomplice. The latter could be more truthful as management argues. Or taking ambiguities into consideration, they may both have been truthful.

The witness for each side was highly credible, the arbitrator determined that management had failed to meet its burden of proof. She dismissed the argument that only the grievant's testimony was self serving, pointing out that the manager had an interest in his authority and reputation and the reputation of the institution and its continued funding. She also noted that the manager walked in midway through the incident and could very easily have misinterpreted what was happening.

While the group of youths who accused the grievant of abuse had complained about his militancy there was no evidence that they had fabricated the story. If they had fabricated the story, it is more likely that they would have come forward with the accusation rather than risk that the injury would not be detected by medical staff.
- The arbitrator found the testimony of two youths under the care of DYS to be highly credible where the two had not seen each other for a year and had not been friends when at the facility, because of the similarity of their descriptions of the events and the instrument used in the alleged abuse: 261

- Where there were strong grounds for believing a witness, his statement that violation occurred on a certain date when, in fact, it could not have occurred (because the grievant was absent from work), was not found to discredit the witness testimony that the violation had occurred: 261

- One witness' testimony was not credible since it was riddled with inconsistency and was much more detailed at the arbitration hearing than it had been at earlier stages of the grievance process: 263

- It is crucial that inmate's testimony be supported: 265

- The one portion of the witnesses' testimony is discredited when another portion is shown to have been a lie: 266

- Where two witnesses gave contradictory accounts, the arbitrator credited the testimony of the witness who had no motive to lie over the witness who had motive to lie: 266

- The State's witness was found to be more credible than the grievant because the state's witness had nothing to gain but much was at stake for the grievant. There was nothing in the evidentiary record to indicate that the state's witness possessed any personal bias or hostility toward the grievant: 267

- Where a witness admitted to omitting key information from her employment application, but denied falsifying the application, the arbitrator held that the attempt to distinguish the two activities strains the grievant's credibility: 268

- Where the grievant was accused of throwing a crate at youths, the grievant's claim that he had lost control of the crate was not credible since the grievant had not made the claim at earlier stages in the investigation: 272

- Testimony is more credible when those testifying have nothing to gain: 281

- Mere use of different language which does not change the meaning of the testimony does not invalidate the credibility of the witness: 286

- Inmate testimony tends to be unreliable and routinely requires corroboration. The medical findings of physical injuries on the bodies of the inmates was evidence that they suffered trauma. These medical findings were sufficient to comply with the corroboration standard: 292

- In an abuse case the report being filed almost a month later during an investigation by a supervisor concerning the reporting employee’s error is grounds for skepticism. It might represent an attempt to deflect attention from the employee onto the grievant: 294

- In determining the truth of testimony the presence or absence of interest is a consideration: 294

- The arbitrator decided that the most reliable youth witnesses are those that are no longer incarcerated in the same facility when the alleged abuse incident occurred: 300

- While testimony given under oath may be entitled to a presumption of accuracy, it does not have to be believed. Triers of fact are free to believe all, some, or none of what they hear: 302

- When both witnesses have shown bias, credibility is best determined through analysis of the substantive evidence: 312

- The State was unable to produce a single witness to testify that the grievant hit or used force against a youth. Not a single witness confirmed that his/her original statement was accurate with respect to the grievant abusing a youth. The State’s evidence is exclusively the unsworn statements of youth felons not subject to cross-examination. There was no evidence that the youths were unavailable to testify. Arbitration is not a court of law; it is not bound by legalistic rules requiring the exclusion of hearsay evidence, but the arbitrator must insure the fundamental fairness of the process by discounting unreliable or untrustworthy evidence. The youth statements lack important safeguards of truthfulness: an opportunity for cross-examination, an opportunity to observe witness behavior (demeanor) and the administration of an oath to tell the truth. Without these safeguards, evidence loses its reliability.
The weight given to the statements must be diminished: 327

- The right to cross-examination is basic to the arbitration process as it allows a party to test and understand the validity of the statements and facts relied upon by the other party. It provides an opportunity to impeach the witness, discredit a liar and protect the falsely accused. These crucial elements would be lost if parties were allowed to simply submit witness statements in lieu of testimony: 327

- Where there are doubts about the credibility of a witness, the right of cross-examination becomes paramount: 327

- The testimony of another Youth Leader adds credibility to the two youth’s statements: 328

- The grievant was a Correction Officer removed for using vulgar language, conducting union business on work time, and fondling an inmate. The arbitrator rejected the claim that the Union had a right to question witnesses at the pre-disciplinary hearing. Nor did the employer violate Article 25.08 because the union made excessive document requests. The employer did violate Article 25.02 by not issuing a Step 3 response for six (6) months, however the grievant was not prejudiced. Therefore, the arbitrator found, because the inmate was more credible than the grievant, that just cause did exist for the removal: 366

- The grievant was a Therapeutic Program Worker who was removed for abusing a client. The client was known to be violent and while upset and being restrained, he spat in the grievant’s face. The grievant either covered or struck the client in the mouth and some swelling and a small scratch were found in the client’s mouth. The grievant had served a 70 day suspension for similar behavior. The arbitrator found that the employer committed procedural violations by not disclosing the incident report and the client’s progress report despite the employer’s claim of confidentiality. The employer’s witnesses were found to be more credible than the grievant. The grievance was denied: 4 1 4

- An inmate was involved in an incident on January 4, 1991, in which a Correction Officer was injured. The inmate was found to have bruises on his face later in the day and an investigation ensued which was concluded on January 28th. A Use of Force Committee investigated and reported to the warden on March 4th that the grievant had struck the inmate in retaliation for the inmate’s previous incident with the other CO on January 4th. The pre-disciplinary hearing was held on April 1 5, and 1 6, and the grievant’s removal was effective on May 29, 1991. The length of time between the incident and the grievant’s removal was found not to be a violation of the contract. The delay was caused by the investigation and was not prejudicial to the grievant. The arbitrator found that the employer met its burden of proof that the grievant abused the inmate. The employer’s witness was more credible than the grievant and the grievant was found to have motive to retaliate against the inmate. The grievance was denied: 4 21

- The grievant was given a 10 day suspension for neglect of duty after failing to assist a youth in his care at the Indian River School. The youth’s finger was caught in a door which the grievant had closed. The arbitrator found that just cause did not exist because of the lack of credibility of the employer’s evidence. The grievant was more credible than the youths who testified against him. Neglect was found not to be proven because as soon as the grievant was sure the youth was injured, he obtained medical assistance for the injury. The grievance was sustained and the grievant made whole: 4 35

- The grievant was a Cosmetologist who was removed for neglect of duty, dishonesty and
failure of good behavior. She was seen away from her shop at the facility, off of state property, without having permission to conduct personal business. The arbitrator found the grievant’s explanation not credible due to the fact that the grievant did not produce the person who she claimed was mistaken for her. There were also discrepancies in the grievant’s story of what happened and the analysis of travel time. The arbitrator found no mitigating circumstances, thus the grievance was denied: 4 38

- The Arbitrator found the testimony of the employer’s witness more credible than that of the grievant. The Arbitrator felt that the grievant tailored his testimony to fit the most self-serving purposes. The arbitrator gave no weight to the testimony changed from the time of the investigation to the time of the hearing; also the witness had a personal relationship with the grievant and thus had a motive to fabricate testimony on his behalf: 5 5 6

- It is apparent from the record of this case that there was good and sufficient evidence from both testifying nurses, one buttressing the other, that the grievant’s activity was as alleged by them. The Arbitrator found the grievant’s testimony not to be credible, because the Arbitrator held that it was self-serving: 5 72

- Conditions to be met in accepting a witness’ statements: 1) lack of animus toward the accused; 2) no interest to benefit from the prosecution of the allegations; and 3) absence of known characteristics that should cause a reasonably prudent person to question the motivations of the accuser: 5 73

- The Arbitrator stated that an accused is presumed to have an incentive for not telling the truth and that when his testimony is contradicted by one who has nothing to gain or lose, the latter is to be believed. Here, the witness had nothing to gain or lose as a consequence of her testimony, while the grievants had a great deal of incentive for distorting the truth because their jobs were in jeopardy: 61 6

- The Arbitrator found the testimony of the victim and the other employees at the Commercial Driving Testing Facility to be more reliable than that of the grievant. This finding was based on the fact that neither the victim nor the other employees had anything to gain from the outcome of the grievance. The grievant, on the other hand, had much to lose if an adverse decision was reached; moreover, the Arbitrator pointed out a number of inconsistencies in the grievant’s testimony that further hurt is credibility: 61 8

On February 27, 2002, the grievant was working second shift at the Toledo Correctional Institution in the segregation unit control center. Due to the ensuing events, she was removed from her position as Correction Officer. The institution has a policy prohibiting two unsecured inmates being placed together in the same recreation cage. Despite this policy, that evening two officers placed two unsecured segregation inmates together in a recreation cage for the purpose of allowing them to settle their differences. Officer Cole Tipton entered the cage as the second inmate was being uncuffed, but he turned to walk away in order not to see what happened. As he exited he claimed that he saw Officers Mong and McCoy (the grievant) overlooking the cage at the control booth. None of the officers reported the incident, but management became aware of it the following morning and an investigation ensued. In his interview and written statement, Officer Mong stated that both he and the grievant were in the control booth at the time of the incident. During the arbitration, his testimony was consistent with this statement, and on cross he stated that he was “fairly sure” the grievant saw the incident but he didn’t see her eyes because she was wearing dark prescription glasses. Officer Tipton also gave a statement during the investigation. He claimed that as he exited the cage he looked up and saw the grievant and Officer Mong in the control booth. However, his testimony during arbitration was contrary to this statement. He stated that he saw only Officer Mong in the control booth and the grievant was in the lighted stairwell. On cross-examination he again stated that he saw both officers in the control booth, and on redirect, he claimed that Mong was standing there alone. The arbitrator ruled that this case turns on the credibility of the witnesses. She was convinced by Mong’s testimony because it was consistent with what he had stated before, and she found that he had nothing to gain by placing the grievant where she was not. On the other hand, she found that Tipton’s testimony was worthless. As evidenced from his first interview, he is willing to lie to protect himself and others. With respect to the dark glasses, the arbitrator stated that if the Union is arguing that they prove Mong could not see where the grievant was looking, it is admitted
that the grievant was there to see the incident. But, the grievant did not claim that she was there, but did not see what had happened. For the foregoing reasons, the arbitrator found that the grievant was guilty, and since there were no mitigating circumstances, the penalty was upheld.

The Arbitrator held that the discipline was for just cause and was not excessive. TPW’s are required to report any incident or known or suspected abuse they observe or become aware of, to ensure that a proper and timely response occurs, while considering the unique circumstances of each client. The Grievant had a duty to report and did not comply. Three incidents were not timely reported on a UIR, but were disclosed by the Grievant during an official investigation by CDC’s Police Department into alleged abuse. The Grievant admitted a UIR was incomplete, but attempted to justify his actions by alleging that: a.) he had been employed only seven months; b.) he did not want to be viewed as a “snitch” among his peers; c.) he has a passive personality; d.) he was concerned other TPWs might retaliate against him; and e.) an unwritten “code of silence” was used by his co-workers which encouraged TPWs not to report unusual conduct. The Arbitrator determined that the Grievant’s overall testimony was not credible and believable. This was buttressed by the Grievant’s failure to provide any specific facts or verifiable supportive evidence to support claims that alleged abuse, unknown to CDC, occurred during his employment. An affirmative defense of disparate treatment could not be supported. Evidence offered was insufficient for a finding that one employee’s behavior and the Grievant’s behavior were closely aligned or that another employee was similarly situated.

Criminal Charges

- The outcome of a grievance does not rest on the fact that a grievant is acquitted in court, but instead is based on the nature of evidence and testimony provided to the arbitrator: 4 4 0

- The grievant was charged with driving while intoxicated and lost his driver’s license. Because of his demonstrated desire to be rehabilitated, the grievant was permitted to seek a modification order of his license suspension in order to continue his employment which required him to drive state vehicles: 4 4 1

- A guilty plea is in and of itself evidence of the underlying factual allegations, and accordingly, the Arbitrator found that the grievant committed gross sexual imposition on the basis of his voluntary guilty plea and subsequent conviction: 4 79

- The grievant voluntarily waived his right to enter a plea of no contest, which cannot be used against an accused in a civil proceeding: 4 79

- Given the “role model” requirement its most narrow reading, the prison employer can show a rational relationship between the correction officer’s off-duty criminal behavior, whether a felony or misdemeanor, and his ability to function as a Correction Officer: 4 82

- A direct conflict exists if a Correction Officer, whose job essentially consists of confining criminals, is himself a criminal. Such a conflict of interest can seriously undermine his ability to do the job: 4 82

- The grievant’s driver’s license was suspended as the result of a charge of driving under the influence. He did not get a modification order allowing him limited driving privileges, and therefore, was unable to perform his job. The employer had just cause to remove him: 4 86

- Involvement in EAP is voluntary; therefore, ODOT’s refusal to enter into an EAP agreement with the grievant was not fatal to its case and was within its rights under Article 5. This is especially true since the grievant was previously convicted of theft, but never removed; there was no evidence that ODOT was predisposed to remove the grievant, and there was no evidence that grievant was subject to disparate treatment: 5 00

- A plea of "no contest" in a criminal proceeding may not be used against the grievant in a subsequent civil or disciplinary proceeding. Criminal charges of sexual harassment and sexual imposition may not be used by the Employer against the grievant to establish just cause for removal: 5 03

- The grievant was found not guilty of criminal charges of abusing a patient. Management refused to reconsider the grievant's removal, and the grievance went forward to arbitration: 5 1 0
- The making of a bomb threat by an employee which constitutes a criminal violation, is just cause for the employee’s termination: 5 4 9

- The grievant, a Correction Officer, was accused of striking an inmate during an altercation. A subsequent criminal trial resulted in the acquittal of the grievant. However, because three other Correction Officers witnessed the incident and testified against the grievant in the arbitration hearing, the Arbitrator determined that management was justified in dismissing the grievant. The Arbitrator held that the criminal trial was not controlling in an arbitration: 6 0 0

- The Arbitrator held that the dismissal of criminal charges by a court does not control in arbitration hearings under the collective bargaining agreement. Furthermore, the Arbitrator emphasized his duty to independently review all the evidence presented pertaining to the grievant’s removal: 6 0 8

- The State maintained that its investigation was lengthy because it was considering imposing criminal charges on the grievant for destroying documents. Further, the State contended that it was under the instructions from Labor Relations to continue the investigation pending a decision from the Highway Patrol. The Union argued that the alleged criminal investigation was a “smokescreen” in order to delay the imposition of discipline on the grievant. The Arbitrator held that the investigation conducted was “tainted” with the Employer’s desire to rid itself of a problematic employee: 6 1 9

- The State argued that the court’s finding of the grievant guilty of a felony supported the Employer’s decision to remove the grievant from his position. However, the Arbitrator held that the Employer can only consider the charges brought at the time of the discipline, which did not include the felony conviction: 6 2 1

Crew Leader

- Duties: 1 6 8

- Realizing that a crew leader cannot discipline his fellow bargaining unit members severely limits the extent of his authority as a crew leader in an incident where one crewmember was waving a knife in front of another. To assure the safety of the crew, the grievant should have voiced his concern immediately upon observing the conduct so as to defuse what was potentially a dangerous and unsafe situation. To merely observe the conduct and say nothing is inconsistent with the crew leaders duty to assure the safety of the crew and "doing the job right." The arbitrator said that the grievant was wrong to think that it was not a serious matter even though employees often carry knives at work and the employee waving the knife did not appear serious to the grievant: 1 6 8

- To require a fellow bargaining unit member, such as the grievant, who is a crew leader to take the type of action required of a supervisor, because his job description provides that he is to "assure the safety of the crews", is inappropriate: 1 6 8

- Inasmuch as the grievant is a bargaining unit member, albeit also a crew leader, I have inferred that the other crew members did not have a reasonable expectation that the grievant would in fact intervene during the episode (one crew member was waving a knife in front of another crew member: 1 6 8

Criminal Conduct

- Widely accepted criteria for determining when off duty criminal activity justifies discharge or other discipline: if the behavior harms the employer's reputation or product; if the behavior renders the employee unable to perform the job satisfactorily and/or leads other personnel to refuse to work with the employee: 1 2 9

Criminal Convictions or Acquittals

- Arbitrator ignored grievant's explanation of why he pleaded guilty when he claimed it was for reasons other than guilt: 1 8

- Arbitrators generally do not look beyond a voluntary guilty plea giving rise to a criminal conviction, but accept it at face value as proving the charges: 1 2 9

- No basis exists for an arbitrator to find a grievant guilty of drug trafficking where (1) the grievant received a criminal conviction for "drug trafficking" because he drove a person carrying 4 pounds of Marijuana front Hamilton County to Columbus and (2) there is no evidence that the grievant was involved in drug trafficking on the premises: 1 4 1
(1) the grievant had received a criminal conviction for drug trafficking which evidences that grievant may be a drug user,

(2) the superintendent testified that he would employ convicted felons if they were qualified and it they have paid for their crime.

(3) the grievant is being monitored so that he will be fired and resentenced if he is found to be using, and

(4) grievant is paying for his crime by fine, short jail term, and probation,

the arbitrator held that the superintendent's willingness to employ felons should include the grievant: 1 4 1

- The fact that the grievant was convicted of trafficking in drugs (while off duty) is not sufficient evidence to prove that he buys and sells drugs with the inmates or coworker. Consequently, that same fact is not sufficient to prove a nexus between the conviction and the grievant's employment duties: 1 4 1

- Even though there was not a nexus between the off duty misconduct and criminal conviction for drug trafficking to uphold the employer's discipline of the grievant, the arbitrator refused to award back pay saying that the employer's actions were not egregious in any sense and that the employer can expect reasonable behavior on or off the job and for that reason, no back pay is awarded: 1 4 1

- The following criteria have been widely accepted for determining when off duty criminal activity justifies discharge or other form of discipline: The behavior harms the employer's reputation or product; the behavior renders the employee unable to perform the job satisfactorily: the behavior leads to the refusal, reluctance or inability of other employees to work with him: 1 4 4

- A nexus between the criminal conviction and a correction officer's duties was found to exist for several reasons:

  (1) Adverse publicity to the facility,

  (2) Reinstatement would disrupt the facility's mission of rehabilitating and reintegrating convicts into society.

  (3) The Correction officer would be subject to manipulation and harassment,

  (4) The institution may be subject to increased liability, and

  (5) Reinstatement would send the wrong message to inmates: 1 4 5

- A grievant who had a felony conviction for off duty conduct while an employee, is not similarly situated with employees who had been hired after being convicted who have completed rehabilitation and paid their dues to society. Thus, disparate treatment cannot be found on the basis of a comparison between the grievant and such person: 1 4 5

- A copy of the grievant's conviction was entered into the record. It is axiomatic that copies of Court records are acceptable evidence and may be received by an arbitrator as such. Thus, the employer has met its burden in proving the commission of a wrongful act by the grievant: 1 4 5

- As other arbitrators construing the contract have observed "just cause" for discharge/discipline standard calls for a de novo presentation of the case against the grievant before the arbitrator. Thus, it is simply inadequate to defer to the criminal justice system. Under the just cause standard it does not suffice to say that one employee guilty of virtually the same conduct as another is subject to discipline because the criminal justice system found him guilty whereas it found the other innocent. If the agency elects to defer to the criminal justice system with all its varieties of prosecutorial discretion and juries, then it does so at its peril: 1 93

- An arbitrator is not bound by the outcome of a proceeding collateral to arbitration, but may admit and afford weight to facts and issues established elsewhere as they relate to the issue at bar. In the case at hand, the arbitrator admitted only those portions of the transcript of the grievant's criminal trial which served to impeach a witness because his testimony at trial was inconsistent with his testimony at arbitration. The arbitrator gave three
reasons why she was not bound by the results of the criminal trial:

(1) The policies and rules governing the two methods of decision-making are different;

(2) The parties do not have control over the collateral proceeding or the qualifications of the trier of fact;

(3) The parties did not bargain for any such restraint upon the arbitrator: 25

**Cross Examination**

The employer has every right to cross-examine the grievant if the grievant testifies: 234

- The State was unable to produce a single witness to testify that the grievant hit or used force against a youth. Not a single witness confirmed that his/her original statement was accurate with respect to the grievant abusing a youth. The State’s evidence is exclusively the unsworn statements of the youth felons not subject to cross-examination. There is no evidence that the youths were unavailable to testify. Arbitration is not a court of law; it is bound by legalistic rules requiring the exclusion of hearsay evidence, but the arbitrator must insure the fundamental fairness of the process by discounting unreliable or untrustworthy evidence. The youth statements lack important safeguards of truthfulness: an opportunity for cross-examination, an opportunity to observe witness behavior (demeanor) and the administration of an oath to tell the truth. Without these safeguards, evidence loses its reliability. The weight given to the statements must be diminished: 327

- The right to cross-examination is basic to the arbitration process as it allows a party to test and understand the validity of the statements and facts relied upon by the other party. It provides an opportunity to impeach the witness, discredit a liar and protect the falsely accused. These crucial elements would be lost if parties were allowed to simply submit statements in lieu of testimony: 327

- Where there are doubts about the credibility of a witness, the right of cross-examination becomes paramount: 327

**Cross Shift**

The portions of the document entitled “Addendum to Pick-A-Post Parameters” dated October 30, 2000 that deal with relief are clear and unambiguous. There was no contract rule of interpretation that requires any general right granted in a contract to a party be accompanied by a list of specific situations in which the right may be exercised. The first preference for utilization of relief officers is a post on their assigned shift, but it is only a preference, which clearly opens relief officers to assignment to posts on shifts other than their assigned shift. The arbitrator found that relief officers must be utilized first on their assigned shift, but then can be assigned to posts on other shifts subject only to the two limitations set for the in the second and third paragraph of the document. 795

**Culpability**

- Where the grievant's comment had led, by a bizarre series of events, to another employee wielding a knife in front of a third employee, the arbitrator held that the grievant was innocent since the consequence of the comment was not reasonably foreseeable: 1

**“Culture in a Facility**

The Grievant was involved in an incident in which a Youth was injured during a restraint. The Employer asserted that the report written by the Grievant was worthless and inaccurate. The entire thrust of the Employer’s argument was based upon proximity and the “culture” at the Facility. The mere fact of proximity does not mean you saw or heard something. This is particularly true if you are engaged in trying to restrain someone. The Employer has no direct evidence that the Grievant saw anything. The Employer contended that the Grievant should have protected the Youth; however, the Arbitrator found that the Employer had no evidence as to how this should have been done. In most arbitrations, the Employer offers evidence as to what the Grievant should have done. The Grievant was not placed on Administrative Leave, nor was he placed in a “No Youth Contact” status. It is a direct contradiction to claim the Grievant was guilty of such severe rule infractions that he should be removed and then to have ignored him for ninety (90) days. The Arbitrator also found no evidence to support the Employer’s contention that there is a “culture” at the Facility that causes cover up. 1 039
Cumulative Discipline
- Where a single error gives rise to several violations, employer can only discipline for most severe violation: 30

- Proper to give cumulative discipline where different errors or acts gave rise to different violations: 30

— D —

Damage to State Vehicle
- Arbitrator found no damage where state patrol and employer's inspector agreed there was no damage to vehicle: 1 3

Defective Removal Order
The Employer did not have just cause to terminate the Grievant, but did have just cause to suspend her for a lengthy suspension for accepting money from a resident. There was a sufficient basis to convince the arbitrator that the Grievant did accept money from a resident. The lax enforcement of Policy No. 4 lulled the employees into a sense of toleration by the Employer of acts that would otherwise be a violation of policy. This lax enforcement negates the expectation by the Grievant that termination would have occurred as a result of the acceptance of money from a resident. The age of the resident and the amount of money involved called for a lengthy suspension. The Arbitrator held that there was no evidence to support the claim that the Grievant had received a defective removal order and that the requirement that the Grievant be made aware of the reasons for the contemplated discipline was met. 970

Delay
- See also forty-five day time limit, procedural violations

- In the case of alleged inmate abuse the pre-disciplinary hearing was not unreasonably delayed since the facility must conduct a Use of Force investigation under Ohio Administrative Code 5 1 20-09-02. Without this investigation the grievant’s statutory rights could have been seriously jeopardized: 292

- The State does not have to notify the employee of impending discipline within forty-five days. The clear language of Section 24 .05 states only that the employer must make a decision within forty-five days. The employer must notify the employee without undue delay, but this does not have to be within the forty-five day time frame: 292

- Fair interpretation of Section 24 .04 would prescribe that Management must provide the actual documents to the Union. The employer technically violated this contractual duty but there is no indication that the Union or the grievant suffered harm as a result. The delay of the first hearing day and the fact that the pre-disciplinary proceedings encompassed ten days cured any substantive impact of the employer’s failure to follow the Agreement. Even though the employer violated the Agreement, there was substantial compliance with the disclosure rules and the grievant was not denied due process: 292

- Section 25 .05 requires a final decision on disciplinary action as soon as possible not to exceed 4 5 days. The exception to the 4 5 -day time limit is in cases where a criminal investigation may occur and the employer decides not to make a decision of the discipline until after disposition of the criminal charges. This specific exception was intended to suspend the otherwise applicable time constraints when the results of a criminal investigation are unknown. By its terms, the exception is future oriented; when the criminal investigation is complete, it no longer “may occur” and the exception no longer applies. Because the employer took longer than 4 5 days after the end of the criminal action, it was in technical violation of the provision: 307

- The State did not capriciously or arbitrarily delay its disciplinary action. The State did not subject the grievant to the hardship of a threatened penalty for 1 8 months and intentionally prevent the Union from collecting evidence to defend the grievant. The State dropped the matter for lack of evidence in 1 988 and took it up again when new evidence came to light from an entirely different source. The delay makes it difficult for anyone to remember what happened and makes it impossible for the Union to refute the charges by placing the grievant somewhere else. In the absence of overwhelming evidence of guilt this delay in the quality of the evidence would be enough to overturn the removal: 31 7
- While on disability leave in October 1990 the grievant, a Youth Leader, was arrested in Texas for possession of cocaine. After his return to work, he was sentenced to probation and he was fined. He was then arrested in Ohio for drug-related domestic violence for which he pleaded guilty in June 1991 and received treatment in lieu of a conviction. The grievant was removed for his off-duty conduct. The grievant’s guilty plea in Texas was taken as an admission against interest by the arbitrator and the arbitrator also considered the grievant’s guilty plea to drug related domestic violence. The arbitrator found that the grievant’s job as a Youth Leader was affected by his off-duty drug offenses because of his co-workers’ knowledge of the incidents. The employer was found not to have violated the contract by delaying discipline until after the proceedings in Texas had concluded, as the contract permits delays pending criminal proceedings. No procedural errors were found despite the fact that the employer did not inform the grievant of its investigation of him, nor permit him to enter an EAP to avoid discipline. No disparate treatment was proven as the employees compared to the grievant were involved in alcohol related incidents which were found to be different than drug-related offenses. Thus the grievance was denied.

- Prompt imposition of discipline may only be delayed under unique sets of circumstances such as rehabilitative efforts engaged in by the Employer or where the Employer must protect the confidentiality of its investigation. In this case, the Employer did not initiate disciplinary action as soon as reasonably possible because the pre-disciplinary conference was held three months after the initial infraction of leaving her job without permission.

- The State did not comply with section 24.02 of the Contract when it failed to timely take disciplinary action against the grievant. In the instant case, waiting an entire year to investigate allegations of a stolen check and then instituting disciplinary action was not reasonable.

- An ongoing criminal investigation is justification for delay of the pre-disciplinary meeting because Article 24.02 expressly grants the Employer the right to delay under such circumstances. However, management does not have the right to postpone or lengthen the investigation, except that in this case the arbitrator found that a change in wardens was a reasonable basis for keeping the investigation open.

- The Union argued that the State conducted too long an investigation and never informed the grievant that he was being investigated. Further, the Union contended that the alleged Highway Patrol investigation was a “smokescreen” in order to promote further delay in imposing discipline. Therefore, the 45-day time limit was exceeded. The State argued that the burden was on the Union to raise the issue prior to arbitration. The Arbitrator did not respond directly to the issue.

**Delay of Step 3 Hearing**

- The Step 3 hearing was not held until almost four months after the grievance was received by Labor Relations. This delay is not conducive to the smooth running of the grievance procedure but this procedural violation is minimal and did not compromise the rights of the grievant.

**Demonstrably Superior**

- The employer posted a Statistician 3 position which the grievants and other individuals bid for. The two grievants had eighteen and thirteen years seniority, while the successful applicant had only one year seniority. The employer contended that the grievants did not meet the minimum qualifications for the position and the successful applicant was demonstrably superior. The employer was found to have the burden of proving demonstrable superiority which was interpreted as a “substantial difference.” Demonstrable superiority was found only to apply after the applicants have been found to possess the minimum qualification. Also, the arbitrator stated that if no applicant brings “precisely the relevant qualifications” to the position, the employer may promote the junior applicant if a greater potential for success was found. The arbitrator found that the employer proved that the junior employee was demonstrably superior and the grievance was denied.

- During the processing of several grievances concerning minimum qualifications, #393**, #397**, a core issue regarding the union’s right to grieve the employer’s established minimum qualifications was identified. The arbitrator interpreted section 36.05 of the contract as
permitting the union to grieve the establishment of minimum qualifications. He explained that the minimum qualifications must be reasonably related to the position, and that the employer cannot set standards which bear no demonstrable relationship to the position: 392

Minimum Qualifications (392 – 397) – The State filed in the Court of Common Pleas to vacate this series of related arbitration decisions. The State later withdrew its motion to vacate these awards.

- The grievant applied for a posted Tax Commissioner Agent 2 position but was denied the promotion. She was told that she failed to meet the minimum qualifications, specifically 9 months experience preparing 10 column accounting work papers. The grievant was found to have experience in 12 column accounting work papers which were found to encompass 10 column papers. Additionally, the employer was found to have used Worker Characteristics, which are to be developed after employment, in the selection process. The grievant was found to possess the minimum qualifications and was awarded the position as well as any lost wages: 393

Minimum Qualifications (392 – 397) – The State filed in the Court of Common Pleas to vacate this series of related arbitration decisions. The State later withdrew its motion to vacate these awards.

- The grievant applied for a posted Word Processing Specialist 2 position and was denied the promotion. The employer claimed that she did not meet the minimum qualifications because she had not completed 2 courses in word processing. The grievant was found not to possess the minimum qualifications at the time she submitted her application. The fact that she was taking her second word processing class cannot count toward her application. Additionally, business data processing course work cannot substitute for word processing as the position is a word processing position: 394

Minimum Qualifications (392 – 397) – The State filed in the Court of Common Pleas to vacate this series of related arbitration decisions. The State later withdrew its motion to vacate these awards.

- The grievant applied for a posted Programmer Analyst 2 position and was denied the promotion. The employer claimed that she did not possess the required algebra course work or the equivalent. The arbitrator found that because the grievant completed a FORTRAN computer programming course, she did possess the required knowledge of algebra. The minimum qualifications allow alternate ways of being met, either through course work, work experience, or training. The grievance was sustained and the grievant was awarded the position along with lost wages: 395

Minimum Qualifications (392 – 397) – The State filed in the Court of Common Pleas to vacate this series of related arbitration decisions. The State later withdrew its motion to vacate these awards.

- The grievant applied for a posted Microbiologist 3 position in the AIDS section position and was denied the promotion because she failed to meet the minimum qualifications. The successful applicant was a junior employee who was alleged to have met the minimum qualifications. The arbitrator found that the junior applicant should not have been considered because the application had not been notarized, and it was thus incomplete at the time of its submission. The arbitrator also found that the employer used worker characteristics which are to be developed after employment (marked with an asterisk) to determine minimum qualifications of applicants. Lastly, neither the successful applicant nor the grievant possessed the minimum qualifications, however the employer was found to have held this against only the grievant. The arbitrator stated that the employer must treat all applicants equally. The grievant was awarded the position along with any lost wages: 396

Minimum Qualifications (392 – 397) – The State filed in the Court of Common Pleas to vacate this series of related arbitration decisions. The State later withdrew its motion to vacate these awards.

- The grievant applied for a posted Microbiologist 3 position in the Rabies section and was denied the promotion because she failed to possess the minimum qualifications. Neither the successful applicant nor the grievant possessed the minimum qualifications for the position but this fact was held only against the grievant. The arbitrator stated that the employer must treat all applicants equally. The arbitrator found that the grievant did possess the minimum qualifications and that the requirement for rabies immunization and other abilities could be
acquired after being awarded the position. The grievant was awarded the position along with any lost wages: 397**

Minimum Qualifications (392 – 397) – The State filed in the Court of Common Pleas to vacate this series of related arbitration decisions. The State later withdrew its motion to vacate these awards.

- The grievant had over 7 years seniority and applied for a posted vacancy. She did not receive the promotion which was given to a more senior employee from the agency despite the fact that she was in Section 1 7.04 applicant group A (1 7.05 of 1 989 contract) and the successful bidder was in group D. The employer stated that the grievant failed to meet the minimum qualifications and the successful bidder was demonstrably superior. The arbitrator held that Article 1 7 established groupings which must be viewed independently. Additionally, the contract applies the demonstrably superior exception only to junior employees. The employer violated the contract by considering, simultaneously, employees from different applicant groups and applying demonstrable superiority to a senior employee. The arbitrator found that the grievant met the minimum qualifications for the vacant position, but she had since left state service. The grievance was sustained and the remedy was the lost wages from the time the grievant would have been awarded the position until she left state service: 4 05

- The Bureau of Motor Vehicles posted a vacancy for a Reproduction Equipment Operator 1 position. The employer chose a junior employee over the grievant, claiming that he failed to meet the minimum qualifications. The arbitrator found that the employer improperly used the semantic distinction between retrieval, the grievant’s present position, and reproduction, what the posting called for, rather than the actual job duties to determine whether the grievant met the minimum qualifications. The arbitrator stated that both consist of making copies of microfilm images on paper. The grievant was found by the arbitrator to possess the minimum qualifications, however the employer was found to not have completed its selection process as the grievant had not been interviewed. The arbitrator ordered the selection process re-opened pursuant to Article 1 7: 4 27

- Even if the grievant met and was proficient in the minimum qualifications, the State could properly have used the “demonstrably superior” language in Article 1 7.06 to select the junior applicant over the more senior grievant: 4 87

- In a case involving a senior male employee who applied for a position alongside a junior female, the State's decision to promote the junior female employee because she was demonstrably superior due to affirmative action consideration was consistent with the language in Contract Article 1 7.06. The language in Article 1 7.06 is clear. Affirmative action is a criterion for demonstrably superior and, so long as the employee meets the minimum qualifications, considerations based on affirmative action, by themselves, can justify the promotion. At such point, the burden of proof shifts to the Union to demonstrate that the standard was improperly applied: 5 4 1

- The grievant was not awarded a position she applied for because she did not meet minimum qualifications contained in the classification specification and position description. The individual who was awarded the position had “demonstrably superior” qualifications: 5 4 5

- The State failed to carry its burden to prove that the junior employee was "demonstrably superior."

- The Union asserted that the State failed to prove that the junior employee was demonstrably superior to the grievant who was the senior employee. The Arbitrator held that the grievant failed to meet the minimum qualifications of the Carpenter 2 position, and that the junior employee was well qualified for that position: 61 7

Demotion

- Except where divested through negotiations, the employer retains the authority to demote under the Ohio Public Employee Bargaining Law. With respect to members of this bargaining unit, the employer did relinquish its right to demote as a disciplinary measure. In Article 24 , 24 .02 o1 the contract, it agreed that discipline would consist of warnings, reprimands, suspensions, and
removals. It retained the right, however, with respect to exempt non-unit employees such as the supervisor in question: 242

- Where the employee's classification changed, his job title changed, his duties changed from those of one classification to another, the arbitrator held that the employee occupied a new position even though the position control number (PCN) did not change. The PCN is nothing more than a number assigned by the employer. It may designate a position but does not define one. A position is defined by the functions and duties which comprise it. The employee’s argument that the position remained the same because the agency decided to assign the same PCN is circular and flies in the face of reason. The demotion placed the employee factually into a new position no matter what PCN was assigned to him: 242

The grievant bid on a Storekeeper 1 position. He won the bid but was never placed in the position. The arbitrator found that the State’s failure to place the grievant into the position was immediately apparent. “If the union believed that the work was being done by others in violation of the collective bargaining agreement, it would have been obvious at that time and it could not wait two and one-half years to file a grievance.” The arbitrator found the grievance to be filed in an untimely manner and did not rule on its merits. 903

The Employer initially took a firm position that the Grievant was not qualified for the promotion of Electronic Design Coordinator position, but agreed to place the Grievant in the position following a grievance settlement/NTA award. A considerable amount of assistance was given to the Grievant in performing his work; however, after the probationary period the Grievant was removed from the position. The Arbitrator found that the Union failed to prove that the Employer, following a reasonable and contractually adherent period of probationary observation, acted in an unreasonable, arbitrary, or capricious manner in determining the Grievant was not able to perform the job requirements of the position of Electronic Design Coordinator. The testimony of the Employer’s witnesses contained the important element of specificity that was not refuted by the Grievant in any specific or substantial manner. In contrast, the Grievant’s direct testimony was far more general, vague, and for the most part accusatory in nature. There was little evidence to demonstrate the Grievant knew enough and was sufficiently skilled to successfully perform the work of an Electronic Design Coordinator in accordance with acceptable standards. 939

**Denial of Access to Documents**

Management used a written reprimand to shape the level of discipline in violation of Article 24.06. The grievant’s action should have been treated as a first offense who was on notice, not as a second offense. Management’s denial of access to documents hindered the Union in its investigation. Pursuant to Article 25.08, management has an obligation to provide documents available to assist the Union in meeting its burden of proof. If management requested the release of redacted documents for inspection by the Union under the umbrella of privilege, it was unreasonable of it to refuse the same request by the Union for the documents need for its case. The arbitrator concluded that the documents in question would have buttressed the Union’s position that other examiners were copying, but were not disciplined for their actions while they others may be guilty of neglect or poor judgment, they were not guilty of insubordination since they were not under orders not to copy. Therefore, the charges of neglect and poor judgment were not justified.

The grievant was under orders not to copy and it was determined that he clearly disregarded the order; therefore, discipline for insubordination was justified. 799

**Denial of Union Representation**

The evidence clearly established that the grievant was 25 minutes late for work. The arbitrator noted that management’s policy did not support its position that an employee could be both tardy without mitigating circumstances and AWOL for the same period of 30 minutes or less.

_The arbitrator found that management violated §24.04 when it denied the grievant representation at a meeting regarding his timesheet. Management had already spoken to the Union regarding this matter, but at a subsequent meeting the next day denied representation. The employer prevented the grievant from choosing wisely when he was given a direct order to correct his timesheet within 55 minutes._ 770
The Arbitrator agreed with the state that the grievance was not properly filed. It was filed as a class action grievance on behalf of all employees at OVH; however, the dispute appeared to be limited to two employees, who were brought into an investigatory interview to provide evidence and requested union representation. That request was denied. However, the Arbitrator did not believe the grievance should be dismissed. Failure to list the members of the class by the Step Three hearing meeting did not require the dismissal of the grievance. Communication from the staff representative to the state indicates that the union identified the potential witnesses and the nature of their testimony. The fact that the union may have requested an improper remedy does not mean that the Arbitrator could not consider whether there was a contract violation and, if necessary, devise a proper remedy. The Arbitrator held that the two Grievants were not entitled to union representation. Their meetings with management were not investigatory interviews. They met with management as a result of a union complaint regarding the conduct of a supervisor. The supervisor was the object of the investigation, not the Grievants. The Grievants had no reason to believe that they could be subject to discipline; they were simply asked to write statements regarding what they saw or heard. The Arbitrator rejected the claim that an employee is entitled to union representation at a meeting with management where the employee feels uncomfortable or feels that he/she needs representation. This position is inconsistent with the standard adopted by SERB and the NLRB which requires employees to reasonably believe that they could be subject to discipline before they are entitled to union representation.

Disability

- As basis of insubordination: 73
- Suspension: 73
- Given the unusual circumstances of the grievant’s return to work (a denial of her request for a disability leave) the grievant had a duty to inform the facility that she was not returning to work. The grievant was injured with the same injury as she previously had been granted disability leave for and called the warden with an unclear message about her ability to return to work: 295
- The grievant’s message that she would not able to return to work was ambiguous. The grievant cannot unilaterally announce a continuing disability, but the warden had a duty to return the grievant’s call and clarify the situation: 295

- It was found that the grievant did abandon her job but there were mitigating factors: No prior discipline and the grievant’s disability leave situation would have been clarified if the warden would have returned the grievant’s call: 295
- Since the grievant’s claim that he has remained disabled from the time of the removal any award of back pay is precluded: 310
- Management did not conduct fair and thorough investigation. While management succeeded in substantiating grievant’s technical violation of the procedures for verifying his inability to work, management did not go the next step and confirm whether or not the employee was indeed able to work. Management made no effort to confirm the doctor’s statement that the grievant offered which state the grievant was unable to work. Management also failed to contact either the doctor or the grievant to notify them of the unacceptability of the doctor’s statement: 356
- The evidence shows that the grievant was indeed unable to work through and past the time of his removal. He provided credible confirmation of this to management, which was rejected solely because of a technicality. The grievant’s offense was one of negligence in sending a tardy response to management’s very tardy information request. Given management’s lackadaisical approach to enforcing its rules against absence without leave, grievant should have been given the benefit of a specific warning of impending discharge prior to any final decision: 356
- The grievant’s basis of refusal to return to work was that he was under a doctor’s care and the doctor had not yet ordered him back to work. For this same injury three separate specialists agreed the grievant could return to work. Another reason the grievant gave was that he was under medication and could not drive. The grievant could not support either excuse. The mere fact that drugs were prescribed does not prove that the doctor ordered them used to such an extent that the grievant could not drive. There was just cause for the grievant’s removal: 359
- This arbitration decision is a clarification of a prior arbitration award. The Arbitrator found that the grievant did not lose any disability pay because of the change in suspension dates. Furthermore, the grievant had no leave balances
during this suspension period. As a result, the length of the grievant’s suspension period (20 days or 13 days) had no effect on the grievant losing any money. The Arbitrator held, however, that if the entire reduction in suspension is nullified, management is not penalized for its procedural misconduct which prejudiced the grievant. Therefore, the grievant is entitled to two days back pay, not as a make whole remedy, but as a penalty to management: 562(A)

- The Employer’s testimony that the grievant said she might be going on disability leave contradicts their letter to the grievant stating that the grievant told her supervisor she was in fact going on disability leave: 477

- The grievant should have known that the Employer could expect her to seek medical authorization for long absences: 477

**Disability Benefits**

- The language of Article 35 A.01 B requires part-time or fixed term regular and irregular employees to work at least 1500 hours in the calendar months preceding that disability. This 1500 hours does not include the use of vacation, sick leave, personal leave or compensatory time: 537

- The grievant, a State employee for twenty-one years, injured his back and neck in an automobile accident and subsequently received State disability benefits. The State removed the grievant after he failed to fill out leave paperwork related to his absence. The Arbitrator held that there was not just cause to remove the grievant and adjusted the discipline to a thirty-day suspension: 601

**Disability Separation**

- In a previous decision, an arbitrator held that if a disability separation was a pretext for discipline, it would be arbitrable: But if it was for health reasons, it was not arbitrable. The union now argues that the ruling was incorrect since it puts an impossible burden upon the union of proving what the employer’s motivation was. The arbitrator rejects the union’s argument saying that it was clear in this case that the grievant’s medical problems justified an involuntary disability separation: 177

The grievant was injured at work and qualified for workers’ compensation. His disability separation date went back to his injury date and he was notified that he had three years from that date to request reinstatement. Three years to the day following his disability separation, the grievant notified his employer that he wished to return to work. He faxed a note from his physician to the administrator of personnel stating that he could return to work with no restrictions. Ten days following grievant’s notification, the administrator notified the grievant that his request must be in writing. The employer removed the grievant from his position on the grounds that the request for reinstatement was not timely. The arbitrator found that the employer’s request ten days beyond the deadline constituted a “waiver by implication” of the employer’s right to require a written request under OAC 23:1-33-04. “Since the facility impliedly represented it would not stand on its right to a timely request for reinstatement, and since that representation induced action on behalf of the grievant, the facility is estopped from now asserting its right to a timely request for reinstatement.” The arbitrator concluded that the employer failed to comply with OAC 23:1-33-04. The arbitrator determined that the issue in this matter was a grievance under Article 25 .01 (A) between the Union and the employer. Since it had not been settled by the grievance process it was arbitrable under Article 25 .02 and because under ORC 411 7.1 0(A) if an agreement allows for a binding and final arbitration of grievances, the arbitrator did not have the authority to accept the decision of the Board of Review which ruled in favor of the employer. 857

- The Grievant injured her back at work. She was off on leave and received payments from Workers’ Compensation. She was then placed in the Transitional Work Program. After 90 days, she was placed back on leave and Workers’ Compensation. The state implemented an involuntary disability separation and her employment with the state ended on January 1, 2006. Under Section 1 23:1-30-01 of OAC the grievant had reinstatement rights for two years. She was cleared to work by her doctor and was reinstated on December 27, 2006. At that time, she requested to have the state restore her personal and sick leave accruals from when she began work in the Transitional Work Program on June 1, 2005, through December 27, 2006. The Arbitrator held that the contract articles did not support the Grievant’s request to have the leave balances restored. The Grievant was subjected to
an involuntary disability separation on January 1, 2006, so that on December 27, 2006, she was not an employee returning to work under the contract but was an individual who was re-hired pursuant to Section 123:1-30-01 of the OAC, which has no provision for the restoration of accrued personal or sick leave. The Arbitrator held that he must ignore the clarification letter relied upon by the state. The letter represents the Office of Collective Bargaining’s interpretation of the contract and its instructions to the agencies about how to handle the restoration of accrued leave. In addition, while Section 123:1-33-1 7(F) of the OAC provides for the accrual of sick leave while an employee is on occupational injury leave, there is no such requirement in Chapter 123:1-30 relating to separations. 1019

Discharge
- See Removal

BWC terminated grievant’s employment on November 5, 1999, after a third party (acting on grievant’s behalf) was denied requests for unpaid leave of absence. The Arbitrator holds that the grievant failed to make proper contact with BWC for four consecutive days in violation of BWC’s Work Rules. Proper contact is a precondition for considering the propriety of any reasons for a leave of absence. 734

Discharge in this situation was appropriate in light of the personal relationships that grievant had with the inmates and accepting the money order under highly suspicious conditions. Analysis of the aggravative and mitigative factors in this case shows that, although MCI proved only some of its charges, the misconduct of the grievant was so serious as to warrant discharge. 736

Disciplinary Guidelines
- A department's unilateral regulations are nothing more than guidelines -communications to the work force of how management intends to exercise its disciplinary authority. They do not supplant negotiated rights and protections. Article 24, section 24.01 establishes the disciplinary standard which overrides every non-negotiated regulation which the employer may choose to publish. It states that no employee shall be disciplined "except for just cause.": 140

- The penalty for the grievant's alleged offense on a first offense was a written reprimand or suspension. Removal was not prescribed by the guidelines until the 3rd offense. The arbitrator held that a removal would be inappropriate. 190

- Having set up its own procedural rules unilaterally, it was incumbent upon the agency to follow them: 192

- The arbitrator found a due process violation where the employer had self imposed requirements for when to provide certain documents, but failed to follow this guidelines in the instant case: 192

- Where the employer's disciplinary grid contained a clause stating it was a guideline, the arbitrator concluded that the employer had retained flexibility to tailor discipline to the circumstances as it sees them. The arbitrator upheld a discipline that appeared inconsistent with the grid: 201

- Disciplinary guidelines established by the institution's administration are only guidelines. They have not been negotiated by the parties and do not carry with them the force of the collective bargaining agreement. They are not binding on either the employer or the union. The standard to be applied is the contractual one of "just cause." If application of the guidelines is harsh, if it shocks the proverbial "reasonable man", clearly such application may be modified: 210

- That the state set forth in its unilaterally promulgated guideline (16b) that an employee would be removed for 3 consecutive days of unauthorized absence does not mean that it is imposed in each and every case. Were that so, the grievance procedure, which is part of the parties bargain, would be meaningless. It is the test of just cause, which is set forth in the contract, that governs the propriety of the penalty imposed by the state: 251

- Guideline 16(b), which imposes removal for three days of consecutive absence is a reasonable rule. It serves the state's goal of efficiency and its right to manage and operate its facilities and programs. These goals cannot be satisfied if employees are absent without proper authority. To be absent 1 day without proper authority is serious enough. To be absent 3 days without authority compounds the offense. The reasonableness is underscored by the provisions for progressive discipline in the rule: 251

The Arbitrator could find no source in the record to warrant the charge of Neglect of Duty, which is
the only offense, per department guidelines, which can result in removal on a first offense. The Arbitrator held that removal was inappropriate.

Disciplinary History

The Employer considered the four-year period of various disciplinary actions taken against the grievant. Prior incidents of similar violations were considered by the Employer in determining appropriate disciplinary action. The grievant had a history of verbal abuse, insubordination and neglect of duty prior to final disciplinary hearing.

The Arbitrator noted that the grievant had worked for a relatively short period of time and though he had a good work record, it did not outweigh the severity of the offensive.

The delay in the initiation of the disciplinary process was the result of an attempt at internal mediation, which was preferred by both the Department and the Union. The Arbitrator found that the Department’s decision to begin the disciplinary process timely.

The Arbitrator found that evaluation of an employee is part of the qualifications for a position, and it could be considered in determining which applicants to interview. The Arbitrator also found that the successful applicant’s evaluation was superior to the grievant’s evaluation. It was noted that the grievant’s recent disciplines were under review, and it was inappropriate to allow the disciplines to carry the “great weight” that it did in DOH’s consideration of the grievant for the position.

Disciplinary Recommendations

- The appointing authority or designee in accordance with 24.05, makes a final decision on the recommended disciplinary action. They have the authority to impose different penalties than those recommended as long as their decision is not arbitrary or capricious: 24.6

Disciplinary Status

- Following reinstatement, the grievant continued to have confrontations with co-workers and supervisors. The grievant signed an agreement to attend EAP sessions to avoid removal, but was not successful in completion of the program.

- The grievant had 27 active disciplinary actions prior to removal. Six of the violations involved charges of making abusive statements to co-workers. The Employer appropriately weighted these factors when determining the necessary disciplinary action to be taken.

Discipline

- Prior incidents involving similar violations were considered by the Employer in weighing the importance of the verbal abuse violation. The verbal comment made by the grievant to his co-worker marked the sixth time the grievant had violated Rule 1.2 – “making abusive statements to another employee.” While the statement alone may warrant suspension or written reprimand, the Arbitrator determined that this violation, coupled with the striking of a supervising officer, which is in violation of Rule 1.9, should and did result in removal.

The grievant had an active 5-day suspension on her disciplinary record for improperly attempting to negotiate her workload. The grievant’s misconduct in this matter in tandem with the active discipline could reasonably erode the employer’s confidence in the grievant as an EEO Investigator.

Insubordination is a serious offense. The Grievant’s misconduct took place in a correctional facility where following orders is particularly important. The very next day the Grievant violated policies and procedures when she left a youth unattended. The Grievant’s disciplinary history was a major factor supporting termination—she had received a 12-day suspension on January 19, 2005. The Arbitrator rejected the claims that the Grievant was the victim of disparate treatment; that the imposition of discipline was delayed; and that the employer was “stacking” charges against the Grievant in order to justify her termination. The Union was unable to show how the delay prejudiced the Grievant’s case or violated the contract. The decision to combine two incidents appeared to be reasonable. The disciplinary record of another JCO involved in leaving the youth unattended justified the different treatment. The Arbitrator concluded that the Grievant’s discharge was for just cause and was in compliance with the collective bargaining agreement.
- The contractual philosophy is to conserve jobs and require the employer to exercise every reasonable effort to correct misconduct: 287

- There is an exception to the general rules of just cause. In the case of employees dismissed for proven patient/client abuse the arbitrator does not have the authority to modify the termination of the employee committing such abuse: 287

- The State did not capriciously or arbitrarily delay its disciplinary action. The State did not subject the grievant to the hardship of a threatened penalty for 18 months and intentionally prevent the Union from collecting evidence to defend the grievant. The State dropped the matter for lack of evidence in 1988, and took it up again when new evidence came to light from an entirely different source. The delay makes it difficult for anyone to remember what happened and makes it impossible for the Union to refute the charges by placing the grievant somewhere else. In the absence of overwhelming evidence of guilt this delay in the quality of evidence would be enough to overturn the removal: 317

- It is management's right to request medical information and the grievant consistently refused to supply it. In the absence of such evidence, the grievant's failure to report to the audit site resulted in progressive discipline: 524

- Article 24 .02 ensures that discipline be administered in a timely fashion. The passage of one full year in which four investigations were conducted between the event and the discipline does not meet the contractual standard of initiating discipline as soon as "reasonably possible": 531

- Without credible witnesses, there is insufficient evidence to support a charge of patient abuse: 539

- There was no disparate treatment between the grievant and his co-worker, because the co-worker had more seniority than the grievant and the grievant's violation was more serious than his co-worker's violation: 543

- The grievant was not subject to disparate treatment as there was no evidence presented showing employees in the same position as the grievant were reclassified. All of the employee examples used to show disparate treatment were not similarly situated to the grievant: 550

- If employees are situated differently with respect to the employment relationship then the employer may treat them differently: 552

- Disparate treatment results from similarly situated employees receiving different discipline for sick leave. The employees being compared here worked in two different units (management and the bargaining unit) and, as such, policy documents governing one unit may not apply in instances where the Collective Bargaining Agreement applies: 555

- The Arbitrator did not find any evidence of disparate treatment because of the differences between the grievant's case and the cases of others cited by the Union. Since there were no other similar cases in which persons were treated differently than the grievant, there is no evidence of disparate treatment: 556

- There was not sufficient evidence offered upon which a reasonable conclusion could be based that there was disparate treatment. Further, disparate treatment was not raised in the grievances or at these hearings. The Arbitrator therefore ruled that the Union could not raise that issue in its post-hearing brief as it had lost its standing to complain: 573

- In disciplinary cases, most arbitrators resolve conflicts between testimony of the grievant and others representing management’s interest by applying certain presumptions. An accused is presumed to have an incentive for not telling the truth and when that testimony is contradicted by one who has nothing to gain or lose, the latter is to be believed: 616

- The grievant argued that the Employer violated Article 24 of the contract. The Arbitrator held that the Employer removed the grievant without just cause since in similarly situated cases, other employees were not discharged for a similar violation: 621

**Disclosure of Confidential Information**

- The grievant was an investigator who was discovered to have used his state telephone credit card for personal calls, which he afterward offered to repay. He also gave an inter-office memo
containing confidential information to his union representative. He was removed for these violations. The arbitrator found that the grievant’s explanation for his use of the telephone card was not credible, however the employer had notice of other employees who had misused their cards but issued no discipline to the others. The document containing the confidential information was not a typical document generated in an investigation and the employer’s rules on disclosure were found to be unclear. The arbitrator distinguished between confidential documents and confidential information, and reinstated the grievant without back pay: 380

- The grievant was removed for misuse of his position for personal gain after his supervisor noticed that the grievant, an investigator for the Bureau of Employment Services, had received an excessive number of personal telephone calls from a private investigator. The Ohio Highway Patrol conducted an investigation in which the supervisor turned over 1 30-1 5 0 notes from the grievant’s work area and it was discovered that the grievant had disclosed information to three private individuals, one of whom admitted paying the grievant. The arbitrator found that the employer proved that the grievant violated Ohio Revised Code section 4 1 4 1 .21 by disclosing confidential information for personal gain. The agency policy for this violation calls for removal. The employer’s evidence was uncontroverted and consisted of the investigating patrolman’s testimony, transcribed interviews of those who received the information, and the grievant’s supervisor’s testimony. The grievant’s 1 3 years seniority was an insufficient mitigating circumstance and the grievance was denied: 4 08

Discovery

- A failure by the State to supply the personnel records of non-State employees or exempt employees is not in error. The State should have to provide information that is available to the general public but the Union’s request was not sufficiently specific and the Union did not show that the complete files were relevant to the grievance: 286

- The Union’s request for the personnel records of women who claimed the grievant sexually harassed them was not specific enough and did not make a showing of relevance that the failure by the State to hand over the files was not a procedural defect: 286

- Fair interpretation of Article 24 .04 , dealing with providing documents, seems to prescribe that the Union is to be provided with the actual documents: 291

- Fair interpretation of Section 24 .04 would prescribe that Management must provide the actual documents to the Union. The employer technically violated this contractual duty but there is no indication that the Union or the grievant suffered harm as a result. The delay of the first hearing day and the fact that the pre-disciplinary proceedings encompassed ten days cured any substantive impact of the employer’s failure to follow the agreement. Even though the employer violated the Agreement there was substantial compliance with the disclosure rules and the grievant was not denied due process: 292

- When the employer sought to admit photographs taken of the alleged victim, the Union objected on the grounds that they had not been provided at the pre-disciplinary or Step 3 meetings. There is no evidence that the employer deliberately suppressed this evidence as, for example keeping secret their existence or refusing a request by the Union to see them. The photographs do not establish a new fact, but merely corroborate the statements of several witnesses—including a Union witness—that the youth had marks on his face. The arbitrator therefore found no undue hardship in admitting and crediting the evidence of the photographs: 300

- The Union protested that the State did not produce witnesses that the Union considered important to its case. This protest was dismissed by the arbitrator. If the Union desired witnesses, it had the right to subpoena them. The Union had no reasonable expectation of relying on the employer to help the Union’s case. The Union is entitled to demand that the employer provide it with available witnesses and documents under Section 25 .08 of the Agreement: 302

- The Union objected that the State withheld certain documents and protested their admittance into evidence. When the arbitrator sustained the Union’s objection and refused to admit the documents into evidence this was deemed a complete remedy for the employer’s violation of the disclosure requirements. By excluding the
material from the arbitration, the arbitrator did not allow the evidence to be used to support discipline: 302

- The employer must provide the full and complete witness statements before the pre-disciplinary hearing, not summaries of the witnesses’ statements. The rationale that the State provided of protecting the youth was nebulous and failed to overcome the clear language of Section 24.04. Altered or unavailable evidence can be severely prejudicial to the Union’s effort to defend the grievant. The arbitrator would have reinstated the grievant without back pay but because of the State’s violations back pay was awarded after the 181st day of the grievant’s removal: 308**

The Union was successful in reducing the employee’s discipline from a removal to a 180 day suspension. The State of Ohio took the position that the 180 day suspension is a 180 working day suspension. The OCSEA position was that the discipline should be a 180 calendar day suspension. OCSEA appealed this case to the Court of Common Pleas to resolve the dispute. The Court ruled in OCSEA’s favor and the State of Ohio did not appeal.

- The grievant was a Correction Officer removed for using vulgar language, conducting union business on work time, and fondling an inmate. The grievant admitted this act to his sergeant. The pre-disciplinary hearing had been rescheduled due to the grievant’s absence and was held without the grievant or the employer representative present. The arbitrator found that because the union representative did not object to the absence of the employer’s representative that requirement had been waived. There was also no error by the employer in failing to produce inmates’ statements as they had not been used to support discipline. The removal order was timely as the 45 day limit does not start until a pre-disciplinary hearing is held, not merely scheduled: 377

- The employer removed the grievant for two reasons: 1) The grievant committed theft because he had been named as the supplier of checks that had been returned to the Bureau of Workers’ Compensation, to another state employee in order to cash the checks (see arbitration decision #370); 2) falsification of his job application because he admitted during the investigation that he had prior felony convictions which he failed to report on his employment application. The arbitrator held that the employer could not use the falsification charge as a basis for removal because the grievant had sought assistance when he completed his application and lacked intent to falsify the application. The employer was also stopped from using the falsification because the grievant had been employed for 8 years, and had been removed once before, thus the employer was found to have had ample time to have discovered the falsification prior to this point. The employer was not permitted to introduce the Bureau of Criminal Investigation’s report into evidence at arbitration because the employer failed to disclose it upon request by the union. The fact that the investigation was ongoing was irrelevant. Just cause was proven through the investigator’s
testimony and testimony of others involved in the scheme. The grievance was denied: 4 01

- The grievant was hired as a Tax Commissioner Agent and had received a written reprimand for poor performance while still in his probationary period. He was assigned a new supervisor who developed a plan to improve his performance, however the grievant continued to receive discipline for poor performance and absenteeism, including a ten day suspension which was reduced pursuant to a last chance agreement. It was discovered after the last chance agreement had been made, that prior to the signing of the last chance agreement, the grievant had committed other acts of neglect of duty. The grievant was removed for neglect of duty. The arbitrator held that a valid last chance agreement would bar an arbitrator from applying the just cause standard to a disciplinary action and that the agreement made by the grievant was valid. It was also found that there existed hostility between the grievant and his supervisor, the employer stacked charges by basing discipline on events which occurred prior to the last chance agreement, and that the discipline did not afford the grievant an opportunity to correct his behavior. The removal was upheld despite the employer’s acts because of the last chance agreement but the grievant was awarded 4 weeks back pay because of the employer’s failure to comply with the union’s discovery requests: 4 12

- The grievant was a Therapeutic Program Worker who was removed for abusing a client. The client was known to be violent and while upset and being restrained, he spat in the grievant’s face. The grievant either covered or struck the client in the mouth and some swelling and a small scratch were found in the client’s mouth. The grievant had served a 70 day suspension for similar behavior. The arbitrator found that the employer committed procedural violations by not disclosing the incident report and the client’s progress report despite the employer’s claim of confidentiality. The employer’s witnesses were found to be more credible than the grievant. The grievance was denied: 4 14

- The grievant was an Investigator with the Department of Commerce who had been suspended for 5 days for failing to follow his itinerary for travel and filing incorrect expense vouchers. The grievant’s itinerary indicated that he would be in Toledo on a Friday, and he submitted expense vouchers for the trip, however it was discovered that he worked at home during the day in question. The arbitrator found that the employer violated Section 24 .04 by failing to provide witness lists and documents and not answering the grievants letters. Section 25 .08 was not found to be violated. The employer’s selection of the pre-disciplinary hearing officer was unwise because she had an interest in the outcome and that the investigation was incomplete and unfair. The arbitrator also found that the grievant’s itinerary was a contemplated itinerary and that he had informed his supervisor of schedule changes, however the grievant was AWOL as there was no provision for working at home. Disparate treatment was suspected by the arbitrator, who also noted that the grievant exhibited a contemptuous attitude towards management. The suspension was reduced to a 1 day suspension: 4 30**

The Union filed a motion in the Court of Common Pleas to vacate the Arbitrator's award. The Union received a decision by the Court of Common Pleas upholding the Arbitrator's award.

The Arbitrator held that to sustain a charge of threatening another employee an employer must have clear and convincing proof. Here the proof did not even rise to the preponderance standard, being based solely on the report of the co-worker allegedly threatened, who had a deteriorated relationship with the Grievant since the events of a prior discipline. The investigator did not consider that the co-worker may have exaggerated or over-reacted. Management’s handwritten notes were held to be discoverable under Article 25 .09. It had refused to produce them until after the grievance was filed and then had to be transcribed for clarity, which delayed the arbitration. The investigator breached the just cause due process requirement for a fair and objective investigation which requires that whoever conducts the investigation do so looking for exculpatory evidence as well as evidence of guilt. Then, to make matters worse, the same investigator served as the third step hearing officer, essentially reviewing his own pre-formed opinion. 985 Discretion of Management

- Before the arbitrator will substitute his judgment for that of trained, long experienced professionals in the field of Correction including the superintendent of the prison, there must be a great
deal of evidence that the employer acted incorrectly: 203

- Where the application of discipline shocks the proverbial "reasonable man", the discipline may be modified. While an arbitrator who finds discipline to be appropriate should be circumspect in substituting his judgment for that of management, the arbitration process itself contemplates that such substitution will occur when the employer has acted in a harsh and overly severe fashion: 21 0

- Reasonable people may differ over the propriety of a specific discipline. Arbitrators should be careful not to usurp managerial authority when it has been correctly utilized: 21 4

- Arbitrators should be reluctant to modify penalties proposed by employers when it is determined that the actions that prompt discipline have actually occurred: 226

Discrimination:

In General

- See Disparate Treatment

- The Union failed to present evidence of supervisory intimidation, discrimination on the basis of handicap (alcoholism) or disparate treatment: 4 4 1

- The Arbitrator rejected the Union’s argument that the grievant, who falsified his applications, resumes and a recommendation letter, was discriminated against. The Union did not corroborate its allegations that the grievant was removed because he filed a multitude of grievances or because he was black: 4 5 3

- The Department of Rehabilitation and Correction’s grooming policy does not violate Section 2.01 of the Agreement, which prohibits discrimination on the basis of sex: 4 74

- The department of Rehabilitation and Correction’s grooming policy does not violate section 2.01 of the Agreement, which prohibits discrimination on the basis of race, creed, religion or national origin: 4 74

- The Union did not establish that the beliefs of Native Americans require long hair for men, therefore the Department of Rehabilitation and Correction’s grooming policy is upheld: 4 74

- The Arbitrator disregarded the State’s claim that it would be unfairly prejudiced by the consideration of the Union’s discrimination claim. The State was neither unfairly surprised nor disadvantaged because it should have recognized that the Union was relying on Article 36.05 as the basis for its pre-positioning charge: 4 87

- Having decided that the grievant was not qualified for the position, it is unnecessary to decide whether the State was guilty of pre-positioning in violation of Article 36.05: 4 87

- Alleged resentment over a prior arbitration award reinstating the grievant with back pay and delay in actually paying the arbitration award was insufficient to prove disparate treatment against the grievant. The presence of another employee, who was also in the department when the door was observed open but received no discipline, did not establish disparate treatment. The grievance was disciplined on the basis of eyewitness testimony. The other employee was never observed in a position to see that the door was open; therefore, it would have been inappropriate to impose discipline upon him: 4 93

- The Union contended that the State, in a premeditated and calculated manner, refused to hire the grievant to fill the position of Radio Operator. The arbitrator decided that although the State may have violated Article 1 7 of the contract by mistake and not by design, the State still was at fault and owed the grievant back pay and benefits: 5 05

- The arbitrator found that other disciplinary instances by the State were distinguishable from this case and that the grievant did not offer sufficient evidence to show disparate treatment, racial discrimination or management bias. The arbitrator upheld the State's discretion for removal because it was in the spirit of the principles of progressive discipline: 5 1 6

- The Arbitrator held that the Agency did not engage in disparate treatment or discrimination in a case where a grievant was removed from his position as a Correction Officer for fighting, when correction officers in another incident received a ten to fifteen day suspension. The Arbitrator held that the other case was not the same as the case at hand: 5 86
The Arbitrator concluded that the discrimination arguments were not properly supported: 5 90

The Union argued that the grievant was discriminated against because he was not able to post bond and was incarcerated. However, the Union did not present any evidence of an employee who was able to post bond, after having been indicted, and was continued on Administrative Leave. Therefore, the Arbitrator concluded that there was not sufficient proof to support the Union’s contention that the grievant was being discriminated against: 5 91

Due to cuts in the budget at the Department of Mental Health, Northcoast Behavioral Healthcare had to eliminate several positions. The grievant’s position was one of them. She was employed as an Office Assistant III and sought a newly created position as a Health Information Technician I. This position required applicants to type 5 0 words per minute with 95 % accuracy. The grievant failed the test. However, another employee bid off an Office Assistant III job and the Union insisted that management contact the grievant about this position. Management declined, stating that it was considering changing the opening to a Health Information Technician I position, and the grievant was subsequently laid off. When management decided to retain the Office Assistant III position, it sent the grievant two recall notices by certified mail. The notices indicated that the job required an applicant to type 5 0 words per minute with 95 % accuracy. The notices were returned as undeliverable or unclaimed and another employee filled the position. The arbitrator denied the Union’s contention that the state had discriminated against the grievant in violation of Article 2 of the collective bargaining agreement. First, he found that there was no disparate treatment. He distinguished the grievant’s case from another case involving a telephone operator position. The arbitrator pointed out that in the present case management was unsure whether the opening would be posted as an Office Assistant III job or Health Information Technician I job and by the time a final decision was made, the grievant was already laid off. In the earlier case, there was no question that the job would be posted as an opening for a telephone operator and management had sufficient time to offer the job to the employee before the scheduled layoff. Secondly, the arbitrator rejected the argument that the 5 0 word per minute typing requirement was added to keep the grievant from filling the position. He stated that the state had the right to be sure that whoever filled the position had the necessary typing skills. Moreover, the Vice President of Human Resources testified that he would not have required the grievant to take a typing test if she had voiced her concerns about the requirement. The arbitrator also noted that the state would not have sent two certified letters to the grievant at two different addresses if it did not want to recall the grievant. Finally, the arbitrator ruled that the union did not present any credible motive that the state discriminated against the grievant. Despite the fact that the grievant was a party to a lawsuit against the department, it had occurred nine years prior to her layoff, and there was no evidence that the other employees who were party to the suit were subject to punishment. 85 3

Anti-Union

- Anti-Union Discrimination: 1 , 5 9, 80
- Cannot be used on hearsay evidence: 1
- Cannot rely upon statements by members of management not involved in imposing the discipline on grievant in order to prove discriminatory discipline: 1
- Not proved where grievant subject to extra surveillance if grievant’s evaluations before and after union activism state that he “needs frequent checking.”: 1
- It is of particular significance that a discipline was imposed for a legitimate reason so that discrimination could only have been a partial motive: 1
- When an employer produces convincing evidence of misconduct, the burden of proof shifts to the Union to prove that anti-union discrimination was the actual reason for the grievant’s discipline: 5 9
- The following elements must normally be present for the union to prove anti-union discrimination: evidence of anti-union activity; lack of good cause for discipline; expressions of antagonism by management; and a nexus (connection) between the disciplinary decision and the alleged union activity: 5 9
- Timing (whether discipline followed on the heels of union activity) is one of the principal tests to determine whether disciplinary action is improperly motivated, especially where the disciplinary justification for removal was weak: 5 9

- Arbitrator found no retaliation because grievant had only filed one of 5 00 grievances that had been filed against the department: 80

- For filing grievances: 1 27

Political

- The arbitrator rejected a claim of "political animus" because "Nothing in the record indicates that the employer was aware of the grievant's political orientation at the time of the disciplinary action: 1 62

Racial

- Grievant's charge of racial discrimination in his discharge was not accepted by the arbitrator. While some managers had been involved in a Klu Klux Klan incident, none of those managers were involved in the decision to discharge the grievant. The evidence falls short of establishing any nexus between the improper racial attitudes apparently held by a small number of managers and the grievant's discharge. The grievant's claim that the other person discharged, a white person, had been discharged as a "cover" for dismissing the grievant was rejected because there were independent grounds for discharging that other person: 1 5 7

- While the witnesses impressed the arbitrator as serious, decent persons, neither could offer any non-hearsay evidence of incidents of racial discrimination. If there were witnesses who could have, they were not produced. The arbitrator found that the Union did not meet its burden of proof: 1 5 9

Sex

- While the arbitrator ruled that a probationary removal is not generally arbitrable. She found that the issue of sex discrimination is arbitrable under 2.01 and 25 .01 : 207

- Arbitrator rejected a claim of discrimination on the basis of gender where

(1) the institution had a clear policy that discrimination would not be tolerated and

(2) another female had received a mere written reprimand for sleeping on duty at a Correction facility: 94

Dishonesty

- See falsification of documents, falsification of job application, fraud, theft

- Deception

- False application: 1 66

- Falsification of documents: 1 7

- Fraud: 1 4 0

- Making false reports: 1 71

- Defined: lack of trustworthiness, truth, or honesty: 33

- Attempt to deposit tax checks in private account was untrustworthy action and therefore dishonest: 33

- Poor procedures and inadequate supervision does not excuse an attempt to deposit public tax money in a private account: 33

- The seriousness of absenteeism is compounded when employee accepts compensation from the state for the day he was absent: 36

- Falsification of the physician's statement is sufficiently serious to support a ten-day suspension. Such violations are viewed as extremely onerous because they jeopardize the cement of the employer/employee relationship. This relationship can only thrive and prosper if it is based on trust. The use of physician's excuses is typically a highly sensitive enterprise and is often subject to abuse. When an employee violates an employer's trust and the trust of the physician by falsifying an excuse it jeopardizes the validity of the entire excuse verification process. This is a process which needs to be rigidly enforced to protect the interests of fellow employees who are legitimately absent for medical reasons: 1 81

- Reported decisions indicate a number of factors considered in evaluating a removal for falsifying
an employment application or other employment related documents:
1) The nature of the fact or item falsified (was it intentional, deliberate, and material)
2) The number of items concealed
3) The time between occurrence and falsification
4) Whether disclosure would have precluded hiring
5) The time between falsification and disclosure
6) The employee's overall job performance
7) The reason or factor that triggered the discharge
8) The employer's motivation
9) Special safety or security considerations
10) Mitigating factors, such as the employee's marital status or age

The most important of these factors is whether the falsifications were willful: 197

- When an employee signs documents which have specific oaths affixed and this action is further documented via a formalized notary procedure certain expectations arise which should be shared by the employee and the employer. An applicant should expect negative consequences if the material proves inaccurate. Although the documents did not include a warning that termination might be a consequence, the Grievant's responsibilities are not diminished. The notary and oath taking processes serve as identical or superior notification mechanisms and provide the grievant with clear direction: 197

- In certain instances, employees have been reinstated where evidence has established that individuals in the personnel department assisted a grievant in filling out an employment application: 197

- The grievant's back problems do not excuse his filing of inaccurate attendance, time and mileage reports: 226

- While dishonesty requires intent, the intent requirement is satisfied where the person performs the act and has knowledge with substantial certainty that deception would occur: 250

- The test for determining the meaning of the grievant's submission of the physician's statement is the meaning to be given by a reasonable person or what the state would have reasonably believed was the intent of the grievant: 250

- Falsifying a Physician's statement is more serious than the offense of working through one's break, leaving a proportionate amount early, but signing out as though having left at the normal time. Hence the former may be penalized even when no penalty is imposed for the latter: 250

- The seriousness of dishonesty and alteration of medical documents must be underscored. Such conduct is unacceptable in the work place: 250

- The arbitrator found the grievant violated the rule against failing to cooperate in any official inquiry or investigation when the grievant lied because she was afraid she could lose her job. The arbitrator did not view the protection of one's job as a plausible defense: 257

- Having inferred the grievant's intent to falsify documentation on one occasion, the arbitrator refused to believe that her failure to honestly document her failure to medicate a patient was caused by management's withholding the forms on which the error was supposed to be documented: 267

- The employer did not stack charges by charging the grievant with both tardiness and submitting false documentation. While the two charges arose from the same incident, the falsification behavior was separate and distinct from the tardiness: 240

- The grievant was involved in a check-cashing scheme involving stolen state checks from another agency, along with two other state employees. His role was that of an intermediary between the person who stole, and the person who cashed the checks. He served 45 days of a criminal sentence. The grievant was found to be deeply involved with the scheme and received a substantial portion of the proceeds. The violations occurred while the grievant was off-duty, however they were found to be connected to the grievant’s job as theft of state property is harm to
the employer. The grievant was found to not be subjected to disparate treatment when compared to other employees not removed for absenteeism while incarcerated: The other employees cited for disparate treatment purposes had not stolen state property: 370

- The grievant was employed as a Salvage Processor who was responsible for signing off on forms after dangerous goods had been destroyed. He was removed for falsification of documents after it was found that he had signed off on forms for which the goods had not been destroyed. The arbitrator found that despite minor differences, the signature on the forms was that of the grievant. The employer was found to have violated just cause by not investigating the grievant’s allegation that the signature was forged, and by failing to provide information to the union so that it could investigate the incidents. The employer was found not to have met its burden of proof despite the grievant’s prior discipline: 398

- The employer removed the grievant for two reasons: 1 ) The grievant committed theft because he had been named as the supplier of checks that had been returned to the Bureau of Workers’ Compensation, to another state employee in order to cash the checks (see arbitration decision #370); 2) falsification of his job application because he admitted during the investigation that he had prior felony convictions which he failed to report on his employment application. The arbitrator held that the employer could not use the falsification charge as a basis for removal because the grievant had sought assistance when he completed his application and lacked intent to falsify the application. The employer was also stopped from using the falsification because the grievant had been employed for 8 years, and had been removed once before, thus the employer was found to have had ample time to have discovered the falsification prior to this point. The employer was not permitted to introduce the Bureau of Criminal Investigation’s report into evidence at arbitration because the employer failed to disclose it upon request by the union. The fact that the investigation was ongoing was irrelevant. Just cause was proven through the investigator’s testimony and testimony of others involved in the scheme. The grievance was denied: 4 01

- The grievant had been a Driver’s License Examiner for 1 3 month. He was removed for falsification when he changed an applicant’s score from failing to passing on a Commercial Drivers’ License examination. The arbitrator found that the grievant knew he was violating the employer’s rules and rejected the union’s mitigating factors that the grievant had no prior discipline and did not benefit from his acts. Falsification of license examination scores was found serious enough to warrant removal for the first offense. The arbitrator also rejected arguments of disparate treatment. The grievance was denied: 4 03

- The grievant was an employee of the Lottery Commission who was removed for theft. The agency’s rules prohibit commission employees from receiving lottery prizes, however the grievant admitted redeeming lottery tickets, but not to receiving notice of the rule. The arbitrator noted that while the employer may have suspected the grievant of stealing the tickets, there was no evidence supporting that suspicion and it cannot be a basis for discipline. The arbitrator found that the grievant did redeem lottery coupons in violation of the employer’s rules and Ohio Revised Code section 3770.07(A) but that he had no notice of the prohibition either through counseling or orientation. The grievant was reinstated without back pay but with no loss of seniority: 4 25

- The grievant was removed after 1 3 years service from her position with the Bureau of Disability Services for unapproved absence, conviction of a drug charge, and failure to report the drug charge as required by the state’s Drug-Free Workplace policy. The Bureau is funded by the federal government and is subject to the Drug-Free Workplace Act of 1 988. The grievant had a history of alcohol problems. She was also involved with a co-worker who, after the relationship ended, began to harass her at work. She filed charges with the EEOC and entered an EAP. The former boyfriend called the State Highway Patrol and informed them of the grievant’s drug use on state property. An investigation revealed drugs and paraphernalia in her car on state property and she pleaded guilty to Drug Abuse. She became depressed and took excessive amounts of her prescription drugs and missed 2 days of work. She was admitted into the drug treatment unit of a hospital for 2 weeks. She was on approved leave for the hospital stay, but the previous 2 days were not approved and the agency sought removal. The arbitrator found that while the employer’s rules were reasonable, their application to this grievant was not. The Drug-
Free Workplace policy does not call for removal for a first offense. The employer’s federal funding was not found to be threatened by the grievant’s behavior. The grievant was found to be not guilty of dishonesty for not reporting her drug conviction because she was following the advice of her attorney who told her that she had no criminal record. The arbitrator noted that the grievant must be responsible for her absenteeism, however the employer was found to have failed to consider mitigating circumstances present, possessed an unwillingness to investigate, and to have acted punitively by removing the grievant. The grievant’s removal was reduced to a 10 day suspension with back pay, benefits, and seniority, less normal deductions and interim earnings. The record of her two day absence was ordered changed to an excused unpaid leave. The grievant was ordered to complete an EAP and that another violation of the Drug-Free Workplace policy will be just cause for removal: 4.29

- The grievant was an Investigator with the Department of Commerce who had been suspended for 5 days for failing to follow his itinerary for travel and filing incorrect expense vouchers. The grievant’s itinerary indicated that he would be in Toledo on a Friday, and he submitted expense vouchers for the trip, however it was discovered that he worked at home during the day in question. The arbitrator found that the employer violated Section 24.04 by failing to provide witness lists and documents and not answering the grievants letters. Section 25.08 was not found to be violated. The employer’s selection of the pre-disciplinary hearing officer was unwise because she had an interest in the outcome and that the investigation was incomplete and unfair. The arbitrator also found that the grievant’s itinerary was a contemplated itinerary and that he had informed his supervisor of schedule changes, however the grievant was AWOL as there was no provision for working at home. Disparate treatment was suspected by the arbitrator, who also noted that the grievant exhibited a contemptuous attitude towards management. The suspension was reduced to a 1 day suspension: 4.30**

The Union filed a motion in the Court of Common Pleas to vacate the Arbitrator's award. The Union received a decision by the Court of Common Pleas upholding the Arbitrator's award.

- The grievant was removed for unauthorized possession of state property when marking tape worth $96.00 was found in his trunk. The Columbus police discovered the tape, notified the employer and the employer found the tape was missing from storage. The arbitrator found that the late Step 3 response was insufficient to warrant a reduced penalty. The arbitrator also rejected the argument that the grievant obtained the property by “trash picking” with permission, and stated that the grievant was required to obtain consent to possess state property. It was also found that while the employer’s rules did not specifically address “trash picking” the grievant was on notice of the rule concerning possession of state property. The grievance was denied: 4.32

- The grievant, a Therapeutic Program Worker, took $1,500 of client money for a field trip with the clients. The grievant was arrested en route and used the money for bail in order to return to work for his next shift. The grievant was questioned about the money before he could repay it, he offered to repay it when he was paid on Friday, but failed to offer payment until the next Monday. He was removed for Failure of Good Behavior. While the employer was found to have poorly communicated its rules concerning use of client funds, the grievant was found to have notice of its provisions. The arbitrator found that the grievant lacked the intent to steal the money, however the grievant’s failure to repay was not excused, thus just cause was found for discipline. Because of the grievant’s prior disciplinary record, removal was held commensurate with the offense and the grievance was denied: 4.33

- The grievant was a Cosmetologist who was removed for neglect of duty, dishonesty and failure of good behavior. She was seen away from her shop at the facility, off of state property, without having permission to conduct personal business. The arbitrator found the grievant’s explanation not credible due to the fact that the grievant did not produce the person who she claimed was mistaken for her. There were also discrepancies in the grievant’s story of what happened and the analysis of travel time. The arbitrator found no mitigating circumstances, thus the grievance was denied: 4.38

- The grievant was removed from his interim position for alleged sexual harassment of a female co-worker, violations of work rules, neglect of duty, sexual discrimination and immoral and indecent conduct, as well as a violation of ORC 124.34 for dishonesty. The grievance was sustained, and the grievant was reinstated to his
former position with full back pay and benefits: 5

- The grievant was removed from her position with the Department of Rehabilitation and Correction for dishonesty and failure to cooperate with an official investigation. The arbitrator felt that removal was inappropriate for a first offense. Therefore, the grievant was reinstated with no loss of seniority but without back pay. 5

- Although the Union provided believable testimony and documents exonerating the grievant, the length of grievant's prior disciplinary record and the grievant's dishonesty under oath weakened his credibility and strengthened the State's claim that it removed the grievant for just cause. 5

- The grievant was properly suspended for submitting a falsified order to report for National Guard training even though the grievant did perform services for the National Guard during the period covered by his excuse, and he was not responsible for the forged signature on the military leave form. The arbitrator concluded that the grievant should have known that, without accompanying orders, a military leave form was insufficient to place him on active duty. Consequently, the arbitrator decided that the grievant was absent from work without proper leave and that he improperly received payment from both the State and the Federal governments for the same period of time. Even so, the arbitrator reduced the penalty from removal to a suspension because the State had not proved its entire case: 5

The arbitrator held that management was justified in dismissing a grievant who falsified his time sheets. Although the grievant was a 20 year employee, the failure of the grievant to demonstrate that he would behave appropriately in the future prohibited the Arbitrator from allowing the employee’s record to serve as a mitigating factor: 5

The grievant was charged with conducting a pay-for-parole scheme, which resulted in at least two inmates inappropriately placed on parole. The arbitrator determined that this matter was based on circumstantial evidence that had not been corroborated by the investigation. The employer’s case was inconclusive. The arbitrator found one exception to his findings. The grievant

raised suspicion of his activities by the volume of phone calls made to him by one of the inmates during an 1 8-month period. This suspicion compromised the grievant ability to perform his duties as a hearing officer. 7

On February 27, 2002, the grievant was working second shift at the Toledo Correctional Institution in the segregation unit control center. Due to the ensuing events, he was removed from his position as Correction Officer. The institution has a policy prohibiting two unsecured inmates being placed together in the same recreation cage. Despite this policy, that evening two officers placed two unsecured segregation inmates together in a recreation cage for the purpose of allowing them to settle their differences. The grievant entered the cage as the second inmate was being uncuffed, but he turned to walk away in order not to see what happened. As he exited he claimed that he saw Officers Mong and McCoy overlooking the cage at the control booth. None of the officers reported the incident, but management became aware of it the following morning and an investigation ensued. When he was first interviewed later that day, the grievant denied having any knowledge of what had transpired. However, ten days later, he gave a written statement and interview admitting to what he had observed. The grievant was later terminated from his position. The Union argued that the punishment was not appropriate for the offense. Officer Mong committed the same offense but he received only five days suspension thought he saw the fight and the grievant did not. In addition, the grievant fully cooperated in the investigation after his first interview. The arbitrator ruled, however, that the grievant cannot be compared to Office Mong because he was not in the position to intervene. Additionally, the fact that the grievant eventually did tell the truth is not enough by itself to mitigate the penalty. She concluded that both offenses, failing to intervene while knowing officers were putting inmates and staff in harm’s way and then lying about it, are individually and collectively terminable acts. Despite the fact that the grievant did not have an active role in the incident, his inaction threatened security and the safety of the inmates as well. 8

The grievant was charged with an unauthorized relationship with an inmate. She denied having a relationship with the inmate and continued up to and throughout the relationship Telephone records (home and cell), transcripts of a control call
between the grievant and an inmate, the investigator’s interview and the testimony of the investigator at arbitration convinced the arbitrator that the grievant was removed for just cause. The arbitrator noted that the grievant continued her denial of the employer’s allegations throughout the arbitration and provided no credible evidence to support her position. The arbitrator also found no disparate treatment in the employer’s decision.

The grievant was employed for over 19 years in the Information and Technology Division of the Ohio Bureau of Worker’s Compensation as a Telecommunications Systems Analyst 3. He, along with five other employees, applied for a promotion to the position entitled Information Technology Consultant 2. Another employee, who was awarded the promotion, did not meet the minimum qualifications for the job and lied on his application when he stated that he possessed an undergraduate core curriculum in computer science and an undergraduate degree in math. The employer argued that the grievant also falsified his application by stating that he had a degree in Electrical Engineering when in fact he had a degree in Electronic Engineering. The arbitrator found however, that despite the fact the grievant did falsify his application, he did not falsify his core curriculum. The successful applicant’s claim that he possessed a bachelor’s degree and completed core course work in computers and technology represents a more serious misrepresentation of fact than that of the grievant’s.

The grievant was involved in a response to a “Signal 14” call for assistance at the institution. The State charged the grievant with dishonesty in regards to the incident. Neither the grievant nor the Union was informed of the “abuse” charge prior to the imposition of discipline. The Agency also refused to allow the Union to review the video tape of the incident prior to arbitration. Both of these procedural issues were presented at arbitration. Following the State’s presentation of its case at arbitration, the Union Representative requested a directed verdict. The arbitrator found that the grievance was sustained in part and denied in part. The grievant’s removal was reduced to a one (1) day suspension. The grievant received all straight time pay he would have incurred if he had not been removed. Deductions for any interim earnings were to be made, except for any earnings received from a pre-existing part-time job. All leave balances and seniority were to be restored. The grievant was to be given the opportunity to repurchase leave balances. The grievant was to be reimbursed for all health-related expenses incurred that would have been paid through health insurance. The grievant was to be restored to his shift and post and his personnel record was to be changed to reflect the suspension.

The Arbitrator found that the evidence and testimony clearly established that the Grievant committed numerous violations of the computer use policy on a regular basis. These included:

- installing a Palm Pilot on her work computer.
- maintaining non-work related files on her department computer.
- accessing two non-departmental email accounts from her computer
- using the computer to actively access shopping sites

The Arbitrator rejected the charge of insubordination. The Arbitrator held that “dishonesty” was not a proper charge. It implies serious misconduct where an employee’s motive is often to obtain pay that he/she is not entitled to receive. The Grievant’s timesheets suggest that she simply recorded her regular starting, lunch, and ending times regardless of the actual times and none involved a claim for extra compensation.
Furthermore, all the timesheets were approved by her supervisor. The prior five-day suspension for computer misuse suggests that the Grievant was familiar with the computer use policy and knew that further discipline would result from continued computer misuse. It also indicates that she failed to take advantage of the opportunity to correct her behavior.

Despite the Grievant’s 13 years of state service, the Arbitrator held that the state had the right to remove her. The Grievant’s extensive violations of the computer use policy combined with the other less serious offenses support the state’s actions. Her prior five-day suspension for computer misuse removes any doubt that the state acted pursuant to its contractual authority.

The pre-disciplinary hearing was not conducted until three months after the investigation was concluded. However, the Arbitrator held that there was no evidence that the delay had an adverse impact on the union’s case. The Arbitrator found the Grievant guilty of dishonesty. His incident report failed to mention his assault on the Youth or any allegations against another JCO. The Arbitrator found that it was clear the Grievant used inappropriate and unnecessary force on the Youth. The Grievant knew the difference between Active and Combative Resistance. The Youth’s hands were underneath him and the other witnesses support the testimony of the JCO who said he saw the Grievant hit the Youth six (6) to eight (8) times. The Arbitrator held that the discipline was commensurate with the offense and the Grievant was discharged for just cause.

The grievance involved two separate incidents. The Arbitrator found that the evidence was overwhelming that the Grievant used inappropriate and unwarranted force in both incidents. The Grievant was interviewed twice. The second time he changed his story and said it was the correct version. The Grievant also failed to file correct reports for one of the incidents. The Arbitrator held that the discipline was commensurate with the offense and consistent with ODYS’s work rules and past practice.

The grievance was sustained. The Grievant’s pay, vacation, leave, benefits, and seniority were restored. The Grievant was involved in an incident in which a Youth was injured during a restraint. The Employer asserted that the report written by the Grievant was worthless and inaccurate. The entire thrust of the Employer’s argument was based upon proximity and the “culture” at the Facility. The mere fact of proximity does not mean you saw or heard something. This is particularly true if you are engaged in trying to restrain someone. The Employer has no direct evidence that the Grievant saw anything. The Employer contended that the Grievant should have protected the Youth; however, the Arbitrator found that the Employer had no evidence as to how this should have been done. In most arbitrations, the Employer offers evidence as to what the Grievant should have done.

The Grievant was not placed on Administrative Leave, nor was he placed in a “No Youth Contact” status. It is a direct contradiction to claim the Grievant was guilty of such severe rule infractions that he should be removed and then to have ignored him for ninety (90) days. The Arbitrator also found no evidence to support the Employer’s contention that there is a “culture” at the Facility that causes cover up.

The Arbitrator held that despite the Grievant’s 19½ years of service, her extension of her break, and more importantly, her dishonesty in the subsequent investigation, following closely her ten-day suspension for insubordination, gave him no alternative, but to deny the grievance and uphold the removal. The Arbitrator rejected the argument that the removal was inconsistent with progressive discipline because dishonesty and insubordination are different offenses. The Arbitrator found this contention contrary to the accepted view of Arbitrators regarding progressive discipline. Also, the agency policy stated that “discipline does not have to be for like offenses to be progressive.”

**Disparate Treatment**

- Cases that are sufficiently different cannot be relied upon as a basis for disparate treatment: 1

- Cases were distinguished where grievant had a different mixture of offenses and had received a removal rather than a demotion: 1

- Cases distinguished where grievant had more recent previous offenses: 1

- Requirement that sick leave policies be fairly applied throughout the state is violated when two employees are absent on the same day (day
preceding vacation in this case) and only one is disciplined for failure to supply documentation: 35

- Contract does not require that different department: must have the same rules or impose the same discipline. Each department may establish rules commensurate with the needs of the department: 37

- Where grievant has several past disciplines, the fact that other employees have received lesser penalties for the same offense grievant is currently charged with is no sufficient to prove disparate treatment: 43

- Complete homogeneity of discipline can scarcely be expected. What is required is a range of reasonableness tailoring discipline to individual circumstances: 43

- Not necessary that the department impose discipline in similar fashion throughout the state. Each facility faces unique circumstances. What is essential is that employees be aware of the rules that apply to them: 43

- Removal reduced because of disparate treatment: 66

- While none of the discipline cited was for exactly similar events and mitigating circumstances affected each disciplinary action, the disparity between the disciplines imposed was inexplicable, and thus, disparate treatment occurred: 83

- The just cause standard dictates "like treatment under like circumstances": 90

- While there was ground for a somewhat greater penalty for grievant than other persons committing similar violations, the much greater leniency granted the other offenders made a reduction of the grievant's discipline appropriate: 90

- Where the grievant's reason for speaking with co-workers was to ask a question pertinent to her duties the arbitrator ruled that there was no evidence that grievant was not tending to her patients and duties: 102, 103

- Arbitrator found disparate treatment where the violations compared were not identical but were "closely akin" or one "could equate" them: 108

- The arbitrator found disparate treatment even though one offender had acted intentionally and the other had acted carelessly. The arbitrator ruled that the tremendous disparity in penalties was not justified by this difference: 108

- Arbitrator used differences in past work records to uphold disparate treatment claim where the offenders had related but not identical offenses: 108

- Where both parties were partly at fault, one received no punishment, and damage was minimal. At most grievant should have been warned, the prescribed penalty for a first occurrence of a horseplay violation: 117

- To succeed on a disparate treatment claim the union must show that the employer was aware of certain irregularities, condoned these irregularities, and treated like instances in a dissimilar fashion: 118

- Aspects of a theft offense that justified different treatment of different offenders included whether the offender engaged in the activity for his own betterment, whether the supervisor had directed the activity, whether the stolen property was transferred in a state vehicle, and whether the offender was on an authorized break: 118

- Disparate treatment violates employment rights but does not justify insubordination: 123

- The arbitrator found disparate treatment where the employer had not treated the "nexus" (connection between off duty conduct and job duties) as essential to an off duty misconduct violation, but had in previous cases, even though the arbitrator went on to find that there was a nexus: 129

- Enforcement of rules and assessments of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variations in the assessment of punishment: 130

- Arbitrator did not uphold the discipline where the state did not meet its burden of proving a reasonable basis for different treatment: 130

- Where the employer's enunciated basis for disparate treatment was "not adequately supported
by the evidence,” the arbitrator ruled that the employer had not enunciated a credible basis for disparate disciplines: 1 36

- The arbitrator found no disparate treatment where the grievant was removed for engaging in a felony while in state service, while the other offender had been convicted prior to entering state service: 1 4 4

- If the evidence establishes that penalties for the same misconduct, under similar circumstances, have been reasonably consistent, then the employee's assertion of disparate treatment will be viewed as unsupported: 1 4 5

- A grievant who had a felony conviction for off-duty conduct while an employee, is not similarly situated with employees who had been hired after being convicted who have completed rehabilitation and paid their dues to society. Thus, disparate treatment cannot be found on the basis of a comparison between the grievant and such persons: 1 4 5

- The grievant, with his 31% absenteeism rate, was not similarly situated to another employee with an 18% absenteeism rate: 1 5 3

- It is not necessarily disparate treatment to give different punishments to two persons involved in the same fight: 1 5 4

- The grievant's disparate treatment argument failed because an employee who is under a last chance agreement is not similarly situated to an employee who is not under such an agreement: 1 6 2

- Where the rule applied to all employees, but only the crew leader was disciplined for not reporting a dangerous situation, the arbitrator found that disparate treatment was a mitigating factor: 1 6 8

- Where the grievant carried a weapon onto the grounds of the forensic unit at CDC illegally, and the guard did not report him immediately or confiscate the weapon, but the guard received only a 2 day suspension while the grievant was removed, the arbitrator held that there was no disparate treatment since the guard was not guilty of illegal conveyance of a weapon as was the grievant: 1 7 4

- In order to establish disparate treatment, the Union must show that penalties for the same misconduct, under similar circumstances, have not been reasonably consistent: 1 7 6

- The arbitrator held that certain examples were not relevant since the union did not discuss them with sufficient specificity for comparison purposes. The mere introduction of documents does not establish the similarity of circumstances. A thorough and complete comparison, by competent witnesses, is essential if the union hopes to establish a disparate treatment condition: 1 7 6

- There was no disparate treatment. The other officers involved in the incident had not been found to have used excessive force. Thus, it was appropriate that their penalties be less severe than the grievant's. The Union had argued that there had been another analogous case where an officer had used force but had not been discharged. The arbitrator determined that the cases were not similar because unlike the grievant, the other officer had not acted maliciously. Since, “in order for there to be disparate treatment, the situations must involve similar circumstances,” the arbitrator found that disparate treatment had not been proved: 1 8 0

- The arbitrator found "overwhelming evidence" of disparate treatment where

1) employees had engaged in the same conduct with what appears to be disparate discipline,

2) the employer offered no evidence to explain away these apparent discrepancies other than to suggest the potential for individual mitigating circumstances and

3) an independent agency (OCRC) had found evidence of "inconsistency and arbitrariness" with regard to discipline for "attendance infractions": 1 8 9

- An implicit component of "just cause" is that equal infractions receive equal discipline. Fair discipline is even discipline. Inconsistent discipline could lead employees to suspect favoritism. Moreover, inconsistent discipline undermines the concept of notice. When an employee sees another employee undisciplined for infractions, a logical inference would be that the employer has "waived" application of the rule. Over time, such a "waiver" could lead to the conclusion that the "rule" no longer existed. In essence, failure to discipline consistently can
constitute "notice" that the rule no longer exists: 1

- Under the disparate treatment concept embedded in the applicable just cause standard, the slightly mitigating circumstance of not having initiated the theft is insufficient to support the totally disparate treatment of no discipline whatsoever, versus discharge: 1 93

- It is now well established that lenient employer policies can be made more stringent following clear notice to employees that such will be the case: 1 93

- As other arbitrators construing the contract have observed, its "just cause" for discharge/discipline standard calls for a de novo presentation of the case against the grievant before the arbitrator. Thus, it is simply inadequate to defer to the criminal justice system- Under the just cause standard it does not suffice to say that one employee guilty of virtually the same conduct as another is subject to discipline because the criminal justice system found him guilty whereas it found the other innocent. If the agency elects to defer to the criminal justice system with all its varieties of prosecutorial discretion and juries, then it does so at its peril: 1 93

- Just cause requires like treatment under like circumstances. There is no discrimination or departure from the consistent or uniform treatment of employees, merely because of variations in discipline reasonably appropriate to the variations in circumstances. Likewise, where the nature of the offense is the same (in this case theft), but other circumstances vary, variations in the discipline imposed must nevertheless be reasonably appropriate to the variations in the other circumstances, Stated otherwise, an essentially proportionate relationship must be maintained: 1 93

- The arbitrator appeared to require clear and convincing evidence of disparate treatment: 1 96

- Disparate treatment requires that the employer was aware of certain irregularities, condoned those irregularities, and treated like instances in a dissimilar fashion: 1 97

- The comparison of non-probationary with probationary employees is completely erroneous because of standing differences enjoyed by differing groups: 1 97

- A disparate treatment claim cannot be defeated by comparing performance evaluations when the grievant's record was incomplete at best: 1 97

- Differences in training and experience are not appropriate bases for differences in discipline where the two employees have committed the same offense: 1 97

- Where the grievant was given a 5 day suspension for a second profanity offense, the minimum allowed by the disciplinary grid, but another employee had been given a written reprimand for a second profanity offense, the arbitrator found disparate treatment. The arbitrator did not accept the employer's attempt to distinguish the cases by saying that the grievant's offense was premeditated whereas the other offense was an emotional outburst. The grievant did not lie in wait for the supervisor but acted on an impulse of the moment: 200

- Mere variations in terms of discipline do not prove disparate treatment when a reasonable basis exists for the different penalties imposed. The grievant was under a last chance agreement. That the employee who received a lesser penalty for the same kind of violation was not subject to such an agreement is a reasonable basis for imposing different penalties: 208

- The employer showed reasonable grounds for the different punishments imposed such as differences in adherence to the call-in procedure, differences in prior discipline (the arbitrator stated that an oral non-documented verbal reprimand cannot be equated with an officially documented verbal reprimand), and differences in frequency of tardiness: 209

- The fact that no other employee received a suspension during a certain time does not establish a “per se” disparate treatment claim: 209

- Disparate treatment is not “per se” unjust; disparate treatment is inherently fair when an individual's problems are weighed into a decision. In fact, the Union would argue that mitigation evidence is important to every discipline decision. Such flexibility is a necessary management tool as well. A recognition that not every employee is treated exactly the same does not justify a charge
of invidious discrimination against any employee of any other intentional discrimination. To show disparate treatment strong enough to overcome management's decision requires the union to show by clear and convincing evidence or a purpose to discriminate. To compare, we must know each employee's total work record, longevity, and past discipline including prior mitigating circumstances: 221

- Where the mandatory over time policy only allowed an employee to be excused if they had already worked 16 hours or been injured, and the grievant was disciplined for refusing to do overtime, even though she had a medical excuse, the arbitrator ruled that the reasonableness of the policy was called into question by the fact that (1) another employee had been excused even though not falling into one of the specified exceptions and (2) management had not attempted to distinguish that employee's situation from the grievant's: 225

- Arbitrator found that the union failed to show disparate treatment since the other officer being compared to the grievant had received a reduction of discipline due to the employer's failure to pursue discipline in a timely fashion: 229

- The burden of proving disparate treatment is on the union. The Union must prove not only that others have escaped harsh discipline for the same offense, but also that their circumstances and records were similar to the employee’s: 232

- Grounds on which cases of theft can be distinguished under disparate treatment analysis include whether one recants one's confession, and whether one voluntarily returns the property: 235

- Where management informed the staff of a new rule by having them sign off on it and thus some employees had notice before others, the arbitrator stated that disparate treatment could be proved by showing that while grievant, who had signed off was punished for violating the rule, other employees who had not yet signed off were not punished when they committed the same offense: 255

- The grievant violated the rule against offering or receiving anything from an inmate when she gave the inmate pictures with the understanding that he would draw a portrait. While the grievant alleged that other employees and managers had received the same service from the inmate, the grievant did not prove disparate treatment since it was not established that the other individuals did not receive the service as a consequence of existing craft procedures: 257

- While medication errors were common and no one had ever been disciplined for a medication error before, the arbitrator held that the grievant was not subject to disparate treatment because she was guilty of more than a medication error; the arbitrator held that she had made several misrepresentations or attempts at misrepresentations concerning her failure to administer the medication. These misrepresentations concerning the medication of patients constitute a serious violation of her duties: 267

- Disparate treatment was not established in an employment application falsification case because no evidence was given as to whether the examples for comparison involved willfulness, prior patterns of falsification, or mitigating factors- One of the cases could be distinguished on the grounds that the employee had cooperated with the investigation and her falsification was not willful: 268

- Disparate treatment requires that an aggrieved employee is similarly situated to a comparison group of employees. This requires evidence and testimony concerning the surrounding circumstances and is not merely limited to an expression of outcome: 268

- The arbitrator found disparate treatment where the employees appeared to be similarly situated. One was given several prior reprimands for sleeping on duty prior to removal while the grievant was removed on the first offense, and the employer failed to offer any substantial evidence to rebut the disparate treatment charge: 270

- The Union must, at a minimum, provide evidence that other employee in a similar situation to the grievant were treated differently. There are two steps to show disparate treatment:

1. The Union must show that other employees have
   a) committed the same or very closely analogous offense
   b) have received different discipline.

2. Do relevant factors exist (aggravating or mitigating) which rationally and fairly explain the
different treatment, i.e., degree of employee’s fault, length of service, prior discipline: 296

- Absolute homogeneity of discipline in a workforce is impossible; all that is required is “a range of reasonableness.”: 296

- One instance of disparate treatment on an employer’s part (unless shown to have been an intentional act) will not suffice. On the other hand, a clear pattern of arbitrary or discriminatory discipline infers motivated different treatment which is manifestly prohibited. The employer is not excused for unfair disparate treatment merely because no evidence of intention is available. On the other hand, discipline does require flexibility in administration: 296

- Once the employer has made a prima facie showing of just cause and once the union has shown prima facie disparate treatment, the waters get murky in terms of burdens of proof and standards. One problem is that the best evidence lies in the hands of the employer who has the greatest access to the background and details of each disciplinary incident. Good faith use of discovery will be necessary to uncover the facts in sufficient detail to clearly show unfair treatment. Generalized allegations of different treatment will not suffice: 296

- Once an employer has shown just cause in the particular case, a presumption of regularity in favor of the employer emerges, this presumption must be rebutted with particularly by the Union: 296

- The other employees that the Union presented as proof of disparate treatment were not similarly situated. They did not cause the injury as the grievant did and they were not present at the incident of abuse: 296

- Another aggravating factor in this case is that the grievant hid the evidence of a patient’s injury. He cleaned up the patient’s wound and hid the clean-up materials in order to disguise the occurrence: 296

- The Union’s claim of disparate treatment was denied since the employees that committed the same offense and received lesser discipline had different disciplinary work records. This difference could rationally account for the differences in the discipline: 296

The two solutions of discipline were different. The grievant intentionally tried to hide and steal the property of the State while the other employee did not. The grievant deliberately stole and sold the State’s property: 364

- By its terms the agency’s disciplinary grid builds in flexibility for management to exercise discretion when dealing with different offenses having penalties within the same range. Reasonable distinctions are the prerogative of management so long as there is no dissimilar treatment when the same offense is involved. Only when management is inconsistent in its discipline for the same offense is just cause jeopardized: 364

- The grievant was involved in a check-cashing scheme involving stolen state checks from another agency, along with two other state employees. His role was that of an intermediary between the person who stole, and the person who cashed the checks. He served 4 5 days of a criminal sentence. The grievant was found to be deeply involved with the scheme and received a substantial portion of the proceeds. The violations occurred while the grievant was off-duty, however they were found to be connected to the grievant’s job as theft of state property is harm to the employer. The grievant was found to not be subjected to disparate treatment when compared to other employees not removed for absenteeism while incarcerated: The other employees cited for disparate treatment purposes had not stolen state property: 370

- The grievant had been a Drivers’ License Examiner for 1 3 months. He was removed for falsification when he changed an applicant’s score from failing to passing on a Commercial Drivers’ License examination. The arbitrator found that the grievant knew he was violating the employer’s rules and rejected the union’s mitigating factors that the grievant had no prior discipline and did not benefit from his acts. Falsification of license examination scores was found serious enough to warrant removal for the first offense. The arbitrator also rejected arguments of disparate treatment. The grievance was denied: 4 03

- While on disability leave in October 1 990 the grievant, a Youth Leader, was arrested in Texas for possession of cocaine. After his return to work, he was sentenced to probation and he was
fined. He was then arrested in Ohio for drug-related domestic violence for which he pleaded guilty in June 1991 and received treatment in lieu of a conviction. The grievant was removed for his off-duty conduct. The grievant’s guilty plea in Texas was taken as an admission against interest by the arbitrator and the arbitrator also considered the grievant’s guilty plea to drug related domestic violence. The arbitrator found that the grievant’s job as a Youth Leader was affected by his off-duty drug offenses because of his co-workers’ knowledge of the incidents. The employer was found not to have violated the contract by delaying discipline until after the proceedings in Texas had concluded, as the contract permits delays pending criminal proceedings. No procedural errors were found despite the fact that the employer did not inform the grievant of its investigation of him, nor permit him to enter an EAP to avoid discipline. No disparate treatment was proven as the employees compared to the grievant were involved in alcohol related incidents which were found to be different than drug-related offenses. Thus, the grievance was denied: 410

- The grievant was a Mail Clerk messenger whose responsibilities included making deliveries outside the office. The grievant had bought a bottle of vodka, was involved in a traffic accident, failed to complete a breathalyzer test and was charged with Driving Under the Influence of Alcohol. The grievant’s guilt was uncontested and the arbitrator found that no valid mitigating circumstances existed to warrant a reduction of the penalty. The grievant’s denial of responsibility for her drinking problem and failure to enroll into an EAP were noted by the arbitrator. The arbitrator stated that the grievant’s improved behavior after her removal cannot be considered in the just cause analysis. Only the facts known to the person imposing discipline may be considered at arbitration. The arbitrator found no disparate treatment as the employees compared with the grievant had different prior discipline than the grievant, thus, there was just cause for her removal: 434

- The Union failed to present evidence of supervisory intimidation, discrimination on the basis of handicap (alcoholism) or disparate treatment: 441

- The burden of proving disparate treatment is on the Union. The Union showed that a number of employees were facially treated differently from the grievant, but different treatment alone does not prove disparate treatment. To prove disparate treatment, the different treatment must either have no reasonable and contractually appropriate explanation or be motivated by discrimination or other ill purpose. The Union proved only one part of the claim of disparate treatment: different treatment. However, the Union failed to show that the employees in question were in a similar or analogous position. In almost all the cases cited by the Union, the employees in question had little or no prior discipline. In this case, the grievant had a long and clear record of disobeying rules with no indication that the discipline was corrective: 452

- The Union’s claim of disparate treatment is not persuasive. The Employer investigated three cases and found differences which explained any disparity in discipline. Other employees, not all black, have been removed for substantiated patient abuse: 463

- The arbitrator took seriously the allegations of racial hostility, but there was no evidence of personal animosity existing between the State’s principal witness and the grievant. There must be some evidence other than the allegations in order to support the claims of disparate treatment: 480

- The issue of disparate treatment was not properly raised by the Union, which had the burden of proof: 482

- Alleged resentment over a prior arbitration award reinstating the grievant with back pay and delay in actually paying the arbitration award was insufficient to prove disparate treatment against the grievant. The presence of another employee, who was also in the department when the door was observed open but received no discipline, did not establish disparate treatment. The grievance was disciplined on the basis of eyewitness testimony. The other employee was never observed in a position to see that the door was open; therefore, it would have been inappropriate to impose discipline upon him: 493

- The Union proved that other employees who had committed assaults against co-workers were not removed. Instead, they were given verbal reprimands, suspensions or offered participation in EAP. Still, the arbitrator found neither disparate treatment nor lax enforcement of work
rules because the agency had never imposed a lesser discipline where the offending employee had a prior disciplinary record or where the assault was especially severe: 5 06**

The State prevailed in arbitration in this case involving a removal for physical assault. The Union then moved to vacate this decision in the Court of Common Pleas. The decision of the Arbitrator was upheld by the Court of Common Pleas. Julius Ferguson appealed to the Court of Appeals. The Court of Appeals dismissed the appeal on the basis of its finding that the employee did not have standing since he was not a party to the original action filed. Only OCSEA and the State were parties.

- The arbitrator found that other disciplinary instances by the State were distinguishable from this case and that the grievant did not offer sufficient evidence to show disparate treatment, racial discrimination or management bias. The arbitrator upheld the State's discretion for removal because it was in the spirit of the principles of progressive discipline: 5 1 6

- An agency's decision not to allow a grievant to participate in a second EAP agreement does not, in and of itself, constitute disparate treatment. Where the grievant failed to complete his first EAP agreement, the Employer's willingness to enter into any subsequent agreement is purely discretionary. Also, an agency can substantially comply with the mandates of the Americans with Disabilities Act (ADA) by attempting to "reasonably accommodate" the grievant's disability. The ADA does not require the Employer to accommodate any request the grievant might make and it cannot operate to void bona fide employment criteria, such as regular attendance: 5 2 3

- Disparate treatment is the treating of similarly situated persons in a different manner. In the instant case, the other instances alluded to by the grievant involve lesser violations. None of these offenses were on the scale of the present offense: 5 2 7

- The grievant admitted to bringing in candy bars and magazines for a particular inmate, which constitutes a violation of the rules at that institution: 5 3 0

- The arbitrator ruled that removal of the grievants, despite the one-day suspensions received by two other examiners, did not constitute disparate treatment given the grievants' relatively short-term work histories, their failure to immediately confess, and the malicious intent underlying their schedule falsifications: 5 3 3

- The grievant was charged with fighting with another employee and patient abuse. Although the misconduct did not rise to the level of abuse, there was sufficient evidence to show that the grievant's conduct was not appropriate. The Arbitrator held that the record did not sustain a charge of disparate treatment because the evidence showed that the other employees were not situated in substantially the same fashion with respect to the severity of the incident and disciplinary history: 5 8 5

- The Arbitrator held that the Agency did not engage in disparate treatment or discrimination in a case where a grievant was removed from his position as a Correction Officer for fighting. Correction Officers in another incident received a ten to fifteen day suspension. The Arbitrator held that the other case was not the same as the case at hand: 5 8 6

- The Union argued that the grievant was subject to disparate treatment since other employees in similar circumstances neither received discipline nor suffered discharge. The Arbitrator agreed that the grievant’s violation did not always result in removal and held that the grievant’s discharge was not commensurate with her offense: 6 1 3

- The Union argued that the grievant was subject to disparate treatment in the selection process of a job vacancy. The Union alleged that Management had a pre-disposition to hire the other applicant and urged other applicants to withdraw from consideration. The Arbitrator held that the testimonial evidence presented by the Union was not persuasive. The Arbitrator also found that Management was not required to investigate beyond the grievant’s application since it was not the Center’s established policy to do so: 6 1 7

- The Union argued that the removal of the grievant was without just cause. In its case, the Union demonstrated that the Employer did not remove other employees who had similar or even greater violations that the grievant’s. The Arbitrator affirmed the Union’s argument and stated that managers must be held to the same or higher standards than their subordinates, which included the grievant. As a result of the grievant’s
Due to cuts in the budget at the Department of Mental Health, Northcoast Behavioral Healthcare had to eliminate several positions. The grievant’s position was one of them. She was employed as an Office Assistant III and sought a newly created position as a Health Information Technician I. This position required applicants to type 50 words per minute with 95% accuracy. The grievant failed the test. However, another employee bid off an Office Assistant III job and the Union insisted that management contact the grievant about this position. Management declined, stating that it was considering changing the opening to a Health Information Technician I position, and the grievant was subsequently laid off. When management decided to retain the Office Assistant III position, it sent the grievant two recall notices by certified mail. The notices indicated that the job required an applicant to type 50 words per minute with 95% accuracy. The notices were returned as undeliverable or unclaimed and another employee filled the position. The arbitrator denied the Union’s contention that the state had discriminated against the grievant in violation of Article 2 of the collective bargaining agreement. First, he found that there was no disparate treatment. He distinguished the grievant’s case from another case involving a telephone operator position. The arbitrator pointed out that in the present case management was unsure whether the opening would be posted as an Office Assistant III job or Health Information Technician I job and by the time a final decision was made, the grievant was already laid off. In the earlier case, there was no question that the job would be posted as an opening for a telephone operator and management had sufficient time to offer the job to the employee before the scheduled layoff. Secondly, the arbitrator rejected the argument that the 50 word per minute typing requirement was added to keep the grievant from filling the position. He stated that the state had the right to be sure that whoever filled the position had the necessary typing skills. Moreover, the Vice President of Human Resources testified that he would not have required the grievant to take a typing test if she had voiced her concerns about the requirement. The arbitrator also noted that the state would not have sent two certified letters to the grievant at two different addresses if it did not want to recall the grievant. Finally, the arbitrator ruled that the union did not present any credible motive that the state discriminated against the grievant. Despite the fact that the grievant was a party to a lawsuit against the department, it had occurred nine years prior to her layoff, and there was no evidence that the other employees who were party to the suit were subject to punishment.

Grievant was terminated from his position as Cook 1 at the Department of Youth Services for reporting to work 22 minutes late on June 1, 2003 and one minute late on June 16, 2003. In addition, the grievant was arrested at the facility for failing to pay a fine for a traffic offense. The Union argued that the grievant was treated differently from other employees because two other employees had been arrested at the institution and both still maintained their employment. However, the arbitrator ruled that there was no disparate treatment because the other employees did not have a poor record as the grievant, and he had been warned that he needed to have his warrant cancelled, while the other employees had not had a similar forewarning.

The Employer initially took a firm position that the Grievant was not qualified for the promotion of Electronic Design Coordinator position, but agreed to place the Grievant in the position following a grievance settlement/NTA award. A considerable amount of assistance was given to the Grievant in performing his work; however, after the probationary period the Grievant was removed from the position. The Arbitrator found that the Union failed to prove that the Employer, following a reasonable and contractually adherent period of probationary observation, acted in an unreasonable, arbitrary, or capricious manner in determining the Grievant was not able to perform the job requirements of the position of Electronic Design Coordinator. The testimony of the Employer’s witnesses contained the important element of specificity that was not refuted by the Grievant in any specific or substantial manner. In contrast, the Grievant’s direct testimony was far more general, vague, and for the most part accusatory in nature. There was little evidence to demonstrate the Grievant knew enough and was sufficiently skilled to successfully perform the work of an Electronic Design Coordinator in accordance with acceptable standards.

Insubordination is a serious offense. The Grievant’s misconduct took place in a correctional
facility where following orders is particularly important. The very next day the Grievant violated policies and procedures when she left a youth unattended. The Grievant’s disciplinary history was a major factor supporting termination—she had received a 1 2-day suspension on January 9, 2005. The Arbitrator rejected the claims that the Grievant was the victim of disparate treatment; that the imposition of discipline was delayed; and that the employer was “stacking” charges against the Grievant in order to justify her termination. The Union was unable to show how the delay prejudiced the Grievant’s case or violated the contract. The decision to combine two incidents appeared to be reasonable. The disciplinary record of another JCO involved in leaving the youth unattended justified the different treatment. The Arbitrator concluded that the Grievant’s discharge was for just cause and was in compliance with the collective bargaining agreement. 94

When the Grievant organized, planned, and promoted a work stoppage she violated Rule 30B. The Arbitrator believed she developed the plan and solicited the participation of other employees. When the grievant organized a work stoppage in the face of an approaching winter storm, she engaged in “action that could harm or potentially harm . . . a member of the general public” and violated Rule 26. Grievant violated Rule 4 by interfering with the investigation of the work stoppage. Testimony from other witnesses showed that the grievant was not truthful in her accounts of the events. The Arbitrator believed the state conducted a full and fair investigation. The Arbitrator did not believe the grievant was the object of disparate treatment. Leaders of work actions are identified and discharged, while employees playing a lesser role receive less severe penalties. The Arbitrator did not believe the state failed to use progressive discipline. In the case of very serious misconduct an employer is not required to follow the usual sequence of increasingly severe discipline. Mitigating factors of long service, good evaluations, and behaving in a professional manner in her work as a union steward did not offset the seriousness of the Grievant’s misconduct. The Arbitrator concluded that when the Grievant organized a work stoppage in the face of major winter storm she provided the state with just cause for her discharge. 95

The Arbitrator held that the discipline was for just cause and was not excessive. TPW’s are required to report any incident of known or suspected abuse they observe or become aware of, to ensure that a proper and timely response occurs, while considering the unique circumstances of each client. The Grievant had a duty to report and did not comply. Three incidents were not timely reported on a UIR, but were disclosed by the Grievant during an official investigation by CDC’s Police Department into alleged abuse. The Grievant admitted a UIR was incomplete, but attempted to justify his actions by alleging that: a.) he had been employed only seven months; b.) he did not want to be viewed as a “snitch” among his peers; c.) he has a passive personality; d.) he was concerned other TPWs might retaliate against him; and e.) an unwritten “code of silence” was used by his co-workers which encouraged TPWs not to report unusual conduct. The Arbitrator determined that the Grievant’s overall testimony was not credible and believable. This was buttressed by the Grievant’s failure to provide any specific facts or verifiable supportive evidence to support claims that alleged abuse, unknown to CDC, occurred during his employment. An affirmative defense of disparate treatment could not be supported. Evidence offered was insufficient for a finding that one employee’s behavior and the Grievant’s behavior were closely aligned or that another employee was similarly situated as the Grievant. 96

The Grievant was removed after two violations—one involving taking an extended lunch break, the second involved her being away from her work area after punching in. Within the past year the Grievant had been counseled and reprimanded several times for tardiness and absenteeism, therefore, she should have know she was at risk of further discipline if she was caught. Discipline was justified. The second incident occurred a week later when the Grievant left to park her car after punching in. The video camera revealed two employees leaving after punching in. The other employee was not disciplined for it until after the Grievant was removed. That the Reviewing manager took no action against another employee when the evidence was in front of him is per se disparate treatment. No discipline for the parking incident was warranted. Management argued that removal was appropriate since this was the fourth corrective action at the level of fine or suspension. The Grievant knew she was on a path to removal. But she also had an expectation of being exonerated at her Non-traditional Arbitration. Her 3-day suspension was vacated by an NTA decision. That fine was not to be counted in the
The Grievant was discharged without just cause. The Arbitrator found that the Grievant should have been aware of Rule 26. He held that there was no disparate treatment. The choice of the charge of the Grievant was reasonable and quite distinguishable from the facts concerning another corrections officer. The record contained evidence of evasion by the Grievant as to the reason why he did not report his arrest immediately. Any violation of Rule 26 would have been the first offense by this Grievant of Rule 26 and, as such, the maximum sanction for the first offense is a 2-day fine, suspension, or working suspension. However, there was a last chance agreement signed by the Grievant, the warden, and by a union representative. The Arbitrator was limited by the rules which the Grievant accepted in the last chance agreement; therefore, the Arbitrator has no authority to modify the discipline in this case. Rule 26, an SOEC Rule on the performance track of the disciplinary grid, was violated by the Grievant. Once such a finding is made, the Grievant himself agreed in the last chance agreement “that the appropriate discipline shall be termination from (his) position.”

The Arbitrator found nothing in the record to support the falsification charge. The administration and interpretation of the Hours of Work/Time Accounting Policy were inconsistent. The policy in no way restricts an employee’s ability to supplement an approved leave and lunch with an afternoon break. The Employer admitted violating Article 24.04 by failing to inform the Union about the purpose of the interview. It viewed the violation as de minimus. The Arbitrator found that this cannot be viewed as a mere procedural defect. “Without prior specification of the nature of the matter being investigated, the right of ‘representation’ becomes a hollow shell.” Without a purpose specification, interviews become an unfocused information gathering forum and can often lead to ambiguous results. The Employer attempted to raise certain credibility concerns because the Grievant provided differing justifications for her action at the investigatory interview versus the pre-disciplinary hearing. This difference in justification was plausible since the purpose requirement of Section 24.04 was violated. A contractual violation of this sort represents a severe due process abridgment, which the Ohio Revised Code, state and federal courts view as a critical element of representation rights. Investigation defect allegations dealing with unequal treatment were supported by the record. Other similarly situated bargaining unit members who had not been disciplined for similar offenses were identified for the Employer.

The Employer did nothing to investigate this unequal treatment. The grievance was sustained in part and denied in part. The removal was modified to a five-day suspension. The Grievant was granted full back pay and benefits less the five-day suspension. The Arbitrator found that Management satisfied its burden of proving that the Grievant failed to maintain the close supervision for one patient and one-on-one supervision for another patient. The Grievant chose to work without adequate sleep, rather than to seek leave, and her choice placed the residents in her supervision, and the Center at risk. However, Management had created an arbitrary distinction in supervision cases arising from sleeping on duty. The Union established that other similarly situated employees received suspensions and/or other disciplinary action far short of removal for similar conduct. Therefore, the Arbitrator held that discipline was warranted, but the removal was without just cause.

**Displacement**

- There was no violation of the notice provision of Article 39 where the Union received formal notice within ten days of the ODOT decision to subcontract, even though fourteen bargaining unit positions were abolished as a result. Because the subcontracting affected only 5.7% of the total number of employees working at the Division of Public Works, the subcontracting was considered "minor". Therefore, the Union was only entitled to "reasonable advance notice". Since neither party argued that the 66 day notice was unreasonable, the State did not violate the notice provision of Article 39: 5 32

- Under Article 18 an ODOT employee used her right to bump. As a result of this employee using her right to bump, the grievant was displaced from her position. The fact that the grievant did not file her grievance until after the employee who had bumped her got her original position back: 5 5 1

- In a case where six grievants who were displaced filed claims in an effort to challenge the abolishment of the positions of Air Quality Technician 1 and Electrician 1, the Arbitrator held that the grievance could not be used as a means of challenging the rationale for the original abolishments: 5 5 4
Disrespect for Superiors

- Grievant's disrespect of her superiors, especially the superintendent, is intolerable. Their positions entitle them to great deference: 1 1 6

- Sign in/ sign out sheets do not necessarily provide accurate comparisons evidencing similar circumstances. Some of these occurrences might have been excused or other factors might have played a role in their evaluation by the employer: 24 1

- Disparate treatment did not occur where the aggressor in the fight was subject to discipline but the other party was not: 24 6

- Settlement agreements cannot be used to prove disparate treatment since the parties have many motives when settling a grievance and their use to prove disparate treatment would discourage settlement: 25 0

- Falsifying a Physician's statement is more serious than the offense of working through one's break, leaving a proportionate amount early, but signing out as though having left at the normal time. Hence the former may be penalized even when no penalty is imposed for the latter: 25 0

Document Requests

- The Union should pay the copying costs of requested documents: 4 89

- It is incumbent upon the Employer to inform the Union that information arguably relevant to the dispute is available, albeit in a form unknown to the Union: 4 89**

- It is not within the province of the Employer to determine which documents are necessary for the Union to make its case. Should the State be able to unilaterally withhold evidence that the Union regards as relevant to its case, the grievance and arbitration procedures will be fatally compromised: 4 89

- The Union needed a copy of the incident report to demonstrate inconsistencies in the witnesses' testimony concerning patient abuse. In addition, the report did not violate the patient's privacy. Therefore, the arbitrator forced the State to turn over a copy of the document to the Union: 5 1 0

Management's denial of access to documents hindered the Union in its investigation. Pursuant to Article 25 .08, management has an obligation to provide documents available to assist the Union in meeting its burden of proof. If management requested the release of redacted documents for inspection by the Union under the umbrella of privilege, it was unreasonable of it to refuse the same request by the Union for the documents needed for its case. 799

Documents, Failure to Provide

- See discovery

- See Procedure

- Where certain documents may not have been the ultimate basis for discipline, but were available to the manager who imposed the discipline, the documents must be provided under 24 .04 since they are documents used to support "possible" disciplinary action: 39

- State statutes or regulations (in this case protecting patient confidentiality) do not provide state with a reasonable basis under 25 .08 or 24 .04 for refusing to provide information since section 4 3.01 of the contract determines that the contract supercedes any conflicting state law: 39

- If medical records can be released, then there is no justification for refusal to release statements from witnesses working at the time of death: 39

- Where another employee's removal for same offense had been modified to 30 day suspension because of 6 years of good service, grievant was not discriminated against when his removal was not modified given that grievant had worked a shorter period: 4 2

- 25 .08 binds the employer to not "unreasonably deny" any Union request for "specific documents" which are (1) "reasonably available" and (2) "relevant to the grievance under consideration: 5 3

- Presence of union at pre-disciplinary hearing does not make union access to statement of administrator's findings superfluous. The Content of the hearing and the administrator's findings are clearly separable: 5 3

- Arbitrator has final decision on relevancy of evidence: 5 3
- A clear distinction must be drawn between whether a document is discoverable under 25.08 and whether the same document is "relevant" evidence before the arbitrator. Receipt of a discoverable document is no guarantee that the document will be considered in evidence. Even to be considered in evidence, there is no requirement that a document has sufficient weight to be either credible or probative: 5 3

- On its face, 25.08 includes broad discovery: 5 3

- Relevancy in discovery is traditionally significantly more liberal than in evidentiary matters: 5 3

- Since the purpose of the arbitration is to determine whether the decision to discipline was made with "just cause", any information used to arrive at that decision is "relevant to that grievance" for the purpose of discovery: 5 3

- Arbitrator followed opinion #5 3: Pre-disciplinary reports are discoverable: 83

- The union has the right to discover the pre-disciplinary report only after the final disciplinary decision has been made. This preserves the situation where both sides present their statements simultaneously to the disciplinary authority, with neither having the opportunity to rebut the other: 83

- There is a distinction between what is discoverable under 25.08 and what is admissible at the arbitration hearing: 83

- In regard to whether manager's disciplinary recommendations are reasonably available arbitrator said, "The management responsibilities of department heads and deputy administrators include, one supposes, making disciplinary recommendations. The arbitrator fails to see how making these responsibilities secret will contribute to a reasonable and fair process. If knowing that their words will be scrutinized will cause persons to choose words carefully, then so be it. The arbitrator funds that well-chosen, reasonable words will strengthen the process not "chill" it: 83

- Complete incident reports are both relevant to the grievance and reasonably available under 25.08 and hence are discoverable: 83

- 24.04 allows the employer to wait until the pre-disciplinary meeting to provide a list of witnesses and documents in support of the employer's charges. Where there was no evidence that the employer relied on a medical report at the pre-disciplinary hearing, the arbitrator ruled that 24.04 was not violated, even though the report, as supplied to the union, was incomplete: 1 06

- Neither just cause nor the contract requires production of the pre-disciplinary document prior to arbitration: 1 06

- While the arbitrator found that A-302(F) did not require a written pre-disciplinary report, she was troubled by the practice since she had held in a previous arbitration that written pre-disciplinary reports are discoverable under 25.08: 1 09

- A deliberate action to avoid the essence of 25.08 (by deliberately failing to provide the pre-disciplinary report) would violate the implicit due process requirements of the contract. The arbitrator took note of the absence of evidence that the action had been deliberate in this case: 1 09

- Section 4 4 2.5 02, C.F.R., confidentiality in certain ways, supercedes 25.08 where 25.08 conflicts with the regulation. The parties did not intend for the contract to supersede federal laws and regulations: 1 1 6

- The employer violated 25.08 by refusing to provide the union with a transcript of an investigatory interview of the patient who made the allegation against grievant. It was a serious violation since the transcript contained the statement of the alleged victim. The seriousness is highlighted in this case where the victim had admitted that part of the allegation had been false: 1 1 6

- The employer violated 25.08 by refusing to furnish the written statements of certain persons that had been taken at step 3. That the persons testified at the arbitration hearing does not cure the violation. (1 ) The Union should have the opportunity to compare the statements with the oral testimony to check for consistency. (2) The Union should not have to guess at what witnesses will testify when the witness' version of the events has already been reduced to writing: 1 1 6
- The request for documents was proper since it was specific, relevant to the grievance, and reasonably available from the employer. In addition, the request was initiated prior to the arbitration hearing and was not a "fishing expedition": 1 1 8

- Arguments by the employer that it ought not have to provide the union with certain documents because of policy considerations, and because it helps the union prepare its case, provide weak justifications in light of the specific language negotiated by the parties: 1 1 8

- The arbitrator gave no effect to the state's failure to provide certain documents to the union on the grounds that the grievant was not prejudiced: 1 3 0

- The employer is not required to provide witnesses' statements, investigatory reports, and incident reports at or prior to the pre-disciplinary conference. Section 24 .04 , which is titled "pre-discipline", only requires the employer to furnish a list of witnesses and documents that will be relied upon ill imposing discipline. This comports with the generally accepted view that pre-disciplinary hearings are usually not considered to be "full-blown": 1 9 2

- The arbitrator found a due process violation where the employer had self imposed requirements for when to provide certain documents, but failed to follow these guidelines in the instant case: 1 9 2

- Confusion with regard to the state's obligation to furnish documents such as witnesses' statements, incident reports, investigatory reports when requested by the union at or after step one is no excuse given the ample arbitral precedent under 25 .08 of the contract. Tardy production of such materials is a due process violation: 1 9 2

- While the arbitrator determined the issue to be moot in this case, she suggested that where the conflicting interests of inmate privacy and the grievant's need to discover the inmate's medical records arise, that the issue might be resolved by having one of the arbitrators on the panel review the evidence and the need for examination prior to the hearing: 2 2 4

- Where the employer was not aware, at the time of the pre-disciplinary meeting, of certain items that would be used as employer exhibits at arbitration, the employer did not violate 24 .04 by failing to provide those items at the time of the pre-disciplinary meeting: 2 5 7

- The arbitrator concluded that the documents might not have been reasonably available when they had been put in security control after being discovered in a shake-down of an inmate: 2 5 7

- Failure to provide certain documents to the union is significantly mitigated when the relevance of the documents has decreased due to the fact that the grievant recanted her original testimony and admitted to the facts for which the documents were evidence: 2 5 7

- Sections 24 .04 and 25 -08 were not violated when the employer failed to provide the work product of the security force investigation until just before the arbitration hearing. The security force did not release the information to the employer until that time which was when it determined that criminal and/or civil proceedings were no longer contemplated. Management requested the work product but was refused. Thus management neither relied on the documents at issue, nor were they reasonably available. Management is allowed to rely on the documents at arbitration because the union introduced them into evidence. The bifurcated investigation procedure is reasonable on its face since collateral investigations cannot be made the basis for discipline but can only be used as supporting evidence: 2 6 3

- The grievant was a Correction Officer who was removed for watching inmates play cards while they were outside their housing unit. The grievant admitted this act to his sergeant. The pre-disciplinary hearing had been rescheduled due to the grievant’s absence and was held without the grievant or the employer representative present. The arbitrator found that because the union representative did not object to the absence of the employer’s representative, that requirement had been waived. There was also no error by the employer in failing to produce inmates’ statements as they had not been used to support discipline. The removal order was timely as the 4
5 day limit does not start until a pre-disciplinary hearing is held, not merely scheduled; 377

The employer removed the grievant for two reasons: 1) The grievant committed theft because he had been named as the supplier of checks that had been returned to the Bureau of Workers’ Compensation, to another state employee in order to cash the checks (see arbitration decision #370); 2) falsification of his job application because he admitted during the investigation that he had prior felony convictions which he failed to report on his employment application. The arbitrator held that the employer could not use the falsification charge as a basis for removal because the grievant had sought assistance when he completed his application and lacked intent to falsify the application. The employer was also stopped from using the falsification because the grievant had been employed for 8 years, and had been removed once before, thus the employer was found to have had ample time to have discovered the falsification prior to this point. The employer was not permitted to introduce the Bureau of Criminal Investigation’s report into evidence at arbitration because the employer failed to disclose it upon request by the union. The fact that the investigation was ongoing was irrelevant. Just cause was proven through the investigator’s testimony and testimony of others involved in the scheme. The grievance was denied: 401

The grievant was a Therapeutic Program Worker who was removed for abusing a client. The client was known to be violent and while upset and being restrained, he spat in the grievant’s face. The grievant either covered or struck the client in the mouth and some swelling and a small scratch were found in the client’s mouth. The grievant had served a 70 day suspension for similar behavior. The arbitrator found that the employer committed procedural violations by not disclosing the incident report and the client’s progress report despite the employer’s claim of confidentiality. The employer’s witnesses were found to be more credible than the grievant. The grievance was denied: 414

The grievant went on approved disability leave. She exhausted her available leave balances and was placed on Physician’s Verification. The grievant was sent a set of disability forms, but failed to submit the documents or contact the personnel office. The arbitrator found that the grievant’s actions, or inactions, aggravated rather than mitigated the situation. It is reasonable to expect an employee experiencing an extended absence to know that he/she must call his/her supervisor. The grievant made no attempt to contact her employer. The employer made several efforts to contact the grievant regarding her absence and the necessity to contact personnel. Nothing in the record indicates the employer did not have the grievant’s telephone number or correct address; nor was there any indication that the grievant had moved or changed her number. The arbitrator stated he had to assume the grievant blatantly disregarded the employer’s efforts. He found it ironic that had the grievant notified her employer, she could have filed her disability application in a timely manner. 873

**Double Jeopardy**

- Once discipline has been imposed and accepted it cannot thereafter be increased: 1

- Double jeopardy concept applies where management unduly delays the assessment or enforcement of discipline: 1

- It is a well-established arbitral principle that an employee cannot be penalized by discharge, or by any other lesser penalty, merely for the employee’s past record, unless the employee has committed a present offense. There must be a justifiable trigger” for any new discipline. 8

- Merger and bar principles espoused in Ohio Administrative Code Rule 1 24 -3-05 are not incorporated into the Agreement through the Preservation of Benefits Clause (Section 4 3.02). 20

- Where there was valid past discipline, the “employer nevertheless bears the burden of proving that just cause exists for any ensuing disciplinary action. 39

- The arbitrator said he could find no reason for the employer to issue a written reprimand and then follow it 2 months and 8 days later with a suspension for the same offense. The evidence showed grievant was guilty and that he could have been suspended to begin with. A suspension issued over three months from the date of the offense clearly does not fall within the spirit of 24.02. 99
It is true that at some point the extra chances end and one infraction serves as a final trigger to bring about removal. Similarly, progressive discipline contemplates the rehabilitation of poor performance and does not require indefinite withholding of discharge, where an employee proves incorrigible. But there must be a final trigger. An employee cannot be arbitrarily fired, without a triggering disciplinary incident. Management cannot simply cite an employee's record as the basis for discharge:

The Union’s argument of double jeopardy is misplaced; there was not a full hearing the first time the incident came up:

The grievant took a magnetic tape containing public information home, which was against agency rules. She intended to return the tape but it became lost, and she was charged with theft of state property. The tape was later recovered by the Highway Patrol during an unrelated investigation. The grievant was transferred to another position without loss of pay or reduction in rank and suspended for 30 days. The arbitrator held that the employer failed to prove that the grievant intended to steal the tape (Hurst arbitration test applied) rather than borrow it. Taking the tape home without authorization was found to be a violation of the employer’s rules. The employer was found not to have applied double jeopardy to the grievant as only one disciplinary proceeding had been brought and the transfer was found not to be disciplinary in nature. The 30 day suspension was found not to be reasonably related to the offense, nor corrective and was reduced to a 1 day suspension with full back pay for the remaining 29 days:

Drinking on Duty

The arbitrator ruled that the employer did not prove the charge by clear and convincing evidence where no one had observed the grievant in possession of alcohol, the employer had no objective proof of intoxication, and no one promptly reported their suspicions to management so that no prompt investigation was carried out. While the grievant was observed drinking a yellow liquid, the grievant testified that it was ginger ale. The testimony that the grievant had slow speech was countered by the arbitrator's observation at the hearing that the grievant has normally slow speech. Objective, clear and convincing evidence of intoxication requires either a blood test or a behavioral test by a medical expert or other expert trained in alcoholism. While one of the witnesses that observed the grievant and testified that he appeared intoxicated had all of the credits necessary for a drug/alcohol certification, but was not certified and had never worked in the field, the arbitrator ruled that this was not sufficient to qualify the witness as an expert:

The arbitrator found that the employer had met its burden of clear and convincing evidence where (1) the trooper's testimony was objective, thorough, and complete, (2) no prejudice was shown, (3) the arbitrator was convinced of his expertise, and (4) the evidence of intoxication was corroborated by the observations of 2 other witnesses:

Driver's License

A driver’s license is a reasonable requirement for the position of a Correction Officer. The grievant’s license is suspended for ten years for accumulating twelve Driving under the Influence citations. The grievant was discharged. The arbitrator decided that even though the grievant had not had to drive for the past six years it did not mean he would not be called upon to drive in the future. The removal was upheld:

When the grievant, a Driver’s License Examiner, examined himself and authorized his own school bus endorsement he used his position for his own personal advantage. Under a minimum standard of reasonableness and fairness the grievant was aware or should have been aware that his conduct of self-certification was highly improper. The State was not required to establish that it had or communicated a specific rule for such a well-recognized proven offense of falsifying State documents in order to obtain a motor vehicle license:

Driving While Intoxicated/Driving Under the Influence

See also driver’s license

The employer is not bound to excuse or forgive a long absence that came about as a consequence of an employee’s willful act. The employee in this case was incarcerated for drunk driving:

The grievant was a Correction Officer who had an alcohol dependency problem of which the
employer was aware. He had been charged twice for Driving Under the Influence, which caused him to miss work and he received a verbal reprimand. The grievant was absent from work from May 18th through the 21st and was removed for job abandonment. The arbitrator found that the grievant’s removal following a verbal reprimand was neither progressive nor commensurate and did not give notice to the grievant of the seriousness of his situation. It was also noted that progressive discipline and the EAP provision operate together under the contract. The grievant was reinstated pursuant to a last chance agreement with no back pay and the period he was off work is to be considered a suspension: 413.

The grievant was a Mail Clerk messenger whose responsibilities included making deliveries outside the office. The grievant had bought a bottle of vodka, was involved in a traffic accident, failed to complete a breathalyzer test and was charged with Driving Under the Influence of Alcohol. The grievant’s guilt was uncontested and the arbitrator found that no valid mitigating circumstances existed to warrant a reduction of the penalty. The grievant’s denial of responsibility for her drinking problem and failure to enroll into an EAP were noted by the arbitrator. The arbitrator stated that the grievant’s improved behavior after her removal cannot be considered in the just cause analysis. Only the facts known to the person imposing discipline may be considered at arbitration. The arbitrator found no disparate treatment as the employees compared with the grievant had different prior discipline than the grievant, thus there was just cause for her removal: 434.

The Employer had just cause to discipline the grievant, who lost his driver’s license due to a charge of driving while intoxicated. However, because of his desire to be rehabilitated and his adequate evaluations, removal was too great a penalty. He was permitted to seek a modification order of his license suspension allowing him to perform his job, which required him to drive state vehicles: 441.

The grievant could not fulfill his job responsibilities, which required him to operate motorized equipment, because he lost his driver’s license due to violations of Ohio drunk driving laws. However, the grievant was given a chance to be reinstated if the grievant could obtain a valid modification order by a specified date. The grievant did not comply with the conditions of the reinstatement award. Therefore the employer is not obligated to reinstate the grievant: 441 (A).

- The grievant’s driver’s license was suspended as the result of a charge of driving under the influence. He did not get a modification order allowing him limited driving privileges, and therefore, was unable to perform his job. The Employer had just cause to remove him: 486.

- The grievant was arrested for DUI while driving a State vehicle and was subsequently removed. The Arbitrator concluded that this removal should be modified and that the grievant should be reinstated without back pay but without loss of seniority or benefits: 571.

- Although Appendix M of the contract relates to the use and/or possession of drugs and alcohol by Department of Transportation employees, it only controls those employees who are under the influence of such substances while on duty. The Arbitrator held that the appendix does not apply to off-duty employees who happen to be on Department property: 605.

Drug Detection

- The evidence that three individuals, experienced in drug identification, smelled marijuana in a control tower points toward the drug being smoked there: 323.
- The marijuana particles lodged in the grooves and cracks of a desk are inconclusive evidence that the grievant brought the drugs onto institution grounds. Different officers were assigned to that tower and the testimony on how and under what circumstances the desk was cleaned was vague: 323.

Drug-Free Workplace Program

- The DAS Drug-Free Workplace Program will provide a letter to Kroll to disseminate to its collection sites (approx. 155) reiterating when a collection site should conduct drug and/or alcohol tests for employees that have been injured and are being treated for workers compensation injury. A collection site should conduct a drug and/or alcohol test for employees that have been injured and are being treated for workers compensation injury only if the test is made:
  A. at the request of the Employer when there is reasonable cause to suspect
the employee may be intoxicated by or under the influence of a controlled substance not prescribed by his/her doctor, or

B. at the request of a Licensed Physician who is not employed by the employer, or

C. at the request of Police Officer pursuant to a traffic stop and not at the request of the employee’s employer.

In addition, the collection site will provide for tests that are conducted at the request of the Employer. An agency management designee will verbally contact the collection site to coordinate the test and the collection site should update its database to reflect this. If a collection site is not verbally contacted by an agency management designee, it may not conduct the test and if it is done, it will be invalid and the agency will not process payment for the test. 1 01 4

Drug Testing

- Grievant’s selection for drug testing was based on evidence identifying him as a prime suspect for drug use. The order to submit to testing was not an order to submit to random drug testing: 323

- The Agreement, in specifically prohibiting random drug testing, leaves testing upon reasonable suspicion to management’s discretion. There is no discernible intent to preclude management from ordering such testing; indeed, the parties bargained over a drug testing provision and intentionally elected only to prohibit random testing. There is no basis for the arbitrator to expand the meaning of Section 4 3.03 to also prohibit testing based on reasonable suspicion: 323

- The lack of written policy on drug testing does not violate Section 4 3.03, which requires prior notification and an opportunity for discussion whenever a new work rule is put into place. The search policy that was already in place does not appear to be intended to cover searches of body fluid such as blood or urine. Since the Warden told the grievant that failure to submit to a drug test would result in dismissal rather than a suspension for insubordination, it follows that management is required to have discussions with the Union about drug testing. It was unclear whether the drug-testing discussions were started before or after the date of the grievance. For this reason the employer was found not to have violated Section 4 3.03 of the Agreement: 323

- The laboratory drug test results were trustworthy. Although the laboratory procedures could have been a little tidier, there was no opportunity for misplacement or tampering and the test ran well within the laboratory’s standards for calibration for the machine. The circumstantial evidence is convincing; the grievant smoked marijuana while on the job: 323

- The fact that the grievant continued to work as a correction officer while pending his review by the Warden is not an indication that management was willing to tolerate the grievant’s offense. It indicates that the employer dealt carefully with the grievant. The unique setting of a prison environment makes it a necessity to stringently enforce rules against illegal drugs on the premises. There was just cause for the grievant’s removal for smoking marijuana while on the job: 323

- The Employer found drug paraphernalia in the grievant’s car during a routine drug sweep. The same day the drugs were found, the grievant was tested for drug use. The test was negative. Based on this evidence, the Arbitrator believed that this contributed to finding that the grievant was removed without just cause: 621

The grievant was involved in a verbal altercation with the Deputy Warden of Operations regarding failure to follow a direct order from the Warden. At the time of the incident the grievant was on a Last Chance Agreement (LCA), which included 6 random drug tests within the year following entrance into the LCA. As a result of his behavior during the argument, the grievant was ordered to submit to a drug test. He refused and was removed. The arbitrator noted that the grievant’s discipline record demonstrated a pattern of poor conduct over a short period of time regarding his inability to follow orders or interact with management appropriately. Further misconduct would surely result in removal. The arbitrator found that the employer failed to establish reasonable suspicion to order a drug test. The grievant’s failure to obey the Warden’s direct order gave just cause to impose discipline, but flaws in procedure on the part of the employer
were noted by the arbitrator for his decision to convert the removal to a suspension. The arbitrator determined that “the overall state of the evidence requires reinstatement, but no back pay or any economic benefit to the grievant is awarded.” 81

The Grievant was a Highway Worker 3 who reported 1 2 minutes late for work, went to the lunchroom, sat down and then suddenly fell out of his chair and passed out on the floor. An emergency squad was called, and he was taken to the nearest medical clinic. At the clinic, medical personnel were unable to determine a medical cause for the Grievant’s passing out or other behavior. The Grievant resisted taking a test and orchestrated a number of delays. After approximately one hour, the Grievant finally complied with the order and provided a urine sample. The Employer did not arrange for a union steward to be present prior to the testing. The sample was negative for alcohol but positive for cocaine. The Grievant had active discipline in his file in the form of counseling, a written reprimand, a one-day fine, and a three-day suspension. He was offered a Last Chance / E.A.P. agreement several times over the course of four days, but he refused the offer. The Employer then terminated his employment for violations of the directives regarding drug testing and unauthorized absence. Evidence undeniably established that the Grievant had reported to work under the influence of an illicit substance. The Arbitrator followed the “plain meaning rule” in determining that the contract language made a clear distinction between employees subject to federal law and all other employees, and found that the Union did not prove that federal law requires union representation as a pre-condition to testing. The Arbitrator further stated that, under the circumstances, the presence of a Union representative would have had no impact on the eventual outcome, especially in view of the fact that there is no claim or any evidence of procedural defects neither in the testing procedure itself nor of any actual rights violations to the Grievant. The Grievant’s refusal to use available rehabilitation opportunities precluded any opportunity for continued employment with ODOT. 94

- The DAS Drug-Free Workplace Program will provide a letter to Kroll to disseminate to its collection sites (approx. 1 5 5 ) reiterating when a collection site should conduct drug and/or alcohol tests for employees that have been injured and are being treated for workers compensation injury. A collection site should conduct a drug and/or alcohol test for employees that have been injured and are being treated for workers compensation injury only if the test is made:
  A. at the request of the Employer when there is reasonable cause to suspect the employee may be intoxicated by or under the influence of a controlled substance not prescribed by his/her doctor, or
  B. at the request of a Licensed Physician who is not employed by the employer, or
  C. at the request of Police Officer pursuant to a traffic stop and not at the request of the employee’s employer.

In addition, the collection site will provide for tests that are conducted at the request of the Employer. An agency management designee will verbally contact the collection site to coordinate the test and the collection site should update its database to reflect this. If a collection site is not verbally contacted by an agency management designee, it may not conduct the test and if it is done, it will be invalid and the agency will not process payment for the test. 1 0 1 4

**Drug Trafficking**

- Reinstatement of a known drug trafficker ought send the wrong signals to existing drug users that their activity is condoned: 1 2 9

- Grievant received conditional reinstatement, in spite of drug trafficking conviction, because of employer's disparate treatment, and the grievant's long service with good record where fellow employee's testified about grievant's good performance and commitment: 1 2 9

- No basis exists for an arbitrator to find a grievant guilty of drug trafficking where (1 ) the grievant received a criminal conviction for "drug trafficking" because he drove a person carrying 4 pounds of Marijuana from Hamilton County to Columbus and (2) there is no evidence that the grievant was involved in drug trafficking on the premises: 1 4 1

- Where (1 ) the grievant had received a criminal conviction for drug trafficking which evidences...
that grievant may be a drug user, (2) the superintendent testified that he would employ convicted felons if they were qualified and if they have paid for their crime, (3) the grievant is being monitored so that he will be fired and resentenced if he is found to be using, and (4) grievant is paying his crime by paying a fine, serving a short jail term, and probation, the arbitrator held that the superintendent's willingness to employ felons should include the grievant: 1 4 1
- The fact that the grievant was convicted of trafficking in drugs (while off duty) is not sufficient evidence to prove that he buys and sells drugs with the inmates or coworkers. Consequently, that same fact is not sufficient to prove a nexus between the conviction and the grievant's employment duties: 1 4 1

- Off duty drug trafficking by a Hospital Aide (Department of Mental Health) involved in the direct care of mentally ill patients, is so serious an offense that express notice need not be given that discharge can be the consequence. The nature of the offense and the job setting involved should have raised certain anticipated expectations: 1 4 4

- Hospital Aides' responsibilities in the role modeling area are an integral component of their job description. A high percentage of patients are plagued with secondary substance abuse disorders. One could logically expect that the habilitation of these patients could be thwarted or misdirected if a convicted drug felon served as their role model: 1 4 4

- The Employer had just cause to remove the grievant where, in spite of an acquittal by a court, it is plausible to believe that the grievant, a Correction Officer, engaged in purchasing drugs for the purpose of selling them to inmates: 4 4 0

- In a case where the grievant was accused of trafficking prescription drugs to a fellow prison employee, his reinstatement with back pay was awarded because the State was unable to convince the arbitrator that the grievant did the deed with which he was charged and thus there was not just cause for his removal: 5 0 7

- The Arbitrator held that the grievant’s arrest for Aggravated Drug Trafficking severely damaged his reputation with the prison inmates (many of whom were convicted on similar charges) and rendered the grievant incapable of adequately performing his duties as a Correction Officer: 6 0 8

Drugs, Possession on State Property
- The Highway Patrol found drugs in the cars of both grievants; the cars were driven and parked on State property by the grievants. These facts constitute a violation of a work rule which outlaws the possession or conveyance of contraband onto state property. The argument that both grievants did not knowingly bring the drugs onto state property was not credible: 3 3 4

Drugs, Prescription
- The grievant was a Correction Officer who was enrolled in an EAP and taking psychotropic drugs. He got into an argument with an inmate who had used a racial slur and struck the inmate. The grievant was removed for abuse of an inmate and use of excessive force. The arbitrator found that the grievant struck the inmate with no justifying circumstances such as self defense, or preventing a crime. The employer, however, failed to prove that the grievant knowingly caused physical harm as required by Ohio Revised Code section 2903.33(B)(2), because the grievant was taking prescription drugs. The grievant’s removal was reduced to a thirty day suspension because the employer failed to consider the grievant’s medication. The grievant was not faulted for not notifying the employer that he was taking the psychotropic drugs because he had no knowledge of their possible side effects. Thus, the use of excessive force was proven, but excessive use of force is not abuse per se: 3 6 8

- The grievant was removed after 1 3 years service from her position with the Bureau of Disability Services for unapproved absence, conviction of a drug charge, and failure to report the drug charge as required by the state’s Drug-Free Workplace policy. The Bureau is funded by the federal government and is subject to the Drug-Free Workplace Act of 1 9 8 8. The grievant had a history of alcohol problems. She was also involved with a co-worker who, after the relationship ended, began to harass her at work. She filed charges with the EEOC and entered an EAP. The former boyfriend called the State Highway Patrol and informed them of the grievant's drug use on state property. An investigation revealed drugs and paraphernalia in her car on state property and she pleaded guilty to Drug Abuse. She became depressed and took excessive amounts of her prescription drugs and missed 2 days of work. She was admitted into the
drug treatment unit of a hospital for 2 weeks. She was on approved leave for the hospital stay, but the previous 2 days were not approved and the agency sought removal. The arbitrator found that while the employer’s rules were reasonable, their application to this grievant was not. The Drug-Free Workplace policy does not call for removal for a first offense. The employer’s federal funding was not found to be threatened by the grievant’s behavior. The grievant was found to be not guilty of dishonesty for not reporting her drug conviction because she was following the advice of her attorney who told her that she had no criminal record. The arbitrator noted that the grievant must be responsible for her absenteeism, however the employer was found to have failed to consider mitigating circumstances present, possessed an unwillingness to investigate, and to have acted punitively by removing the grievant. The grievant’s removal was reduced to a 10 day suspension with back pay, benefits, and seniority, less normal deductions and interim earnings. The record of her two day absence was ordered changed to an excused unpaid leave. The grievant was ordered to complete an EAP and that another violation of the Drug-Free Workplace policy will be just cause for removal: 429

Due Process
- See delay, procedural violations

- The State called a witness that did not appear on the State’s witness list. This witness alone testified that the grievant was engaged in another incident of prisoner abuse other than the alleged incident at issue. The arbitrator found that the employer’s neglect of its responsibility to notify the Union of witnesses is a manifest violation of the contractual requirement of due-process protection of employee rights. In the arbitrator’s judgment this surprise witness cannot be credited and the incident that she testified to cannot be used as grounds for grievant’s removal: 302

- It is the State’s contractual obligation to prove that the grievant committed the charged violations, not the Union’s to establish the grievant’s innocence: 302

- Even in abuse cases the grievant continues to have rights. First, they are entitled to a strict construction of the burden-of-proof clause. The employer was obligated to prove its charges, and the employee had a legitimate claim to favorable findings from evidentiary inconsistencies.
- Given the lack of specificity of the charge, i.e., the grievant allegedly had sexual contact with a youth sometime in September; there is no defense for the grievant except to swear that she is innocent. The grievant did not have the opportunity to rebut the specific charges. The evidence was found insufficient to sustain charges of moral turpitude: 317

- The Union and the grievant were aware of the nature of the charges against the grievant and the State’s failure to provide a supervisor’s memo does not undermine the grievant’s due process rights. The failure to provide the memo is a “de minimis” violation which, by itself, is certainly not enough to sustain the grievance: 332

- The grievant was an Investigator with the Department of Commerce who had been suspended for 5 days for failing to follow his itinerary for travel and filing incorrect expense vouchers. The grievant’s itinerary indicated that he would be in Toledo on a Friday, and he submitted expense vouchers for the trip, however it was discovered that he worked at home during the day in question. The arbitrator found that the employer violated Section 24 .04 by failing to provide witness lists and documents and not answering the grievants letters. Section 25 .08 was not found to be violated. The employer's selection of the pre-disciplinary hearing officer was unwise because she had an interest in the outcome and that the investigation was incomplete and unfair. The arbitrator also found that the grievant’s itinerary was a contemplated itinerary and that he had informed his supervisor of schedule changes, however the grievant was AWOL as there was no provision for working at home. Disparate treatment was suspected by the arbitrator, who also noted that the grievant exhibited a contemptuous attitude towards management. The suspension was reduced to a 1 day suspension: 4 30**

The Union filed a motion in the Court of Common Pleas to vacate the Arbitrator's award. The Union received a decision by the Court of Common Pleas upholding the Arbitrator's award.

- Due Process was found to be satisfied where the Grievant was read her Miranda rights and was offered union representation before she was interviewed by police in an investigatory interview: 5 4 9

- The Arbitrator held that the grievant was denied her due process rights because management intentionally withheld documents and hindered the Union’s preparation of its case: 5 80

- The Arbitrator rejected the Union’s argument that the grievant’s right to due process had been violated. In reaching this decision, the Arbitrator found that the Employer initiated disciplinary action as soon as the victim raised her concerns and that the notice concerning the pending charge was sufficiently explicit in terms of the work rule violated at the time period in which the violation occurred: 618

Duty to Bargain

- The Employer did not have a duty to bargain under Ohio revised Code 4 1 1 7.08(A) when it promulgated the new grooming policy: 4 74

Duty to Understand Agency Rule

The Arbitrator found that the Grievant should have been aware of Rule 26. He held that there was no disparate treatment. The choice of the charge of the Grievant was reasonable and quite distinguishable from the facts concerning another corrections officer. The record contained evidence of evasion by the Grievant as to the reason why he did not report his arrest immediately. Any violation of Rule 26 would have been the first offense by this Grievant of Rule 26 and, as such, the maximum sanction for the first offense is a 2-day fine, suspension, or working suspension. However, there was a last chance agreement signed by the Grievant, the warden, and by a union representative. The Arbitrator was limited by the rules which the Grievant accepted in the last chance agreement; therefore, the Arbitrator has no authority to modify the discipline in this case. Rule 26, an SOEC Rule on the performance track of the disciplinary grid, was violated by the Grievant. Once such a finding is made, the Grievant himself agreed in the last chance agreement “that the appropriate discipline shall be termination from (his) position.” 998

– E –

Early Retirement Incentive (ERI)

- Ohio Revised Code 1 4 5 .298 requires that under certain conditions of layoff, the Employer is required to establish a retirement incentive plan
for employees of the employing unit in which the layoffs are to take place: 4 5 8

- For purpose of ERI “employing unit” is defined as “any entity of the state including any department agency, institution of higher education, board, bureau, commission, council, office, or administrative body or any part of such entity that is designated by the entity as the employing unit”: 4 5 8

- The State had discretion to designate the employing unit: 4 5 8

- Article 4 3.04 of the Contract provided some basis for finding that the Employer should have extended ERI to OBES employees indirectly affected by being bumped as a result of Public Assistance Service Operations (PASO) being abolished: 4 5 8

- The Employer has not shown that even though the retirement of public employees is a matter of law and because an early retirement plan benefit is not specifically a contractual benefit, there are sufficient reasons to preclude the grievances from being arbitrable: 4 5 8

- There is no language in the Collective Bargaining Agreement, which specifically defines early retirement incentive plans. The 1998-1991 Collective Bargaining Agreement does not support the claim that people out the PASO unit have a contractual right to be offered ERI’s: 4 5 8(A)

**Economic Difficulties of Employer**

- Despite the fiscal difficulties that implementation will cause employer, arbitrator is bound by the language of the agreement: 5 5

**Effect of Arbitrability on Remedy**

- Even when a grievance does not specify the sections of the Agreement allegedly violated and the relief sought, the grievance is still arbitrable. Had the Arbitrator determined that the grievant had been improperly removed, sanctions for the content violations would have been applied in terms of the remedy requested: 5 7 5

**Emergency Defense**

- The Arbitrator found that the Grievant was removed without just cause. Management did not satisfy its burden of proving that he acted outside the Response to Resistance Continuum and engaged in the conduct for which he was removed. The Youth’s level of resistance was identified as combative resistance. The Grievant’s response was an emergency defense, which he had utilized one week earlier with the same Youth and without disciplinary action by Management. A fundamental element of just cause is notice. Management cannot discharge for a technique where no discipline was issued earlier. In addition there was no self-defense tactic taught for the situation the Grievant found himself in. 1 0 3 2

**Emergency Leave**

The Arbitrator held that certain employees should receive their full day’s pay or have their leave balances restored. The Union was to provide the Employer with a list of employees who met the criteria the Arbitrator set forth. This arbitration concerned a series of grievances filed regarding the Power Outage that occurred on or around August 14 and 15, 2003. At the hearing, the Arbitrator review a recent award issued by Arbitrator Susan Grody Ruben for a similar case involving SEIU/District 1 1 9 9 employees. The Arbitrator agreed with the essence of Arbitrator Ruben’s award. The Arbitrator held that the August 14 -1 5 blackout was reasonably foreseeable to facilities which provide back-up generators. The Arbitrator held that state employees in the Greater Cleveland Area who fell within the following circumstances should receive their full day’s pay or have their leave balances restored:

1. State employees who reported to work and were sent home by the Employer;
2. State employees who reported to work and were denied access to the premises by authorities; or
3. State employees who were instructed by an Employer’s representative not to report to work.

The Union was given 90 days from the date of the award to provide the Employer with a list of employees who fell within these circumstances. The Employer then had 60 days from the receipt of the list to verify the information. The Arbitrator retained jurisdiction. 9 1 8

**Emergency Pay**
Section 1 3.1 5 of the agreement gives the authority to declare a snow emergency to the employer, but does not specify that the Director of Highway Safety is the sole and exclusive authority to issue declarations of emergency. The Deputy Director of ODOT District 5 called the situation an emergency when asking District 5 employees to report to work and work overtime to the limits of their capabilities. It is reasonable for the employees to believe that he had proper authority to do so and they are entitled to rely upon his representations in such circumstances. The case is the same for those employees who had previously received a letter stating that they were to report to work when the Director of Highway Safety declared an emergency. Those employees are not to be expected to ask the Deputy Director if he is acting upon the authority of the Director of Highway Safety before responding to the call: 275

The agreement gives the authority to declare an emergency to the employer. Since, under the contract, an emergency is considered to exist when the employer declares it so, the arbitrator is not permitted to second guess the employer as to whether an emergency existed: 275

- The arbitrator’s interpretation of Section 1 3.1 5 of the Agreement the word ‘emergency’ was defined. First, an emergency is not limited to weather conditions. The arbitrator used the following analysis:
  1) Is the event (a prison escape) “normal or reasonably foreseeable to the place of employment and/or position description of the employee?” An escape is a situation reasonably foreseeable under the position description of a Correction Officer.
  2) The Agreement also designates the employer as the declarer of emergencies. The second question is whether the employer by its actions should be estopped to deny that an emergency took place.

In the case at hand the first line supervisor used the word emergency and had apparent authority to declare an emergency. The supervisor’s actions were ratified by his superiors. The second shift was held over, thus violating routine overtime rules: 299

- Arbitrations are by common practice aimed at fairness (estoppel is at the basis of equity – the law of fairness). Estoppel is a venerable contract doctrine used by arbitrators when justice demands: 299

The lieutenant referred to the escape as an emergency and the superiors ratified his authority. Overtime rules can only be violated when a Section 1 3.1 5 emergency exists. By failing to make the employees whole for the contract violation, the employer ratified the lieutenant’s words: 299

- In discussing the issue of emergency pay, the first question is whether the event is “normal or reasonably foreseeable to the place of employment and/or position description of the employee.” The next step is did the employer declare the emergency. The last consideration is whether the employer, through its actions, is estopped from claiming the situation was not an emergency. For example: 1) Did the employer follow the correct call out procedure for voluntary overtime? 2) Did anyone in a position of authority or apparent authority characterize the situation as an emergency? Interoffice communications written after the alleged emergency cannot be relied upon and so are not evidence of the concept of estoppel: 337

- The arbitrator found that the grievants were not entitled to emergency pay since the State had never declared an emergency. The fact that a Sergeant at Marion Correctional Institution used the word emergency does not mean that the employer declared an emergency: 343

- The grievants were at the District 1 0 garage when called to their supervisor’s office. The Department Head of Design and the Survey Supervisor ordered them to an “emergency” where they were to work ten hour days to repair a culvert. They were to stay at a hotel and meals and lodging were paid by the employer. The grievants were not paid according to section 1 3.1 5 and they filed a grievance. The arbitrator held that an emergency requires a formal announcement or statement and neither internal memos nor the supervisor’s statement to that effect are sufficient. The employer was not stopped from arguing that no formal emergency existed due to supervisor’s statements and internal memos referring to an emergency. Also, the grievants were not ordered to go to the work site, but were asked whether they wanted to go. Thus, the grievance was denied: 385

- Although the two winter storms of 1 996 were severe and declared level three emergencies by
sheriffs in 5 counties, the Director of Public Safety did not declare an emergency. Thus, employees could not be compensated pursuant to the emergency pay guidelines of Article 1 3, Section 1 3.1 5. However, the Arbitrator retained jurisdiction to consider individual grievances with special circumstances which may warrant relief: 606

**Employee Assistance Program (EAP)**

--Even though the arbitrator thought the grievant's rehabilitation activities are highly commendable. The arbitrator did not feel that sufficient grounds for mitigation existed: 145

- Once the employer facilitated the referral process its obligation was completed; it was then the grievant's responsibility to follow up with additional intervention efforts. It does not appear that the agreement places any additional requirements on the employer: 184

- The grievant's participation in EAP only a few days prior to the initial disciplinary interview is viewed as a last ditch deceptive tactic: 185

- Section 24 .08 contains the word "elect." The employee must "elect" to participate in the EAP. The grievant did not make that election. The employer lacks contractual authority to force the employee to participate in EAP. Had the grievant done so, the "serious consideration to modifying the ...disciplinary action" contemplated by the agreement might have occurred. By her own action, the grievant deprived the state of the opportunity to modify the discharge penalty: 186

- The disciplinary actions in this case were unreasonable because several mitigating circumstances were not considered when levying the discipline. The grievant was employed for a number of years with an above average performance and disciplinary record. Also, her attempts to resolve her problems via an employee assistance effort indicates that she took positive steps to remedy her difficulties: 225

- The arbitrator held 24 .08 did not apply even though the grievant considered himself to be in EAP because he had signed up for EAP and had gone to talk with a Social Program Specialist. The grounds for the holding were:

  (1) the Social Program Specialist was not qualified to counsel but only to find placements with outside centers,

  (2) the grievant had not signed a formal EAP agreement,

  (3) the employee had entered detoxification treatment after being fired,

  (4) the detoxification program he entered was not part of the official EAP program: 236

- Under 24 .08, the State has discretion to delay disciplinary action until completion of EAP. It is not required to do so: 251

The arbitrator found that the Employee Assistance Program referral is to be entirely at the employee’s volition; the employer may not direct an employee into the program. Because of this the arbitrator would not order the reinstated grievant to enter the EAP: 305

- Section 29.04 of the Agreement deals with sick leave. The Agreement specifically and clearly provided for specific notification of 16 hour and 0 hour sick leave balances followed by meetings with the employee to learn of extenuating circumstances, and to suggest the Employee Assistance Program where appropriate. The employer argued that this procedure would be implemented after 11/30/90 based on the first sentence of Section 29.04, “Sick leave usage will be measured from December 1 through November 30 of each year.” This argument is flawed. The sick leave policy spelled out in 29.04 states the following essentials:
  1. The policy of the State is to grant sick leave when requested.
  2. Corrective action is to be taken for unauthorized use of sick leave and/or abuse of sick leave.
  3. Corrective action is to be applied:
     a) progressively
     b) consistently
  4. Policy requires equitable treatment which is not arbitrary or capricious: 318**

- The employer is not obliged to persuade the employee to enroll in the Employee Assistance Program: 362

- The grievant was a Correction Officer who was enrolled in an EAP and taking psychotropic drugs. He got into an argument with an inmate who had
used a racial slur and struck the inmate. The grievant was removed for abuse of an inmate and use of excessive force. The arbitrator found that the grievant struck the inmate with no justifying circumstances such as self defense, or preventing a crime. The employer, however, failed to prove that the grievant knowingly caused physical harm as required by Ohio Revised Code section 2903.33(B)(2), because the grievant was taking prescription drugs. The grievant’s removal was reduced to a thirty day suspension because the employer failed to consider the grievant’s medication. The grievant was not faulted for not notifying the employer that he was taking the psychotropic drugs because he had no knowledge of their possible side effects. Thus, the use of excessive force was proven, but excessive use of force is not abuse “per se”: 368

- The grievant began his pattern of absenteeism after the death of his grandmother and his divorce. The grievant entered an EAP and informed the employer. He had accumulated 1 04 hours of unexcused absence, 80 hours of which were incurred without notifying his supervisor, and 24 hours of which were incurred without available leave. Removal was recommended for job abandonment after he was absent for three consecutive days. The pre-disciplinary hearing officer recommended suspension, however the grievant was notified of his removal 5 2 days after the pre-disciplinary hearing. The arbitrator found that the employer violated the contract because the relevant notice dates are the hearing date and the date on which the grievant receives notice of discipline. Other arbitrators have looked to the hearing date and decision date as the relevant dates. Additionally, the employer was found to have given “negative notice” by overlooking prior offenses. The arbitrator reinstated the grievant without back pay and ordered him to enter into a last chance agreement based upon his participation in EAP: 371

- The grievant attended a pre-disciplinary hearing for absenteeism at which his removal was recommended, but deferred pending completion of his EAP. He failed to complete his EAP and was absent from December 28, 1 990 to February 1 1 , 1 991 . The grievant was then requested to attend a meeting with a union representative to discuss his absence and failure to complete his EAP. The grievant was removed for absenteeism. The arbitrator found the grievant guilty of excessive absenteeism and prior discipline made removal the appropriate penalty. The employer was found to have committed a procedural error. Deferral because of EAP participation was found proper, however the second meeting was not a contractually proper pre-disciplinary hearing. No waiver was found on the part of the union, thus the arbitrator held that the employer violated the contract and reinstated the grievant without back pay: 383

- The grievant was a field employee who was required to sign in and out of the office. He began to experience absenteeism in 1 990 and entered drug abuse treatment. He continued to be excessively absent and was removed for periods of absence from October 2nd through the 1 0th and October 26th to the 30th, during which he called in sporadically but never spoke to a supervisor. The grievant was found to have violated the employer’s absenteeism rule. Additionally, the employer was found not to be obligated to enter into a last chance agreement nor to delay discipline until the end of the grievant’s EAP. Mitigating circumstances existed, however, to warrant a reduced penalty. The arbitrator noted the grievant’s length of service from 1 981 to 1 990, and the fact that he sought help himself, therefore the arbitrator reinstated the grievant with no back pay pursuant to a last chance agreement after a physical examination which must show him to be free of drugs: 391

- While on disability leave in October 1 990 the grievant, a Youth Leader, was arrested in Texas for possession of cocaine. After his return to work, he was sentenced to probation and he was fined. He was then arrested in Ohio for drug-related domestic violence for which he pleaded guilty in June 1 991 and received treatment in lieu of a conviction. The grievant was removed for his off-duty conduct. The grievant’s guilty plea in Texas was taken as an admission against interest by the arbitrator and the arbitrator also considered the grievant’s guilty plea to drug related domestic violence. The arbitrator found that the grievant’s job as a Youth Leader was affected by his off-duty drug offenses because of his co-workers knowledge of the incidents. The employer was found not to have violated the contract by delaying discipline until after the proceedings in Texas had concluded, as the contract permits delays pending criminal proceedings. No procedural errors were found despite the fact that the employer did not inform the grievant of its investigation of him, nor permit
him to enter an EAP to avoid discipline. No disparate treatment was proven as the employees compared to the grievant were involved in alcohol related incidents which were found to be different than drug related offenses. Thus the grievance was denied: 4 1 0

- The grievant was a Correction Officer who had an alcohol dependency problem of which the employer was aware. He had been charged twice for Driving under the Influence, which caused him to miss work and he received a verbal reprimand. The grievant was absent from work from May 1 8th through the 21 st and was removed for job abandonment. The arbitrator found that the grievant's removal following a verbal reprimand was neither progressive nor commensurate and did not give notice to the grievant of the seriousness of his situation. It was also noted that progressive discipline and the EAP provision operate together under the contract. The grievant was reinstated pursuant to a last chance agreement with no back pay and the period he was off work is to be considered a suspension: 4 1 3

- The grievant was removed after 1 3 years of service from her position with the Bureau of Disability Services for unapproved absence, conviction of a drug charge, and failure to report the drug charge as required by the state’s Drug-Free Workplace policy. The Bureau is funded by the federal government and is subject to the Drug-Free Workplace Act of 1 988. The grievant had a history of alcohol problems. She was also involved with a co-worker who, after the relationship ended, began to harass her at work. She filed charges with the EEOC and entered an EAP. The former boyfriend called the State Highway Patrol and informed them of the grievant’s drug use on state property. An investigation revealed drugs and paraphernalia in her car on state property and she pleaded guilty to Drug Abuse. She became depressed and took excessive amounts of her prescription drugs and missed 2 days of work. She was admitted into the drug treatment unit of a hospital for 2 weeks. She was on approved leave for the hospital stay, but the previous 2 days were not approved and the agency sought removal. The arbitrator found that while the employer’s rules were reasonable, their application to this grievant was not. The Drug-Free Workplace policy does not call for removal for a first offense. The employer’s federal funding was not found to be threatened by the grievant’s behavior. The grievant was found to be not guilty of dishonesty for not reporting her drug conviction because she was following the advice of her attorney who told her that she had no criminal record. The arbitrator noted that the grievant must be responsible for her absenteeism, however the employer was found to have failed to consider mitigating circumstances present, possessed an unwillingness to investigate, and to have acted punitively by removing the grievant. The grievant’s removal was reduced to a 1 0 day suspension with back pay, benefits, and seniority, less normal deductions and interim earnings. The record of her two day absence was ordered changed to an excused unpaid leave. The grievant was ordered to complete an EAP and that another violation of the Drug-Free Workplace policy will be just cause for removal: 4 2 9

- The grievant became involved in an EAP program prior to receiving notice of pending discipline, and as such, this was a mitigating circumstance in modifying his removal: 4 5 6

- The grievant signed a last-chance agreement which stated that his removal would be held in abeyance for 90 days, provided the grievant complete an EAP, as allowed by Article 24 .08 of the Contract. Regardless of any mitigating circumstances, the Employer had just cause to remove the grievant when the last chance agreement conditions were not met: 4 6 5

- The fact that the grievant enrolled in the EAP is irrelevant, particularly because the grievant inquired about EAP only after disciplinary action had begun: 4 6 6

- Under Article 24 .09 of the Collective Bargaining Agreement, EAP agreements to rehabilitate employees were voluntary, therefore ODOT’s refusal to enter into such an agreement was not fatal to its case against an employee who was removed for shoplifting: 5 0 0

- The Union proved that other employees who had committed assaults against co-workers were offered participation in EAP. However, the arbitrator held that the State's decision to withhold EAP was neither arbitrary, capricious nor discriminatory, because the agency proved that it had never offered EAP participation to an employee who was removed as a result of a physical confrontation: 5 0 6**

The State prevailed in arbitration in this case involving a removal for physical assault. The
Union then moved to vacate this decision in the Court of Common Pleas. The decision of the Arbitrator was upheld by the Court of Common Pleas. Julius Ferguson appealed to the Court of Appeals. The Court of Appeals dismissed the appeal on the basis of its finding that the employee did not have standing since he was not a party to the original action filed. Only OCSEA and the State were parties.

- The grievant violated his EAP agreement by giving his supervisor and a co-worker "the finger" just five days after signing his EAP agreement, by misrepresenting the status of his Commercial Driver's License and by failing to provide releases to his case monitor: 5 08

- The Collective Bargaining Agreement does not require Union representation at the execution of an Employees Assistance Program Agreement between the State and the employee. The EAP may serve as a conditional discharge which gives the State grounds to terminate the employee who fails to comply with the terms of the agreement: 5 1 6

- Because the grievant was actively seeking treatment for her drug dependency and because her drug dependency was primarily responsible for non-compliance with the initial EAP agreement and her excessive tardiness, her removal was neither commensurate nor progressive. Thus, the arbitrator concluded that it would be more just to reinstate the grievant and order her to enter into a second EAP (Last Chance Agreement): 5 2 0

- In a case involving a grievant who signed an EAP agreement to correct his persistent tardiness due to drinking, the State had just cause to remove the grievant when his problems continued and when he failed to enroll in a detoxification program. Although the EAP agreement was to last ninety days, the arbitrator concluded that the State did not act prematurely in removing the employee: 5 2 1

- In a case involving a grievant who had a prior EAP agreement which he had broken, the State did not violate the contract by refusing to enter into a second EAP agreement when the grievant's work-related problems continued, even though other employees in the department had been granted a second chance at EAP in the past. The rationale relied on the finding that the other employees were not similarly situated, and thus the grievance was lacking a necessary component of disparate treatment: 5 2 2

- An agency's decision not to allow a grievant to participate in a second EAP agreement does not, in and of itself, constitute disparate treatment. Where the grievant failed to complete his first EAP agreement, the Employer's willingness to enter into any subsequent agreement is purely discretionary. Also, an agency can substantially comply with the mandates of the Americans with Disabilities Act (ADA) by attempting to "reasonably accommodate" the grievant's disability. The ADA does not require the Employer to accommodate any request the grievant might make and it cannot operate to void bona fide employment criteria, such as regular attendance: 5 2 3

- The grievant was removed because he (1) took an inmate who needed emergency medical care to a hold and signed him in instead of taking the inmate to a waiting station as he was directed to do, (2) refused to immediately transport this inmate to the hospital, (3) refused to report to the lieutenant's office to explain his combative behavior, and (4) refused, in an obscene manner, to work mandatory overtime. Given the grievant's long history of prior discipline and the fact that the grievant only sought acceptance into the program after the events which led to his removal, the Employer rightfully refused the grievant's request. The arbitrator held that management did not improperly deny the grievant access to the EAP and participation in a last chance agreement: 5 4 0

- The Arbitrator found that the grievant was terminated for just cause, because the grievant did not fulfill the terms of his EAP agreement, did not attempt to make use of EAP's services appropriately, and did not report to the EAP on the date she would: 5 4 4

- The grievant was arrested for DUI while driving a state vehicle and was subsequently removed. The Arbitrator concluded that the employer ought to consider the fact that the grievant attempted some self rehabilitation by attending an employee assistance program: 5 7 1

- The grievant, improperly terminated for incidents related to his alcohol abuse, was reinstated with full seniority and benefits to his former position on a conditional last chance basis. As a condition
of his reemployment, the grievant was to continue to participate in individual after-care counseling as well as self-help support groups to the extent determined by the Employee Assistance program (EAP) of its designee: 5 77

- The Arbitrator held that an EAP agreement, which would result in the delay or mitigation of discipline in alcohol or drug use cases, is not mandatory. Since there are no guidelines for when an EAP agreement must be reached, the Arbitrator stated that the decision was solely at the discretion of the immediate supervisor: 605

The Arbitrator found that the evidence showed the Grievant had violated Work Rule Neglect of Duty (d) and Failure of Good Behavior (e). The evidence failed to demonstrate any words or conduct that rose to the level of a threat or menacing. The Arbitrator held that the removal was excessive due to the Grievant’s medical condition; the Grievant’s acute personal issues; a relatively minor discipline record at time of removal; eleven years of satisfactory service; and the absence of threatening conduct. The Arbitrator reinstated the Grievant with conditions: she will successfully complete an EAP program for anger management and stress—failure to do so would be grounds for immediate removal; discipline of a 1 5 day suspension without pay for violating the work rules;

she shall receive no back pay, seniority and/ or any other economic benefit she may have been entitled to;

she shall enter into a Last Chance Agreement, providing that any subsequent violation of the work rules for a year following her reinstatement will result in immediate removal. 999

The grievance was sustained in part and denied in part. The removal was reduced to a suspension. The Grievant was placed on administrative leave that continues until he completes an EAP-designed comprehensive anger-management program for a minimum of twenty consecutive work days. If the Grievant fails to successfully complete the EAP program, his removal shall be immediately reinstated.

REASONS: The evidence does support a finding that just cause exists for discipline under Rule #6 because it was the clear intent of the Grievant to threaten the co-worker. A picture posted in the break room by the Grievant was offensive and was intended to threaten and intimidate the co-worker. However, just cause does not exist for removal. The evidence fails to indicate that during the confrontation in the break room the Grievant engaged in any menacing or threatening behavior toward the co-worker. The co-worker’s initial response to the posting of the picture failed to demonstrate any fear or apprehension on his part. In fact, his reaction in directly confronting the Grievant in the break room underscores his combative nature, and was inconsistent with someone allegedly in fear or apprehension.

The Arbitrator took into consideration several mitigating factors. None of the Grievant’s allegations against the co-worker were investigated. The facts are unrefuted that the Employer failed to provide any documents or witness list before the pre-disciplinary hearing, in violation of Article 24 .05 . The Grievant’s immediate supervisor was directed by his supervisors to alter his evaluation of the Grievant. The revised evaluation contained four “does not meet” areas, whereas his original evaluation had none. Witnesses from both sides, including management, were aware of the animus between the co-workers. The Employer was complicit in not addressing the conduct or performance issue of the Grievant and the co-worker, which escalated over time and culminated in the break room incident. 1 01 3

- The Arbitrator held that the Employer had just cause to terminate the Grievant. The Grievant’s disciplinary record exhibited several progressive attempts to modify his behavior, with the hope that progressive penalties for the same offense might lead to positive performance outcomes. As such, the Grievant was placed on clear notice that continued identical misconduct would lead to removal. The Arbitrator also held that the record did not reflect any attempt to initiate having the Grievant enroll in an EAP program within five days of the pre-disciplinary meeting or prior to the imposition of discipline, whichever is later. This barred any attempts at mitigation. 1 030

- The Arbitrator held that BWC had just cause for removing the Grievant, since the Grievant was either unwilling or unable to conform to her employer’s reasonable expectation that she be awake and alert while on duty. The agency and the Grievant had entered into a settlement agreement, wherein the Grievant agreed to participate in a 1 80-day EAP. However, the Arbitrator found that the sleeping while on duty was a chronic problem which neither discipline or the EAP had been able to correct. The Grievant raised the fact that she had a common aging problem with dry eyes and was taking a drug that made the condition worse. However, she never disclosed to the supervisor her need to medicate her eyes. The Arbitrator held that this defense amounted to post hoc rationalization and couldn’t be credited. The Arbitrator felt that a person on a last-chance agreement for sleeping at work and who had been interviewed for an alleged sleeping infraction would take the precaution of either letting her supervisor know in advance about this treatment, take the treatment while on break and away from her work area, or get a witness. 1 033
Equipment

- The employer is not required to provide work shoes or safety shoes for employees, nor compensate them for the purchase of such items. The employer did not require safety shoes, but prohibited tennis shoes and sandals. The department's regulation only recommends safety or heavy work shoes. No one has been disciplined for the shoes they wore except when they wore tennis shoes or had also been guilty of insubordination because they had refused to change shoes after being ordered to do so. The employer's department's policies about shoes have been in place for several years. Failure to grieve earlier constituted acquiescence in the employer's interpretation of the contract. Finally, 33.01 and 33.02 reference specific requirements regarding the furnishing of uniforms and tools. If the union wanted the employer to supply shoes it should have negotiated for the requirement. For the arbitrator to impose such a requirement would be to add to the contract in violation of 25.03 which prohibits the arbitrator from adding to the contract: 25 9

Equity

- Arbitration is not "an equitable forum." (except perhaps, in discipline cases where the arbitrator is licensed to interpret "just cause). The arbitral task in contract disputes is to interpret and apply the contract. Equity is a bargaining-table issue, not a foundation for arbitral awards. The U.S. Supreme Court has so held: [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense [their] own brand of industrial justice": 1 91 A

- The rule disfavoring interpretations which lead to harsh, absurd, or otherwise indefensible results has been researched in depth by the arbitrator. Without exception, every pronouncement of the principle carefully circumscribes it to ambiguous language. If the parties’ intentionally negotiated something which could bring about untoward consequences, an arbitrator has no authority but to apply the language as it was meant to be applied. The arbitrator cannot rescue a party from a bad bargain, improve the governing collective bargaining agreement, or disregard any of its written provisions. This precept has been repeated time and again in arbitral opinions and judicial rulings. More to the point, 25 .03 sets forth the principle as a restriction on arbitral jurisdiction. 228

Escape, Aiding Patient in

Escape of Inmate

- Even though the perimeter security patrol is the institution's last line of defense, and the post orders for that position require being "ready to take any steps including deadly force to maintain the security of the institution", the arbitrator found the grievant had not violated the post order when he did not act to prevent the escape because the situation was already beyond the grievant's stopping by the time the grievant became aware of the escape: 223

- To paraphrase a noted jurist, "bravery is not required of a police officer in the face of an uplifted knife"; nor, it might be added, in the face of a loaded weapon. The arbitrator made the foregoing statement in reference to a Correction officer: 223

- Although the grievant was trained on the steps to be taken in the event of an escape by an inmate who takes a hostage, the circumstances of an actual escape with a hostage dictate the exercise of judgment in the light of the circumstances. It cannot be concluded that the grievant's judgment was improper: 223
- Broad abstract goals on the objectives and goals of correctional institutions and the duties of correctional officers do not resolve the factual issues which were raised in this case: 223

- Injured correctional officers are normally taken to health services within the facility. The employer argues that the grievant should have been alerted to the escape attempt when he was told that a correctional officer needed to be let through the outer gate because he was injured. The arbitrator disagreed pointing out that other officers besides the grievant were also not alerted by the request: 223

- The fact that grievant failed to detect signs of the escape that were present and found by a later search does not prove that the grievant failed to search the area or that he searched it negligently. The later search was conducted in daylight and with the benefit of the knowledge that an escape had probably occurred. The grievant's search had occurred before the sun came up and without the knowledge of a probable escape: 240

- The fact that it took the grievant nearly 3 times as long to clear the area the second time as the first is somewhat troublesome, but not enough to conclude that his search was negligent. Moreover, the men in the message center, including members of management, were not sufficiently concerned to call and ask why there was a delay: 240

- While an effective security system depends on proper functioning of equipment and personnel, the grievance was sustained because "there is no evidence that the grievant did anything other than what was accepted practice at the institution at the time: 240

**Estoppel**

- Since employer had led employees to believe that the stand-by pay policy had been reinstated, and since the employees had relied on supervision's actions, the employer is estopped from denying that the policy was reinstated. Thus, the employer violated 1 3.1 2 when it did not pay stand-by pay. ("Estopped" means one is not allowed to make a statement since, given one’s previous conduct, it would be unfair or unjust to make the statement): 92

- The grievant had held several less than permanent positions with the state since March 1 989. In December 1 990 the grievant bid on and received a Delivery Worker position from which he was removed as a probationary employee after 1 1 7 days. The grievant grieved the probationary removal, arguing that his previous less than reinstatement. The arbitrator found the grievance arbitrable because section 4 3.02 incorporated Ohio Administrative Code section 1 23:1 -33.03 as it conferred a benefit upon state employees not found within the contract. The grievant thus had three years from his separation to request reinstatement, which he did. The grievance was also found to be timely filed because there was no clear point at which the employer finally denied the grievant’s request for reinstatement and the union was not notified of the events by the employer. Additionally, the employer was estopped from asserting timeliness arguments because the employer was found to have delayed processing the grievant’s request for reinstatement. The physician who performed a state-ordered examination released the grievant to work, thus the employer improperly refused the grievant’s reinstatement request. The grievant was reinstated with back pay less other income for the period, holiday pay, leave balances credited with amounts he had when separated, restoration of seniority and service credits, medical expenses which would have been covered by state insurance, PERS contributions, and he was to receive orientation and training upon reinstatement: 375

- The grievants were at the District 1 0 garage when called to their supervisor’s office. The Department Head of Design and the Survey Supervisor ordered them to an “emergency” where they were to work ten hour days to repair a culvert. They were to stay at a hotel and meals and lodging were paid by the employer. The grievants were not paid according to section 1 3.1 5 and they filed a grievance. The arbitrator held that an emergency requires a formal announcement or statement and neither internal memos nor the supervisor’s statement to that effect are sufficient. The employer was not estopped from arguing that no formal emergency existed due to supervisor’s statements and internal memos referring to an emergency. Also, the grievants were not ordered to go to the work site, but were asked whether they wanted to go. Thus, the grievance was denied: 385
permanent service should have counted towards the probationary period. The arbitrator found the grievance not arbitrable because it was untimely. The triggering event was found to have been the end of the shortened probationary period, not the removal. The union or the grievant were held obligated to discover when an employee’s probationary period may be abbreviated due to prior service. The employer was found to have no duty to notify a probationary employee of the grievant’s eligibility for a shortened probationary period when it is disputed. There was no intentional misrepresentation made by the employer, thus the employee waived his right to grieve the end of his probationary period and the employer was not estopped from removing the grievant. The grievance was not arbitrable: 4 1 1

Ethics Violation

- The grievant was properly removed where he admitted that he unethically and intentionally used the Bureau's facilities and confidential client records for personal profit. Moreover, the grievant's offer to make restitution, which was motivated more by a desire to avoid criminal prosecution than by any real feelings of remorse, did not serve to mitigate the offense. Given the severity of the offense, the grievant's long history of service and discipline-free work record was insufficient to mitigate the misconduct in the instant case. Therefore, the State did not violate the principle of progressive discipline: 5 25

Evenhanded, Discipline not

- The grievant inflamed the anger of the co-worker by insulting and debasing the co-worker on the workroom floor. The co-worker confronted the grievant in the restroom, an argument ensued and the co-worker attempted to knock the grievant’s finger away from her face. The co-worker received a forty-five day suspension and was reinstated after she executed a last chance agreement, but the grievant was removed. The Arbitrator concluded that both the participants were aggressors and each were guilty for what happened. Thus, the grievant was reinstated without back pay or reinstatement of benefits, but with full and unbroken seniority: 61 0

Evidence

- The grievant was a Correction Officer who had been accused of requesting sexual favors from inmates and accused of having sex with one inmate three times. The inmates were placed in security control pending the investigation. During this time statements were taken and later introduced at arbitration. The arbitrator found that the employer failed to prove by clear and convincing evidence that the grievant committed the acts alleged and management had stacked the charges against the grievant by citing to a general rule when a specific rule applied. The primary evidence against the grievant, the inmates’ statements, were not subject to cross examination and the inmate who testified was not credible. The grievant was reinstated with full back pay, benefits, and seniority. The arbitrator recommended that the grievant be transferred to a male institution: 379

- The employer removed the grievant for two reasons: 1) The grievant committed theft because he had been named as the supplier of checks that had been returned to the Bureau of Workers’ Compensation, to another state employee in order to cash the checks (see arbitration decision #370); 2) falsification of his job application because he admitted during the investigation that he had prior felony convictions which he failed to report on his employment application. The arbitrator held that the employer could not use the falsification charge as a basis for removal because the grievant had sought assistance when he completed his application and lacked intent to falsify the application. The employer was also estopped from using the falsification because the grievant had been employed for 8 years, and had been removed once before, thus the employer was found to have had ample time to have discovered the falsification prior to this point. The employer was not permitted to introduce the Bureau of Criminal Investigation’s report into evidence at arbitration because the employer failed to disclose it upon request by the union. The fact that the investigation was ongoing was irrelevant. Just cause was proven through the investigator’s testimony and testimony of others involved in the scheme. The grievance was denied: 4 0 1

- The grievant was removed for misuse of his position for personal gain after his supervisor noticed that the grievant, an investigator for the Bureau of Employment Services, had received an excessive number of personal telephone calls from a private investigator. The Ohio Highway Patrol conducted an investigation in which the supervisor turned over 1 30-1 5 0 notes from the
grievant’s work area and it was discovered that the grievant had disclosed information to three private individuals, one of whom admitted paying the grievant. The arbitrator found that the employer proved that the grievant violated Ohio Revised Code section 4141.21 by disclosing confidential information for personal gain. The agency policy for this violation calls for removal. The employer’s evidence was uncontroversed and consisted of the investigating patrolman’s testimony, transcribed interviews of those who received the information, and the grievant’s supervisor’s testimony. The grievant’s 13 years seniority was an insufficient mitigating circumstance and the grievance was denied: 4 08

- While on disability leave in October 1990 the grievant, a Youth Leader, was arrested in Texas for possession of cocaine. After his return to work he was sentenced to probation and he was fined. He was then arrested in Ohio for drug-related domestic violence for which he pleaded guilty in June 1991 and received treatment in lieu of a conviction. The grievant’s guilty plea in Texas was taken as an admission against interest by the arbitrator and the arbitrator also considered the grievant’s guilty plea to drug related domestic violence. The arbitrator found that the grievant’s job as a Youth Leader was affected by his off-duty offenses because of his co-workers’ knowledge of the incidents. The employer was found not to have violated the contract by delaying discipline until after the proceedings in Texas had concluded, as the contract permits delays pending criminal proceedings. No procedural errors were found despite the fact that the employer did not inform the grievant of its investigation of him, nor permit him to enter an EAP to avoid discipline. No disparate treatment was proven as the employees compared to the grievant were involved in alcohol related incidents which were found to be different than drug-related offenses. Thus, the grievance was denied: 4 1 0

- The grievant was a Mail Clerk messenger whose responsibilities included making deliveries outside the office. The grievant had bought a bottle of vodka, was involved in a traffic accident, failed to complete a breathalyzer test and was charged with Driving Under the Influence of Alcohol. The grievant’s guilt was uncontested and the arbitrator found that no valid mitigating circumstances existed to warrant a reduction of the penalty. The grievant’s denial of responsibility for her drinking problem and failure to enroll into an EAP were noted by the arbitrator. The arbitrator stated that the grievant’s improved behavior after her removal cannot be considered in the just cause analysis. Only the facts known to the person imposing discipline may be considered at arbitration. The arbitrator found no disparate treatment as the employees compared with the grievant had different prior discipline than the grievant, thus, there was just cause for her removal: 4 3 4

- Telephone company’s records of phone lines and collect phone calls to a grievant’s home can be used as evidence of an improper relationship between the grievant and an inmate: 4 9 5

The grievant was charged with sexual harassment of a co-worker. The record indicated that no action taken during investigation was sufficient to modify or vacate the suspension, however some of the statements the investigator collected could not be relied upon because they were hearsay or rebutted by the witness. The arbitrator noted that the matter came down to the testimony of one person against another and there was no substantial evidence to sustain the charge. The arbitrator determined that the matter was properly before her because it was appealed within ninety days of the Step 3 response. The arbitrator noted that the fact that it was appealed before the mediation meeting did not invalidate the appeal. 807

Admissibility

- Objection to admission of a transcript granted when it had been prepared 10 days after the conference: 3 5

- Unless expressly required by the parties in submitting their case to the arbitrator, strict observance of legal rules of evidence is not necessary: 4 1

- Under Ohio Rules of Evidence 804 (A)4, an exception to the hearsay rule, a statement is admissible which is given by a person unable to attend a hearing because of existing physical or mental illness or infirmity 4 1
- Employer is not barred from presenting evidence that employee merited discipline in the past when no discipline was imposed: 47

- No weight was given to the written statements of alleged victims when they did not testify at the arbitration hearing: 67

- Arbitrator disregards all evidence presented of conversations with the deceased where all of the evidence was self serving for the presenting side and none of the evidence was corroborated: 86

- Arbitrator declined to admit the report of the hearing officer because the report offered no information not testified to in the hearing and because the conclusions of the hearing officer as to credibility carry no weight since it is the arbitrator's basic job to draw those conclusions herself: 86

- Consideration of other alleged violations discussed at the hearing, but excluded from the removal order would violate the grievant's due process rights: 108

- The employer's confusion concerning the differences and similarities between unauthorized use of a state vehicle and the misuse of a state vehicle prevented the arbitrator from determining the issue of whether the grievant was guilty of an unauthorized use of a state vehicle: 118

- The parties did not intend to expressly bar the use of polygraph evidence. If they had, they would have done so expressly in 24.07 which deals with polygraph evidence: 124

- No weight was assigned to the unsworn statement of an inmate since the inmate did not testify and was therefore not subject to cross-examination: 124

- Where the staff representative knew for a long time, that medical reasons for tardiness were relevant, but failed to obtain the necessary medical evidence, the arbitrator concluded that no proof of the medical reasons existed: 138

- When the state offered a past reprimand that should have been expunged from grievant's records under 24.06, the state violated 24.06. The arbitrator mistakenly ignored 24.06 when he accepted the reprimand into evidence. Consequently, the arbitrator gave the reprimand no weight: 140

- It is axiomatic that copies of Court records are acceptable evidence and may be received by an arbitrator as such: 145

- Arbitration is not "an equitable Forum," (except perhaps, in discipline cases where the arbitrator is licensed to interpret just cause). The arbitral task in contract disputes is to interpret and apply the contract. Equity is a bargaining-table issue, not a foundation for arbitral awards. The U.S. Supreme Court has so held: [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement: he does not sit to dispense his own brand of industrial justice." This is the universally recognized principle governing arbitral authority in the private employment sector, and is equally applicable to the public sector: 152

- Much as this arbitrator may be sympathetic toward the argument that the grievant has been deprived of a hearing because of the technical application of contractual terms, the circumstances of this case (an untimely appeal to arbitration following an untimely response by the employer from an earlier step of the grievance process) do not authorize this neutral to order an arbitration hearing on the merits on equitable grounds: 158

- Typically, where medical fact is at the very heart of the issue, such as the case where the parties are litigating whether an employee is permanently disabled, medical evidence is normally admissible. There is no guarantee, however, that it will be credited to the extent that it would otherwise be if the physician were present at the hearing. Greater weight, however, may be placed on affidavits of the sort presently discussed where the issue is whether an employee has a valid excuse for missing work and relies on the doctor's excuse as the proof of illness: 181

- Statements uttered either in the opening or closing arguments are not viewed as facts unless properly supported: 209

- The arbitrator refused to second guess the grievant as to what tactic she should have used in defending herself from the attack by the patient. Such second-guessing would be improper speculation which must not occur in a discipline situation: 216
- The employer cannot point to the content of a certain letter now as evidence of disloyalty at arbitration when it clearly failed to do so at the time of the grievant's discharge. Fundamental notions of fairness, embedded in the just cause concept proscribe it from doing so at this juncture: 21

- An allegation does not become a valuable piece of credible evidence without the support of evidence and testimony: 24

- An arbitrator is not bound by the outcome of a proceeding collateral to arbitration, but may admit and afford weight to facts and issues established elsewhere as they relate to the issue at bar. In the case at hand, the arbitrator admitted only those portions of the transcript of the grievant's criminal trial which served to impeach a witness because his testimony at trial was inconsistent with his testimony at arbitration. The arbitrator gave three reasons why she was not bound by the results of the criminal trial:

  (1) the policies and rules governing the method of decision making in each forum are different:

  (2) the parties do not have control over the collateral proceeding or the qualifications of the trier of fact;

  (3) the parties did not bargain for any such restraint upon the arbitrator: 25

- Merely arguing or asserting matters at the opening or closing arguments does not elevate them to the level of purposeful evidence and testimony. When certain arguments are raised, the party which asserts their relevance has an affirmative obligation to provide evidence and testimony in support of the truth of the matter: 25

- When the state attempted to introduce a written statement, the arbitrator sustained the union's objection to allowing the statement into evidence since the author was not present at the hearing to be cross-examined. However, when the union then tried to enter certain parts of the statement into the record, the arbitrator brought the whole statement into the record on the grounds that it is unfair to merely lift a few sentences out of the statement without putting them in the context of the whole statement. The arbitrator then focused on a different portion of the statement and used it to support his denial of the grievance: 26

- Once the union had introduced certain documents into evidence, the employer had every right to use the contents of the documents to refute the Union's assertions or to bolster its own allegations: 26

- The rules of evidence are not strictly adhered to in arbitration. Therefore, the arbitrator has far more discretion than a trial judge with regard to what can and cannot be admitted into the record. In this case, the arbitrator admitted a memo from the Deputy Director of the Office of Collective Bargaining advising the agency to settle immediately for fear of losing in arbitration: 5

- It is a matter of law that if failure to afford Miranda rights is argued successfully in court, then the result would be suppression of the information obtained under such circumstances: 5

- The State objected to the Union's introduction of copied documents, as evidence to show the grievant's previous work experience. The State argued that copied documents are not the best evidence and should not be admissible. The Union contended that it was past practice for both parties to utilize copied documents at arbitration proceedings. The Arbitrator did not directly address this issue, but stated that the Union's arguments for lack of further documentation of the grievant's work experience was not persuasive: 6

- The Arbitrator refused to consider evidence of threats allegedly made by the grievant once he was informed that disciplinary action was being initiated against him for sexual harassment. The Arbitrator held that evidence of an unrelated offense, which is uncovered after notice of discipline has been received by the grievant, is inadmissible at arbitration because it does not relate to the charge for which the grievant is being disciplined and could ultimately prejudice the outcome of the hearing: 61

Effect of Failure to Produce Important Evidence

- The grievant asserted that she was misguided by two individuals regarding the nature of her responses to specific questions contained on her
employment documents. This assertion, without some additional form of documentation, has to be viewed as self-serving and thus cannot be given much weight. Even if these individuals could not attend the hearing, documented attempts to contact these individuals, regardless of the results, might have swayed the arbitrator’s perceptions. A sworn deposition or statement might have filled this critical void in the evidence: 197

- The arbitrator gave greater weight to the grievant's testimony than the State's main witness because the State failed to present a key witness who could have resolved some of the conflicts in testimony between the State's main witness and the grievant: 223

- The grievance was granted in its entirety. The Grievant was reinstated to his post, shift, and days off; made whole; and the discipline was removed from his record. The Arbitrator ruled that the failure of the Employer to grant a one week continuance of the Pre-Disciplinary hearing was moot. The Arbitrator overruled the procedural objections. There was no evidence that the material requested—but not provided—was relied upon. The Arbitrator did not find the Grievant untruthful. The Investigator said the inmate made no specific allegations against the Grievant and the video showed no contact. No officer saw the Grievant hit the inmate. The Employer's conclusion is not supported by any evidence. The Arbitrator held that the discipline was not for just cause. 1029

  Hearsay

- Hearsay cannot be relied upon to establish so serious an allegation as discriminatory treatment: 1

- The arbitrator viewed as contrived the grievant's claim he had permission for his activity from a particular manager, since the union did not have the manager testify on the grievant's behalf and did not introduce a statement from the manager. Such a critical feature of the grievant's defense requires documentation or testimony if it is to be given any weight by this arbitrator: 1118

- The arbitrator assigned no weight to the undocumented hearsay testimony to the effect that some unnamed youth complained of physical abuse by the Grievant. If the employer considered such charges worthy of investigation and disciplinary action, they should have been the subject of another disciplinary proceeding: 163

- Evidence that grievant reviewed policy 2 months after incident for which she was disciplined was determined to be irrelevant: 35

- The Arbitrator held that the Labor Relation’s Officer’s statements relating to the grievant’s alleged verbal abuse of the resident was hearsay. Although the Arbitrator admitted the hearsay in as evidence, it was given diminished weight and credibility: 613

  Medical

- Inmate testimony tends to be unreliable and routinely requires corroboration. The medical findings of physical injuries on the bodies of the inmates were evidence that they suffered trauma. These medical findings were sufficient to comply with the corroboration standard: 292

- The fact that no staff member subsequently noticed any evidence of abuse points towards the conclusion that the grievant is innocent of abusing the client. The claim that the grievant dropped the full weight of his body, landing knees first on the client must be viewed with skepticism: 294

- The State presented medical evidence that the grievant’s accuser had suffered arm burns as a result of the September 15 assault. The State presented medical evidence by way of the statement of the grievant’s supervisor that the arm of the grievant’s accuser was “beet red to the elbow,” and by way of the testimony of a physician who, although not a witness to the assault, stated that there was no medical reason to doubt the claim of the grievant’s accuser: 615

  Phone Records

- The phone records of the grievant, showing calls from the correctional facility to his house, were taken as reliable evidence. A number of collect calls were person to person. It is impossible to be charged for these calls without the consent of someone at the residence. The records are objective proof of a series of unreported and improper contacts between the grievant and an inmate. The inmate’s testimony that he was blackmailing the grievant and that the grievant sold marijuana to the inmate were corroborated by the marijuana found in the inmate’s cell, a blackmail note written by the inmate and the telephone calls between the inmate and the
grievant. There was just cause for the removal: 31

- The grievant’s telephone statements constitute reliable and probative circumstantial evidence that the grievant did in fact have an authorized relationship with the mother and sister of an inmate: 339

**Testimony versus Written Statements**

- Taken for what it was worth, signed statement from grievant's mother saying she had called in for grievant does not overcome the evidence presented by the persons who testified at the hearing: 96

**Video Evidence**

- The Arbitrator held that there was ample evidence that the Grievant failed to take care of a resident of the Ohio Veteran’s Home. The Grievant left the resident, who was unable to take care of himself, unattended for five and one-half hours. In light of the Grievant’s prior discipline, the Arbitrator found the removal to be progressive. The Union made a procedural objection to the use of video evidence on a CD, because it was not advised of the CD’s existence until less than a week prior to the hearing. Since the employees and the Union are aware that video cameras are placed throughout the institution, the Arbitrator ruled that the CD could be used; however, he reserved the right to rule on its admissibility in relation to the evidence. The Union’s objection to the use of video evidence was sustained as to all events that occurred in a break room. The Arbitrator found little independent evidence of those events and did not consider any of that evidence on the video in reaching his decision: 1 007

**Ex Post Facto Discipline**

- The supervisor who initiated discipline admitted that he discounted the 1 4 -month improvement in the grievant's record because he concluded that "had he been Grievant's supervisor previously, he would have disciplined the grievant for absenteeism offenses during that period." This conclusion violates basic notions of fairness implicit in “just cause." A member of management is bound by the employers’ records and actions. A manager cannot arbitrarily and capriciously impose what amounts to "ex post facto" punishment to remedy what in his mind were past management failures: 1 89

- The employer violated 24 .01 by imposing discipline under a directive not clearly in force at the time of the incident and different from the directive specified on the notice of investigation. While the employer has the right to promulgate reasonable work rules, it cannot deprive employees or the union rights guaranteed to them under the contract. Nor can it Initiate discipline under one set of work rules and complete it under another when the result is to the employee's disadvantage: 227

**Excessive Force**

- Under OAC 5 1 20-9-02(c), a use of force investigation is mandatory where an inmate is struck, where mace is used, and where more than slight force was used. Otherwise the associate superintendent has discretion to order an investigation. Where Correction officer had sprayed inmate with fire extinguisher. The arbitrator ruled that none of the conditions necessary to make the investigation mandatory were present: 1 05

- The grievant engaged in conduct in direct violation of Directive NB-1 9, Rule 23, Physical Assault, and Rule 24 (a), Using Excessive Force on a Youth. The grievant allegedly placed his hands on the youth's neck and chest area and initiated an illegal take down causing the grievant to fall on top of the youth. The youth suffered bruises to his neck and chest that were consistent with the alleged acts of the grievant. The grievant had no justifiable reason to intervene at all, much less to physically intervene in the manner described by eyewitness testimony. The grievant twice received and signed a copy of Chapter B-1 9, the Department of Youth Services Directive relating to the conduct of employees, and as such, was on notice as to the regulation of the use of force: 5 95

- The Arbitrator found that though the Employer had just cause to discipline the grievant, the penalty imposed was excessive. He determined that the Employer had just cause to suspend the grievant for falsification charges, but not for the excessive force charge because the Employer did not provide satisfactory proof of the charge: 71 5

- The Arbitrator determined that the physical resistance of the inmate caused the Correction Officers to act hastily. He noted that there was no
evidence that the grievants intentionally placed the inmate in a cell with another inmate who was not restrained in the same fashion. Because of the conflicting testimony of the co-workers and inmates, the Arbitrator found it difficult to discern whether the inmate was struck in the face during an altercation with the grievants or whether he was attacked by one of the officers or inmates.

The Arbitrator did find that the grievant touched the youth on his back to turn him to exit the bathroom which was a fateful move on the grievant’s part. The Arbitrator stated that the touch precipitated the struggle that the youth intended to have with the grievant. Although this was a violation of Rule 21 a, it did not warrant removal. The grievant had already been disciplined for the first violation of Rule 21 a. Under Directive B-1 9, the second violation called for a sanction from a 15-day suspension to removal and a third violation called for automatic removal. The Arbitrator found that the injury to the youth was totally unrelated to his touching the youth; therefore, one of the factors that led to the grievant’s removal was not present when the grievant’s removal was based only by the touching and turning of the youth. The grievant’s action warranted discipline, but not removal. The removal was converted to suspension without pay.

The arbitrator determined that the grievant physically abused an inmate in a mental health residential unit. He was accused of using abusive and intimidating language towards the inmate in addition to stomping the inmate. The evidence presented and the testimonies of the witnesses supported management’s position and removal was warranted.

The grievant was assigned to the dining hall to check for contraband. He found a coat stored by an inmate in an improper area. He dragged the coat across the floor and threw it to the floor. The inmate approached the grievant about the way in which the grievant treated his clothing and a confrontation ensued. During the confrontation, the inmate was handcuffed and the grievant shoved the inmate into a wall. The grievant failed to include that action in his report. The arbitrator found that the witnesses – other CO’s and the inmate – were more credible than the grievant. The arbitrator noted that the grievant’s action “was not of an egregious nature” and one its own would not support removal; however, lying about what transpired during the incident was very serious and coupled with the excessive force warranted the grievant’s removal.

The grievant was charged with allegedly using profanity, being disrespectful to a superior and using excessive force in his attempt to break up a fight between two youths. The arbitrator held that the agency established that the grievant used the “F” word in referring to how he would handle any further improper physical contact by a youth. It was determined that the grievant was disrespectful towards his superior. The arbitrator found that the employer did not provide sufficient evidence to support the excessive force charge. Because the employer proved that the grievant had committed two of the charges leveled against him, the arbitrator found that some measure of discipline was warranted. The aggravating factors in this case were the grievant’s decision to use threatening, abusive language instead of allowing his Youth Behavior Incident Report to go through the process and his decision to insult his superior. He also continued to deny that he used profanity. The arbitrator noted that his decisions were unfortunate because as a JCO, he had the responsibility to be a role model for the Youth at the facility. The mitigating factors included the grievant’s thirteen years of satisfactory state service and no active disciplines on his record.

The arbitrator found insufficient evidence to overturn the removal. The weight of the evidence established that the grievant used excessive force when he grabbed and pushed an inmate, absent any credible evidence that the inmate touched or physically threatened him. The grievant went beyond grabbing and subduing the inmate when he began to repeatedly strike the inmate in the head. His seemingly boastful attitude following the incident further supported the employer’s decision to remove the grievant from his position.

The grievant was charged with physically striking a youth inmate. The arbitrator found that although the youth was not seriously hurt, he could have been badly injured. The Grievant had options which could have been used in an effort to avoid confrontation. Discipline short of removal was warranted. The award issued by the arbitrator was meant to correct the Grievant’s behavior and to emphasize “discretion is often the better part of
valor when it comes to handling dangerous and difficult juvenile inmates.” 915

The grievant was charged with excessive force in subduing a youth during an incident in the gym at a youth facility. The arbitrator noted a disparity in the discipline decisions to remove the grievant, but not to issue discipline to a General Activities Therapist whose actions included dragging a youth to the floor by his shirt. The arbitrator found that the grievant’s actions warranted progressive discipline, but not removal. The grievant failed to take the most appropriate action during the incident and was unable to timely anticipate the need to call for assistance from other officers. The arbitrator determined that the charge of dishonesty lacked sufficient evidence. There was no evidence in the grievant’s employment record to indicate that he could not correct his actions through additional training. The employer’s decision to allow the grievant to continue to work for an extended period of time following the date of the incident indicated that the employer did not foresee any additional problems. 926

The arbitrator reversed the removal stating, “Based particularly on the disparity regarding the levels of discipline imposed, the significance of the Grievant’s inappropriate response to the Youth’s activity in the gym incident, and the Grievant’s previous work record with DYS, the arbitrator finds that the Grievant’s summary discharge in response to this one performance offense is excessive, does not fit the ‘crime,’ and does not fundamentally comport with either progressive discipline or ‘just cause.’” 927

The arbitrator concluded that the burden of proof needed in this case to support the removal was absent. DYS removed the Grievant for two distinct reasons: use of excessive force with a youth and lying to an investigator regarding an incident in the laundry room. The evidence, even if viewed in light most favorable to DYS, failed to establish that the Grievant’s inability to recall the laundry room matter was designed purposely to deceive. Both parties agreed that nothing occurred in the laundry room that would warrant discipline. The record failed to support a violation of Rule 3.1 for deliberately withholding or giving false information to an investigator, or for Rule 3.8-interfering with the investigation. The Grievant’s misstatement of fact was nothing more than an oversight, caused by normal memory lapses—a trait common to JCOs. He handles movement of multiple juveniles each day, and the investigatory interview occurred eight days after the incident in question. No evidence existed to infer that the Grievant exhibited dishonest conduct in the past or had a propensity for untruthfulness. The evidence did not support that the Grievant violated Rules 4.14 and 5.1. The use of force by the Grievant was in accord with JCO policy aimed at preventing the youthful offender from causing imminent harm to himself or others. The grievance was granted. 943

The arbitrator concluded that the decision to remove the Grievant was not unreasonable, arbitrary, or capricious and denied the grievance. The arbitrator concluded that the Grievant did everything wrong. He used an unauthorized “physical action” in the form of kicks; he made no effort to modulate the force of the kicks in compliance with Policy No. 301.05; he used the...
The Grievant was indicted on criminal charges, but entered an Alford plea to the lesser charges of criminal Assault and Falsification. As part of the Alford plea the Grievant agreed not to work in an environment with juveniles, which precluded his being reinstated at Scioto. The Union subsequently modified the Grievance to exclude the demand for the Grievant’s reinstatement and that he only sought monetary relief and a clean record. The Arbitrator was not persuaded that there was clear and convincing evidence that the Grievant used excessive force against the Youth. The Arbitrator held that for constitutional purposes an Alford Plea was equivalent to a guilty plea; however, for the purposes of arbitration the Grievant’s Alford Plea did not establish that the Grievant used excessive force against the Youth. In addition, the Arbitrator held that the Grievant did not violate any duty to report the use of force. The Grievant did have a clear and present duty to submit statements from youth when requested and violated Rule 3.8 and 5.1 when refusing to do so. The Arbitrator found that the termination of the Grievant was unreasonable. Under ordinary circumstances he would have reinstated the Grievant without back pay, but reinstatement could not occur due to the Alford plea. However, because of the number of violations and the defiant nature of his misconduct, the Grievant was not entitled to any monetary or non-monetary employment benefits. The grievance was denied.

968

- The grievance was granted in its entirety. The Grievant was reinstated to his post, shift, and days off; made whole; and the discipline was removed from his record. The Arbitrator ruled that the failure of the Employer to grant a one week continuance of the Pre-Disciplinary hearing was moot. The Arbitrator overruled the procedural objections. There was no evidence that the material requested—but not provided—was relied upon. The Arbitrator did not find the Grievant untruthful. The Investigator said the inmate made no specific allegations against the Grievant and the video showed no contact. No officer saw the Grievant hit the inmate. The Employer’s conclusion is not supported by any evidence. The Arbitrator held that the discipline was not for just cause. 1029

Exempt Duties

- The issue was previously found arbitrable in Arbitration Decision 989. The Arbitrator held that the evidence did not demonstrate that the Agency possessed the intent to erode the bargaining unit. Nothing in the arbitral record suggested that the Agency exerted less than reasonable effort to preserve the bargaining unit. The Arbitrator also held that the record did not demonstrate that the Agency intended to withdraw the vacancy to circumvent the agreement. Constructive erosion occurs where a new position is erroneously labeled exempt when it should have been labeled nonexempt. Constructive erosion restricts the future size of a bargaining unit; direct erosion reduces the present size of a bargaining unit. The Arbitrator used the label “hybrid” to explain the nature of the contested position, reflecting the presence of both exempt and nonexempt duties in one position. Furthermore, he posed that the fundamental issue of the grievance was: Whether the contested position was exempt or nonexempt? Consequently, the Arbitrator proposed a screening device for hybrid positions that might be useful in resolving subsequent classification disputes. This screening test puts the focus on essential duties (“Essence Test”): whether exempt or nonexempt duties are required in (essential to) daily job performance. A hybrid position is exempt if daily job performance entails exempt duties; a hybrid position is nonexempt if daily job performance necessitates nonexempt duties. The Arbitrator held that exempt duties do not somehow become nonexempt merely because bargaining-unit employees have performed them; nor do nonexempt duties become exempt because supervisors perform them. The
Arbitrator’s application of the “Essence Test” indicated that the contested position was exempt. Although the duties were not fiduciary, many of the duties were central to managerial decision-making authority. 1 024

Exempt Employee

- SERB is the ultimate decision maker where bargaining units are involved: 4 72
- The Employer’s decision to change the grievant’s classification status based on a unilateral action flies in the face of the authority vested in SERB under Ohio Revised code 4117.06(A): 4 72
- The grievant’s termination should have been preceded by the statutorily defined protocols, and the Employer should have petitioned SERB to determine whether a community of interest exists or whether the appropriate unit requires the exclusion of the Liaison Officer I position: 4 72

Expedited Arbitration

- Liberal rules for expedited arbitration do not eliminate state’s responsibility to present sufficient evidence to justify a finding of just cause: 69

Expert Witness

- Expert testimony based on an incomplete investigation was found to be inconclusive: 39
- Testimony of coroner’s office was found to be inconclusive for establishing time of death because investigation was incomplete. Determination of time of death would involve not only check for rigor mortis, but also checks of body temperature and lividity: 39
- The Arbitrator concluded that while the trial testimony of the expert conflicted with his arbitration testimony, the conflict was the result of a misunderstood question rather than a change of opinion. The expert was highly competent and his conclusions were "positive, well-grounded, and unchallenged by anyone qualified to do so." The bottom-line was the Arbitrator was convinced that grievant was the person who signed the receipts at issue: 5 87
- The State’s expert witness, a physician, stated that there was no medical reason to doubt the claim of the grievant’s accuser: 61 5

Health physicists were assigned on a rotating basis to respond to incidents, including those at landfills. The Grievant sought pre-exposure vaccinations and protective gear for onsite inspections. OSHA guidelines state that vaccine is to be offered to employees who have occupational exposure to the hepatitis B virus. Occupational exposure has the same definition as in the OSHA guidelines. The expert witness, a PERRP program administrator, reviewed the Bureau’s written policy and the duties of health physicists and testified that these employees were not reasonably expected to have contact with blood or other potentially infectious materials and were not required to have pre-exposure vaccinations. The incident of falling in the muck at the landfill as related by the grievant was an accident for which the right to post-exposure evaluation and treatment was created. The Arbitrator concluded that Health Physicists did not have “occupational exposure” and therefore were not entitled to hepatitis B vaccine pre-exposure. The grievance was denied. 962

Extended Break

- The Arbitrator held that despite the Grievants 1 9 ½ years of service, her extension of her break, and more importantly, her dishonesty in the subsequent investigation, following closely her ten-day suspension for insubordination, gave him no alternative, but to deny the grievance and uphold the removal. The Arbitrator rejected the argument that the removal was inconsistent with progressive discipline because dishonesty and insubordination are different offenses. The Arbitrator found this contention contrary to the accepted view of Arbitrators regarding progressive discipline. Also, the agency policy stated that “discipline does not have to be for like offenses to be progressive.” 1 04 0

Extended Lunch Break

The Grievant was removed after two violations—one involving taking an extended lunch break, the second involved her being away from her work area after punching in. Within the past year the Grievant had been counseled and reprimanded several times for tardiness and absenteeism, therefore, she should have know she was at risk of further discipline if she was caught. Discipline was justified. The second incident occurred a week later when the Grievant left to park her car after punching in. The video camera revealed
two employees leaving after punching in. The other employee was not disciplined for it until after the Grievant was removed. That the Reviewing manager took no action against another employee when the evidence was in front of him is per se disparate treatment. No discipline for the parking incident was warranted. Management argued that removal was appropriate since this was the fourth corrective action at the level of fine or suspension. The Grievant knew she was on a path to removal. But she also had an expectation of being exonerated at her Non-traditional Arbitration. Her 3-day suspension was vacated by an NTA decision. That fine was not to be counted in the progression. The Grievant was discharged without just cause. 992

– F –

Facility Closure

Despite the testimony and evidence presented by the Union concerning health and safety issues, the arbitrator found that he could not stop the closure of LCI. First, while there was no doubt that prisons are a difficult and dangerous workplace, it did not appear that the “relatively small increase in crowding increases the threat to health and safety”. Second, there were actions that could be taken to improve the effects if crowding. The arbitrator stated the stated and Union must work together to resolve the issues. 839

Failure to Attach Grievance Form to Appeal

– The Arbitrator held that the grievance was not arbitrable based on the fact that a grievance form was not attached to the appeal in accordance with Article 25: 5 97

Failure of Good Behavior

- The charges of failure of good behavior and neglect of duty are subsumed by the more serious charges of insubordination, fighting or striking supervisor, and being absent without leave/leaving work without permission of supervisor: 1 73

- The Employer had just cause to remove the grievant for sexual harassment and failure of good behavior, especially considering his disciplinary record. The grievant was provided with proper notice concerning the sexual harassment policy. Witness testimony demonstrated that the grievant’s lewd, harassing behavior created an oppressive working environment: 4 61

- In a case involving a grievant who was disciplined for fighting and using insulting language, the arbitrator found that the grievant could not be disciplined for "failure of good behavior" because such a charge amounts to stacking, and thus the grievant would be charged with the same actions twice. Where an action violates two rules, the more specific rule violation should be chosen: 5 34

An employee received a written reprimand for failure of good behavior after he was arrested off duty and pled no contest to a drug possession charge. Since the employee had no prior violations, a written reprimand was proper: 5 5 8

Failure of Good Behavior

The grievant made threatening comments to her supervisor in a DOH office. Comments made to members of the center’s police department and the Highway Patrol Trooper, in addition to the grievant’s insubordination supported the state’s decision to remove the grievant. 772

Though the arbitrator found that the grievant had made inappropriate comments to both co-workers and customers who visited the center, he could not sustain the removal. The grievant was no aware that his conduct was not welcome. The female co-workers who filed the charges never told the grievant that his behavior upset them. The employer failed to provide the proper sexual harassment training pursuant to a settlement agreement following a one-day suspension he received for previous misconduct. The arbitrator could not award back pay because the grievant’s record indicated that he had previously been disciplined three times for inappropriate comments to female customers. The arbitrator noted that after completion of sexual harassment training, the grievant would be fully responsible for the consequences incurred as a result of any further sexually harassing comments made to co-workers or customers. 776

The grievant was accused of striking his supervisor, causing injury to his eye. The arbitrator found the supervisor’s version of what happened to be credible over the grievant’s
The arbitrator noted that the grievant showed no remorse, did not admit to what he did not commit to changing his behavior. The arbitrator stated that without the commitment to amend his behavior, the grievant could not be returned to the workplace. 780

The grievant was charged with conducting a pay-for-parole scheme, which resulted in at least two inmates inappropriately placed on parole. The arbitrator determined that this matter was based on circumstantial evidence that had not been corroborated by the investigation. The employer’s case was inconclusive. The arbitrator found one exception to his findings. The grievant raised suspicion of his activities by the volume of phone calls made to him by one of the inmates during an 18-month period. This suspicion compromised the grievant ability to perform his duties as a hearing officer. 783

By the time the Arbitrator heard this case, the applicant had mastered the English language enough to testify for herself. The Arbitrator heard from the applicant directly and found her testimony credible. The Arbitrator stated that the testimony of her friends corroborated her testimony. The Arbitrator noted that the loud talking that the lead worker heard but could not understand; coupled with nonverbal behavior she observed, fit the pattern of a sexual abuse victim reluctant to come forward and the outrage of friends. The Arbitrator found that the evidence presented clearly proved that the grievant had abused his position and that removal was justified. 792

The arbitrator stated that if the grievance had been properly filed, it would have been denied on its merits. The grievant was charged with using derogatory and obscene language towards a security guard. Two witnesses, both of who were Ohio State Patrol Troopers, corroborated the guard’s testimony. Though the incident did not occur when the grievant was on duty, it did occur in the public area of the State building where the grievant’s office was located and where State employees, as well as the public were present. The employer did not consider the grievant’s 22 years of service and the arbitrator noted that there was no obligation to do so because the grievant had signed a Last Chance Agreement from a previous disciplinary action which had been negotiated and agreed to by both parties. 805

The grievant was charged with violating several rules/regulations, mainly acts of insubordination. Instead of removal, the employer, the Union and the grievant to hold the discipline in abeyance pending completion of an EAP. The grievant was also moved to a new area with a new supervisor. The evidence showed that the grievant failed to comply with the agreement by not maintaining contact with EAP. The arbitrator found the grievant’s “flat refusal to follow reasonable and proper directives and her blatant defiance of her supervisor’s authority…inexcusable.” The arbitrator noted that the minor violations alone were not serious but in totality with the continued pattern of insubordination they took on greater significance. He did not find sufficient evidence that the grievant “clocked-in” for another employee. 848

The grievant was removed from his position for making sexual comments and other types of nonverbal sexual conduct towards a Deputy Registrar who worked in the same building, thus, creating a hostile work environment. The arbitrator found that the evidence and testimony presented by the employer was clear and convincing that the grievant’s conduct was unwelcome, offensive and adversely effected the victim’s job performance, ultimately becoming a major factor in “constructively discharging her”. The two aggravating factors which weighed the most against the grievant were the serious nature of his misconduct and his resistance to rehabilitation despite that fact that he had received sexual harassment training as the result of an earlier violation. 850

The grievant was given a 10-day suspension for various alleged violations including Neglect of Duty, Insubordination, Exercising Poor Judgment; Failure of Good Behavior and Working Excess Hours Without Authorization. The Union argued that the same person conducted the third step proceeding, the pre-disciplinary meeting, another third step meeting and also prepared the notice of the pre-disciplinary meeting notice. In essence, the grievant’s “Accuser, Judge and Employer Representative.” The arbitrator determined that there was no conflict and that the contract does not require that different individuals preside over the various steps in the process. He noted that the pre-disciplinary meeting was not an adjudicatory hearing, stating that it is described in Article 24.04 as a meeting.

The arbitrator found that five examination reports were not submitted by the grievant. The
supervisor was “extraordinarily patient with the grievant” and gave him several reminders to submit the examination reports. The grievant clearly understood he was to submit the reports. The grievant’s failure to submit the reports was a failure to perform a fundamental part of his job. The Employer failed to make its case with regards to the grievant’s time sheets. The employer did not show just cause to discipline the grievant for working excess hours without authorization. Though the time sheet was not clear, it was obvious that the grievant was not claiming hours beyond his scheduled hours. The arbitrator determined that there was no just cause for Working in Excess Poor Judgment, Failure of Good Behavior and Exercising Poor Judgment; however, he found just cause for Insubordination and Neglect of Duty.

The arbitrator found the 10-day suspension reasonable. The decision by the employer to suspend the grievant for 10 days in this case was based in part on an act of insubordination that occurred approximately one month prior to the charges in this matter. 854

The grievant was charged with providing Mine Safety and Health Administration compliance training as an independent contractor for compensation. He stated that he had been providing the training since the late 1980’s and saw nothing wrong with it. The supervisor gave the grievant a direct order to discontinue providing the training. Following the direct order, the grievant notified management that he would be providing the training and that the Division did not provide the compliance training. Management stated that providing the training was a conflict of interest. The BWC Code of Ethics prohibits employees from engaging in outside employment that results in “conflict or apparent conflict with the employee’s official duties and responsibilities.” The arbitrator concluded that outside employment and matters of his employer need not be direct and a relationship is recognized if outside employment relates “in any way to workers compensation matters.” The arbitrator noted that the Bureau considered providing the training at one time but chose not to due to a lack of funds. That consideration clearly established the training as a BWC matter. The grievant’s supervisor at the time encouraged him to provide the training because the Bureau did not provide the training. While it was confirmed by both parties that the grievant did not provide the training as a BWC employee, the grievant could have been assigned the task by his supervisor. “It is important that the public understand that the employees of the Bureau act only in the interest of the people uninfluenced by any consideration of self-interest except those inherent in the proper performance of their duties.” The 10-day suspension was within the scope of the violation, however, the employer, through the grievant’s supervisor, contributed to the grievant’s conduct. While the supervisor’s encouragement did not constitute permission from the employer, it was sufficient evidence to show that BWC must share responsibility for the grievant’s conduct. 855

The arbitrator found that the grievant displayed contempt rather than compassion for a co-worker, had an insubordinate attitude towards management, used foul language and apparently resented being corrected and reprimanded. However, the arbitrator found no evidence of this behavior being a plan to intentionally harm; it was rather a private bad joke. The arbitrator agreed that the employer could prohibit expressions of hostility in the workplace, even when they are merely bad jokes and take corrective action. The arbitrator also agreed that the grievant cannot be allowed to continue as he is. For this reason, the charge of Menacing/threatening/harassing behavior was removed from his record and replaced with the charge noted in the award. 872

The grievant was a visiting room shakedown officer responsible for checking for drugs and contraband. While of-duty, he was arrested and charged with the possession cocaine and tampering with evidence. In lieu of a conviction, the grievant was sentenced to three (3) years probation. Other CO’s, as well as inmates testified that they were aware of the grievant’s arrest and subsequent removal and the circumstances surrounding them. The arbitrator determined there was a substantial relationship between his off-duty misconduct and his job as a CO. The arbitrator noted that the “grievant had a duty to enforce the law and the very subject matter of his off-duty misconduct was identical to his job duties.” 874

The grievant accused by her employer of deleting records from the database in an effort to outperform a co-worker. The employer never presented testimony or evidence to prove this theory. The grievant testified that customer feedback regarding her performance was important. There was a problem in system in
obtaining that feedback. The arbitrator stated in his decision that the grievant credibly explained her situation and what she did to explore the problem. Nothing in the record discredited the feedback problem experienced by the grievant. The arbitrator concluded that the grievant’s attempt to clarify the matter appeared plausible, although somewhat unusual. 886

The grievant was charged with allegedly using profanity, being disrespectful to a superior and using excessive force in his attempt to break up a fight between two youths. The arbitrator held that the agency established that the grievant used the “F” word in referring to how he would handle any further improper physical contact by a youth. It was determined that the grievant was disrespectful towards his superior. The arbitrator found that the employer did not provide sufficient evidence to support the excessive force charge. Because the employer proved that the grievant had committed two of the charges leveled against him, the arbitrator found that some measure of discipline was warranted. The aggravating factors in this case were the grievant’s decision to use threatening, abusive language instead of allowing his Youth Behavior Incident Report to go through the process and his decision to insult his superior. He also continued to deny that he used profanity.

The arbitrator noted that his decisions were unfortunate because as a JCO, he had the responsibility to be a role model for the Youth at the facility. The mitigating factors included the grievant’s thirteen years of satisfactory state service and that there were no active disciplines on his record. 907

The grievant was a TPW working third shift at a group home. When he arrived at work he was told that a resident was found with knives and Tylenol. He was instructed to position himself so he could visually monitor the resident. Co-workers testified that they saw the grievant sleeping while on duty. They also testified that the grievant was not in a physical position to see the resident if he were on the stairs. During his shift the grievant placed three telephone calls to the supervising nurse at home. He was allegedly rude and disrespectful each time he called. The arbitrator found that the grievant’s removal was just. In addition to his rude behavior the grievant had previously been given a verbal warning and two (2) five-day working suspensions for similar offenses within his four years of employment. 95

The Arbitrator found that the evidence showed the Grievant had violated Work Rule Neglect of Duty (d) and Failure of Good Behavior (e). The evidence failed to demonstrate any words or conduct that rose to the level of a threat or menacing. The Arbitrator held that the removal was excessive due to the Grievant’s medical condition; the Grievant’s acute personal issues; a relatively minor discipline record at time of removal; eleven years of satisfactory service; and the absence of threatening conduct. The Arbitrator reinstated the Grievant with conditions: she will successfully complete an EAP program for anger management and stress—failure to do so would be grounds for immediate removal; discipline of a 15 day suspension without pay for violating the work rules; she shall receive no back pay, seniority and/or any other economic benefit she may have been entitled to; she shall enter into a Last Chance Agreement, providing that any subsequent violation of the work rules for a year following her reinstatement will result in immediate removal. 999

**Failure of Grievant to Appear at Arbitration Hearing**

- Certain justifiable inferences might be drawn from the grievant not being present at the hearing. When one refuses to testify, inference can be drawn which are limited to evidentiary facts. These inferences, however, do not extend to ultimate conclusions of guilt or innocence: 451

**Failure to Act/Neglect**

- The Arbitrator noted that his determination that verbal communication was not required of the grievant was further supported by the changes made following the grievant’s removal “signifying supervisory responsibility for residents at the green house.” The Arbitrator found that the grievant exercised poor judgment in dropping visual contact of the resident on two occasions in a short span of time. 717

**Failure to Call In**

- In a case involving a correction officer grievant who was persistently tardy at his report-in location, the arbitrator found just cause to remove the grievant even though his tardiness was due to the grievant's drinking problem. Although the circumstances might explain the grievant's tardiness, they did not prevent the grievant from...
The arbitrator determined that the charges of failing to notify a supervisor of an absence or follow call-in procedure and misuse of sick leave were without merit. He found that the charge of AWOL did have merit. 765

The grievant was allegedly injured by an unknown assailant who was attempting to enter the building where the grievant worked. There were no witnesses to the incident. Due to inconsistency in the grievant’s statements the arbitrator found that the record did not indicate that the grievant was injured. The arbitrator found that the grievant was well aware that he did not have leave balance accrued and that the medical choices made by the grievant were his own doing. Given the arbitrator's finding regarding the assault, the arbitrator determined that the grievant was absent without leave for more than four days and that he misused/abused approved leave. The arbitrator stated that those violations warranted removal. The arbitrator concluded that the facts did not support a work-related injury. He stated that critical to his conclusion was the grievant’s credibility. The grievant provided no evidence to conclude that an unknown assailant injured him. The arbitrator stated that the grievant’s overall testimony was not believable and his refusal to acknowledge wrongdoing negated any mitigating factors. 925

The arbitrator found that the grievant had no concrete knowledge of the impropriety of discussing her probable cause findings with the complainant. The Arbitrator noted that the grievant revealed her findings to the complainant at the time the individual inquired about the findings, and as an EEO Investigator, had a duty to answer the complainant’s questions honestly. Therefore, the Arbitrator found that the grievant did not exercise poor judgment in informing the grievant of her findings, or that the department changed those findings. 7

The arbitrator held that a statement by the Grievant in an email was a false, abusive, and inflammatory statement concerning his supervisor. The Grievant did provide false information in an investigation. The Arbitrator found that the Grievant was not permitted to complete closing inventory on the Operation in question; consequently, he did not breach his job...
duty to complete the inventory properly. The record supported the finding that the Grievant did not provide even a minimal level of support to the Operator in dealing with customer complaints about the operation of her facility. Therefore, the Arbitrator held that the Grievant did fail to carry out one of his assigned job duties and failed to follow administrative rules. Because some of the Grievant’s work was for his personal business and for his job at Columbus State Community College, the work was for his personal gain. The Arbitrator held he did fail to follow administrative regulations in the use of his computer equipment assigned to him. The Grievant did have 27 years service to the Commission and had no disciplinary record. However, his ease in involving his blind clients in the investigation of his own conduct as a Specialist demonstrates a lack of sensitivity to the vulnerability of his clients. His supervisor was visually impaired and he wrote a false statement about her in the course of an investigation. Both actions show that the Grievant exhibits little concern for the blind. The Arbitrator found that the grievant cannot be trusted to return to an organization devoted to the service of the blind.

Failure to Cooperate in an Investigation

- In a case involving a grievant who refused to identify his roommate during an internal investigation, the arbitrator held that it is not up to the grievant to decide what questions are relevant to the investigation. The grievant failed to cooperate in the investigation in violation of work rules and, in combination with other violations, could be removed: 517

- During an investigation to determine the origin of bullets found in an inmate's cell, the grievant lied to investigators and also lied on a polygraph test. Although the grievant was not involved in bringing bullets into the institution, any lying during an investigation must be deemed uncooperative behavior: 530

- The Arbitrator, in denying the grievance, borrowed language from Thrifty Dru, 50 LA 1 25 3, stating that “It is manifest that an employee has an obligation, arising from operation necessity, to make reasonable disclosures to his employer of facts which are relevant to the employer’s operations.” Here, the grievants were uncooperative during the employer’s investigation of the alleged incident: 616

- The Arbitrator determined that the grievant did fail to cooperate with the investigation because he did not come forward with any information he had after the inmate’s escape. 733

- The Arbitrator determined that while the grievant was not guilty of physical abuse, handcuffing the inmate did constitute an inappropriate use of force in this case. She noted that the grievant’s misconduct was aggravated by his failure to report the use of force. She found that the grievant’s conduct warranted discipline, but removal was too severe. The removal was converted to a five-day suspension. 749

The Arbitrator found that from approximately 1995 until 2006 the Employer did not investigate relationships and/or other improprieties involving gifts or money received by employees from residents. The Arbitrator cited a 2007 decision: “Arbitrator Murphy found that the Employer’s lax enforcement of its policies . . . lulled the employees into a sense of toleration by the Employer of acts that would otherwise be a violation of policy.” There was no evidence that the Employer made any efforts to put its employees on notice that certain policies/procedures which were

Failure to Come to the Aid of a Fellow Correction Officer

- When a Captain at the same institution, who is an instructor in fight break-up technique, testified that officers in the grievants position (Range officer) always come to his aid to break up fights, the arbitrator took this as clear evidence of the sort of behavior to be expected: 203

- Failure to come to the aid of a fellow officer in a fight break up must be considered a serious offense in the prison community. The safety of fellow officers and prisoners may be compromised by inaction: 203

Failure to Comply with Award

- Because the grievant failed to comply with the arbitration award by failing to obtain a modification of his driver’s license suspension, the Employer had just cause to remove him. The grievant allowed his driver’s license to expire, preventing him from obtaining a modification order, and thereby making it impossible for him to perform his job duties, which consisted largely of driving state vehicles: 441 (A)
previously unenforced would no longer be ignored. The Arbitrator noted that statements made by the Grievant and her co-workers indicated evasiveness, but not falsification. The Arbitrator held that just cause did not support the decision to suspend the Grievant for ten (10) days. Furthermore, the Grievant’s failure to report any information under Policy No. 4 prior to November, 2006 occurred in an environment indicating that relationships or the exchange of items of value was known and tolerated by OVH Management. 1 001

- The Arbitrator held that the Bureau had just cause to discipline the Grievant for a willful failure to carry out a direct order and for her failure to produce a Physician’s Verification for an absence. This also constituted an unexcused absence for the same date. The Bureau also had just cause to discipline the Grievant for the improper call-off on a later day. The Grievant’s refusal to answer any questions in both investigatory interviews constituted separate violations of the fourth form of insubordination, in that the Grievant failed to cooperate with an official investigation. The Arbitrator held that the record did not support the mitigating factor that the Grievant’s work was placed under “microscopic” review. Nor did the record provide substantial information that the supervisors were universally committed to finding any violations of work rules by the Grievant. 1 021

**Failure to Follow Orders**

- See insubordination

- Where departmental directive said superintendent may require sick leave documentation, arbitrator refused to uphold discipline for not providing sick leave documentation when manager other than superintendent had requested the documentation: 35

- A 60 day suspension was warranted where the grievant, a Correction Officer, failed to call in or report for scheduled overtime, failed to follow an order to report to the Captain’s office, and made an unauthorized personal phone call: 4 4 4

- The grievant failed to follow post orders by bringing candy bars and magazines into the institution for an inmate. These items are considered contraband, and distribution thereof is expressly prohibited: 5 30

- In a case involving a grievant who was disciplined for fighting and verbal abuse, the arbitrator held that there was no failure to follow orders because at no point was there a direct order: 5 34

Discipline was imposed upon the grievant for just cause. The State provided eyewitness testimony that the grievant was observed standing beside the open salvage door when no loading was in progress. Given the grievant’s continued dishonesty in the face of credible eyewitnesses and his extensive disciplinary record (which including numerous reprimands for dishonesty and neglect of duty, failure to carry out work assignment, willful disobedience of direct order and violations of agency policies and procedures), the removal was commensurate with the offense: 4 93

- The grievant was charged with using a State vehicle to steal two snow blowers. In addition, he was charged with failing to comply with an order not to drive a State vehicle during the time that he did not have prescription glasses. The Arbitrator found that there was clear and convincing evidence that the grievant was involved in the theft of the two snow blowers. The value of the snow blowers involved in the case clearly made the theft a dischargeable offense: 5 92

The grievant, a Correction Officer, was observed in the company of a particular inmate on several occasions, including an incident in which another correction officer witnessed the inmate rubbing the grievant’s back. The arbitrator concluded that sufficient evidence existed to support the employer’s position. The inmate’s statement and the CO’s statement corroborated each other and were credible. The arbitrator noted that testimony from two Union witnesses who observed the grievant’s behavior and viewed the grievant’s conduct as inappropriate enhanced that credibility. The arbitrator determined that the employer provided conclusive and substantial evidence that the grievant had unauthorized contact with the grievant. The employer provided evidence that the grievant emailed the inmate’s mother and indicated that she wanted the inmate’s mother to call her. The fact that the grievant failed to comply with the direct orders to provide her son’s cell phone number – pivotal in determining whether or not phone calls occurred using that particular phone – indicated to the arbitrator that the grievant did not want to disclose the number. There were no mitigating factors in this case. The grievant was aware of the risks and the consequences of her actions. She continued her
actions anyway. The arbitrator found removal was for just cause. 798

The arbitrator found that the grievant lied about having a handgun in his truck on State property. The State did not prove that the grievant threatened a fellow employee. The arbitrator stated that it was reasonable to assume that the grievant was either prescribed too many medications or abusing his prescriptions. The arbitrator determined that the grievant’s use of prescription medications played a major role in his abnormal behavior. The grievant’s seniority and good work record were mitigating factors in this case and his removal was converted. 808

The grievant was charged with violating institution policy by opening the cell door of the segregation unit prior to the inmates being restrained in handcuffs. Another CO struggled with, and was accused of injury, one of the inmates. The grievant was evasive in the interview with the investigator regarding what actually occurred during the incident. The arbitrator determined that the grievant was a relief officer who rotated among several posts. There was no evidence that the grievant received training regarding specific procedures for the segregation unit. The arbitrator found the grievant’s testimony credible. He concurred with the Union that not all of the evidence was considered in this matter. Although the grievant had only twenty months of service, the fact that she had no prior disciplines was also a mitigating factor. 81

The grievant failed to include that action in his report. The arbitrator found that the witnesses – other CO’s and the inmate – were more credible than the grievant. The arbitrator noted that the grievant’s action “was not of an egregious nature” and one its own would not support removal; however, lying about what transpired during the incident was very serious and coupled with the excessive force warranted the grievant’s removal. 837

The Arbitrator held that the Agency failed to establish by preponderant evidence that the Grievant engaged in either sexual activity or sexual contact with a Youth. In addition, preponderant evidence in the record did not establish that the Grievant violated Rule 6.1, Rule 3.1, Rule 3.9, and 4.10. The Arbitrator concluded that the Youth was less credible than the Grievant. The Grievant’s refusal to submit to a polygraph test did not establish his guilt. The slight probative value of polygraph examinations disqualifies them as independent evidence and relegates them to mere corroborative roles. Because the Agency established the Grievant’s failure to cooperate under Rule 3.8, some discipline was indicated. The strongest mitigating factor was the Grievant’s satisfactory and discipline-free work record. The major aggravative factor was the Grievant’s dismissive attitude toward the Agency’s administrative investigation. 972

Failure to Follow Orders

The grievant was charged with insubordination and willful disobedience of a direct order – to release medical information. The grievant was given several opportunities to comply with the order and refused on each occasion. The arbitrator determined that no evidence presented suggested any distinction or difference between OCSEA employees and other employees regarding IME’s within ODNR. The arbitrator noted that the grievant was aware that his employer could discipline him for failure to release medical results. The grievant’s conduct was insubordinate and he failed to follow clear directives. The hearing officer decided that due to the grievant’s work history and length of service, and his willingness to see other examiners, a 10-day suspension, as opposed to removal was warranted. The arbitrator elected not to substitute his judgment in this matter. 806
The grievant was involved in a verbal altercation with the Deputy Warden of Operations regarding failure to follow a direct order from the Warden. At the time of the incident the grievant was on a Last Chance Agreement (LCA), which included 6 random drug tests within the year following entrance into the LCA. As a result of his behavior during the argument, the grievant was ordered to submit to a drug test. He refused and was removed. The arbitrator noted that the grievant’s discipline record demonstrated a pattern of poor conduct over a short period of time regarding his inability to follow orders or interact with management appropriately. Further misconduct would surely result in removal. The arbitrator found that the employer failed to establish reasonable suspicion to order a drug test. The grievant’s failure to obey the Warden’s direct order gave just cause to impose discipline, but flaws in procedure on the part of the employer were noted by the arbitrator for his decision to convert the removal to a suspension. The arbitrator determined that “the overall state of the evidence requires reinstatement, but no back pay or any economic benefit to the grievant is awarded.”

The grievant, a TPW with 1 2 ½ years of service, no active disciplines and satisfactory evaluations was removed from his position for leaving a client alone in a restroom. The client was under an “arms length”, “one-on-one supervision” order. The client was discovered on the restroom floor by the grievant who did not report the incident. The arbitrator stated that the employer’s definition of client neglect was two-fold. First, there must be a failure to act. Second, the failure to act must result in, or cause “potential or actual harm.” The arbitrator found that the grievant failed to act when he allowed the client to enter the restroom alone; however, there was no evidence to establish “causal link” to the client’s injuries. The arbitrator determined that the grievant’s neglect exposed the client to potential harm and that his act of neglect was more than simply poor judgment. The arbitrator found that the mitigating and aggravating circumstances did not outweigh the severity of the violations allegedly committed by the grievant.

The grievant was charged with failing to provide a nexus form to his employer regarding the incarceration of his brother. He was also charged with threatening an inmate with bodily harm. The employer failed to prove that the grievant did not inform it of his relationship with an individual under the supervision of the State of Ohio. However, the employer provided substantial proof that the grievant threatened an inmate. The grievant had only been a fulltime correction officer for seven months prior to the incident. There were no mitigating factors to warrant reducing the removal to a lesser discipline.

An inmate was dead in his cell of an apparent suicide. The grievant was charged with failing to perform cell checks. The arbitrator found that the condition of the body and the filthy condition of the cell indicate that if the grievant had made the two rounds per hour as required, the inmate's suicide attempt would have been discovered much earlier. The grievant was a “short-term” employee with a prior discipline for inattention to duty. The arbitrator found no mitigating factors to warrant reducing the removal to a lesser discipline.

The grievant was charged with accessing employee email accounts without authorization. He was removed for failure of good behavior and unauthorized use of state time/property/resources for personal use. The Union argued that a procedural flaw occurred in this matter in that the disciplinary action was untimely. In its implementation of discipline, management relied upon a report that took 1 ¾ years to complete. It was not reasonable to expect the grievant to remember events over such a long period of time. The Union noted that there was a distinction between accessing an email account and actually viewing the emails. Accessing the accounts did not violate the grievant’s network privileges. The employer could not prove that the grievant did indeed view the contents of the accounts. The grievant had a good work record prior to the discipline. The employer did not implement progressive discipline in this instance. The arbitrator rejected the Union’s timeliness objection, stating that the employer moved in a timely manner once it was satisfied that the grievant had violated policy. The arbitrator noted that the employer allowed ample time for the Union to conduct a proper investigation. The arbitrator found that management could prove that the grievant logged on to several accounts, but could not prove that he actually read the contents. Management could not prove that the grievant used state resources for personal use or gain. The arbitrator noted that a co-worker had also
accessed email accounts that were not his, but he had not been disciplined. The arbitrator stated, “If it is a serious offense to log on to accounts other than one’s own the question arises as to why one employee was discharged and the other was neither discharged nor disciplined.” The grievance was sustained. The grievant was reinstated. He received back pay minus any earnings he received in the interim from other employment due to his removal. The grievant received all seniority and pension credit and was to be compensated for all expenditures for health incurred that would have been covered by state-provided insurance. All leaves balances were restored and any reference to this incident was ordered stricken from the grievant’s personnel record. 924

The grievant was charged with excessive force in subduing a youth during an incident in the gym at a youth facility. The arbitrator noted a disparity in the discipline decisions to remove the grievant, but not to issue discipline to a General Activities Therapist whose actions included dragging a youth to the floor by his shirt. The arbitrator found that the grievant’s actions warranted progressive discipline, but not removal. The grievant failed to take the most appropriate action during the incident and was unable to timely anticipate the need to call for assistance from other officers. The arbitrator determined that the charge of dishonesty lacked sufficient evidence. There was no evidence in the grievant’s employment record to indicate that he could not correct his actions through additional training. The employer’s decision to allow the grievant to continue to work for an extended period of time following the date of the incident indicated that the employer did not foresee any additional problems. 926

The grievant was accused of failing to follow post orders and interfering with an official investigation. He allegedly improperly stored a large package brought in by a visitor to the institution and he left his post to go to a unit where he was seen having an unauthorized conversation with an inmate. Prior to the grievant’s removal he received a two-day fine for a rule violation that the employer then included in its basis for the removal. The Union argued that the employer subjected the grievant to double jeopardy because the charges resulting in the fine were also included in the charges for which the grievant was removed. The arbitrator found that “the conduct of the Grievant in violation of Rules 3(G) and 24, became intertwined in the investigation and was never separated during the disciplinary process to establish the division required in maintaining the disciplinary grids regarding attendance and performance offenses argued by the Employer.” The arbitrator found the investigatory interview flawed in that there was no difference in the questions for each specific violation. The arbitrator found that the grievant did violate the work rule regarding visiting an inmate in the segregation area without authorization. 966

**Failure to Follow Proper Procedures**

- Charge does not embrace "breach of confidentiality:" a highly specific charge detailed in a statute carrying the severe penalty of dismissal: 33

- Failure to follow procedures is mitigated by lack of written policies and poor supervision: 33

- The grievant failed to properly report an incident of physical injury to a patient. This failure resulted in the patient waiting over six hours to receive medical attention for a cut that required six stitches: 296

- The grievant was removed for misuse of his position for personal gain after his supervisor noticed that the grievant, an investigator for the Bureau of Employment Services, had received an excessive number of personal telephone calls from a private investigator. The Ohio Highway Patrol conducted an investigation in which the supervisor turned over 130-150 notes from the grievant’s work area and it was discovered that the grievant had disclosed information to three private individuals, one of whom admitted paying the grievant. The arbitrator found that the employer proved that the grievant violated Ohio Revised Code section 4141.21 by disclosing confidential information for personal gain. The agency policy for this violation calls for removal. The arbitrator found that the employer proved that the grievant violated Ohio Revised Code section 4141.21 by disclosing confidential information for personal gain. The agency policy for this violation calls for removal. The employer’s evidence was uncontroverted and consisted of the investigating patrolman’s testimony, transcribed interviews of those who received the information, and the grievant’s supervisor’s testimony. The grievant’s 13 years seniority was an insufficient mitigating circumstance and the grievance was denied: 408

- The grievant was a Therapeutic Program Worker who was removed for abusing a patient by
restraining him in a manner not provided for in the client’s restraint program. The client was acting out while eating and the grievant either choked or placed the client in a bear hug. The arbitrator found that the employer proved that the grievant abused the client. The grievant was shown to have engaged in acts inconsistent with the client’s human rights by restraining the client in a way not permitted by the client’s program or the agency’s policies. The testimony of the employer’s witnesses was found to be more credible than that of the grievant, and there was no evidence of coercion by the employer or collusion among the witnesses. The arbitrator recognized that if abuse was proven, then no authority exists to reduce the penalty of removal, thus the grievance was denied: 409

- The grievant was removed for unauthorized possession of state property when marking tape worth $96.00 was found in his trunk. The Columbus police discovered the tape, notified the employer and the employer found that the tape was missing from storage. The arbitrator found that the late Step 3 response was insufficient to warrant a reduced penalty. The arbitrator also rejected the argument that the grievant obtained the property by “trash picking” with permission, and stated that the grievant was required to obtain consent to possess state property. It was also found that while the employer’s rules did not specifically address “trash picking” the grievant was on notice of the rule concerning possession of state property. The grievance was denied: 432

- The grievant was a person trained in animal husbandry who presumably knew the appropriate methods of animal control. Such cruelty directed to the very animals that the grievant was to care for, had no excuse: 561

- Where the grievant failed to follow proper procedures by misplacing his security equipment in an area not accessible to inmates for a short time the Arbitrator reduced the ten day suspension to a three day suspension: 578

- The Arbitrator held that the grievant was denied her due process rights due to the fact that management intentionally withheld documents and hindered the Union’s preparation of its case: 580

The grievant was removed from his position for leaving a client alone in a restroom. The client was under an “arms length”, “one-on-one supervision” order. The client was discovered on the restroom floor by the grievant who did not report the incident. The arbitrator stated that the employer’s definition of client neglect was two-fold. First, there must be a failure to act. Second, the failure to act must result in, or cause “potential or actual harm.” The arbitrator found that the grievant failed to act when he allowed the client to enter the restroom alone; however, there was no evidence to establish “causal link” to the client’s injuries. The arbitrator determined that the grievant’s neglect exposed the client to potential harm and that his act of neglect was more than simply poor judgment. The arbitrator found that the mitigating and aggravating circumstances did not outweigh the severity of the violations allegedly committed by the grievant. 880

The grievant was charged with failure to make a physical head count of inmates at the facility after three previous counts had resulted in different figures. Following that incident, the grievant found two metal shanks, which he documented and secured. Prior to finding the shanks, the grievant found 16 pieces of metal hidden in a ceiling. He disposed of them in a secured receptacle which was not accessible to inmates. He did not report finding the metal. The Union argued that a procedural flaw occurred in this matter in that a second pre-disciplinary hearing was held and a second charge was leveled against the grievant, leading to his removal. The arbitrator found no procedural error. He found that when the Employer reconvened the pre-disciplinary hearing and that was not prohibited by the contract. He stated that if that were a procedural error, it was minimal at best and a decision could be reached on the merits of the case alone. The grievant was an experienced Correction Officer and well-versed in the detection of contraband which was evidenced by his numerous commendations. The arbitrator found that he grievant made a judgment when he found the metal blanks and placed them in a secured receptacle. Although the grievant’s decision may have been erroneous, the arbitrator noted that there are no precise definitions for “hot trash” versus contraband. In his decision, the arbitrator stated, “As ambiguity exists concerning the treatment of contraband found by Officers discharge for disposing of the metal blanks rather than reporting them is inappropriate.” The
The grievant was charged with physically striking a youth inmate. The arbitrator found that although the youth was not seriously hurt, he could have been badly injured. The Grievant had options which could have been used in an effort to avoid confrontation. Discipline short of removal was warranted. The award issued by the arbitrator was meant to correct the Grievant’s behavior and to emphasize “discretion is often the better part of valor when it comes to handling dangerous and difficult juvenile inmates.”

The grievant was charged with excessive use of force on a youth at his facility. The evidence presented included a video recording of the incident. The video did not have sound which precluded hearing the level of the disturbance in the gym where the incident took place. The tape did not reveal provocations by the youth indicating that the grievant’s actions were warranted. The arbitrator noted a disparity in the discipline decisions to remove the two officers involved, but to issue no discipline to a General Activities Therapist whose actions included dragging a youth to the floor by his shirt. The arbitrator reversed the removal stating, “Based particularly on the disparity regarding the levels of discipline imposed, the significance of the Grievant’s inappropriate response to the Youth’s activity in the gym incident, and the Grievant’s previous work record with DYS, the arbitrator finds that the Grievant’s summary discharge in response to this one performance offense is excessive, does not fit the ‘crime,’ and does not fundamentally comport with either progressive discipline or ‘just cause.’”

An inmate committed suicide in his cell block. The COs responsible for periodic range checks neglected to make rounds. A proper check may have saved the life of the inmate. A discrepancy was discovered between the ledger and the video recording. The grievant was charged with failing to confirm the range checks and logging them into the ledger properly. The arbitrator found that the grievant was responsible for maintaining the logs, not entering the data. The grievant testified that he felt the officers could have done something more, but management could show no direct connection between the grievant and the officers to indicate that he assisted in misrepresenting their duties. The arbitrator based his decision to reinstate the grievant without back pay upon the grievant’s “failure to adequately fulfill his supportive responsibility with respect to the log sheet and his inconsistent and evasive testimony about operating the DVR in the cell booth”. Because he could not be held accountable for a duty which was only a supportive duty at best, the removal was too harsh and without just cause.

A heavy master lock left the Grievant’s hand and struck an inmate in the groin area. This occurred in the context of an argument that resulted in the Grievant firing the inmate. There were no reliable witnesses to the incident. The accusing inmate waited to report the incident for over 24 hours, thus giving time to conspire with other inmates present at the time. The nature of the injuries suggests a different source for the injuries. The Arbitrator could not tell if the incident occurred as the inmate said or as the Grievant said; therefore, the State’s case lacked the required quantum of proof on the physical abuse charge. The Grievant struck an inmate while engaged in horseplay and should have reported it and did not. Since the abuse charge was unproven and the Grievant’s record only had a 2-day fine on it, he received a 5-day penalty for the Rule 25 violation. The Arbitrator found that the Grievant was removed without just cause.

The Grievant was indicted on criminal charges, but entered an Alford plea to the lesser charges of criminal Assault and Falsification. As part of the Alford plea the Grievant agreed not to work in an environment with juveniles, which precluded his being reinstated at Scioto. The Union subsequently modified the Grievance to exclude the demand for the Grievant’s reinstatement and that he only sought monetary relief and a clean record. The Arbitrator was not persuaded that there was clear and convincing evidence that the Grievant used excessive force against the Youth. The Arbitrator held that for constitutional purposes an Alford Plea was equivalent to a guilty plea; however, for the purposes of arbitration the Grievant’s Alford Plea did not establish that the Grievant used excessive force. In addition, the Arbitrator held that the Grievant did not violate any duty to report the use of force. The Grievant did have a clear and present duty to submit statements from youth when requested and
violated Rule 3.8 and 5 .1 when refusing to do so. The Arbitrator found that the termination of the Grievant was unreasonable. Under ordinary circumstances he would have reinstated the Grievant without back pay, but reinstatement could not occur due to the Alford plea. However, because of the number of violations and the defiant nature of his misconduct, the Grievant was not entitled to any monetary or non-monetary employment benefits. The grievance was denied. 968

The Employer waited 5 5 days to notify the Grievant that a problem existed with two assignments. The Arbitrator agreed that this delay was unreasonable under Article 24 .02 and was not considered grounds to support removal. Given that his direct supervisors considered the Grievant a good worker, any conduct which could accelerate his removal should have been investigated in a timely manner. The Arbitrator found that sufficient evidence existed to infer that the Grievant’s conduct surrounding one incident--in which proper approval was not secured nor was the proper leave form submitted--was directly related to a severe medical condition. Twenty-one years of apparent good service was an additional mitigating factor against his removal. DPS met its burden of proof that the Grievant violated DPS’ Work Rule 5 01 .01 (C) (1 0) (b) on two dates and that discipline was appropriate, but not removal. However, as a long-term employee the Grievant was knowledgeable about DPS’ rules relating to leave and any future violation would act as an aggravating factor warranting his removal. 969

The grievant was charged with pushing and attempting to choke a youth inmate. The arbitrator found that the grievant used inappropriate force against the youth on three occasions. However, the removal was unreasonable in light of the grievant’s seventeen years of service and his discipline-free record. The arbitrator stated that a “healthy dose of discipline was clearly warranted to impress upon the grievant and any other JCOs of like mind “ that such behavior is unsatisfactory. 971

The Arbitrator relied on the video evidence. The video indicated that the youth was not engaged in any conduct that required imminent intervention by the Grievant. The Arbitrator held that, given the seriousness of the use of unwarranted force by the Grievant and his failure to follow proper procedures when judgment indicated that a planned use of force was required, just cause for discipline existed. However, removal was inappropriate. The Grievant’s record of fourteen years of good service as well as his reputation of being a valued employee in helping diffuse potential problem situations mitigated against his removal. The incident was hopefully an isolated, one-time event in the Grievant’s career. 996

The Arbitrator found that from approximately 1 995 until 2006 the Employer did not investigate relationships and/or other improprieties involving gifts or money received by employees from residents. The Arbitrator cited a 2007 decision: “Arbitrator Murphy found that the Employer’s lax enforcement of its policies ‘ . . . lulled the employees into a sense of toleration by the Employer of acts that would otherwise be a violation of policy.’” There was no evidence that the Employer made any efforts to put its employees on notice that certain policies/procedures which were previously unenforced would no longer be ignored. The Arbitrator noted that statements made by the Grievant and her co-workers indicated evasiveness, but not falsification. The Arbitrator held that just cause did not support the decision to suspend the Grievant for ten (1 0) days. Furthermore, the Grievant’s failure to report any information under Policy No. 4 prior to November, 2006 occurred in an environment indicating that relationships or the exchange of items of value was known and tolerated by OVH Management. 1 001

Central to the issue was the credibility of the Grievant. There was evidence to contradict the Grievant’s statement that the youth threatened to harm himself. Reliable evidence existed to conclude that the youth was not suicidal and did not state that he was going to harm himself. Even though the Grievant claimed the youth was going to harm himself, he did not implement a planned use of physical response per DYS policy 301 .05 . The physical response utilized by the Grievant was unwarranted under the facts, and it constituted a violation of Rule 4 .1 2. The Grievant escalated the situation by removing items from the youth’s room—an action that was not required. The Grievant could have utilized other options, but did not. After physically restraining the youth, the Grievant contacted two operations managers. If he was able to contact his supervisors after the restraint, what was the imminent intervention that precluded his contacting them prior to the altercation? The Arbitrator held that DYS had just cause to discipline the Grievant and given his prior discipline of record, their actions were not arbitrary, unreasonable, or capricious. 1 002
The Arbitrator held that a statement by the Grievant in an email was a false, abusive, and inflammatory statement concerning his supervisor. The Grievant did provide false information in an investigation. The Arbitrator found that the Grievant was not permitted to complete closing inventory on the Operation in question; consequently, he did not breach his job duty to complete the inventory properly. The record supported the finding that the Grievant did not provide even a minimal level of support to the Operator in dealing with customer complaints about the operation of her facility. Therefore, the Arbitrator held that the Grievant did fail to carry out one of his assigned job duties and failed to follow administrative rules. Because some of the Grievant’s work was for his personal business and for his job at Columbus State Community College, the work was for his personal gain. The Arbitrator held he did fail to follow administrative regulations in the use of his computer equipment assigned to him. The Grievant did have 27 years service to the Commission and had no disciplinary record. However, his ease in involving his blind clients in the investigation of his own conduct as a Specialist demonstrates a lack of sensitivity to the vulnerability of his clients. His supervisor was visually impaired and he wrote a false statement about her in the course of an investigation. Both actions show that the Grievant exhibits little concern for the blind. The Arbitrator found that the grievant cannot be trusted to return to an organization devoted to the service of the blind. 1 005

- An inmate committed suicide while the Grievant was working. Post Orders required rounds to be made on a staggered basis every thirty minutes. On the night the inmate committed suicide, the Grievant did not check on the inmate for two hours. In addition, the Grievant admitted to making false entries in the log book and admitted to not making rounds properly for ten years. The Union’s claim that complacency by Management was the cause was not supported by persuasive evidence. There was evidence that “employees could be written up every day.” But there was also evidence that Management took steps to correct this and employees were given plenty of notice. The Arbitrator reviewed the Seven Steps of Just Cause and found the discipline commensurate. 1 01 0

- The grievance was sustained in part and denied in part. The removal was reduced to a 1 0-day suspension. The Arbitrator found that the Grievant committed the alleged misconduct; therefore, the Employer had just cause to discipline her. However, there was not just cause to remove her. Considering all the circumstances, the Grievant had an isolated and momentary lapse in judgment. There was no physical harm or dire consequences from the momentary lapse. Recent arbitration awards between the Parties, uniformly reinstated--without back pay--employees involved in physical altercations more substantial that the Grievant’s. (See Arbitration Decisions: 971, 995, 996.) The Grievant was reinstated without back pay, but with seniority restored. 1 034

**Failure to Maintain a Driver's License**

- The grievant was permitted to seek a modification order of his driver’s license suspension, which resulted from a charge of driving while intoxicated, so that he could perform his job which required him to drive state vehicles: 4 4 1

- The grievant was allowed to seek a modification of his driver’s license suspension. However, he let his license expire, which prevented him from obtaining a modification. He did not renew his license until 1 7 days after the date the Arbitrator specified that the grievant was to return to work. Because he showed disregard for his employer’s needs and the arbitration award, the Employer had just cause to remove the grievant: 4 4 1 (A)

The grievant failed to inform a supervisor that he had lost his driving privileges and of his continuing to drive state vehicles. Because he lost his license, he was unable to perform his job duties, and it was additionally unlikely, in light of his suspension, that he could obtain the newly required commercial driver’s license by the deadline. Therefore, the Employer had just cause to remove the grievant: 4 6 6

ODOT policy prohibits any ODOT employee from operating or driving any department equipment unless or until their modification of driver’s license suspension is documented on the employee’s driving record at the BMV. The grievant failed to comply with the requirements of the modifying order, and so was not able to obtain limited driving privileges. Because 70 percent of the grievant’s job duties required him to drive ODOT vehicles off-season, and 1 00 percent in snow season, he was unable to perform his job. Therefore, the Employer had just cause to remove the grievant: 4 8 6

- The grievant, a Driver's License Examiner 1 employed by the Department of Highway Safety,
was involved in an accident while uninsured. As a result, her driver's license was suspended for 90 days, and the agency removed her. The arbitrator determined that the grievant's removal was improper because the grievant could have been assigned to perform a number of other duties during the period of the suspension, and in the past, the agency has permitted co-workers to trade non-driving duties with an employee who has a suspended driver's license in an attempt to accommodate that employee's circumstances.  

Under Article 37.07 of the Agreement the employer must move an employee to another position if that employee fails to meet the licensing or certification requirements of a position. However, this is only required if the license or certification requirements of a position change while the employee is serving in that position: 5 36

Failure to Protect a Youth

- The employer removed the Grievant contending that he failed to protect a Youth; that he placed the Youth on restriction for seven to ten days without a Supervisor’s approval in order to conceal the Youth’s injuries; and that he failed to report Child Abuse. The Arbitrator held that the discipline imposed was without just cause. The Arbitrator found no evidence that the Grievant failed to protect the Youth. The evidence did not support the contention that the Grievant failed to see that the Youth got medical attention. The Arbitrator opined that “for the employer to assert that the Grievant should have substituted his judgment for that of the medical staff on this set of facts is unrealistic.” The Arbitrator also found that there was clear evidence that Unit Managers receive no training and there is no written policy on restrictions. The Arbitrator found there was no evidence that the Grievant failed to cooperate or to file other reports as required to report Child Abuse. Management was aware of the incident. If the employer wanted the Grievant to complete a specific form, per its own policy, it should have given the Grievant the form. 1 022

Failure to Provide Documentation

The Arbitrator found that the Employer’s refusal to grant emergency vacation leave unreasonable. She noticed that the grievant gave ample notice, and the Employer did not indicate that there were any staffing concerns on either that day shift or the grievant’s shift. The Arbitrator concluded that the grievant’s application of the term “emergency” to his circumstances was reasonable because the Employer did not clearly communicate what constituted an emergency. 728

The Arbitrator held that the state properly assigned points to the applicants for the Computer Operator 4 position and selected the appropriate applicant for the job. The Grievant was not selected because her score was more than ten points below that of the top scorer. The Union argued the Grievant should have been selected because she was within ten points of the selected candidate and therefore, should have been chosen because she had more seniority credits than he did. The language could be clearer, but the intent is clear. If one applicant has a score of ten or more points higher than the other applicants, he or she is awarded the job. If one or more applicants have scores within ten points of the highest scoring applicant, the one with the most state seniority is selected for the position. The Arbitrator pointed out that the union’s position could result in the lowest scoring person being granted a job. If that person was awarded the job, someone within ten points of him or her could argue that he or she should have gotten the job. The Arbitrator commented on the union’s complaint that the state violated Article 25 .09 when management refused to provide notes of the applicants’ interviews. The issue submitted to the Arbitrator was simply the violation of Article 1 7. The state provided the requested material at the arbitration hearing and the Union had the opportunity to address the notes at the hearing and in its written closing statement. 976

Failure to Report For Duty

The grievant was removed for excessive absenteeism. The arbitrator stated that the grievant’s absenteeism was extraordinary as was management’s failure to discipline the grievant concerning her repetitive absenteeism. The arbitrator found that the fact that the grievant used all of her paid leave and failed to apply for leave without pay, shielded management form the consequences of its laxness. It was determined that through Article 5 , management has clear authority to remove the grievant for just cause even though her absenteeism was not due to misconduct if it was excessive. The arbitrator found that the grievant’s numerous absences coupled with the fact that she did not file for
workers’ compensation until after termination, and never applied for unpaid leave, supported management’s decision to remove her. 791

Failure to Report Incident

The Grievant was indicted on criminal charges, but entered an Alford plea to the lesser charges of criminal Assault and Falsification. As part of the Alford plea the Grievant agreed not to work in an environment with juveniles, which precluded his being reinstated at Scioto. The Union subsequently modified the Grievance to exclude the demand for the Grievant’s reinstatement and that he only sought monetary relief and a clean record. The Arbitrator was not persuaded that there was clear and convincing evidence that the Grievant used excessive force against the Youth. The Arbitrator held that for constitutional purposes an Alford Plea was equivalent to a guilty plea; however, for the purposes of arbitration the Grievant’s Alford Plea did not establish that the Grievant used excessive force. In addition, the Arbitrator held that the Grievant did not violate any duty to report the use of force. The Grievant did have a clear and present duty to submit statements from youth when requested and violated Rule 3.8 and 5 .1 when refusing to do so. The Arbitrator found that the termination of the Grievant was unreasonable. Under ordinary circumstances he would have reinstated the Grievant without back pay, but reinstatement could not occur due to the Alford plea. However, because of the number of violations and the defiant nature of his misconduct, the Grievant was not entitled to any monetary or non-monetary employment benefits. The grievance was denied. 968

Fair Labor Standards Act (FLSA)

- For the Union to ask the Arbitrator to interpret and apply the Fair Labor Standards Act, when the possible violation was not brought up until the arbitration hearing smack of unfairness. The carefully drawn class grievance has been in the pipeline for two years and the possible FLSA violation by the employer should have been brought up before the hearing. The arbitrator does not wish to categorically hold that every issue must always be explicitly raised in the initial grievance. Many times grievances are drawn by persons who are untutored in specificity. Holding such persons to highly formalistic rules is unfair; pleading by inference in such cases is just: 34 5

- Even if the Union’s charge that the employer violated the FLSA was timely, the arbitrator would still decline to rule on that issue. The interpretation and the incorporation of the FLSA are beyond the competence of the arbitration process. FLSA rights are “better protected in a judicial rather than an arbitral forum.” Barrentine v. Arkansas Best Freight Systems j. Brennan: 34 5

- Where it is not clear how an issue would be resolved legally under the Fair Labor Standards Act, the arbitrator said it would be inappropriate to fashion a potential remedy under the guidelines of the Act. 146

Fall Back Rights

The issue in this grievance was whether the employer has the right to place an exempt employee back into the bargaining unit once he/she has moved outside of the bargaining unit. A training officer applied for and was awarded an exempt position of Training Center Manager. As a result of restructuring, her position was eliminated. The employer allowed the individual to return to her previous bargaining unit position (training officer). The union contended that the individual should have been placed in a pool of applicants for selection. The arbitrator found that the contract is silent on the issue of fall back rights and therefore the Ohio Revised Code § 41 21 .1 21 (B) (2) applies. The employer’s actions were consistent with ORC § 41 21 .1 21 (B) (2). The employer placed the individual into a vacant position in the same classification held prior to being awarded the manager’s position. Article 18 had no bearing on this grievance. Due to the absence of specific contractual language, the issue of fall back rights is controlled by ORC § 41 21 .1 21 (B) (2). 920

Falsification of Documents

- When the grievant, a Driver’s License Examiner, examined himself and authorized his own school bus endorsement, he used his position for his own personal advantage. Under a minimum standard of reasonableness and fairness the grievant was aware or should have been aware that his conduct of self-certification was highly improper. The State was not required to establish that it had communicated a specific rule for such a well-
recognized proven offense of falsifying State documents in order to obtain a motor license: 361

- The grievant was employed as a Salvage Processor who was responsible for signing off on forms after dangerous goods had been destroyed. He was removed for falsification of documents after it was found that he had signed off on forms for which the goods had not been destroyed. The employer was found to have violated just cause by not investigating the grievant’s allegation that the signature was forged, and by failing to provide information to the union so that it could investigate the incidents. The employer was found not to have met its burden of proof despite the grievant’s prior discipline: 398

- The employer removed the grievant for two reasons: 1 ) The grievant committed theft because he had been named as the supplier of checks that had been returned to the Bureau of Workers’ Compensation, to another state employee in order to cash the checks (see arbitration decision #370); 2) falsification of his job application because he admitted during the investigation that he had prior felony convictions which he failed to report on his employment application. The arbitrator held that the employer could not use the falsification charge as a basis for removal because the grievant had sought assistance when he completed his application and lacked intent to falsify the application. The employer was also estopped from using the falsification because the grievant had been employed for 8 years, and had been removed once before, thus the employer was found to have had ample time to have discovered the falsification prior to this point. The employer was not permitted to introduce the Bureau of Criminal Investigation’s report into evidence at arbitration because the employer failed to disclose it upon request by the union. The fact that the investigation was ongoing was irrelevant. Just cause was proven through the investigator’s testimony and testimony of others involved in the scheme. The grievance was denied: 4 03

- The grievant was an Investigator with the Department of Commerce who had been suspended for 5 days for failing to follow his itinerary for travel and filing incorrect expense vouchers. The grievant’s itinerary indicated that he would be in Toledo on a Friday, and he submitted expense vouchers for the trip, however it was discovered that he worked at home during the day in question. The arbitrator found that the employer violated Section 24 .04 by failing to provide witness lists and documents and not answering the grievants letters. Section 25 .08 was not found to be violated. The employer’s selection of the pre-disciplinary hearing officer was unwise because she had an interest in the outcome and that the investigation was incomplete and unfair. The arbitrator also found that the grievant’s itinerary was a contemplated itinerary and that he had informed his supervisor of schedule changes, however the grievant was AWOL as there was no provision for working at home. Disparate treatment was suspected by the arbitrator, who also noted that the grievant exhibited a contumacious attitude towards management. The suspension was reduced to a 1 day suspension: 4 30**

The Union filed a motion in the Court of Common Pleas to vacate the Arbitrator's award. The Union received a decision by the Court of Common Pleas upholding the Arbitrator's award.

- If no mitigating factors exists then the act of falsifying an employment application merits termination: 4 5 3

- The grievant was properly suspended for submitting a falsified order to report for National Guard training, even though the grievant did perform services for the National Guard during the period covered by his excuse, and he was not responsible for the forged signature on the military leave form. The arbitrator concluded that the grievant should have known that, without accompanying orders, a military leave form was insufficient to place him on active duty. Consequently, the arbitrator decided that the grievant was absent from work without proper leave and that he improperly received payment from both the State and the Federal governments
for the same period of time. Even so, the arbitrator reduced the penalty from removal to a suspension because the State had not proved its entire case: 5 28

- The grievants falsified drivers license examination schedules in order to avoid working Saturdays. They hoped to convince the State that the weekend examination program was wasteful and unnecessary, and attempted to sabotage the program. The grievants were removed as a result of the falsifications: 5 33

- In a case involving a Youth Leader who was engaged in horseplay with a youth who was consequently injured, the arbitrator held that there was just cause to remove the grievant, in part because the grievant lied on the official injury report as to the cause of the injury: 5 4 2

- In reaching a decision to terminate the grievant, the Arbitrator considered the grievant’s past disciplinary record which included several reprimands for Neglect of Duty due to her attendance related problems. The Arbitrator found the grievant to be a less credible witness because of her past disciplinary record: 5 4 4

- The Arbitrator found that the penalty of discharge was not too severe for the infraction alleged because of the limited amount of supervision that the grievant was under. The amount of trust in the truthfulness of the employee’s reports is of great importance in the grievant’s situation. When it is proven that such trust has been deliberately betrayed, discharge is not too severe a penalty: 5 5 6

- The Arbitrator found that there was just cause for the grievant’s violations of several Employee Conduct Rules, which included dishonesty, the falsification of documents, and theft. The grievant was removed as a result of these charges: 5 6 3

- The Arbitrator found that the employer failed to prove the charges that the grievant falsified an official document and one element of its claim that the grievant incurred an unexcused absence. The supervisor testified that the grievant falsified the document but the Arbitrator concluded that the supervisor did not have any independent knowledge of the time the grievant actually left because he did not check his watch or the clock: 5 8 8

- The Arbitrator held that management justifiably removed a grievant who was found to have falsified his time sheets. Although the grievant denied that he falsified his time sheets, the Arbitrator found that the testimony of two witnesses left no other explanation. Absent any mitigating factors, management properly dismissed the grievant: 5 9 4

- The Arbitrator found that errors in procedure and contract violations precluded him from addressing the merits of the case. 7 1 1

- The Arbitrator noted that the record showed the grievant signed all the door logs on her assigned floor thirty to forty-five minutes early. He concluded that it was not likely that the grievant accidentally or negligently initialed the logs prematurely. 7 1 2

- The Arbitrator found that an omission of an important fact or circumstance during an investigation was a "bold and blatant attempt to falsify.” Therefore, the Arbitrator found that the Employer had just cause to suspend the grievant for the falsification charge. 7 1 5

- The Arbitrator stated that an employer has the right to expect an employee to be honest. He determined that in light of the evidence presented, it was undeniable that the grievant falsified her employment application and misled the Employer with the submission of a public record that did not include her criminal history. The Arbitrator found that when the grievant was asked whether she had ever been convicted of a felony she lied and when asked to submit a police record to supplement her application, she presented a police record from the county where the Employer is located. The Arbitrator stated that the grievant was very aware that the record she obtained would show no criminal convictions in that county. The Arbitrator found that these actions undermined her credibility. 7 2 2

The grievant was charged with failing to utilize the proper techniques to diffuse a physical attack against her by a patient. The patient was a much larger person than the grievant and was known to be aggressive. She allegedly punched the patient several times in an attempt to get him to release her hair. The arbitrator determined that while it was clear the grievant placed herself in a position to be a target of the patient and her judgment was very suspect, a lapse in common sense, the failure to flee and the improper use of hair release did not equal abuse of a patient. The arbitrator noted that
there was no evidence that the patient sustained any physical injuries. The arbitrator found that “…it is not reasonable to fire an employee for employing immediate and reasonable defensive measures that come to the fore to avoid serious injury”. 785

The arbitrator found that, while on his watch, the grievant witnessed an inmate being assaulted by another Correction officer. The grievant cooperated in a conspiracy with other officers to cover up the incident. By doing so, the grievant failed to follow appropriate post orders and policies, falsified his report of the incident, interfered with the assault investigation, and failed to report of the work rule regarding the appropriate and humane treatment of an inmate. The arbitrator found that all of this conduct by the grievant violated Work Rules 7, 22, 24, and 25. The arbitrator further found that the grievant violated the work rule on responsiveness in that the grievant failed to remain fully alert and attentive at all times while on duty and to properly respond to any incident. The arbitrator concluded that all of these work rule violations, when taken together, along with the aggravated circumstances of the brutal assault of an inmate on the grievants watch justify the termination of the grievant. 820

The employer raised the issue of timeliness at arbitration. The arbitrator found that management’s acceptance of the grievance form at Step 2 did not relieve the grievant from timely filing his grievance at Step 3 in accordance with specific language of the Collective Bargaining Agreement. “It is reasonable to assume that the Grievant and the current Local Union President (then steward) were well aware of the filing procedures for discipline and were even reminded of the procedures by the language of the grievance form. 840

The grievant was charged with submitting a false expense report. The arbitrator found the evidence overwhelming convincing that he was removed for just cause. The grievant was unable to present any evidence to support his position. He admitted that he did not attend a scheduled meeting as he had indicated on his expense report. The arbitrator stated that the grievant’s account of what occurred on his alleged trip included premises his could not support with any evidence. The arbitrator found that the grievant submitted false expense reports. The disciplinary grid for the agency included removal as a penalty for this violation for a first offense. Although the grievant was a decorated veteran of the USAF and a good employee, the arbitrator noted that he made a series of mistakes which justify his removal. 901

The grievant was charged with allegedly submitting false documents about his work history to an outside certification institute, forging an ODOT employee’s initials on the paperwork. These actions resulted in an award of certification by the outside institute to the grievant which he used in an effort to obtain a promotion. The arbitrator found that the grievant was less than honest with co-workers who were assisting him in obtaining certification. It was problematic for the arbitrator that the grievant rejected responsibility for his actions which led to the removal. The arbitrator noted that the record contained a series of events that were not minor and covered an extensive period of time. Those actions outweighed length of service as a mitigating factor. The arbitrator also noted that the grievant had a fiduciary position as a PS II and his conduct demonstrated dishonesty and a manipulative approach for personal gain that warrants removal. 902

The Arbitrator held that the Employer had just cause to remove the Grievant for falsification. When an employee is found to have falsified a series of request forms to receive compensation for which he is not entitled, this misconduct is equivalent to “theft.” The Grievant used education leave for periods of time when no classes were scheduled and falsified a request for sick leave on a date he was not sick. The Arbitrator found no notice defects. The Grievant’s credibility was hurt based on the differing justifications for his misconduct. 982

Falsification of Job Application

- See Dishonesty

- The grievant, even with minimal reading and writing skills was able to read the job application and oath. The grievant also knew that he was lying about his past work history and criminal record. Falsification of the information on an application destroys the basis of the employment relationship itself. The offense is so serious that progressivity is irrelevant. The grievant was also on notice of the possible consequences of perjury. The grievant’s work record cannot be used to
lessen the severity of the offense or mitigate the removal: 35 4

- If no mitigating factors exist then the act of falsifying an employment application merits termination: 4 5 3

The grievant was employed for over 19 years in the Information and Technology Division of the Ohio Bureau of Worker’s Compensation as a Telecommunications Systems Analyst 3. He, along with five other employees, applied for a promotion to the position entitled Information Technology Consultant 2. Another employee, who was awarded the promotion, did not meet the minimum qualifications for the job and lied on his application when he stated that he possessed an undergraduate core curriculum in computer science and an undergraduate degree in math. The employer argued that the grievant also falsified his application by stating that he had a degree in Electrical Engineering when in fact he had a degree in Electronic Engineering. The arbitrator found however, that despite the fact the grievant did falsify his application, he did not falsify his core curriculum. The successful applicant’s claim that he possessed a bachelor’s degree and completed core course work in computers and technology represents a more serious misrepresentation of fact than that of the grievant’s. 863

Falsification of Test Results

- Where one has the duty to make the test and record the result, recording results of test performed and falsified by another constitutes falsification of test results: 1 7

- Falsification of test results endangered the public, harmed the reputation of ODOT, and may subject the public to great expense if the concrete ages prematurely. Consequently, the offense is sufficiently serious to warrant discharge on the first offense even where the inspector has long service with the department: 1 7

Federal Law Incorporation

- The parties did not intend for the contract to supersede applicable federal laws and regulations: 1 1 6

- Where it is not clear how an issue would be resolved legally under the Fair Labor Standards Act, the arbitrator said it would be inappropriate to fashion a potential remedy under the guidelines of the Act: 1 4 6

- The federal government created, established hiring criteria, and funded job training positions within the Ohio Bureau of Employment Services for Disabled Veterans’ Outreach Specialists (DVOPS), and Local Veteran’s Employment Representatives (LVERS). The OBES and Department of Labor negotiated changes in the locations of these employees which resulted in layoffs which were not done pursuant to Article 1 8. Title 38 of the United States Code was found to conflict with contract Article 1 8. There is no federal statute analogous to Ohio Revised Code section 4 1 1 7 which allow conflicting contract sections to supersede the law, thus federal law was found to supersede the contract. As the arbitrator’s authority extends only to the contract and state law incorporated into it, the DVOPS’ and LVERS’ claim was held not arbitrable. Other resulting layoffs were found to be controlled by the contract and Ohio Revised Code sections incorporated into the contract (see, Broadview layoff arbitration #34 0). The grievance was sustained in part. The non-federally created positions had been improperly abolished and the affected employees were awarded lost wages for the period of their improper abolishments: 390

- The grievant was removed after 13 years service from her position with the Bureau of Disability Services for unapproved absence, conviction of a drug charge, and failure to report the drug charge as required by the state’s Drug-Free Workplace policy. The Bureau is funded by the federal government and is subject to the Drug-Free Workplace Act of 1 9 8 8. The grievant had a history of alcohol problems. She was also involved with a co-worker who, after the relationship ended, began to harass her at work. She filed charges with the EEOC and entered an EAP. The former boyfriend called the State Highway Patrol and informed them of the grievant’s drug use on state property. An investigation revealed drugs and paraphernalia in her car on state property and she pleaded guilty to Drug Abuse. She became depressed and took excessive amounts of her prescription drugs and missed 2 days of work. She was admitted into the drug treatment unit of a hospital for 2 weeks. She was on approved leave for the hospital stay, but the previous 2 days were not approved and the agency sought removal. The arbitrator found that
while the employer’s rules were reasonable, their application to this grievant was not. The Drug-Free Workplace policy does not call for removal for a first offense. The employer’s federal funding was not found to be threatened by the grievant’s behavior. The grievant was found to be not guilty of dishonesty for not reporting her drug conviction because she was following the advice of her attorney who told her that she had no criminal record. The arbitrator noted that the grievant must be responsible for her absenteeism, however the employer was found to have failed to consider mitigating circumstances present, possessed an unwillingness to investigate, and to have acted punitively by removing the grievant. The grievant’s removal was reduced to a 10 day suspension with back pay, benefits, and seniority, less normal deductions and interim earnings. The record of her two day absence was ordered changed to an excused unpaid leave. The grievant was ordered to complete an EAP and that another violation of the Drug-Free Workplace policy will be just cause for removal: 429

Fighting

- A-301 put grievant on notice that such behavior could result in suspension or dismissal: 86
- The arbitrator treated the following as mitigating factors:
  (1) short duration of fight
  (2) fight occurred after work hours
  (3) blows were returned by other party
(4) Grievant had 13 years of service with no previous discipline: 86
- The arbitrator treated the following factors as aggravating:
  (1) Grievant started confrontation
  (2) Grievant made the first physical contact
  (3) Grievant was still belligerent after other party had retired from the battlefield: 86
- Where management gave equal penalties to combatants because it could not determine who was at fault, the arbitrator upheld the punishment as a fair and reasonable result: 109
- Verbal provocation does not excuse or justify fighting. Nor is the stress of a Correction officer's job an excuse. Correction officers are selected and expected to be able to meet and handle such verbal taunts: 154
- It is not necessarily disparate treatment to give different punishments to two persons involved in the same fight: 154
- Although all fights may be serious, they are not equal qualitatively or in penalty deserved. The arbitrator noted that the fight in the present case was about the least serious fight one could imagine: a single blow with no other blows attempted. In addition grievant had a good record with 4 years of service and had apologized for the incident and promised to avoid such incidents in the future. Since the grievant received the second most severe punishment out of seven available

Felony Conviction

- See Criminal Convictions

Fiduciary Employee

- The fiduciary exception specified in Ohio Revised Code 4117.01(C) is not a “per se” exception to definition of “public employee.” A fiduciary determination may play a critical role in any finding under 4117.06(A), but SERB has the authority to determine the appropriateness of each bargaining unit, and nothing in the statute precludes an evaluation of units which may be composed of excluded employees: 472
- Bypassing SERB’s bargaining unit determination authority caused an improper designation of the grievant as a fiduciary: 472
- Because the grievant was improperly designated a fiduciary, her bargaining unit status was never properly modified at the time of her termination. Since the grievant maintained her bargaining unit status, she could only be removed and/or disciplined pursuant to the provisions of Section 24.01 of the Contract: 472
- The grievant was improperly designated a fiduciary and, therefore, maintained her bargaining unit status. The Employer, therefore, violated Section 24.01 of the Contract when it terminated the grievant without just cause: 472

Fighting

- A-301 put grievant on notice that such behavior could result in suspension or dismissal: 86
- The arbitrator treated the following as mitigating factors:
  (1) short duration of fight
  (2) fight occurred after work hours
  (3) blows were returned by other party
  (4) Grievant had 13 years of service with no previous discipline: 86
- The arbitrator treated the following factors as aggravating:
  (1) Grievant started confrontation
  (2) Grievant made the first physical contact
  (3) Grievant was still belligerent after other party had retired from the battlefield: 86
- Where management gave equal penalties to combatants because it could not determine who was at fault, the arbitrator upheld the punishment as a fair and reasonable result: 109
- Verbal provocation does not excuse or justify fighting. Nor is the stress of a Correction officer's job an excuse. Correction officers are selected and expected to be able to meet and handle such verbal taunts: 154
- It is not necessarily disparate treatment to give different punishments to two persons involved in the same fight: 154
- Although all fights may be serious, they are not equal qualitatively or in penalty deserved. The arbitrator noted that the fight in the present case was about the least serious fight one could imagine: a single blow with no other blows attempted. In addition grievant had a good record with 4 years of service and had apologized for the incident and promised to avoid such incidents in the future. Since the grievant received the second most severe punishment out of seven available
under the department's guidelines, the arbitrator held that the penalty was not commensurate with the offense. The arbitrator found that there was just cause only for the least severe penalty for fighting, based on the employer's guidelines: 1 5 4

- If employer had a disciplinary grid calling for removal on the first fighting offense, the arbitrator would have upheld the removal. Without such a grid, the arbitrator had to look to the contract to determine what an appropriate penalty would be. While fighting is a serious charge and the fact that a supervisor received a minor injury requires a significant increase in discipline, there were mitigating factors. The employer must bear some of the responsibility for the fight since it assigned spouses, which it knew were having marital difficulties, to work together: 1 6 3

- The charge of verbal abuse against another employee is subsumed by the violation of the rule prohibiting fighting and does not justify imposition of an additional penalty: 1 6 3

- Of critical importance to the arbitrator is the fact that no resident was the subject of any physical harm. However, the injury to the supervisor, albeit minor, requires a significant increase in the severity of the discipline against the grievant: 1 6 3

- Other arbitrators have recognized that a discharge penalty for fighting is inappropriate where there are mitigating circumstances such as provocation: 1 6 3

- In reducing a grievant's penalty for fighting, the arbitrator found significance in the fact that there was no evidence that the work environment had been poisoned against the grievant by the incident: 1 6 3

- Persons in an industrial society are expected to know that they should not fight with or strike their supervisor. That conduct results from intent to physically harm the supervisor. The arbitrator held that the offense had not occurred where there was contact but not an intent to harm 1 7 3

- If the grievant intentionally scratched the other employee with a screwdriver he had in his hand, it would raise the charge of horseplay to an assault falling within fighting: 1 8 2

- It is axiomatic in the absence of mitigating circumstances, fighting is generally regarded as a serious form of misconduct, typically warranting the penalty of heavy suspension up to discharge. Such determinations, however, require analysis of certain recognized defenses to determine the reasonableness of the implemented penalty. Those defenses include the following:

  (1 ) An employee may be an innocent and injured victim of an unprovoked assault and not, himself, engage in aggression or hostility. In such a case, the victimized employee has engaged in no wrongful conduct and must be regarded as innocent.

  (2) Self-defense. When an employee engages in only as much hostile conduct as is reasonably necessary to defend himself from aggression and uses no more force than is reasonably necessary for that purpose, he will generally be found not guilty of fighting or assault. This is a defense of justification which is a complete defense.

  (3) Provocation. When an employee is the victim of provocation which is foreseeable to provoke an ordinarily reasonable person to a heat of rage and aggression, the conduct of that employee may be excused (as opposed to justified) either partially or completely: 2 4 6

- Disparate treatment did not occur where the aggressor in the fight was subject to discipline but the other party was not: 2 4 6

- Arbitrator Pincus repeated the principles for analyzing fighting grievances which he had asserted in a previous arbitration. Where the grievant was involved in a fight, there was no wrongful conduct if the grievant was an innocent victim or acted in self-defense. In addition, provocation can either partially or completely mitigate the offense: 2 6 3

- Where it was found that the grievant was attacked, the arbitrator determined that all subsequent acts of the grievant were acts of self-defense and thus justified. The arbitrator noted that the grievant engaged in conduct reasonably necessary to defend herself from aggression. She did not respond in an excessive manner when (1 ) she wrestled with her attacker in an attempt to free herself while the attacker was pulling her hair out, (2) samples of the grievant's hair were found in the room, but none of the attackers hair was found, and (3) the attacker was uninjured and worked the rest of the day: 2 6 3
- The arbitrator reduced a discharge for fighting to a 20 day suspension in the following circumstances: The other combatant was not disciplined because the grievant was alleged to be the aggressor. The only evidence that the grievant initiated physical aggression was the testimony of the other combatant. That testimony was discredited since (1) he had a motive to lie and (2) and his testimony was determined to contain a lie about another matter. While grievant did start the argument and did raise his voice, that is not a basis for discharge. The arbitrator thought that the grievant's conduct did, however, deserve some penalty given the grievant's disciplinary record:

- The way in which the agency controlled the hearing and the speed with which it imposed the removal indicate a cavalier approach to just-cause requirements. The question the employer was obliged to ask and answer before deciding on discipline was: In view of the misconduct and its aggravating and mitigating factors, what amount of discipline is likely to be corrective? When an employer acts against an employee precipitously, in knee-jerk fashion, its actions become suspect. Summary discipline opens the door for arbitral intrusion. It licenses the arbitrator to substitute his/her judgment for management's. It is up to the arbitrator to perform the employer's job when the employer fails to perform it. Second-guessing by an arbitrator should be expected when management neglects its disciplinary duties:

- The Arbitrator held that a fight occurred in violation of departmental rules based on the grievant's conduct in attempting to overcome the officer by striking him across the face. In addition, the Arbitrator held that the Union's contention that the grievant was subjected to reverse discrimination was without merit because the Union had no documentation to support its claim and the incident involving the African-American officers was not similar to the incident at hand. Although the grievant had no prior discipline, the Arbitrator believed that based on the seriousness of the incident, removal was proper, and therefore, the Agency had just cause to do so:

- The grievant was removed for fighting with a co-worker. The Arbitrator noted that the grievant was not a physical battler, rather she fought with her mouth. The Arbitrator held that despite grievant’s threat to shoot her co-worker, there was no evidence to indicate that she was prone to violent behavior. Thus, the grievant was reinstated without back pay or reinstatement of benefits, but with full and unbroken seniority:

- The arbitrator found that the grievant lied about having a handgun in his truck on State property. The State did not prove that the grievant threatened a fellow employee. The arbitrator stated that it was reasonable to assume that the grievant was either prescribed too many medications or abusing his prescriptions. The arbitrator determined that the grievant’s use of prescription medications played a major role in his abnormal behavior. The grievant's seniority and good work record were mitigating factors in this case and his removal was converted.

**Fire Exit, Blocking**

- In determining whether grievant had notice of the requirement that he not block the fire exit, the arbitrator put "great weight" on the fact that the fire department had stated that there was no penalty or fine for temporarily blocking the fire exit:

- The grievant should have known that fastening the fire exit door was forbidden for the purpose of preventing a resident from leaving:

**Fitness for Return-to-Work**

The Arbitrator rejected the Employer’s contention that the grievance was not arbitrable because it was untimely. It was unclear when the Grievant was removed. A notice of removal without an effective date has no force or effect. The allegation of misconduct arose from three incidents involving a coworker. In the first the Grievant was joking and it should have been obvious to the coworker. Given the questions about the coworker’s view of the first incident and her failure to report the alleged misconduct until the next day, the Arbitrator could not accept the coworker’s testimony on the second incident. Because he was out of line when he confronted the coworker in a rude and aggressive manner, the Grievant merited some disciplinary action for the third incident. The strict adherence to the schedule of penalties in the Standards of Employee Conduct sometimes results in a penalty that is not commensurate with the offense and the employee’s overall record. The Arbitrator denied
the request for full back pay based on the Grievant’s failure to contact the employer or to authorize the union to contact the employer on his behalf. 932

**Five Year Rule**

- Nothing in any of the Article 1 8 sections .02 through .08 contradict, modify or eliminate the Five Year Rule. The Arbitrator rejected the argument that Article 1 8 supersedes the Ohio Revised Code and the Ohio Administrative Rules. The Article specifically states that the ORC and OAC sections are included. If the parties intended that Sections1 8.02 through 1 8.05 should completely supersede the ORC and OAC, the Contract would so state. In addition, nowhere is any time limit stated on these rights: 4 5 0

**Flex Time**

- When employees are expected to use flex time in a certain fashion, grievant cannot be disciplined for doing so: 70

- While the arbitrator was sympathetic with the grievant's reasons for tardiness, the arbitrator ruled that the grievant could have avoided the problem through use of flextime. She should have actively pursued permission for flextime and continued to do so until she got an answer one way or another: 88

**FMLA**

The Arbitrator found that the Employer applied the principles of progressive discipline and no evidence existed that the Employer’s conduct was arbitrary, unreasonable or capricious. The Grievant was given a ten-day suspension for failure to notify the employer of an absence within the 30 minutes required. Grievant also was absent without pay on one day, assuming he had not exhausted his FMLA leave after an extended disability leave. The Union considered the ten-day suspension punitive and asked the Arbitrator to consider medical reasons as extenuating circumstances warranting mitigation and to lessen the discipline. The grievant’s history of FMLA use, plus four prior disciplines involving the exact issue of this grievance, failed to convince the Arbitrator that the grievant’s conduct was an honest mistake. In considering mitigation for a long-term employee (24 years), quality of service must also be weighed. The grievant engaged in repeated violations of the work rules and seemingly made no effort to change his conduct, despite progressive discipline. Discipline imposed was reasonable and fair in an effort to correct his conduct. The discipline was issued for just cause. 95 4

The failure of the Grievant to timely call off by 4 7 minutes is not in dispute, nor is the past disciplinary record which contains various interventions and four separate, but similarly related infractions that resulted in discipline. The Grievant maintained that over-the-counter medication she took for severe leg cramps caused her to oversleep. The Grievant was certified for certain medical conditions recognized under the FMLA; however, none of the Grievant’s certified FMLA medical conditions affected her ability to call off properly. The facts failed to support a finding that “circumstances” precluded proper notification. The Arbitrator held that BWC exercised discretion under Art. 29.03 and the Work Rules when it determined removal should not occur and instead imposed the suspension. Given the choice of removal versus suspension, BWC acted properly. “Just cause” existed and no standards were violated in disciplining the Grievant. The record is undisputed that the Grievant received increasing levels of discipline, including economic penalties, to impress upon her the significance of her non-compliance with the attendance procedures. The absence of attendance infractions since her last discipline indicates that the Grievant can correct her behavior. 986

**Following Orders Defense**

- Where grievant had been made the object of a staff incident report claiming negligence for not getting to classroom on time, arbitrator determined that grievant was not only authorized to leave his other post in time to get to class, he had been ordered to do so: 9

**Forgery**

- The grievant, an Activities Therapist 1 at a youth facility, was removed for unauthorized use of an employer credit card. The grievant allegedly forged the names of other employees on the receipts. Forgery of credit card receipts from an employer's credit card subjects an employee to removal from his position: 5 87

**Forgetfulness**
- Not an excuse after employee has breached his last chance agreement and then been given an additional chance: 23

**Forty-Five Day Time Limit**

- See also delay

- See timeliness in initiating discipline

- In the absence of a company default provision in section 24.05 specifying the effect of employer's failure to issue final disciplinary action within 45 days, "this arbitrator would feel compelled to consider all circumstances surrounding the particular grievance at issue including the past practices of the parties in similar situations: 10"

- The contract provides for both investigatory interviews and pre-disciplinary meetings. An investigatory interview may be held at the pre-disciplinary conference. For purposes of determining which of two meetings actually held was the pre-disciplinary conference, the employer's compliance with the article 24 requirements for a pre-disciplinary meeting is pertinent to the determination. The arbitrator determined that of two meetings held, the second was the pre-disciplinary conference since it met the requirements of article 24. He held that the first meeting was not a pre-disciplinary conference, even though it was referred to as such in the communication instructing the grievant to attend, since it did not meet the requirements set out in article 24: 15

- Where pre-disciplinary conference was recessed at grievant's request until he replied on an invitation to take a polygraph test, the 45 day time limit did not begin to run until at least the time when grievant replied to the invitation: 15

- Contractual provision should not be waived merely because no actual harm to grievant. The clear import of the contractual language is that due process is presumptively harmed for all employees after 45 days. To ignore this negotiated and explicit requirement would not merely waive the grievant's rights but the rights of all the employees: 44

- If time limits are too limiting, the parties should negotiate the new time frame. (Implication: it is not the arbitrator's role to waive the old limit even if grievant was not prejudiced when management failed to meet time limit): 44

- If time limit could be waived because failure to meet limit did not prejudice grievant, nothing would prevent management from taking much longer periods. But the need for time limits in labor management grievance settlement is well settled. Failure to impose such limits can lead to labor unrest, render resolution difficult because of death, retirement, resignation, and loss of evidence. (Several arbitrations are cited): 44

- An Ohio Court upheld an arbitrator who found that employer defaulted by failing to adhere to contract time limits. Ohio Council 8, AFSCME v. Central State University 474 N.E.2d 647 (1985)

- Where 45-day limit had not been met, arbitrator imposed the lesser penalty that had been recommended by the assistant superintendent after the pre-disciplinary meeting: 44

- Arbitrator would have overturned the dismissal because of the employer's failure to abide by the 45 day time limit in the contract, but did not because of mitigating circumstances: (1) employer's good faith belief that the union had waived the time limit. (2) The issue was not fairly raised at arbitration since it had not been raised in earlier steps, and (3) the removal was justified on the basis of offenses with regard to which the 45 day role had not been violated: 128

- Reading sections 24.02 and 24.05 together leads to the conclusion that the 45 days is an absolute maximum. It supplements, but does not entirely supersede the Employer's responsibility to react to a disciplinary event "as soon as reasonably possible": 140

- The arbitrator sustained the grievance because the discipline was not rendered within the contractually mandated 45 days. She also noted that given the long delay between the event and the hearing, a witness had died and other witnesses' memories had become vague. Consequently, the state proved unable to meet its contractually required burden of showing "just cause": 204

- Even though technically the employer violated its contractual duties of disclosure there is no indication that the Union or the grievant suffered harm as a result. The pre-disciplinary hearing proceedings encompassed ten days. There was
substantial compliance by the State with the disclosure rules: 292
- The five months between the alleged abuse of an inmate by the grievant and the discharge may seem to violate Article 24 .02 which sets the standard as requiring the employer to act with as much dispatch “as reasonably possible.” In this case the arbitrator found that management did act as quickly as statutory procedures allowed and the grievant’s case was aided by the delay, not hampered by it: 292

- Ohio Administrative Code 5 1 20-9-01 establishes the basis for allowing force in a prison setting and distinguishes between uses which are legitimate and those which are not. When force is used or alleged, an internal investigation is performed and the institution head is advised of the findings. The pre-disciplinary hearing was scheduled six days after this review. There is no unreasonable delay: 292

- The forty-five day time limit to impose discipline means only that the decision to impose discipline must be made within forty-five days. The arbitrator decided that Article 24 .05 of the Agreement did not make the employer responsible for notifying the employee within forty-five days: 292

- The employer must notify an employee of his/her discipline without undue delay. This does not mean that the employer has to notify the employee within forty-five days: 292

- The State does not have to notify the employee of impending discipline within forty-five days. The language of Section 24 .05 states only that the employer must make a decision within forty-five days. The employer must notify the employee without undue delay, but this does not have to be within the forty-five day time frame: 292

- In the case of an alleged inmate abuse the pre-disciplinary hearing was not unreasonably delayed since the facility must conduct a Use of Force investigation under Ohio Administrative Code 5 1 20-09-02. Without this investigation the grievant’s statutory rights could have been seriously jeopardized: 307

- Section 24 .05 requires a final decision on disciplinary action as soon as possible not to exceed 45 days. The exception to the 45-day time limit is in cases where a criminal investigation may occur and the employer decides not to make a decision on the discipline until after disposition of the criminal charges. This specific exception was intended to suspend the otherwise applicable time constraints when the results of a criminal investigation are unknown. By its terms, the exception is future oriented; when the criminal investigation is complete, it no longer “may occur” and the exception no longer applies. Because the employer took longer than 45 days after the end of the criminal action, it was in technical violation of the provision: 307

- The grievant began his pattern of absenteeism after the death of his grandmother and his divorce. The grievant entered an EAP and informed the employer. He had accumulated 104 hours of unexcused absence, 80 hours of which were incurred without notifying his supervisor, and 24 hours of which were incurred without available leave. Removal was recommended for job abandonment after he was absent for three consecutive days. The pre-disciplinary hearing officer recommended suspension, however the grievant was notified of his removal 52 days after the pre-disciplinary hearing. The arbitrator found that the employer violated the contract because the relevant notice dates are the hearing date and the date on which the grievant receives notice of discipline. Other arbitrators have looked to the hearing date and decision date as the relevant dates. Additionally, the employer was found to have given “negative notice” by overlooking prior offenses. The arbitrator reinstated the grievant without back pay and ordered him to enter into a last chance agreement based upon his participation in EAP: 371

- The grievant was a Correction Officer, as was his wife. She had filed sexual harassment charges against a captain at the facility. The grievant and the grievant’s wife’s attorney contacted an inmate to obtain information about the captain. The employer removed the grievant for misuse of his position for personal gain, and giving preferential treatment to an inmate, 44 days after the pre-disciplinary hearing, and he received notice of his removal on the 46th day after the pre-disciplinary. The arbitrator held that the employer proved that the grievant offered the inmate personal and legal assistance in exchange for information. The investigation was proper as it was a full investigation and it was conducted by persons not reporting to anyone involved in the events. It was found that the investigation need not contain all
information, only relevant information, thus the grievance was denied: 372

- The grievant was a Correction Officer who was removed for watching inmates play cards while they were outside their housing unit. The grievant admitted this act to his sergeant. The pre-disciplinary hearing had been rescheduled due to the grievant’s absence and was held without the grievant or the employer representative present. The arbitrator found that because the union representative did not object to the absence of the employer’s representative that requirement had been waived. There was also error by the employer in failing to produce inmates’ statements as they had not been used to support discipline. The removal order was timely as the 4 5 day limit does not start until a pre-disciplinary hearing is held, not merely scheduled: 377

- The grievant attended a pre-disciplinary hearing for absenteeism at which his removal was recommended, but deferred pending completion of his EAP. He failed to complete his EAP and was absent from December 28, 1990 to February 1, 1991. The grievant was then requested to attend a meeting with a union representative to discuss his absence and failure to complete his EAP. The grievant was removed for absenteeism. The arbitrator found the grievant guilty of excessive absenteeism and prior discipline made removal the appropriate penalty. The employer was found to have committed a procedural error. Deferral because of EAP participation was found proper, however the second meeting was not a contractually proper pre-disciplinary hearing. No waiver was found on the part of the union, thus the arbitrator held that the employer violated the contract and reinstated the grievant without back pay: 383

- While on disability leave in October 1990 the grievant, a Youth Leader, was arrested in Texas for possession of cocaine. After his return to work, he was sentenced to probation and he was fined. He was then arrested in Ohio for drug-related domestic violence for which he pleaded guilty in June 1991 and received treatment in lieu of a conviction. The grievant was removed for his off-duty conduct. The grievant’s guilty plea in Texas was taken as an admission against interest by the arbitrator and the arbitrator also considered the grievant’s guilty plea to drug related domestic violence. The arbitrator found that the grievant’s job as a Youth Leader was affected by his off-duty drug offenses because of his co-workers knowledge of the incidents. The employer was found not to have violated the contract by delaying discipline until after the proceedings in Texas had concluded, as the contract permits delays pending criminal proceedings. No procedural errors were found despite the fact that the employer did not inform the grievant of its investigation of him, nor permit him to enter an EAP to avoid discipline. No disparate treatment was proven as the employees compared to the grievant were involved in alcohol related incidents which were found to be different than drug related offenses. Thus the grievance was denied: 410

- An inmate was involved in an incident on January 4, 1991, in which a Correction Officer was injured. The inmate was found to have bruises on his face later in the day and an investigation ensued which was concluded on January 5th. A Use of Force Committee investigated and reported to the warden on March 4th that the grievant had struck the inmate in retaliation for the inmate’s previous incident with the other CO on January 4th. The pre-disciplinary hearing was held on April 1st, and 56, and the grievant’s removal was effective on May 29, 1991. The length of time between the incident and the grievant’s removal was found not to be a violation of the contract. The delay was caused by the investigation and was not prejudicial to the grievant. The arbitrator found that the employer met its burden of proof that the grievant abused the inmate. The employer’s witness was more credible than the grievant and the grievant was found to have motive to retaliate against the inmate. The grievance was denied: 421

- The Union argued that the State conducted too lengthy an investigation and never informed the grievant that he was being investigated. Further, the Union contended that the alleged Highway Patrol investigation was a “smokescreen” in order to promote further delay in imposing discipline. Therefore, the Union argued that the 4 5 -day time limit under Article Section 24.05 was exceeded. The State argued that the burden was on the Union to raise the issue prior to arbitration. The Arbitrator did not respond directly to the issue: 619

- The Arbitrator overruled the timeliness issue raised by the union. Article 24.06 gives the employer the option to delay the decision to discipline and halt the
running of the forty-five days until after any criminal
investigation. The evidence was clear that there was a
fight and that the Grievant and several other JCO’s
were injured. However, the evidence was clear from
witnesses that the Grievant hit and kicked the Youth
once the Youth was on the ground. Considering the
severity of the assault, the Arbitrator found the removal
to be correct. 1 020

Fraternization with an Inmate

The Arbitrator was convinced that the grievant
received a haircut from an inmate. She could find
no reasonable explanation why the grievant woke
up the inmate and took him up into the restroom
to stack cleaning supplies at 2:00 or 2:30 in the
morning. The Arbitrator found the grievant guilty
of the charge of “dealing with an inmate.” 71 8

Fraud

- See Dishonesty

- When the grievant received sick leave and was
actually working at another job, she committed
fraud. The fact that the employer knew of the
grievant’s second job and approved the grievant’s
leave request is irrelevant. The employer had no
knowledge that the grievant was working at the
second job while she was claiming sick leave: 291

- The grievant, an Employment Services
Representative, was found to have recommended
her daughter for two positions that the daughter
was not qualified for without her supervisor’s
permission. The arbitrator found that job
openings were an asset and the grievant’s
misconduct is that of theft-in-office. The
arbitrator saw little conceptual difference between
stealing publicly held job rights and stealing
public funds: 35 8

- The grievant knew that illicit referrals were being
made and willingly participated. She cannot
excuse her own corrupt practice by establishing
that her superior engaged in similar misconduct: 35 8

- The charge of fraud, with its criminal
implications, requires precise definition. The
Employer had a responsibility to state clearly
what it meant by "fraud" and prove the elements
of the charge. "Fraud" consists of intentional
deception designed to mislead, for the purpose of
obtaining an illicit gain or advantage: 1 4 0

- The union argued that fraud is defined as
falsification of a document to obtain illicit gain.
The arbitrator held that the definition was
irrelevant since the "present matter deals with a
work rule violation that anticipates willful
falsification of an official document": 1 8 1

- Fraud and perjury are matters involving moral
turpitude are to be established therefore beyond a
reasonable doubt: 1 8 7

Freedom of Speech

- Where the employer sought to discipline the
grievant for the content of certain letters he had
written, the arbitrator held that a balancing test is
applicable to determine if the state was violating
his First Amendment rights. One side of the
balance is the interest of the employee as a citizen
in commenting on matters of public concern. The
other side of the balance is the interest of the
State, as an Employer, in promoting efficiency of
the public services it performs through its
employees. In this case, the balance favors the
grievant. The concerns the grievant raised were
eventually acted upon by the employer. The
employer's reasons for opposing the suggestions
were questionable: 21 8

- Where the content of a letter is protected speech,
it cannot be characterized as "improper self-help"
and thus made the subject of discipline. Virtually
all employee First Amendment cases could be
characterized as "self-help" in the sense that
employees seldom criticize the employer's actions
unless they see said actions as hindering their
self-interest, which happens to coincide, as here,
with a public interest. The board cannot
accomplish indirectly that which it cannot
accomplish directly, namely, discipline for the
content of the protected speech: 21 8

– G –

Garrity Waiver

The Arbitrator found that the State acted
unreasonably when it did not offer a Garrity
waiver to the grievant and when it barred the
grievant from answering questions after promising
to hear his testimony on the same day. It was
recommended by the Arbitrator that the parties
meet in order for the Employer to clarify the confusion of its policy regarding when and how a Garrity waiver is offered during a Use of Force inquiry. 719

Goldstein Decision

- See Section II of Index

- This decision deals with the definition of a work area. The definition of a work area governs the rights of employees to transfer and rotate within the work area. The case is limited to direct care employees. These employees work in State institutions and are employed in full-time, custodial and security positions. The institutions covered by this decision are Rehabilitation and Correction; Youth Services; Mental Health and Mental Retardation/Developmental Disabilities; Ohio Veterans Home; and the Ohio Veterans Children’s Home. Rehabilitation and Correction was separated from the other agencies in the decision. The Union and the State each submitted proposals to Mr. Elliott Goldstein, the arbitrator. The Union argued for strict seniority bidding, for work selection in the smallest feasible unit, post, ward or cottage, with unlimited selection rights and no limitations on the “ripple effect.” The ripple effect is the bumping and confusion caused by constant reassignments. This proposal is feasible and is working in other AFCSME represented institutions and facilities.

- The State argued that the Union’s proposal was impossible. The Union agreed to negotiate on several points. The Union could establish a waiting period before seniority can be exercised, limit the frequency of exercising seniority rights and limit the number of times an employee could be assigned. The arbitrator awarded the following:

  1) In all Agencies except for Rehabilitation and Correction the arbitrator found that the work area is defined as the smallest subdivision of regular work assignment in the physical setting wherein an employee performs his or her assigned work on a regular basis. Seniority is to be one of the criteria utilized in the selection of work area; other criteria are skills and abilities and the professional needs of the facility. If the latter two factors are equal, seniority shall control. Employees are limited to exercising their right to select a post to twice in one year. Job reassignments resulting from a selection are limited to two in number.

  2) In the area of rehabilitation and Correction the arbitrator urged the parties to come to an agreement. The arbitrator retained jurisdiction that if the parties could not come to an agreement Arbitrator Goldstein would accept the last best offer.

- The union and the State could not reach an agreement. The arbitrator accepted the State’s last best offer. The Union argued that the key distinction between work areas was stress level and not physical location. The Union proposed that employees should be rotated among the most and least desirable positions in an even-handed and structured way. The Union’s plan would result in an individual Correction Officer being required to spend no more than one six month period out of every eighteen months in a high stress position.

- The State contended that the Union’s proposal did not follow the actual manner in which jobs are actually categorized. The State offered four designated zones of rotation – Housing A, Housing B, Non-housing and Relief. The arbitrator rejected the seniority principle and the “Pick-A-Post.” A reservation of some discretion in the employer to assign work duties in an institutional structure must be recognized. There is a need for rotation that provides a mix of experienced personnel and there is a need for training opportunities. The arbitrator found that the Union’s proposal did not consider geographical or physical location, concerns for training, security for a mix of experienced and inexperienced. The State’s proposal considered these factors and also included in their plan certain stress levels. The Union’s proposal would not solve the problem of work area merely fracture the institutional work are.

- With reference to Rehabilitation and Correction, a rotation to occur every six months. There will be four different types of work to be defined by the parties and the rotation shall include one job assignment in each over the course of two years.

- The Employer’s ability to implement scheduling changes is restricted by the “work area” language negotiated by the parties pursuant to the Goldstein decision which fashioned a specific definition to the term “work area” for the Departments of Mental Health and Mental Retardation: 448

  - The following rules apply in determining "good management reasons" for denying an employee a
pick-a-post position. A performance evaluation that meets expectation should not preclude an employee from being awarded a bid job unless the collective bargaining agreement specifically provides that the employee with the best performance review will be awarded the job. Ordinary discipline that has been removed from the employee's personnel file after two years cannot form the basis for a "good management reason" to deny the grievant the bid to a special duty post. Finally, when considering attendance deficiencies of an employee, only those deficiencies that subject the employee to discipline can be considered for purposes of exclusion from a bid job: 5 74

Grand Jury Determinations

- Not binding on arbitrator since the two forums have different purposes and rules of evidence: 33

- Admission of evidence concerning grand jury decision is questionable: 33

- The results of the other proceedings and investigations which were carried out by the FBI, the grand jury, the State Highway Patrol, the Legislature's Correctional Institution Committee, and the Unemployment Compensation Board of Review were produced under different rules and for different purposes than those which govern this arbitration. Thus, those results carry no weight in this arbitration: 1 80

Grievance Procedures

The Ohio State Highway Patrol began a criminal investigation in August 2001 of the activities of the grievant, including those while the grievant was on duty as an employee of the Department. The grievant was subsequently discharged on December 2, 2001. The union filed a grievance challenging the discharge. The union requested the arbitration proceed under Section 25 .02 of the contract with the state of Ohio. Delays have resulted based on the belief criminal charges were going to be filed against the grievant. No charges were filed, yet the Department refused to schedule the arbitration. Under Section 25 .02, a strict timeline is set out for the processing of Discharge Grievances unless the grievance involves criminal charges of on duty actions of the employee, grievants who are unable to attend due to a disability, or grievances that involve an unfair labor practice charge, in which the strict time limits may be exceeded. The Department was found to have the burden of proof showing that the exception to the strict timeline of scheduling the discharge grievance is present on the facts. The Department argued that the criminal investigation was included as a criminal charge within the language of Section 25 .02. The arbitrator found that the criminal investigation did not fall within the criminal charges exception. The arbitrator cited Section 24 .04 in which criminal investigation and criminal charges were plainly distinguished. The arbitrator also stated that criminal investigation did not meet the definition of criminal charge as given by the Department. 81 6

The grievant was terminated as a Correction Officer at the Lima Correctional Institution. Under Article 25 .02 of the Contract, a grievance involving a layoff or discipline shall be initiated at Step three (3) of the grievance procedure within fourteen days of notification of such action. The grievance was filed twenty-four days after the Union was notified of the removal. The arbitrator found that the Contract language was clear and that discharge grievances must be filed with the Agency Head or designee within fourteen days of notification. While OCB had a new address and there were new players for both the Union and institution involved with this grievance, these factors do not make the enforcement of the fourteen-day time limit unreasonable. The arbitrator found that even though the Department overlooked procedural flaws in other grievances, enforcing such standards on this grievant is not unjust. The arbitrator stated that the parties themselves have the power to settle or not settle and to waive or not waive timeliness as they see fit. In this instance, the Department is enforcing the timeliness requirement. Since the grievance is not arbitrable, the merits cannot be addressed. 821

Grievant's Testimony

- The arbitrator inferred from the grievant's failure to deny the abuse that the grievant had committed the abuse: 261

- The grievant did not explain why she initially wrote that she had taken the patient's pulse at 5:1
5. In the absence of any explanation by the grievant, it is reasonable to believe that she would have falsified the time she took the patient's pulse if her supervisor had not warned her that she would get herself in trouble if she falsified documentation: 267

- The Arbitrator stated that the grievant’s testimony did not provide any evidence that the grievant’s accuser was not telling the truth. The Arbitrator added that if the Arbitrator were to believe the grievant’s testimony regarding the September 15 incident, the Arbitrator would be accepting the grievant’s conspiracy theory: 615

**Grooming Policy**

The Employer complied with Section 4 4 .03 when it adopted grooming policy work rules, notifying the Union about the new policy and providing a draft copy: 474

- The Department of Rehabilitation and Correction’s grooming policy is “reasonable” as required by Section 4 4 .03 of the Contract. The Employer’s reasons that conservative and uniform appearance is useful in controlling inmates indicated that the policy is not arbitrary or capricious in the sense that it was adopted without any basis other than the prejudices of those responsible for the policy: 474

**Guidelines Published by Employer**

- See agency policies, agency rules

- Where the employer has published guidelines for timeliness in steps of the disciplinary process which were presumably relied upon by employees, since 24 .02 requires that disciplinary action be initiated as soon as is reasonably possible and directs that the arbitrator consider "timeliness of the Employer's decision to begin the disciplinary process," and since Just cause under 24 .01 requires fairness in the imposition of discipline, having promulgated the guidelines, the employer must follow them: 83

- Since the arbitrator has no power of mandamus over future behavior of a party, the question of enforcement of guidelines and procedures must be handled within the context of a particular grievance. Once the substantive issue on the merit is resolved, the arbitrator may modify the remedy where appropriate to encourage the parties to abide by the rules: 83

- A department's unilateral regulations are nothing more than guidelines -communications to the work force of how management intends to exercise its disciplinary authority. They do not supplant negotiated rights and protections. Article 24 , section 24 .01 establishes the disciplinary standard which overrides every non-negotiated regulation which the employer may choose to publish. It states that no employee shall be disciplined "except for just cause": 140

- H –

**Harassment by Other Employees**

- Where a correction officer had been searched after a tip that he was carrying drugs, the arbitrator ruled that while the search was appropriate, the existence of the tip did support the CO's claim that he was subject to harassment by the other employees: 110

**Harassment by Supervisor**

- Harassment by supervisor: 65, 78, 125, 258

- Where supervisor had said she would ride the grievant's ass until she would be glad to quit" the arbitrator found that this statement in no way diminishes the unsatisfactory record of the grievant: 65, 125

- The employee might prefer that correction be sympathetic and pleasant. However, guarantees of attitudes are not in the contract: 78

- Where the employer had adhered to the absenteeism policy in removing the grievant, and no other evidence of personal animus had been presented, the arbitrator found that there had been no supervisory harassment of the grievant in the decision to remove her for two tardiness violations totaling only 3 minutes: 258

**Headphones, Wearing**

- Order not to wear earphones was reasonable. Wearing headphones to avoid listening to supervisor is implicitly insubordination: 28

**Health Benefits**

- See remedy
The arbitrator, in an improper job abolishment, granted the grievants back pay, seniority, holidays, vacations, and leaves. The employer was also directed to pay any health expenditures that would have been paid by the health insurance provided by the State: 31

**Hearsay**

- Where neither of the accusers made any charges until several days after the alleged incident, and one refused to testify under oath or otherwise regarding those charges, the arbitrator held that the hearsay testimony as to her accusations was "entitled to little or no weight.": 10
- While hearsay is generally received in arbitration and "taken for what it is worth," it generally is accorded little to no weight in discipline and discharge cases, with exception, to be sure, in circumstances which tend to corroborate the hearsay evidence: 14

**Highway Patrol**

- 4 3.01 gives precedence to the agreement over any statute other than ORC 4 1 1 7 where such statutes conflict with the agreement. Thus, the requirement in 25 .08 that the state produce evidence requested by the union supercedes the Ohio Highway Patrol's statutory privilege in ORC 1 4 9.4 3: 75

The Arbitrator found that the real issue is whether a past practice of long standing has changed the “plain meaning” of the language in Appendix M to the Collective Bargaining Agreement. At Trumbull and other institutions the Ohio State Patrol conducts reasonable suspicion testing for alcohol abuse testing. The Union queried 27 institutions as to their methods of handling the testing. Of the 25 institutions that responded 14 said they did not use the Ohio State Patrol and 11 said they did. This creates a past practice that is not followed by a plurality of the institutions. The Arbitrator found that the requirements for management to make a past practice argument were not met. 988

**Holiday Pay**

- See Remedy
- The reinstated grievant was given holiday pay but not overtime pay: 31

Assuming no clear and consistent practice to the contrary, the employer can refuse to give holiday pay if employee had authorized leave without pay on the previous day: 21

General rule applied by arbitrators is that an employer need not pay employee for a day not worked unless there is either a clear and unambiguous contractual requirement or a clear and consistent practice of doing so: 21

An employee is on a "regular" schedule, for the purposes of 26.02 and 1 3.07, the schedule is predictable. Thus, even a rotating schedule can be a regular schedule: 93

Holiday pay lost as a result of unjust removal is due the grievant, as are all other contractual benefits: 25

After approval of the 2006-2009 contract, a number of disputes arose over the interpretation and application of Section 26.04. The parties agreed to submit two questions to an Arbitrator and to use his answers as a guide in resolving the pending grievances. Question two included ten scenarios. In these two scenarios the employee may or may not meet the standard depending on the nature of the sickness. (In cases where an employee’s ability to report for work is not clear, the state has the right to ask the employee for further documentation.) Employee calls in sick, provides a doctor’s slip confirming the sickness, which does not explain how the sickness prevented him/her from working. Employee calls in because his/her minor, dependent child is sick and employee provides a doctor’s slip confirming the sickness, which does not explain how the child’s sickness prevented the employee from working. This case is currently being appealed by the union in court. 95 **

No dispute exists that non part-time employees are entitled to be paid the “normal” number of hours they would be scheduled to work as holiday/straight time pay. The dispute centers upon number of hours part-time employees are to be paid as holiday pay under Article 26.02 and/or straight time pay under Article 26.03. The language to standardize the computation of holiday pay for part-time employees was accomplished during negotiations and the evidence offered by the Union fails to contradict the final written agreement. The reading of Article 26.03 in conjunction with Article 26.02 does not modify the language to make it ambiguous or unclear. The parties could have made it
clear in Article 26.02 that part-time employees who work holidays were entitled to holiday pay based upon the actual hours worked that day. They did not. There is no evidence to find that a mutual mistake occurred which would require reformation.

- Section 26.02 was newly negotiated contract language in the 2006-2009 collective bargaining agreement. The disputed language was proposed by the Employer and accepted by the Union. The Arbitrator held that the Employer did not violate Section 26.02 when it implemented and applied a formula for calculating part-time employees’ holiday pay. Section 26.02 contains language which is clear and unambiguous because holiday pay is pro-rated and based on the daily average of actual hours worked. The parties admitted the primary goal with the provision was to standardize outcomes across and within agencies. The Union argued that the parties did not intend to have any workers harmed as a consequence of the new formula. The Arbitrator held that maintaining holiday pay outcomes within this circumstance were highly unlikely, since the parties agreed to a standardized methodology, where various methodologies were employed in the past. This would result in some employees having holiday pay increases or decreases from pre-negotiated methods of calculation.

**Hybrid** Positions

- The issue was previously found arbitrable in Arbitration Decision 989. The Arbitrator held that the evidence did not demonstrate that the Agency possessed the intent to erode the bargaining unit. Nothing in the arbitral record suggested that the Agency exerted less than reasonable effort to preserve the bargaining unit. The Arbitrator also held that the record did not demonstrate that the Agency intended to withdraw the vacancy to circumvent the agreement. Constructive erosion occurs where a new position is erroneously labeled exempt when it should have been labeled nonexempt. Constructive erosion restricts the future size of a bargaining unit; direct erosion reduces the present size of a bargaining unit. The Arbitrator used the label “hybrid” to explain the nature of the contested position, reflecting the presence of both exempt and nonexempt duties in one position. Furthermore, he posed that the fundamental issue of the grievance was: Whether the contested position was exempt or nonexempt? Consequently, the Arbitrator proposed a screening device for hybrid positions that might be useful in resolving subsequent classification disputes. This screening test puts the focus on essential duties (“Essence Test”): whether exempt or nonexempt duties are required in (essential to) daily job performance. A hybrid position is exempt if daily job performance entails exempt duties; a hybrid position is nonexempt if daily job performance necessitates nonexempt duties. The Arbitrator held that exempt duties do not somehow become nonexempt merely because bargaining-unit employees have performed them; nor do nonexempt duties become exempt because supervisors perform them. The Arbitrator’s application of the “Essence Test” indicated that the contested position was exempt. Although the duties were not fiduciary, many of the duties were central to managerial decision-making authority.

**Horseplay**

- Where both parties were partly at fault, one received no punishment, and damage was minimal, at most grievant should have been warned, the prescribed penalty for a first occurrence of a horseplay violation: 1 1 7

- If the grievant intentionally scratched the other employee with a screwdriver he had in his hand, it would raise the charge of horseplay to an assault falling within fighting: 1 8 2

- Horseplay cannot be tolerated in an ODOT garage. While intentions in horseplay may be less malicious than during a fight, the possibility of injury remains unacceptably high. In a work place with dangerous tools and rough conditions such as an ODOT garage, even light hearted horseplay can result in serious injuries: 1 8 2

- The grievant was an 1 1 -year employee with no prior discipline. While the arbitrator must hesitate to substitute her judgment for management's, the imposition of a ten day suspension in this Incident is not commensurate with the offense nor progressive with regard to this grievant. On the other hand, horseplay is dangerous on the job and abusive language beyond shoptalk can provoke reactions which also cause unsafe conditions and potential injury: 1 0 2 4

**Ignorance**

- Not an excuse where dishonest intent is present: 3 3
Inappropriate and Unwarranted Force

The grievant was charged with pushing and attempting to choke a youth inmate. The arbitrator found that the grievant used inappropriate force against the youth on three occasions. However, the removal was unreasonable in light of the grievant’s seventeen-years of service and his discipline-free record. The arbitrator stated that a “healthy dose of discipline was clearly warranted to impress upon the grievant and any other JCOs of like mind “that such behavior is unsatisfactory. 971

Inattention to Duty

The grievant was a TPW working third shift at a group home. When he arrived at work he was told that a resident was found with knives and Tylenol. He was instructed to position himself so he could visually monitor the resident. Co-workers testified that they saw the grievant sleeping while on duty. They also testified that the grievant was not in a physical position to see the resident if he were on the stairs. During his shift the grievant placed three telephone calls to the supervising nurse at home. He was allegedly rude and disrespectful each time he called. The arbitrator found that the grievant’s removal was just. In addition to his rude behavior the grievant had previously been given a verbal warning and two (2) five-day working suspensions for similar offenses within his four years of employment. 95

Incarceration

- In cases dealing with discharge of an incarcerated employee because of absenteeism, Once it has been determined that the employer has been reasonable and evenhanded, mitigating factors are considered such as the length of employment, the dependability of the employee, the employee's period of incarceration, the employee's prior disciplinary record, and the difficulty of replacing an employee temporarily: 251
- The Arbitrator concluded that there was proper and just cause to remove the grievant based on the general principle that the employer usually prevails when the employer discharges an incarcerated employee on the basis of absenteeism caused by an employee’s incarceration: 590

Incompetence

- Removal improper where grievant did not receive notice of the consequences associated with his level of performance: 20
- Cannot contend performance is unsatisfactory if comparable performance was accepted during probationary period: 20
- Assessment of performance is not valid if carried out over relatively short time period: 20
- Discipline inappropriate where employer did not provide proper supervision necessary for learning: 20
- Not proved by grievant's failure to notice patient had died since failure could be explained by work rule that prevented attendant from shining flash light in patient's face while asleep: 39
- Since many of grievant's errors could have been avoided by re-checking her work, the arbitrator found that those errors were unrelated to "training issues." 78
- Management retains the right to set standards of work quality and quantity of production: 78
- Within the protective boundaries of the contract, for just cause, management has the right to terminate nonproductive workers. Without this management ability, the jobs of all workers are ultimately at risk: 78
- By retaining the grievant after the probationary period, the employer certified that she could perform her duties at an appropriate level of proficiency: 197
- Substance abuse does not need to exist in order to establish performance deficiencies. When an employee appears listless, sleepy and fails to diligently engage in assigned tasks, an employer may reasonably conclude that an employee is unable to perform: 241
- One has to wonder why the grievant was allowed to perform this service if in fact it was determined that he was unable to perform: 241

Incorporation of State and Federal Law

- The grievant was a Correction Officer who was enrolled in an EAP and taking psychotropic drugs. He got into an argument with an inmate who had used a racial slur and struck the inmate. The
grievant was removed for abuse of an inmate and use of excessive force. The arbitrator found that the grievant struck the inmate with no justifying circumstances such as self defense, or preventing a crime. The employer, however, failed to prove that the grievant knowingly caused physical harm as required by Ohio Revised Code section 2903.33(B)(2), because the grievant was taking prescription drugs. The grievant’s removal was reduced to a thirty day suspension because the employer failed to consider the grievant’s medication. The grievant was not faulted for not notifying the employer that he was taking the psychotropic drugs because he had no knowledge of their possible side effects. Thus, the use of excessive force was proven, but excessive use of force is not abuse per se: 368

- The grievant had been on a disability separation and had been refused when he requested reinstatement. The arbitrator found the grievance arbitrable because section 4 3.02 incorporated Ohio Administrative Code section 1 23:1 -33.03 as it conferred a benefit upon state employees not found within the contract. The grievant thus had three years from his separation to request reinstatement, which he did. The grievance was also found to be timely filed because there was no clear point at which the employer finally denied the grievant’s request for reinstatement and the union was not notified of the Additionally, the employer was estopped from asserting timeliness arguments because the employer was found to have delayed processing the grievant’s request for reinstatement. The physician who performed a state-ordered examination released the grievant to work, thus the employer improperly refused the grievant’s reinstatement request. The grievant was reinstated with back pay less other income for the period, holiday pay, leave balances credited with amounts he had when separated, restoration of seniority and service credits, medical expenses which would have been covered by state insurance, PERS contributions, and he was to receive orientation and training upon reinstatement: 375

- The grievant retired from the State Highway Patrol and was hired by the Department of Health four days later. His new employer determined that the Ohio Revised Code section 1 24 .1 81 did not provide for longevity pay supplements based on prior state service for rehired retirees. The arbitrator found the grievance arbitrable despite the employer’s argument that because of the grievant’s retiree status that longevity was a retirement benefit, and under Ohio Revised Code section 4 1 1 7.1 0(A) longevity for a retired employee was not a bargainable subject. Section 1 24 .1 81 was found to be applicable and section 36.07 of the contract confers longevity pay based solely on length of service. That the grievant experienced a change in classification was found to be irrelevant for the purpose of calculating longevity and the grievance was sustained: 389

- The federal government created, established hiring criteria, and funded job training positions within the Ohio Bureau of Employment Services for Disabled Veterans’ Outreach Specialists (DVOPS), and Local Veteran’s Employment Representatives (LVERS). The OBES and Department of Labor negotiated changes in the locations of these employees which resulted in layoffs which were not done pursuant to Article 1 8. Title 38 of the United States Code was found to conflict with contract Article 1 8. There is no federal statute analogous to Ohio Revised Code section 4 1 1 7 which allow conflicting contract sections to supersede the law, thus federal law was found to supersede the contract. As the arbitrator’s authority extends only to the contract and state law incorporated into it, the DVOPS’ and LVERS’ claim was held not arbitrable. Other resulting layoffs were found to be controlled by the contract and Ohio Revised Code sections incorporated into the contract (see, Broadview layoff arbitration #34 0). The grievance was sustained in part. The non-federally created positions had been properly abolished and the affected employees were awarded lost wages for the period of their improper abolishments: 390

- The grievant was an employee of the Lottery Commission who was removed for theft. The agency’s rules prohibit commission employees from receiving lottery prizes, however the grievant admitted redeeming lottery tickets, but not to receiving notice of the rule. The arbitrator noted that while the employer may have suspected the grievant of stealing the tickets, there was no evidence supporting that suspicion and it cannot be a basis for discipline. The arbitrator found that the grievant did redeem lottery coupons in violation of the employer’s rules and Ohio Revised Code section 3770.07(A) but that he had no notice of the prohibition either through counseling or orientation. The grievant was reinstated without back pay but with no loss of seniority: 4 25
- Three Bureau of Employment Services employees grieved that their seniority dates were wrong. They had held positions with the employer until laid off in 1982. They were called back to intermittent positions within 1 year but not appointed to full-time positions until more than 1 year had elapsed from their layoff. The employer determined that they had experienced a break in service as placement in intermittent positions was not considered to meet the definition of being recalled or re-employed. The arbitrator found that the term “re-employment” carries its ordinary meaning and not that meaning found in the Ohio Administrative Code when used in Article 1 and the 1989 Memorandum of Understanding of Seniority, thus the grievants did not experience a break in service because they had been re-employed to intermittent positions. The grievants were found to continue to accrue seniority while laid off. The employer was ordered to correct the seniority dates of the grievants to show no break in service and that any personnel moves made due to the seniority errors must be corrected and lost wages associated with the moves must be paid: 426

**Incorporation of the Agreement**

- The folly of the employer’s suggestion that the arbitrator should apply court defined civil service entitlements and ignore the more generous requirements of the Collective Bargaining Agreement is too obvious for lengthy discussion. The Agreement controls in this case: 292

**Incorporation of the Law into the Agreement**

- Public and private sector labor disputes are not identical. Bargaining in private industry grew out of a perceived need of employees to carve protections out of management’s absolute authority. Bargaining in the State of Ohio did not have the same need, at least not to the same degree. Protections were already in place in the form of long-standing civil service legislation. Ohio did not abandon Civil Service regulations when it enacted the Public Employee Collective Bargaining Law; the regulations were the only shelter for classified employees that were not clothed with bargaining rights. In the private sector, silence is presumed to insure bargaining unit seniority against outside encroachment. In Ohio, the opposite conclusion is required; where the Agreement makes no reference to a subject, it incorporates preexisting law. The preexisting law allows bumping rights for displaced supervisors: 336

**Incorporation of the Ohio Revised Code (O.R.C.)**

- The State cited Ohio Revised Code Section 124.34 in the grievant’s removal for abuse. Arbitrator Rivera quoted Arbitrator Pincus in the Dunning** opinion. “Reliance on this section (the ORC section defining abuse), moreover, conflicts with a recent Ohio Supreme Court decision which found that the Code cannot be used to supplement and indirectly usurp provisions negotiated by the parties.” The standard under the Agreement is just cause, not a lesser standard defined by the Ohio Revised Code. This violation was found to be de minimis: 308**

**Indecent Exposure**

- The grievant, a Correction Officer, was found to have intentionally exposed himself to a busload of female inmates. This behavior occurred while the grievant was off duty. Off-duty behavior is normally not the employer’s business. To allow discipline, a clear nexus must exist between the behavior and the job. The arbitrator found that nexus in this case. The grievant charged with the safekeeping of inmates deliberately chose, while in uniform, a group of female inmates as the victims of his indecent behavior. The end result would be that female not knowing which male Correction Officer was involved could justifiably fear that the Officer in question might have power over them. Sexual abuse of prisoners by Correction Officers is not unknown. Although the removal was the harshest penalty in the disciplinary grid, the factors weighed by the Warden were reasonable and fair. The grievant’s lack of remorse or any indication that the grievant understood and was seeking help for his problem ruled against mitigation: 309

**Independent Judgment**

- Section 30.06 is an express limitation on the rights of management as found in Article 5 of the Agreement. It grants to a limited and defined category of employees who have “technical or specialized skills who exercise independent judgment in their jobs.” Employees must have both “technical or specialized skills” and “exercise independent judgment.” The arbitrator
found that although most of the Classification Specification for both a Local Veterans Employment Representative (LVER) and a Disabled Veterans Outreach Specialist (DVOS) are general requirements both must have in their subsequent employment specific knowledge of agency policy and procedures. The LVER and DVOS employees meet the first prong of the test having technical or specialized skills. The next issue is one of independent judgment. The arbitrator equated the word judgment with discernment and the ability to discriminate between choices. Since all the work that the DVOS and LVER employees do which requires judgment is carried out under general supervision it cannot be said to be independent. Few employees will qualify under Section 30.06. The number of employees that qualify is further narrowed by the last provision of the section. The meeting must be a “work related professional meeting.” The fact that the employer paid for other meetings, which it was not required to do under Section 30.06, means that the LVER and DVOS employees were discriminated against under Section 2.02 of the Agreement. Only because the leave denials were discriminatory is the employer directed to reimbursed the grievants for their leave requests: 331

- Under 37.03 it is mandated that the employer pay overtime or reimburse travel expenses. The word “required” in Section 37.03 was defined by the arbitrator as required by the employer. If the employer requires the employee to attend then the employer is required to pay. The employer’s choice to require attendance to a meeting is entirely within Article 5 management rights: 345

- The Union argued that the employer’s classification of the training as voluntary (37.04) as opposed to required (37.03) is unreasonable. The arbitrator denied this claim. The employer did not act in bad faith, the decision was not capricious or discriminatory, and the decision was in accord with the Agreement. The employer did treat training differently in the past but that was because it was a pilot program. To differentiate after a trial period is not capricious. See Denver Publishing and Denver Typographical Union 5 2 LA 5 5 3: 345

- Since the employees were not eligible for pay beyond their regular hours under 37.04 they are not eligible for overtime under Section 1 3.01 of the Agreement: 345

**Independent Medical Examination (IME)**

The grievant was charged with insubordination and willful disobedience of a direct order – to release medical information. The grievant was given several opportunities to comply with the order and refused on each occasion. The arbitrator determined that no evidence presented suggested any distinction or difference between OCSEA employees and other employees regarding IME’s within ODNR. The arbitrator noted that the grievant was aware that his employer could discipline him for failure to release medical results. The grievant’s conduct was insubordinate and he failed to follow clear directives. The hearing officer decided that due to the grievant’s work history and length of service, and his willingness to see other examiners, a 10-day suspension, as opposed to removal was warranted. The arbitrator elected not to substitute his judgment in this matter. 806

**Inefficiency**

The employer had just cause to remove an employee for neglect of duty and inefficiency in a case where the grievant was progressively disciplined in the past under these two areas. However, the employer did not have just cause to discipline the employee for dishonesty because the employer failed to differentiate between acts of the grievant that might have been characterized as neglect of duty and acts that may have been characterized as dishonest: 562

**Injury**

- Of critical importance to the arbitrator is the fact that no resident was the subject of any physical harm. However, the injury to the supervisor, albeit minor, requires a significant increase in the severity of the discipline against the grievant: 163
- The supervisor of the grievant’s accuser stated that the arm of the grievant’s accuser “was beet read to the elbow,” following the September 15 incident. The State presented an expert witness who stated that, as a physician, there was no medical reason to doubt the testimony of the grievant’s accuser: 615

**Inmate Abuse**
After careful examination, the Arbitrator determined that the inmates’ accounts were more credible than those of the officer’s, which were rife with problems and contradictions, in addition to being self-serving: 4 70

The Arbitrator found that the grievant committed gross sexual imposition of an inmate, based on his voluntary guilty plea and subsequent conviction: 4 79

The Employer did not abuse its discretion in removing the grievant considering the seriousness of the grievant’s commission of gross sexual imposition of an inmate, and its direct relation to the grievant’s responsibilities and job performance: 4 79

The State did not sustain its Section 24.01 burden of proof to establish just cause for discipline. The allegations of inmate abuse were not supported. The testimony of the State’s witness, many of whom have criminal records, was inconsistent, and in some cases, not credible. No reports were filed on the incident nor were medical exams conducted until days later. Material evidence was not secured, and a detailed investigation was apparently not conducted by the Employer after the incident: 4 81

The grievant’s removals were overturned because the Employer failed to meet its burden to prove inmate abuse: 4 81 (A)

- Article 24 .02 ensures that discipline be administered in a timely fashion. The passage of one full year in which four investigations were conducted between the event and the discipline does not meet the contractual standard of initiating discipline as soon as "reasonably possible": 5 31

- The grievant, a Correction Officer, was accused of striking an inmate during an altercation. However, the inmate identified another Correction Officer as the culprit. The Arbitrator determined that because three other Correction Officers identified the grievant and they had no reason to lie, the inmate must have been mistaken in his identification. Therefore, management properly removed the grievant: 600

The arbitrator found insufficient evidence to overturn the removal. The weight of the evidence established that the grievant used excessive force when he grabbed and pushed an inmate, absent any credible evidence that the inmate touched or physically threatened him. The grievant went beyond grabbing and subduing the inmate when he began to repeatedly strike the inmate in the head. His seemingly boastful attitude following the incident further supported the employer’s decision to remove the grievant from his position. 908

**Inmate Fraternization**

- See unauthorized relationship

- Exchange of favors for personal gain: 1 5 7

- The Arbitrator is not to substitute her judgment for management's on the question of whether punishment is commensurate with the offense unless management's judgment is unreasonable. In this case, the superintendent could reasonably have found an intentional, unremorseful, willful action on the part of the grievant justifying dismissal. While the grievant's conduct, trading sunglasses for cigarettes with an inmate, is not as serious as dealing drugs or weapons, the grievant had several previous disciplines: 1 5 5

- Where witnesses testified they had overheard the grievant express willingness to exchange money with an inmate for more favorable work assignments. The arbitrator held that such willingness standing alone warrants discharge: 1 5 7

- It is simply self evident that such dealings with inmates compromises an officer's effectiveness and thereby jeopardizes not only the officer himself but others working with him as well, and In this matter adversely affects the safety and security of the entire staff. For these reasons, the arbitrator said he was constrained to agree with management that in the absence of the most extraordinary mitigating circumstances, clearly not present here, dealing with inmates and the introduction of contraband into the prison is so serious that the only commensurate penalty is removal: 1 5 7

- While it was not shown that the inmate had a sexual relationship with the inmate, he nevertheless did engage in an improper relationship as evidenced by his speaking with the inmate on the telephone on at least 6 occasions
and by asking his union representative "if lie would get in trouble by allowing the inmate to live in his home after release.": 224

- That relationship was quite extensive was viewed as an exacerbating contingency: 231

- Factors considered relevant to whether there is a nexus between the relationship and the employment include: actual or potential adverse publicity, possible refusal of co-employees to work with offender, employee's ability and suitability to perform job functions properly: 231

- All employees working in a Correction environment are responsible for security: 231

- An unauthorized relationship between an employee in Correction and a parolee casts potentially negative implications on the employee's ability and suitability in performing Job functions properly: 231

- A mere acquaintance would not be discussing such subjects as feelings, divorce, religion, sex and life after release from prison: 25

- The arbitrator rejected the grievant's argument that she had made the various statements in an attempt to diffuse the inmate's interest- The grievant's conduct nurtured the relationship- The topics of conversation were not those discussed by mere acquaintances. The grievant could have used other available means to deter the inmate: Notifying her supervisors about the inmate's advances would have been extremely helpful: 25

- The grievant violated the rule against offering or receiving anything from an inmate (1) when she received flowers from the inmate without reporting it, and (2) when she gave the inmate pictures with the understanding that he would draw a portrait. While the grievant alleged that other employees and managers had received the same service from the inmate, the grievant did not prove disparate treatment since it was not established that the other individuals did not receive the service as a consequence of existing craft procedures: 25

- The grievant was a Correction Officer and had received and signed for a copy of the agency’s work rules which prohibit relationships with inmates. The grievant told the warden that she had been in a relationship with an inmate prior to her hiring as a CO. Telephone records showed that the grievant had received 197 calls from the inmate which lasted over 134 hours. Although the grievant extended no favoritism toward the inmate, just cause was found for the removal: 374

- The grievant was a Correction Officer who had been accused of requesting sexual favors from inmates and accused of having sex with one inmate three times. The inmates were placed in security control pending the investigation. During this time statements were taken and later introduced at arbitration. The arbitrator found that the employer failed to prove by clear and convincing evidence that the grievant committed the acts alleged and management had stacked the charges against the grievant by citing to a general rule when a specific rule applied. The primary evidence against the grievant, the inmates’ statements, were not subject to cross examination and the inmate who testified was not credible. The grievant was reinstated with full back pay, benefits, and seniority. The arbitrator recommended that the grievant be transferred to a male institution: 379

- Although the grievant was not charged with violating Ohio Department of Rehabilitation and Correction Standard #4 6D (committing any sexual act with an inmate), the Arbitrator held that the grievant did violate Standards #4 6A and #4 6E. These violations were serious enough to constitute just cause and warrant the grievant’s removal: 604

- The Arbitrator held that two recorded phone conversations between the grievant and an inmate was evidence of an unauthorized relationship in direct contravention of the Department of Rehabilitation and Correction’ Rule #4 6. Although the Union argued that the conversations were for therapeutic purposes, the Arbitrator concluded that they revealed “a meaningful and prolonged” relationship between the grievant and inmate: 607

Inmate Testimony

- Although the inmates testifying about the abuse was exaggerated, it is almost certain that they did not inflict the abuse upon themselves. The medical findings further prove the State’s claim that the grievant abused the inmates: 291
- Inmate testimony tends to be unreliable and routinely requires corroboration. The medical findings of physical injuries on the bodies of the inmates was evidence that they suffered trauma. These medical findings were sufficient to comply with the corroboration standard: 292

- Inmate testimony can be allowed. In this case of alleged abuse the medical findings, the physical injuries on the bodies of the inmates, were sufficient to comply with the corroboration standard: 292

- It is unreasonable to believe that an inmate “snitch” would disclose information about violations by other inmates when hanging around the grievant’s desk. The grievant also never explained the reason why she went into a locked restroom with the inmate. It is also irrelevant that the restroom was such a small room. The close quarters make a reasonable inference that the grievant was engaged in improper conduct. It is incumbent on the grievant to keep the door open so that the appearance of impropriety would not be created: 293

- Playfulness or teasing of a highly suggestive nature indicates a familiarity with the prisoners that is inappropriate in a correctional facility: 293

- Once the State proved that the grievant was frequently in a locked restroom with the inmate and allowed the inmate to help her with pack ups, the burden was on the grievant to refute or satisfactorily explain these actions: 293

- The grievant jeopardized the safety of the other correction Officers by carrying the “man-down” alarm when she was with an inmate in a locked restroom or out on the landing: 293

- The failure of the grievant to submit to a polygraph examination was given no weight: 293

- The phone records of the grievant, showing calls from the correctional facility to his house, were taken as reliable evidence. A number of collect calls were person to person. It is impossible to be charged for these calls without the consent of someone at the residence. The records are objective proof of a series of unreported and improper contacts between the grievant and an inmate. The inmate’s testimony that he was blackmailing the grievant and that the grievant sold marijuana to the inmate were corroborated by the marijuana found in the inmate’s cell, a blackmail note written by the inmate and the telephone calls between the inmate and the grievant. There was just cause for the removal: 31 3

- After careful examination, the Arbitrator determined that the inmates’ accounts were more credible than those of the officers, which were rife with problems and contradictions, in addition to being self-serving: 4 70

- The State did not sustain its Section24 .01 burden of proof to establish just cause for discipline. The allegations of inmate abuse were not supported. The testimony of the State’s witnesses, many of whom have criminal records, was inconsistent, and in some cases, not credible. No reports were filed in the incident nor were medical exams conducted until days later. Material evidence was not secured, and a detailed investigation was apparently not conducted by the Employer until long after the incident: 4 81

**Inmate Work**

- The decision to allow a training opportunity for inmates involved the assignment of new work, not a transfer of work customarily done by the bargaining unit. There were educational opportunities and goals in assigning inmates to do the renovation: 4 67

The use of inmates to do the renovation work at issue in no way eroded the bargaining unit since Unit 6 increased by almost 1 00 employees between 1 986 and 1 990: 4 67

**Institutional Seniority**

The grievant was removed from MANCI as a CO and transferred to OSP. A settlement agreement was entered into by the parties on December 4, 2001 granting the transfer to OSP but also allowing for the grievant to carry his institutional seniority with him to OSP under paragraph 5 of the settlement agreement. The OCSEA then intervened declaring the settlement agreement violated Art. §1 6.01 (B)- Institutional Seniority of the CBA. Subsequently, OCSEA with OCB’s consent amended the settlement agreement to remove paragraph 5 (the transferring of institutional seniority). The arbitrator found that the failure to transfer the institutional seniority as proscribed in the settlement agreement did not violate the rights of the grievant since settlement agreements can only work within the confines of the CBA, in which this particular agreement did...
not. No other provisions in the CBA allowed such a settlement agreement by the parties to work outside of the provisions provided by the CBA. The arbitrator further found that the settlement agreement did not need to be executed by the grievant unless a waiver of individual right's was at issue, which was not at issue in this case. Therefore, the amending of the settlement agreement without the grievant consenting was valid. 81

Instructions, Failure to Give

- Even in the absence of express instructions to not leave patients by themselves, a staff member may have a duty to remain present if dangerous circumstances are apparent. No such duty was found in this case since, from grievant's observation, there was no requirement that a staff sit in day rooms at all times. Furthermore, the program director testified that he intended grievant to be assigned to the location for the limited purpose of observing and becoming familiar with care rendered by aides: 9

Insubordination

- Refusal to work overtime: 1 1 5
- Where one reports to work but then refuses an assignment it is insubordination. (This case involved a correction officer refusing a post that was different than his regular assignment because of medical problems.): 3

- Grievant was insubordinate when she chose the path of deliberate provocation and disobedience rather than obeying and availing herself of the grievance process: 28

- Where departmental directive said superintendent may require sick leave documentation, arbitrator refused to uphold discipline for not providing sick leave documentation when manager other than superintendent had requested the documentation: 35

- Where grievant had not previously been disciplined for insubordination, arbitrator determined a reprimand was appropriate: 80

- Insubordination is an offense that requires very specific elements. To find insubordination, fire arbitrator must at minimum find a direct order that has been deliberately and knowingly disobeyed: 86

- Where grievant complained about order and explained his position, but also obeyed the order, arbitrator ruled that "this scenario simply does not constitute insubordination 86

- Where grievant was offered voluntary overtime and accepted but then refused to work when he was told his post upon reporting in, the arbitrator determined that the grievant was not guilty of insubordination since the offer of overtime had been intentionally ambiguous so as to suggest that grievant would work at his ordinary post. Under such conditions, the grievant's refusal to work the other post was justified. Since insubordination under Rule 3A is defined as an unjustified refusal to follow an order, grievant was not insubordinate. If grievant had no right to know what post he would be assigned to, then he should have been so informed when offered of overtime at which point grievant had specifically asked what post he would be assigned to: 1 1 5

- Grievant's disrespect of her superiors, especially the superintendent, is intolerable. Their positions entitle them to great deference: 1 1 6

- Grievant was insubordinate when he stated his refusal to carry out his supervisor's order (even though the arbitrator was convinced that grievant would ultimately have carried out the order). On the other hand, mere complaining about the inexactness of the order would not have been insubordination: 1 1 9

- Grievant did not follow the general principle-obey, grieve later. The section 1 1 .03 right to refuse an unsafe order applies only where there are unsafe condition abnormal to the work place. While such conditions may have been present, the grievant's refusal to vacate her supervisor's office rose to a level of insubordination that was not justified by the unsafe working conditions She could have merely declined to work at her regular station. 1 23

- The employer has an inherent right to direct the work force. It is entitled to give orders and employees are obliged to obey. Except in exceptional circumstances, if an employee believes that an order violates his rights, he should "obey now, grieve later." 1 23

- While insubordination is not as serious as some offenses, it is serious enough that in certain situations the employer can impose removal
without following the disciplinary sequence. Under 24 .02 the employer must attempt to correct insubordination; but if correction is unlikely it can end an intolerable situation by imposing terminal ion out of sequence: 1 23

- Where grievant expressed no regret about her manhood, nation at the arbitration hearing, the arbitrator deter- I mined that she was beyond correction, and consequent I, upheld a removal that was imposed without following the regular progressive discipline schedule: 1 23

- Disparate treatment violates employment rights but does not justify insubordination: 1 23

- In taking time off when the supervisors had told her, not to, the grievant was defiant: 1 37

- Where the employer was unable to identify the time, place, or wording of the direct order allegedly disobeyed except that the order was issued "a couple of months before, the arbitrator held that this clearly falls short of the proof needed to sustain this charge: 1 39

- Failure to follow written procedures is not sufficient to constitute insubordination: "willful disobedience of a direct order by a supervisor: 1 68

- An employee is required to follow a supervisor's direction made within the employment relationship and scope of the employer's actual or at least apparent authority. The arbitrator held the employer's demand was not within the employer's authority when the employer demanded that the employee make an appointment to see a doctor when the employee had already said twice that he was not to go. The employer had not shown any business basis for the employer's demand: 1 73

- It should be pointed out that a letter from the supervisor to the grievant "expecting" her to report to work on a given day is not a direct order. In this case, the supervisor showed himself capable of issuing a direct order when in a later letter he used simple and unequivocal language 1 98

- While the arbitrator does not condone the use of abuse language, the penalty of discharge was excessive and unduly harsh given the circumstances. The employee had reason to suspect discrimination was asking for a reason for the departure from past procedure, but overreacted in his discussion with the supervisor: 202

- Where (1 ) upper management arguably lacked authority to issue the order it issued because it had a conflict of interest, but (2) grievant’s immediate supervisor could properly have issued the order, and (3) the order was issued by upper management but delivered by the immediate supervisor, the arbitrator found that insubordination occurred when the grievant disobeyed the order because the grievant’s immediate supervisor agreed with the order when he delivered it. 21 l

- It is well established that insubordination is a serious offense: 21 l

- Under most circumstances, an employee is insubordinate if he refuses an order. The rile is "obey now, grieve later." There is an exception where a reasonable person would believe that by carrying out the work assignment, he/she would endanger his/her health or safety. That the grievant did not refuse to work earlier, that the Division of Occupational Safety and Health did not close the plant down, that tests did not reveal that the asbestos did not exceed recommended standards, that the grievant's physician was unable to substantiate that the grievant's health problems were caused by the working conditions, and that grievant rejected an offer that would have lowered his contact with the asbestos, were all bases on which the arbitrator concluded that a reasonable person would not have refused to work: 220

- Section 24 .04 was violated where the grievant was never specifically informed that his actions could result in removal. The employer attempted to skirt this issue by alleging that the grievant's actions (refusal to obey an order on the basis of a claim that working conditions were unsafe) amounted to a malum in se offense. This arbitrator disagrees because the nature of this specific insubordinate offense differs significantly from the "obey now grieve later" situation. (Note that in this case the arbitrator did find that the grievant should have obeyed the order because a reasonable person would not have believed the working conditions unsafe): 220

- A showing of mere negligence is not sufficient for establishing insubordination. Insubordination entails intentional defiance of authority: 232
- Insubordination as delineated in 2(b) is a serious charge. It requires a direct order and willful disobedience. The grievance was sustained because the arbitrator found neither a direct order or any willful disobedience: 237

- When the grievant, a flagger who was in charge of directing traffic during construction, left her post during a storm it was deemed to be Neglect of Duty and Insubordination. The grievant’s explanation of her leaving her post as a refusal to work in a dangerous or unsafe work area (Section 11.03) was not believed. The grievant was trained in her responsibilities as a flagger, she knew the storm was approaching and there were several reasonable alternatives to her action of abandoning her post. A responsible employee faced with similar circumstances would have attempted a number of reasonable alternatives rather than place the lives of co-workers and the driving public in jeopardy. The grievant should have contacted her supervisor. She could have moved her location to under an overpass or moved closer to the work site. The responsibilities of a flagger played a critical role in the arbitrator’s determination of the grievant’s negligence: 304

- The Union’s medical defense was rejected. The employer required the grievant to be clean-shaven to properly wear a respirator. The grievant’s skin condition of pseudo folliculitis barbae can, as shown by medical testimony, be managed by shaving with barber clippers instead of a razor. This manner of shaving would have been acceptable to the State. The fact that the grievant passed a respirator fit test does not have a great deal of bearing on this case. The test is conducted under the most ideal conditions. The manufacturer of the respirator and OSHA advised against bearded employees using a respirator. The requirement by the State that the grievant be clean-shaven is a reasonable one: 319

- The grievant was removed for insubordination for failing to shave his beard to wear a respirator. The OSHA recommendation that the grievant be reinstated is entitled to little weight. The grievance procedure is the exclusive method for resolving this dispute. OSHA did not conduct the sort of evidentiary hearing required by the elementary considerations of due process. The conclusion of the Director of the Industrial Relations is not controlling and does not serve to bind the arbitrator: 319

- There was the requisite just cause for the grievant’s removal. The grievant would not shave his beard. The rule that employees who wear respirators in asbestos filled areas must be clean-shaven is reasonable. The employer progressively disciplined the grievant for insubordination finally resulting in discharge: 319

- The grievant was upgraded through Class Modernization to a Systems Analyst 2 position. She received an adequate mid-probationary rating but received a verbal reprimand for poor performance afterwards. She alleged supervisory harassment and was transferred to another supervisor who also rated her below average in all six categories. Her performance failed to improve and she received further discipline up to and including the ten day suspension which is the subject of this grievance. She was charged with failure to follow a direct order, breach of security for failing to turn her computer terminal off at the end of the day, and various items relating to proper completion of work assignments. However, the employer failed to send a Step 3 response to the Union. The arbitrator found that the employer did violate section 24.02 by not sending a Step 3 response to the union, however there was no harm to the grievant. The employer proved that the grievant was guilty of the acts alleged and that there was no supervisory harassment. Progressive discipline was followed (a 10 day suspension following a 1 day suspension) but the procedural violation warranted a reduction to a seven day suspension: 386

- The grievant had failed to complete several projects properly and on time and another employee had to complete them. She had also been instructed to set projects aside and focus on one but she continued to work on several projects. The grievant had prior discipline for poor performance including a 7 day suspension. The arbitrator found that the employer had proven just cause for the removal. The grievant was proven unable to perform her job over a period of years despite prior discipline. The fact that another employee completed the projects was found to be irrelevant. Removal was found to be commensurate with the offense because of the prior discipline and the work was found to have been within the grievant’s job description and she had been offered training. Thus, the grievance was denied: 402
- The grievant was a Psychiatric Attendant who had received prior discipline for refusing overtime and sleeping on duty. He refused mandatory overtime and a pre-disciplinary hearing was scheduled. Before the meeting occurred, the grievant was found sleeping on duty. A 6 day suspension was ordered based on both incidents. The arbitrator found that despite the fact that the grievant had valid family obligations, he had a duty to inform the employer rather than merely refuse mandated overtime and, thus was insubordinate. The employer failed to meet its burden of proof as to the sleeping incident, however due to the grievant’s prior discipline a 6 day suspension was warranted for insubordination. The grievance was denied: 4 04

- The grievant was a Psychiatric Attendant who had been mandated to work overtime. The grievant notified the employer that he would be unable to work due to his children’s school bus and was unable to find a substitute, and he signed out at his normal time. The grievant had two prior suspensions for failure to work mandatory overtime. Ordinarily, the “work now, grieve later” doctrine applies to such situations, however the arbitrator noted that certain situations alter that policy. The grievant gave a legitimate reason for refusing the overtime and the employer was found to have abused its discretion in not finding a substitute. The grievant was found to have a history of insubordination and inability to arrange alternate child care. Upon a balancing of the parties’ actions, the arbitrator held that there was no just cause for removal, but reduced the penalty to a 60 day suspension: 4 1 5

- The grievant was removed for failing to report off, or attend a paid, mandatory four-hour training session on a Saturday. The grievant had received 2 written reprimands and three suspensions within the 3 years prior to the incident. The arbitrator found that removal would be proper but for the mitigating factors present. The grievant had 23 years of service, and her supervisors testified that she was a competent employee. The arbitrator noted the surrounding circumstances of the grievance; the grievant was a mature black woman and the supervisor was a young white male and the absence was caused by an embarrassing medical condition. The removal was reduced to a 30 day suspension and the grievant was ordered to enroll into an EAP and the arbitrator retained jurisdiction regarding the last chance agreement: 4 2 2

- The grievant was a LPN who had been assaulted by a patient at the Pauline Lewis Center and she had to be off work due to her injuries for approximately 1 month. When she returned she was assigned to the same work area. She informed her supervisor that she could not work in the same work area, and was told to go home if she could not work. The grievant offered to switch with another employee whom she identified, but the supervisor refused. She then told her supervisor she was going home but instead switched work assignments. The grievant had prior discipline including two 6 day suspensions for neglect of duty. The supervisor concluded that the grievant was given a direct order to work in her original work area. The grievant erroneously believed that switching assignments was permitted. Despite the grievant’s motivation for her actions, the grievant’s prior discipline warranted removal, thus the grievance was denied: 4 2 4

- The insubordination involved the grievant disobeying his supervisor's order to maintain a strictly professional relationship with a particular inmate. The grievant admitted to engaging in non-professional conversations with the inmate: 5 3 0

- The grievant was removed because he (1) took an inmate who needed emergency medical care to a hold and signed him in instead of taking the inmate to a waiting station as he was directed to do, (2) refused to immediately transport this inmate to the hospital, (3) refused to report to the lieutenant's office to explain his combative behavior, and (4) refused, in an obscene manner, to work mandatory overtime. Consequently, the arbitrator found that the grievant was discharged for just cause and in a manner consistent with progressive discipline. In fact, the arbitrator held that where an offense is extremely serious, a discharge may occur without progressive discipline, and noted that the instant case would have merited such a result. The grievant's activities were so outrageous that, when compounded with the grievant's prior record, the Employer was left with no alternative except to remove the grievant: 5 4 0

- In a case where the employer failed to clearly delineate insubordinate acts or words towards the grievant, the Arbitrator held that there was
The arbitrator held that the grievant was rightfully removed for insubordination stemming from his failure to attend a pre-disciplinary hearing and to submit to a physical examination. Although the grievant claimed that he never received the correspondence informing him of these two appointments, the Arbitrator held that reasonable efforts were made on the part of management to contact the grievant and the fact that the grievant had received prior discipline was also considered.

The arbitrator found that the State’s charge of insubordination was negated by the testimony of the Human Resources Director who stated that he told the grievant that she did not need to sit by the phone while on administrative leave. The Arbitrator noted that the grievant did treat the statement requiring her to call supervisor Monday through Friday by 7:30 a.m. as a direct order. He determined that “the grievant was not under any duty based upon any order of a supervisor to remain at her telephone during the working hours while on administrative leave.”

The arbitrator found that the grievant deliberately disobeyed a direct order. He noted that under most circumstances the grievant would not be obligated to obey an order given prior to his/her shift time. However, the grievant had a history of violence in the workplace, and his supervisor demonstrated concern for a co-worker by following the grievant to the control center and attempting to block the grievant’s entrance. Therefore, the Arbitrator found the supervisor’s order to leave the cafeteria and return to his office to be legitimate.

The arbitrator found that the grievant deliberately disobeyed a direct order. He noted that under most circumstances the grievant would not be obligated to obey an order given prior to his/her shift time. However, the grievant had a history of violence in the workplace, and his supervisor demonstrated concern for a co-worker by following the grievant to the control center and attempting to block the grievant’s entrance. Therefore, the Arbitrator found the supervisor’s order to leave the cafeteria and return to his office to be legitimate.

The arbitrator found that the grievant’s disciplinary history was included in the aggravating factors in this case. The grievant was disciplined twice for attendance-related misconduct. The Arbitrator found that the disciplines failed to either rehabilitate or discourage the grievant.

The arbitrator found that management violated §24 .04 when it denied the grievant representation at a meeting regarding his timesheet. Management had already spoken to the Union regarding this matter, but at a subsequent meeting the next day denied representation. The employer prevented the grievant from choosing wisely when he was given a direct order to correct his timesheet within 5 5 minutes. The insubordination charge was dismissed.
The grievant, a Correction Officer, was observed in the company of a particular inmate on several occasions, including an incident in which another correction officer witnessed the inmate rubbing the grievant’s back. The arbitrator concluded that sufficient evidence existed to support the employer’s position. The inmate’s statement and the CO’s statement corroborated each other and were credible. The arbitrator noted that testimony from two Union witnesses who observed the grievant’s behavior and viewed the grievant’s conduct as inappropriate enhanced that credibility. The arbitrator determined that the employer provided conclusive and substantial evidence that the grievant had unauthorized contact with the grievant. The employer provided evidence that the grievant emailed the inmate’s mother and indicated that she wanted the inmate’s mother to call her. The fact that the grievant failed to comply with the direct orders to provide her son’s cell phone number – pivotal in determining whether or not phone calls occurred using that particular phone – indicated to the arbitrator that the grievant did not want to disclose the number. There were no mitigating factors in this case. The grievant was aware of the risks and the consequences of her actions. She continued her actions anyway. The arbitrator found removal was for just cause.

The grievant was charged with insubordination and willful disobedience of a direct order – to release medical information. The grievant was given several opportunities to comply with the order and refused on each occasion. The arbitrator determined that no evidence presented suggested any distinction or difference between OCSEA employees and other employees regarding IME’s within ODNR. The arbitrator noted that the grievant understood the orders he received and refused to obey them. Evidence showed that he understood the directives but disobeyed them anyway. The arbitrator found that the grievant’s conduct warranted discipline but not removal. The grievant’s twenty-one years of service were mitigating factors in the arbitrator’s decision to conditionally return the grievant to work. Although the grievant’s work history was tarnished by a prior discipline, after reviewing the grievant’s record in its entirety, the evidence supported reinstatement under certain conditions.

At the conclusion of his Transitional Work Program, the grievant provided a required return to work slip from his physician which stated he could return to work with no restrictions; however, the doctor also stated the grievant
should work the day shift and no mandatory overtime. The grievant was advised that if he could not return to **full duty** he should other benefits, i.e. workers compensation. The grievant was ordered to work overtime which he refused on three separate days. He was subsequently late for roll call. His normal post was taken by a co-worker. When he arrived he was offered another post; he refused the post and left the facility. The arbitrator concluded that all JCOs, including the grievant, understood that mandatory overtime was a requirement. Evidence and witness statements proved that the grievant left the facility upon being informed that he could not work his regular post. The arbitrator noted that if the behavior displayed by the grievant continued, he would surely be terminated. 828

The grievant requested leave on various dates to go to medical and dentist appointments. Investigation by the employer revealed that the grievant had no appointments on the dates stated on the leave forms. The grievant was ordered to provide a statement from his physician and dentist regarding the appointments. The arbitrator found that a preponderance of the evidence supported the employer’s allegations that the grievant was insubordinate and that he falsified official documents. He noted that the grievant had an active discipline at the time of his suspension and that employers routinely remove individuals who engage in either misconduct. The grievant engaged in both. Although the grievant had 22 years of state service, it did not outweigh the mitigating factors in this instance. 829

The grievant was charged with violating several rules/regulations, mainly acts of insubordination. Instead of removal, the employer, the Union and the grievant to hold the discipline in abeyance pending completion of an EAP. The grievant was also moved to a new area with a new supervisor. The evidence showed that the grievant failed to comply with the agreement by not maintaining contact with EAP. The arbitrator found the grievant’s “flat refusal to follow reasonable and proper directives and her blatant defiance of her supervisor’s authority…inexcusable.” The arbitrator noted that the minor violations alone were not serious but in totality with the continued pattern of insubordination they took on greater significance. He did not find sufficient evidence that the grievant clocked-in” for another employee. 848

Insubordination is a serious offense. The Grievant’s misconduct took place in a correctional facility where following orders is particularly important. The very next day the Grievant violated policies and procedures when she left a youth unattended. The Grievant’s disciplinary history was a major factor supporting termination—she had received a 1 2-day suspension on January 19, 2005. The Arbitrator rejected the claims that the Grievant was the victim of disparate treatment; that the imposition of discipline was delayed; and that the employer was “stacking” charges against the Grievant in order to justify her termination. The Union was unable to show how the delay prejudiced the Grievant’s case or violated the contract. The decision to combine two incidents appeared to be reasonable. The disciplinary record of another JCO involved in leaving the youth unattended justified the different treatment. The Arbitrator concluded that the Grievant’s discharge was for just cause and was in compliance with the collective bargaining agreement. 942

- The Arbitrator found that the evidence and testimony clearly established that the Grievant committed numerous violations of the computer use policy on a regular basis. These included:
  i. installing a Palm Pilot on her work computer.
  j. maintaining non-work related files on her department computer.
  k. accessing two non-departmental email accounts from her computer
  l. using the computer to actively access shopping sites

The Arbitrator rejected the charge of insubordination. The Arbitrator held that “dishonesty” was not a proper charge. It implies serious misconduct where an employee’s motive is often to obtain pay that he/she is not entitled to receive. The Grievant’s timesheets suggest that she simply recorded her regular starting, lunch, and ending times regardless of the actual times and none involved a claim for extra compensation. Furthermore, all the timesheets were approved by her supervisor. The prior five-day suspension for computer misuse suggests that the Grievant was familiar with the computer use policy and knew that further discipline would result from continued computer misuse. It also indicates that she failed to take advantage of the opportunity to correct her behavior.

Despite the Grievant’s 13 years of state service, the Arbitrator held that the state had the right to
The Grievant’s extensive violations of the computer use policy combined with the other less serious offenses support the state’s actions. Her prior five-day suspension for computer misuse removes any doubt that the state acted pursuant to its contractual authority.

Intent

- While dishonesty requires intent, the intent requirement is satisfied where the person performs the act and has knowledge with substantial certainty that deception would occur.

- Having inferred the grievant's intent to falsify documentation on one occasion, the arbitrator refused to believe that her failure to honestly document a patient's medication was caused by management's withholding the forms on which the error was supposed to be documented.

Intent to Violate Employer's Rules

- The grievant ran out of gasoline as he entered the parking area of his facility. He was unable to buy gasoline on his way to work because the station would not take his fifty-dollar bill. He was seen siphoning gasoline from a state vehicle to use in his truck until he could go to buy more at lunch and replace the gasoline siphoned. He did not speak to management about his situation because his regular supervisor was not present. The arbitrator found that just cause existed for some discipline because the grievant showed poor judgment in not obtaining gasoline before work and not speaking to management personnel. The grievant was found to lack the intent to steal instead for merely borrowing the gasoline, thus the grievant was reinstated without back pay.

- The grievant was a Youth Leader who had forgotten that his son’s BB gun was put into his work bag to be taken to be repaired. While at work a youth entered the grievant’s office, took the BB gun and hid it in the facility. Management was informed by another youth and the grievant was informed the next day. He was removed for failure of good behavior, bringing contraband into an institution, and possessing a weapon or a facsimile on state property. It was proven that the grievant committed the acts alleged but removal was found to be too severe. The grievant had no intent to violate work rules, the BB gun was not operational, and the employer withdrew the act of leaving the office door open as a basis of discipline. The grievant’s work record also warranted a reduction to a thirty day suspension.

- The employer removed the grievant for two reasons: 1) The grievant committed theft because he had been named as the supplier of checks that had been returned to the Bureau of Workers’ Compensation, to another state employee in order to cash the checks (see arbitration decision #370); 2) falsification of his job application because he admitted during the investigation that he had prior felony convictions which he failed to report on his employment application. The arbitrator held that the employer could not use the falsification charge as a basis for removal because the grievant had sought assistance when he completed his application and lacked intent to falsify the application. The employer was also estopped from using the falsification because the grievant had been employed for 8 years, and had been removed once before, thus the employer was found to have had ample time to have discovered the falsification prior to this point. The employer was not permitted to introduce the Bureau of Criminal Investigation’s report into evidence at arbitration because the employer failed to disclose it upon request by the union. The fact that the investigation was ongoing was irrelevant. Just cause was proven through the investigator’s testimony and testimony of others involved in the scheme. The grievance was denied.

- The grievant took a magnetic tape containing public information home, which was against agency rules. She intended to return the tape but it became lost, and she was charged with theft of state property. The tape was later recovered by the Highway Patrol during an unrelated investigation. The grievant was transferred to another position without loss of pay or reduction in rank and suspended for 30 days. The arbitrator held that the employer failed to prove that the grievant intended to steal the tape (Hurst arbitration test applied) rather than borrow it. Taking the tape home without authorization was found to be a violation of the employer’s rules. The employer was found not to have applied double jeopardy to the grievant as only one disciplinary proceeding had been brought and the transfer was found not to be disciplinary in nature. The 30 day suspension was found not to be reasonably related to the offense, nor corrective.
and was reduced to a 1 day suspension with full back pay for the remaining 29 days: 4 17

-The grievant was a LPN who had been assaulted by a patient at the Pauline Lewis Center and she had to be off work due to her injuries for approximately 1 month. When she returned she was assigned to the same work area. She informed her supervisor that she could not work in the same work area, and was told to go home if she could not work. The grievant offered to switch with another employee whom she identified, but the supervisor refused. She then told her supervisor she was going home but instead switched work assignments. The grievant had prior discipline including two 6 day suspensions for neglect of duty. The supervisor concluded that the grievant was given a direct order to work in her original work area. The grievant erroneously believed that switching assignments was permitted. Despite the grievant’s motivation for her actions, the grievant’s prior discipline warranted removal, thus the grievance was denied: 4 24

-The grievant was an employee of the Lottery Commission who was removed for theft. The agency’s rules prohibit commission employees from receiving lottery prizes, however the grievant admitted redeeming lottery tickets, but not to receiving notice of the rule. The arbitrator noted that while the employer may have suspected the grievant of stealing the tickets, there was no evidence supporting that suspicion and it cannot be a basis for discipline. The arbitrator found that the grievant did redeem lottery coupons in violation of the employer’s rules and Ohio Revised Code section 3770.07(A) but that he had no notice of the prohibition either through counseling or orientation. The grievant was reinstated without back pay but with no loss of seniority: 4 25

- The grievant was a Therapeutic Program Worker, took $1 50 of client money for a field trip with the clients. The grievant was arrested en route and used the money for bail in order to return to work for his next shift. The grievant was questioned about the money before he could repay it, he offered to repay it when he was paid on Friday, but failed to offer payment until the next Monday. He was removed for Failure of Good Behavior. While the employer was found to have poorly communicated its rules concerning use of client funds, the grievant was found to have notice of its provisions. The arbitrator found that the grievant lacked the intent to steal the money, however the grievant’s failure to repay was not excused, thus just cause was found for discipline. Because of the grievant’s prior disciplinary record, removal was held commensurate with the offense and the grievance was denied: 4 33

- The grievant was custodian for the Ohio School for the Blind who was removed for the theft of a track suit. The arbitrator looked to the Hurst decision for the standards applicable to cases of theft. It was found that while the grievant did carry the item out of the facility, no intent to steal was proven; removal of state property was proven, not theft. The arbitrator found no procedural error in that the same person recommended discipline and acted as the Step 3 designee. Because the employer failed to meet its burden of proof, the removal was reduced to a 30 day suspension with the arbitrator retaining jurisdiction to resolve differences over back pay and benefits: 4 39

Interest

- In the absence of bad faith by the employer, no interest is awarded: 21 8

- This is a decision dealing with the initial arbitration of decision 25 2. The Union argued that the employer should pay interest on the grievant’s back pay. The grievant was first discharged on 1/2/1 5/89. At the conclusion of the initial arbitration hearing on 4/17/90, the arbitrator put the employer on notice that the grievant would be reinstated. The employer requested a delay to effectuate a face saving settlement. When such a settlement was not forthcoming the arbitrator awarded the grievant to be reinstated in a written opinion on 4/3/90. The employer did not reinstate the grievant until 5/20/90 and the grievant did not receive her back pay until 6/1/90. The arbitrator first found that she did have the authority to award interest on a back pay award. The arbitrator decided that the interest award was not a type of punitive damages as argued by the employer, but only a part of a make whole remedy. As such, the arbitrator was entitled to decide the issue of interest payments. The arbitrator found that the employer’s delay did not rise to the level of egregious conduct which would allow an award of prejudgment interest. The employer’s delay from 4/30/90 to 6/1/90 (post-judgment) does warrant an award of interest. A post-judgment interest is clearly part of a make
whole remedy. The employer should not benefit from its bureaucratic inefficiency. The arbitrator decided to award an interest rate of the adjusted prime rate in effect on 4/30/90 compounded daily: 25 2(B)

– The Arbitrator found that it was more likely than not that the employer’s actions of firing the grievant and bringing a civil action against him resulted in the grievant’s personal liability for his daughter’s medical expenses. The Arbitrator also found that these expenses fell within her February 7, 1995, order directing the employer “to reimburse the grievant any medical expenses incurred that would have been covered by his employer-paid insurance had he not been removed without just cause.” Lastly, the Arbitrator denied the grievant interest on his back pay and legal fees consistent with decision 5 66: 5 66(A)

**Interfering With. Or Failure to Cooperate in an Official Investigation or Inquiry**

The arbitrator found that the grievant lied about having a handgun in his truck on State property. The State did not prove that the grievant threatened a fellow employee. The arbitrator stated that it was reasonable to assume that the grievant was either prescribed too many medications or abusing his prescriptions. The arbitrator determined that the grievant’s use of prescription medications played a major role in his abnormal behavior. The grievant’s seniority and good work record were mitigating factors in this case and his removal was converted. 808

The grievant was charged with violating institution policy by opening the cell door of the segregation unit prior to the inmates being restrained in handcuffs. Another CO struggled with, and was accused of injury, one of the inmates. The grievant was evasive in the interview with the investigator regarding what actually occurred during the incident. The arbitrator determined that the grievant was a relief officer who rotated among several posts. There was no evidence that the grievant received training regarding specific procedures for the segregation unit. The arbitrator found the grievant’s testimony credible. He concurred with the Union that not all of the evidence was considered in this matter. Although the grievant had only twenty months of service, the fact that she had no prior disciplines was also a mitigating factor. 811

The grievant was charged with, and admitted to, playing cards with inmates and leaving his area unsupervised for a period of time. A surveillance camera was unplugged during his shift and an inmate received a tattoo while the camera was off. The grievant did not report the tattooing incident. The arbitrator gave the grievant the benefit of the doubt in considering his explanation for while the camera was off. He was unaware that there was a camera and pulled the plug so the inmate could use the outlet for a power source for the tattoo gun. The arbitrator found that the grievant was guilty of helping inmates engage in prohibited behavior but was not guilty of interfering with an investigation. The State argued that it had no choice but to remove the grievant because his actions made him untrustworthy and an unfit CO; however, it left him on the job for two months following the discovery of his actions. He also had not received a performance evaluation since 1999. The arbitrator determined that the grievant was guilty of actions warranting discipline, but those actions did not fatally compromise his ability to perform his duties as a CO. In light of his service record, years of service and remorse, he was entitled to learn from his mistakes. 825

The grievant was assigned to the dining hall to check for contraband. He found a coat stored by an inmate in an improper area. He dragged the coat across the floor and threw it to the floor. The inmate approached the grievant about the way in which the grievant treated his clothing and a confrontation ensued. During the confrontation, the inmate was handcuffed and the grievant shoved the inmate into a wall. The grievant failed to include that action in his report. The arbitrator found that the witnesses – other CO’s and the inmate – were more credible than the grievant. The arbitrator noted that the grievant’s action “was not of an egregious nature” and one its own would not support removal; however, lying about what transpired during the incident was very serious and coupled with the excessive force warranted the grievant’s removal. 837

The grievant was charged with engaging in his outside job, scalping baseball tickets, while on FMLA to care for sick parents. The arbitrator found that the employer failed to prove that the grievant did not provide assistance to his parents while on leave. However, it was clear that the grievant engaged in his supplemental employment while on leave. There was no evidence the parties
agreed that FMLA was subject to the same contractual conditions as under Article 29.04 regarding unauthorized use of sick leave or abuse of sick leave. There are no provisions in FMLA restricting an employee’s use of the leave to medical treatment. Though the arbitrator found that the grievant was initially untruthful, his dishonesty did not warrant removal, based on his 16 years of service and satisfactory performance evaluations. The arbitrator noted that if ODOT had a policy regarding non-work which met the test of § 825.31(2)(h) of the FMLA, the decision would have been different.

The grievant was charged with sexual misconduct with inmates and lying during the investigation of the charge. The arbitrator found that the employer substantiated the charges and the removal should stand. The arbitrator cited the grievant’s “gross abuse of his position as a Correction Officer and the sexual nature of his exploitative conduct” as “nothing short of unprincipled, heinous, and wholly intolerable.”

The grievant was charged with failing to stop a physical altercation between two inmates. She also allegedly stopped a co-worker from intervening. The arbitrator found that the employer substantiated the charges. It was noted that the employer’s delay in its investigation and report could have been detrimental not only to the employer’s case, but also to the Grievant’s; however, the Union did not claim undue harm was done to the Grievant. Therefore, the issue of timeliness had little bearing upon the decision. The delay was seen as a technical error. The arbitrator found that the grievant made a mistake in judgment and should be given the opportunity to learn from her mistake. Removal was too harsh.

An inmate was dead in his cell of an apparent suicide. The grievant was charged with failing to perform cell checks. The arbitrator found that the condition of the body and the filthy condition of the cell indicate that if the grievant had made the two rounds per hour as required, the inmate’s suicide attempt would have been discovered much earlier. The grievant was a “short-term” employee with a prior discipline for inattention to duty. The arbitrator found no mitigating factors to warrant reducing the removal to a lesser discipline.

An inmate committed suicide in his cell block. The COs responsible for periodic range checks neglected to make rounds. A proper check may have saved the life of the inmate. A discrepancy was discovered between the ledger and the video recording. The grievant was charged with failing to confirm the range checks and logging them into the ledger properly. The arbitrator found that the grievant was responsible for maintaining the logs, not entering the data. The grievant testified that he felt the officers could have done something more, but management could show no direct connection between the grievant and the officers to indicate that he assisted in misrepresenting their duties. The arbitrator based his decision to reinstate the grievant without back pay upon the grievant’s “failure to adequately fulfill his supportive responsibility with respect to the log sheet and his inconsistent and evasive testimony about operating the DVR in the cell booth”.

Because he could not be held accountable for a duty which was only a supportive duty at best, the removal was too harsh and without just cause.

The grievant was involved in a verbal altercation with an inmate at the facility. At arbitration the employer attempted to introduce an enhanced recording of a taped conversation which also contained the argument between the grievant and the inmate. The arbitrator found that the enhanced tape did not exist during the investigation and could not be presented. He determined that all other evidence – the original tape, interviews of both the grievant and the inmate and the grievant’s lack of remorse or acknowledgment of what occurred during the confrontation - supported management’s position that the grievant was removed for just cause. The grievant threatened the security and safety of the inmate by challenging the inmate to engage in a physical confrontation. The arbitrator stated, “…the evidence of the egregious conduct by the Grievant under the three rules—24, 38, and 44—stands alone as a basis for the justification for the removal in this case.” The Union’s allegation that the grievant’s removal was in retaliation for a sexual harassment suit filed against the institution was unfounded. The arbitrator noted there was no evidence connecting this grievance to the suit. The warden was not charged with any liability in the suit and the investigating superior in this grievance was not connected to the suit.
The Grievant deliberately used excessive force on a youth who was totally complying with the Grievant’s directives. The Arbitrator held that the Agency failed to prove that the Grievant interfered with or hampered its investigation of events because one cannot reasonably expect an employee to disobey a direct order from his supervisor not to report events of abuse he witnessed. The Grievant’s six years of tenure, above average job performance, discipline-free work record, and winning an award for “JCO of the Month” for June 2004 were factors in his favor. However, the Arbitrator held that the nature of the Grievant’s misconduct and abuse of his position as JCO warranted his removal, even though the Agency’s disciplinary grid did not absolutely demand that measure of discipline. The Grievant’s continued employment with the Agency would be inconsistent with its policy and fundamental mission. The grievance was denied in its entirety.  946

When the Grievant organized, planned, and promoted a work stoppage she violated Rule 30B. The Arbitrator believed she developed the plan and solicited the participation of other employees. When the grievant organized a work stoppage in the face of an approaching winter storm, she engaged in “action that could harm or potentially harm . . . a member of the general public” and violated Rule 26. Grievant violated Rule 4 by interfering with the investigation of the work stoppage. Testimony from other witnesses showed that the grievant was not truthful in her accounts of the events. The Arbitrator believed the state conducted a full and fair investigation. The Arbitrator did not believe the grievant was the object of disparate treatment. Leaders of work actions are identified and discharged, while employees playing a lesser role receive less severe penalties. The Arbitrator did not believe the state failed to use progressive discipline. In the case of very serious misconduct an employer is not required to follow the usual sequence of increasingly severe discipline. Mitigating factors of long service, good evaluations, and behaving in a professional manner in her work as a union steward did not offset the seriousness of the Grievant’s misconduct. The Arbitrator concluded that when the Grievant organized a work stoppage in the face of major winter storm she provided the state with just cause for her discharge. 956

The grievant was accused of failing to follow post orders and interfering with an official investigation. He allegedly improperly stored a large package brought in by a visitor to the institution and he left his post to go to a unit where he was seen having an unauthorized conversation with an inmate. Prior to the grievant’s removal he received a two-day fine for a rule violation that the employer then included in its basis for the removal. The Union argued that the employer subjected the grievant to double jeopardy because the charges resulting in the fine were also included in the charges for which the grievant was removed. The arbitrator found that “the conduct of the Grievant in violation of Rules 3(G) and 24, became intertwined in the investigation and was never separated during the disciplinary process to establish the division required in maintaining the disciplinary grids regarding attendance and performance offenses argued by the Employer.” The arbitrator found the investigatory interview was flawed in that there was no difference in the questions for each specific violation. The arbitrator found that the grievant did violate the work rule regarding visiting an inmate in the segregation area without authorization. 966

The Grievant was indicted on criminal charges, but entered an Alford plea to the lesser charges of criminal Assault and Falsification. As part of the Alford plea the Grievant agreed not to work in an environment with juveniles, which precluded his being reinstated at Scioto. The Union subsequently modified the Grievance to exclude the demand for the Grievant’s reinstatement and that he only sought monetary relief and a clean record. The Arbitrator was not persuaded that there was clear and convincing evidence that the Grievant used excessive force against the Youth. The Arbitrator held that for constitutional purposes an Alford Plea was equivalent to a guilty plea; however, for the purposes of arbitration the Grievant’s Alford Plea did not establish that the Grievant used excessive force. In addition, the Arbitrator held that the Grievant did not violate any duty to report the use of force. The Grievant did have a clear and present duty to submit statements from youth when requested and violated Rule 3.8 and 5.1 when refusing to do so. The Arbitrator found that the termination of the Grievant was unreasonable. Under ordinary circumstances he would have reinstated the Grievant without back pay, but reinstatement could not occur due to the Alford plea. However, because of the number of violations and the defiant nature of his misconduct, the Grievant was
not entitled to any monetary or non-monetary employment benefits. The grievance was denied.

Intermittents

- Before the grievant could be laid off as a permanent full-time employee in her classification, intermittent employees in the same classification must be laid off first: 4 71

Interpretation of Contract

- When certain exceptions are expressly provided for in the agreement, no other exceptions can be implied: 1 9

- When selecting between alternative interpretations, nonsensical interpretations should yield to reasonable interpretations: 1 9

- ORC 4 1 1 7.1 0 requires that where the contract stakes no specifications about a matter, then the applicable law applies.

- Section 4 3.01 of the agreement requires an arbitrator to find the contract controlling if a section of the Ohio Revised Code conflicts with a contractual provision: 22

- Parties must be able to expect reasonable and logical application of unambiguous contract language. Where the language is clear, full effect must be given to contract requirements: 4 4

- Longstanding principle of contract construction holds that specific language must be given more weight than general language in determining the meaning of the agreement: 5 5

- A general principle of contract interpretation expressed by judges and arbitrators alike is that when the words are clear and unambiguous the interpreter need not look at other documents or the context in order to determine meaning. It is a mistake to apply this principle by simply looking at the document itself. Almost all documents are clear and unambiguous until someone tries to apply them. Words which on their face seem clear may be terms of art in certain situations. For example, "winter" in 1 3.06 does not apply to the calendar season but to the non-construction season. The appropriate test is therefore not whether the words are clear and unambiguous on their face but whether, when applied, can the words lend themselves to two reasonable but differing conclusions. If two reasonable interpretations are possible, then and only then, must the arbitrator look behind the words to figure out the parties' intentions: 84

- The American jurisprudence of contract interpretation looks to the objective manifestation of intent. The actual subjective intent of the parties gives way to the expressed will of the parties as manifested in the contractual words to which they agreed: 84

- It is axiomatic that a principle rule governing the interpretation of contract language is that the agreement must be construed as a whole. "Sections or portions cannot be isolated from the rest of the agreement and given construction independently of the purpose or the agreement of the parties as evidenced by the entire document. The meaning of each paragraph and each sentence must be determined in relation to the contract as a whole": 1 00

- As a matter of well-settled principle, the interpreter must first decide if the contract is clear on its face. Only if he decides that the contract is not clear on its face should the interpreter seek to determine the intentions of the parties by evidence beyond the words of the contract. The traditional method of determining whether the contract is clear on its face was to look only at the language itself- The modern method, recognizing words seldom have a plain meaning without context, is to consider evidence about the "meaning of the words" and the intentions of the parties: 1 07

- The fact that a party negotiated the contract with a false factual assumption does not change what he agreed to in the contract: 1 07

- "Expressio unius, exclusio alterius." (When the parties choose to include one statement into the contract, it can be implied that the parties intended not to include certain other statements in their contract). The arbitrator saw that the parties had included a section about polygraphs to the contract, but fit that section had not said anything to the effect that polygraph evidence cannot be admitted at arbitration. It inferred that the parties had not intended to exclude polygraph evidence from arbitration: 1 24

- Well-known and long-standing rules of contract interpretation have held that "notification" only
requires that a notice be properly posted. Receipt is not an element of notification unless specified: 1 34

- Where the words of the contract are contradictory and the evidence of intent is cloudy at best, the rules of construction provide a fair and objective method of interpretation. First, the interpreter must construe the Contract as a whole. Secondly, whenever possible apparently contradictory sections should be read in a manner so as to make them consistent. Third, the words chosen by the parties must be given meaning and cannot be ignored. Fourth, specific words are to take precedence over general words: 1 35

- People craft contracts with the best of intentions only to have imperfections revealed upon application. The task of the labor arbitrator is to give a fair and reasonable interpretation on those occasions when the imperfections become manifest. The task of negotiators on both sides is to craft a more perfect document at the next bargaining session: 1 35

- A cardinal and overriding arbitral principle of contract interpretation is that a contractual provision dealing with a particular topic must be interpreted as a whole. Other arbitral rules of construction include: (1) Two clauses in seeming conflict within the same provision should be read where possible in a manner which avoids the conflict, since the parties are deemed to not have intended to provide conflicting clauses. (2) To express one thing is to exclude another (where items are listed, items not in the list are assumed to have been left out intentionally): 1 4 2

- It is axiomatic in cases dealing with contract interpretation that the arbitrator must review the true intent of the parties, not from a single word or phrase, but from the contract as a whole: 1 4 6
- Two types of ambiguity are normally considered by the law. The first type called "patent ambiguity" occurs where the language is unclear on its face and a reading of the disputed provision readily surfaces the confusion. The second type has been characterized as "latent ambiguity" and occurs where the language appears clear on its face but becomes unclear when an effort is made to apply it to a given situation: 1 99

- When an arbitrator is able to ascertain with certainty the intention of the parties from the writing itself, it would be improper to go outside of the four comers of the agreement. This task may be extremely difficult for an arbitrator when the parties have agreed to language which may be outside the domain of common usage. The arbitrator does not have the authority to substitute his own brand of industrial jurisprudence under the guise of interpretation: 1 99

- In an Agreement of such length it maybe tempting for one party or the other to adopt the view that some words or phrases are more significant than others. This view is mistaken. All terms of the agreement are to be given effect: 21 0

- The rule disfavoring interpretations which lead to harsh, absurd, or otherwise indefensible results has been researched in depth by the arbitrator. Without exception, every pronouncement of the principle carefully circumscribes it to ambiguous language. If the parties intentionally negotiated something which could bring about untoward consequences, an arbitrator has no authority but to apply the language as it was meant to be applied. The arbitrator cannot rescue a party from a bad bargain, improve the governing collective bargaining agreement, or disregard any of its written provisions. This precept has been repeated time and again in arbitral opinions and judicial rulings. More to the point, 25 .03 sets forth the principle as a restriction on arbitral jurisdiction: 228

- It is a time honored maxim that a party will not be permitted to gain something in arbitration which it lost at the bargaining table. The agreement provides no supervisory discretion to deny personal leave requests submitted a day in advance, and the arbitrator cannot create an extra-contractual management right: 228

- The word "abuse" in 24 .01 is not defined, nor is it referenced to another contract section or the code. Abuse has varying definitions among agencies. However, abuse in 24 .01 is a significant word because once abuse is found, the arbitrator loses power to modify the termination. Thus, in the context of the contract, file word "abuse" is latently ambiguous - that is, the word has at least two plausible meanings. The duty of the arbitrator is to define the word as "intended" by the parties. The arbitrator is clear that abuse in the contract has to be a singular clear standard and cannot be defined each time by a different agency's standard. The finding of abuse under 24 .01 is an exceedingly powerful finding and must
be a firmly fixed lodestar. The arbitrator is very persuaded by the cogent opinion of Arbitrator Pincus (G-87-001 (A) 1 0-31 -87) and the persuasive elaboration by arbitrator Michael: 238

- It is axiomatic in contract interpretation that if the language of an agreement is clear and unequivocal—an arbitrator generally will not give it a meaning other than that expressed by the parties: 259

- There are a variety of approaches that arbitrators can take when applying outside statutory law. Arbitrator Patricia Thomas Bittel cites Arbitrator Bernard D. Meltzer’s analysis:

  1) where the provision being interpreted or applied has been loosely contrived, the arbitrator may consider all relevant factors, including relevant law;

  2) where a provision suggest two interpretations, one compatible with applicable law and the other not, the statute is a relevant factor and the construction compatible with the law should be favored; and

  3) where it is clear the parties anticipate the arbitrator will render an advisory opinion as to the law, such opinion is within the arbitrator’s role: 297

- ORC 411 7.1 0 states the public employer and its employees are subject to applicable employment laws “where o agreement exists or where the agreement makes no specification about a matter.” If the parties Agreement does make a specification about the obligations of the Agency, this controls: 297

- The method of filling bargaining unit jobs is set out in the Agreement; the Agreement is not silent in this area and ORC 411 7.1 0 gives Article 1 7 precedence over Ohio Administrative Rule 1 23:1 -24 -03: 297

- Section 4 3.01 gives the Agreement precedence over conflicting laws: 297

- Section 4 3.02 of the Agreement preserves statutory benefits “in areas where the Agreement is silent.”: 297

- The language of the Administrative Code, Ohio Revised Code 411 7.1 0 and article 4 3 of the Agreement recognize the preeminence of Article 1 7 over any rights to demotion into the bargaining unit designated by the Administrative Code. The Agency does not have to violate the Agreement to follow the Administrative Code: 297

- Layoffs are to be made pursuant to the Ohio Revised Code, § 1 24 .321 -327 and the Administrative Rules 1 23:1 -4 1 -01 through 22. Other sections of the Revised Code and Administrative Rules are incorporated by Section 4 3.02 of the Agreement. In the situation where state statutes and regulations confer benefits upon employees in areas where the Agreement is silent, the benefits shall continue. It was a benefit to employees prior to the institution of collective bargaining that the State Personnel Board of Review hear appeals from layoffs. Under Section 25 .01 the grievance procedure is the “exclusive method” of resolving grievances. Employees covered by the Agreement no longer have access to the State Personnel Review Board in order to contest layoffs. The employees must grieve under the plain language of the Agreement. The parties altered the forum of review. The grievance procedure, including arbitration, now serves as the same avenue of appeal. When appeals were taken to the Board of Review they were made pursuant to rules that are not specifically set out in the Agreement. One rule placed the burden upon the employer to demonstrate by “a preponderance of the evidence that a job abolition was undertaken due to the lack of the continuing need for the position, a reorganization, for the efficient operation of the appointing authority, for reasons of economy or for a lack of work expected to last more than twelve months.” ORC 1 24 .701 (A)(1). This rule represents a benefit to employees and is continued under the language of Section 4 3.02 of the Agreement. The two major decisions in the area of layoffs are Bispeck and Esselburne. Bispeck emphasizes that the burden is on the employer and Esselburne sets out the standard of proof the employer must show to carry its burden. The arbitrator decided that the employer must compare current work levels for the employee to a period when a lack of work existed in either of the layoffs. The State’s reference to the money that could be saved by not paying the grievants does not prove that there existed a lack of funds. As Bispeck states, “Evidence of not having to pay the salaries on its own is not sufficient to prove increased efficiency and economy as required.” Not having to pay the grievants’ salaries is
sufficient evidence of the employer’s increased economy and efficiency: 311 **

- The grievant injured his back in a car accident and was off work for six months while receiving disability benefits. His doctor released him to work if no lifting was allowed. Because the position required lifting, he either left or was asked to leave work. He failed to call in for three consecutive days and was removed for job abandonment. The union requested arbitration more than 30 days after the date on the Step 3 response. No evidence was offered on the interpretation of 25 .02, and as to when the union received the Step 3 response. The employer failed to overcome the presumption that a grievance is arbitrable. The arbitrator found just cause because: the grievant has served a 5 day suspension for failing to follow call-in procedure while on disability, his doctor’s statement that he should avoid lifting was ambiguous, and he failed to respond to the employer’s attempts to contact him. Filing for Workers’ Compensation was found not to substitute for contact with the employer: 373

- The grievant had been on a disability separation and had been refused when he requested reinstatement. The arbitrator found the grievance arbitrable because section 4 3.02 incorporated Ohio Administrative Code section 1 23:1 -33.03 as it conferred a benefit upon state employees not found within the contract. The grievant thus had three years from his separation to request reinstatement, which he did. The grievance was also found to be timely filed because there was no clear point at which the employer finally denied the grievant’s request for reinstatement and the union was not notified of the events by the employer. Additionally, the employer was estopped from asserting timeliness arguments because the employer was found to have delayed processing the grievant’s request for reinstatement. The physician who performed a state-ordered examination released the grievant to work, thus the employer improperly refused the grievant's reinstatement request. The grievant was reinstated with back pay less other income for the period, holiday pay, leave balances credited with amount he had when separated, restoration of seniority and service credits, medical expenses which would have been covered by state insurance, PERS contributions, and he was to receive orientation and training upon reinstatement: 375

- The employer posted a Statistician 3 position which the grievants and other individuals bid for. The two grievants had eighteen and thirteen years seniority, which the successful applicant had only one year seniority. The employer contended that the grievants did not meet the minimum qualification for the position and the successful applicant was demonstrably superior. The employer was found to have the burden of proving demonstrable superiority which was interpreted as a “substantial difference.” Demonstrable superiority was found only to apply after the applicants have been found to possess the minimum qualification. Also, the arbitrator stated that if no applicant brings “precisely the relevant qualifications” to the position, the employer may promote the junior applicant if a greater potential for success was found. The arbitrator found that the employer proved that the junior employee was demonstrably superior and the grievance was denied: 382

- The grievant began to experience absenteeism problems and received notification of his removal on February 8. 1 991 . The Union’s Executive Director received a copy of the removal order on February 19. The grievance was written on February 22nd and received by the employer on March 1, twenty days after the removal order. The grievance was held to be not timely filed and thus not arbitrable. The triggering event was the grievant’s receipt of his removal order. Section 25 .01 employs calendar days, not work days. Also, while the day of receipt of the removal order is not counted, the day the grievance is postmarked is counted. No basis for an extension of time was proven: 387

- The grievant retired from the State Highway Patrol and was hired by the Department of Health four days later. His new employer determined that the Ohio Revised Code section 1 24.1 81 did not provide for longevity pay supplements based on prior state service for rehired retirees. The arbitrator found the grievance arbitrable despite the employer’s argument that because of the grievant’s retiree status that longevity was a retirement benefit, and under Ohio Revised Code section 4 1 1 7.1 0(A) longevity for a retired employee was not a bargainable subject. Section 1 24.1 81 was found to be applicable and section 36.07 of the contract confers longevity pay based solely on length of service. That the grievant experienced a change in classification was found
to be irrelevant for the purpose of calculating longevity and the grievance was sustained: 389

- During the processing of several grievances concerning minimum qualification, #393**, 397**, a core issue regarding the union’s right to grieve the employer’s established minimum qualifications was identified. The arbitrator interpreted section 36.05 of the contract as permitting the union to grieve the establishment of minimum qualifications must be reasonably related to the position, and that the employer cannot set standards which bear no demonstrable relationship to the position: 392

- The grievant had over 7 years seniority and applied for a posted vacancy. She did not receive the promotion which was given to a more senior employee from the agency despite the fact that she was in Section 1 7.04 applicant group A (1 7.05 of 1 989 contract) and the successful bidder was in group D. The employer stated that the grievant failed to meet the minimum qualifications and the successful bidder was demonstrably superior. The arbitrator held that Article 1 7 established groupings which must be viewed independently. Additionally, the contract applies the demonstrably superior exception only to junior employees. The arbitrator found that the grievant met the minimum qualifications for the vacant position, but she had since left state service. The grievance was sustained and the remedy was the lost wages from the time the grievant would have been awarded the position until she left state service: 4 05

- The Ohio Penal Industries operates shops in which inmates work and bargaining unit employees supervise them. Prior to June 1 989 three bargaining unit members and two management employees were assigned to the shop. One bargaining unit member then retired, but his vacancy was not posted but rather the duties were assumed by a management employee. The arbitrator rejected the employer’s argument that there had been no increase in bargaining unit work performed by management. It was found that despite general inmate supervision performed by management, the duties assumed after the bargaining unit member’s retirement were a material and substantial increase. This increase in the amount of bargaining unit work done by management was held to be a violation of Section 1 .03, the grievance was sustained and the employer was ordered to cease performing bargaining unit work and post the vacancy in the shop: 4 06**

- A General Activity Therapist 2 position was posted for which the grievant bid. The posting listed a valid water safety instructor’s certificate as a minimum qualification. The grievant did not possess the certificate and an outside applicant was selected. The arbitrator found that the employer improperly posted the position by using a worker characteristic that doesn’t have to be acquired until after the employee receives the job. While the arbitrator cautioned that employees must act timely to become qualified, the employer can only hold bidders to minimum qualifications required by the contract. The grievance was sustained and the grievant was awarded the position with back pay: 4 1 8

- The grievant was conducting union business at the Warrensville Developmental Center when a client pushed her and injured her back. Her Occupational Injury Leave was denied because she was conducting union business. A settlement was reached concerning a grievance filed over the employer’s refusal to pay, in which the employer agreed to withdraw its objection to her OIL application based on the fact that she was performing union business. Her application was then denied because her injury was an aggravation of a pre-existing condition. The arbitrator found the grievance arbitrable because the settlement was mistakenly entered into. The grievant believed that her OIL would be approved while the employer believed that it was merely removing one basis for denial. The arbitrator interpreted Appendix K to vest discretion in DAS to make OIL application decision. The employees’ attending physician, however, was found to have authority to release employees back to work. Additionally, Appendix K was found no to limit OIL to new injuries only. The grievant’s OIL claim was ordered to be paid: 4 20

- Three Bureau of Employment Services employees grieved that their seniority dates were wrong. They had held positions with the employer until laid off in 1 982. They were called back to intermittent positions within 1 year but not appointed to full-time positions until more than 1 year had elapsed from their layoff. The employer determined that they had experienced a break in
service as placement in intermittent positions was not considered to meet the definition of being recalled or re-employed. The arbitrator found that the term “re-employment” carries its ordinary meaning and not that meaning found in the Ohio Administrative Code when used in Article 16 and the 1989 Memorandum of Understanding on Seniority, thus the grievants did not experience a break in service because they had been re-employed to intermittent positions. The grievants were found to continue to accrue seniority while laid off. The employer was ordered to correct the seniority dates of the grievants to show no break in service and that any personnel moves made due to the seniority errors must be corrected and lost wages associated with the moves must be paid.

- The grievant was an Auto Mechanic 2 who had been assigned on an interim basis as an Auto Mechanic 3 from June until September 1989 when he was placed back into his former position due to poor performance. The employer posted the Auto Mechanic 3 position when it became vacant in January 1990; the grievant bid but the promotion was awarded to a junior employee. The arbitrator found that the grievant possessed the minimum qualifications found on the class specification. Section 17.05 was interpreted to also require proficiency in the minimum qualifications found on the position description. Due to the grievant’s performance while assigned on an interim basis, the arbitrator found that the employer had not acted in bad faith, that no purpose would be served by allowing a probationary period to prove the grievant’s proficiency, thus the grievance was denied.

Interpretation in General

- Language of the form "management may require X" clearly indicates that there is no intention to create a mandatory requirement on employees to do X. 35

- Of Co-workers

The grievant was suspended for several alleged charges stemming from a verbal altercation with her supervisor and a co-worker. The arbitrator found that the grievant’s actions were intimidating but not threatening. He noted that the grievant’s actions were related to her behavior and not her performance. He was convinced that if her misconduct continued it would eventually result in removal and that reduction of the suspension should not be construed as condoning the grievant’s behavior. The arbitrator concluded that the use of more charges than required and the failure to prove the most serious offense – threatening a superior or co-worker – required a reduction of the suspension.

- Of An Inmate

The grievant was a Correction Officer charged with threatening an inmate and using abusive language towards the inmate. The arbitrator found that the grievant’s conduct warranted discipline; however, the Union demonstrated that a co-worker who previously committed a similar offense was treated differently. The employer offered no explanation for the disparate treatment. The removal was ruled excessive and the grievant was reinstated.

Investigation:

- By a Bargaining Unit Member

- To overturn a discipline just because a bargaining unit member had investigated the violation would place an improper restriction upon the state in its efforts to police its internal affairs: 21

- Criminal

- Section 24.05 requires a final decision on disciplinary action as soon as possible not to exceed 45 days. The exception to the 45-day time limit is in cases where a criminal investigation may occur and the employer decides not to make a decision of the discipline until after disposition of the criminal charges. This specific exception was intended to suspend the otherwise applicable time constraints when results of a criminal investigation are unknown. By its terms, the exception is complete, it no longer “may occur” and the exception no longer applies. Because the employer took longer than 45 days after the end of the criminal action, it was in technical violation of the provision: 307

- A criminal investigation is beyond the four corners of the Agreement between the parties: 325

- The arbitrator does not have the authority to indicate to the State Highway Police where it may or may not conduct its investigations: 325
- The employer removed the grievant for two reasons: 1) the grievant committed theft because he had been named as the supplier of checks that had been returned to the Bureau of Workers’ Compensation, to another state employee in order to cash the checks (see arbitration decision #370); 2) falsification of his job application because he admitted during the investigation that he had prior felony convictions which he failed to report on his employment application. The arbitrator held that the employer could not use the falsification charge as a basis for removal because the grievant had sought assistance when he completed his application and lacked intent to falsify the application. The employer was also estopped from using the falsification because the grievant had been employed for 8 years, and had been removed once before, thus the employer was found to have had ample time to have discovered the falsification prior to this point. The employer was not permitted to introduce the Bureau of Criminal Investigation’s report into evidence at arbitration because the employer failed to disclose it upon request by the union. The fact that the investigation was ongoing was irrelevant. Just cause was proven through the investigator’s testimony and testimony of others involved in the scheme. The grievance was denied: 4 01

- The grievant was removed for misuse of his position for personal gain after his supervisor noticed that the grievant, an investigator for the Bureau of Employment Services, had received an excessive number of personal telephone calls from a private investigator. The Ohio Highway Patrol conducted an investigation in which the supervisor turned over 1 30-1 5 0 notes from the grievant’s work area and it was discovered that the grievant had disclosed information to three private individuals, one of whom admitted paying the grievant. The arbitrator found that the employer proved that the grievant violated Ohio Revised Code section 4 1 4 1 .21 by disclosing confidential information for personal gain. The agency policy for this violation calls for removal. The employer’s evidence was uncontroverted and consisted interviews of those who received the information, and the grievant’s supervisor’s testimony. The grievant’s 1 3 years seniority was an insufficient mitigating circumstance and the grievance was denied: 4 08

- The pre-disciplinary notice was issued reasonably promptly after the County declined to prosecute. Lack of witness cooperation, an on-going criminal investigation, and a change in wardens justified the delays in this case: 4 70

- The grievant asserted that the criminal investigation was unfairly focused on him as it did not consider all of the potential suspects. Where an outside criminal investigation is conducted, that investigation is presumed by the Arbitrator to be conducted in a fair and equitable manner absent contrary evidence produced by the grievant: 5 87

- Fairness of

- A "fair" investigation is contextual, and no specific behavior is required. A "fairer" investigation might have been had if the grievant were asked for his side. However, the evidence indicates that if the behavior was in error, it was in this case "harmless error": 1 28

- Where the union alleged that the investigation was unfair, but failed to present any evidence in support of the contentions, it is impossible for the arbitrator to base judgment on the legitimacy of the allegations: 1 4 5

- One of the key components of a disciplinary system is the duty on the employer to make a "fair and objective" investigation before imposing discipline. Accusations against employees are to be carefully considered to see if they are supported by facts. Witnesses should be sought and interviewed, and a careful investigation made to see that both sides of the story are available and fairly presented. The employer must make a "good faith" effort: 1 67

- The arbitrator sustained the grievance on the ground that the employer had not made a "fair and objective" investigation before imposing discipline. The arbitrator said. -Me so called "investigation report" was not a report of an investigation by a neutral, rather the report contained solely the complaint of the accuser. While the accuser was a security officer, no evidence exists that security officers as a class are less likely to misperceptions and falsehoods. Moreover, this individual security officer had a questionable record. The only component of an investigation was the medical examination which produced evidence to call the accuser's report into question. Subsequently, the police chief investigated nothing. He did not view or measure the site. He did not test the accusations against
 physical evidence, i.e., the door or the bed. He did not interview other persons in the area. This lack of investigation by a trained police officer tainted all subsequent disciplinary steps.” The report was relied upon at later steps of the grievance procedure: 1 67

- Where the grievant was on disability leave and requested a continuance for the pre-disciplinary hearing, and the employer rejected the request without taking the employee's circumstances into consideration, the employer violated its duty to provide a fair and objective investigation because it never truly provided the grievant with an opportunity to justifiably postpone the pre-disciplinary hearing and (hereby deprived the grievant) a fair opportunity to respond to (his) alleged falsification accusations: 1 97

- The employer's investigation requirement has a twofold purpose: (1) a determination of what the employee has done, and (2) a determination of why the employee might have engaged in the activity. The second determination may potentially minimize the gravity of the activity which may bear directly on the question of whether corrective measures are appropriate: 1 97

- The arbitrator invalidated a discipline for refusing mandatory overtime because management had failed to give a full and good faith consideration to the reasons advanced by the grievant for refusing to accept the overtime assignment. The grievant had placed management on notice of her medical problems and had supplied documentation from her physician. Only limited attempts were undertaken to determine the veracity of the grievant's assertions. The grievant's physicians were never contacted. Investigation weaknesses on the employer's part cannot be used as a veil to skirt critical just cause responsibilities: 225

- Although the investigation conducted by the Employer was lengthy and produced a substantial amount of circumstantial evidence, it was neither full nor fair since it only looked at one side of the case. Further, the Arbitrator held that the investigation was “tainted” by the Employer's desire to rid itself of a problematic employee: 61 9

- Where the grievant was disciplined for sleeping on duty, but claimed at his pre-disciplinary conference that he had improperly been denied paid leave, but the record was unclear as to whether the grievant was correct, the arbitrator held that the issue should have been more fully investigated prior to the imposition of discipline: 227

- That the removal order was dated the day after the pre-disciplinary hearing is strongly suggestive of prejudice: 227

- Although the investigation must be a real one, not superficial or bogus, this arbitrator holds the view (that the employer is not required to do everything possible to exonerate the employee. The employer must merely make a reasonable inquiry without prejudice: 230

- The supervisor simply chose not to believe the employee's account. The employer did not investigate. The employer's notion that investigation is solely the union's burden "flies in the face of labor management law". The employer has greater resources to carry out the investigation. To find just cause the employer cannot rely on the mere subjective feeling of supervisors: 25 2

- Although the investigation conducted by the Employer was lengthy and produced a substantial amount of circumstantial evidence, it was neither full nor fair since it only looked at one side of the case. Further, the Arbitrator held that the investigation was “tainted” by the Employer’s desire to rid itself of a problematic. As an example of the partiality demonstrated in the investigation, the Arbitrator pointed out that Management did to collect material from the grievant’s wastebasket on the days the grievant was not at work and noted that Management also did not observe his work as during the day. In the Arbitrator’s opinion, either of these procedures might have produced evidence of the grievant’s innocence: 61 9

The Arbitrator held that to sustain a charge of threatening another employee an employer must have clear and convincing proof. Here the proof did not even rise to the preponderance standard, being based solely on the report of the co-worker allegedly threatened, who had a deteriorated relationship with the Grievant since the events of a prior discipline. The investigator did not consider that the co-worker may have exaggerated or over-reacted. Management’s handwritten notes were held to be discoverable under Article 25 .09.
It had refused to produce them until after the grievance was filed and then had to be transcribed for clarity, which delayed the arbitration. The investigator breached the just cause due process requirement for a fair and objective investigation which requires that whoever conducts the investigation do so looking for exculpatory evidence as well as evidence of guilt. Then, to make matters worse, the same investigator served as the third step hearing officer, essentially reviewing his own pre-formed opinion. 985

- The Arbitrator found that the Grievant told her co-worker that she was taking a bathroom break at 6:30 a.m., left her assigned work area, and did not return until 7:30 a.m. This length of time was outside the right to take bathroom breaks, and therefore, the Grievant had a duty to notify her supervisor. Failing to notify the supervisor would have given rise to a duty to notify the grounds office supervisor who is available 24 hours a day, 7 days a week. The Grievant’s prior discipline record should have put her on notice of the seriousness of the offense. The supervisor should have raised the matter of the absence with the Grievant sooner, but there was nothing in the record to show that this failure in any way inhibited the case presented by the Union, or enhanced the case presented by the Employer. The Arbitrator held that there was no proof that the discharge was tainted by any claim of due process or unfairness, when the same supervisor conducted both the fact-finding and the investigation. The most damaging testimony to the Grievant was presented by her co-employees, not by the supervisor. The Arbitrator found that the Grievant exhibited disregard for the performance of her duties to care for the residents, a matter for which she had been amply warned on previous occasions. 1012

- Initial

- For an investigation to be fair, the grievant must be apprised of his/her situation and its gravity. The grievant must be given adequate opportunity to prepare his/her defense without loss of evidence due to erosion of time or denial of access to pertinent information. Where prejudice to a grievant’s case can be shown due to a failure to notify the employee of his or her status, the arbitrator may find a failure of due process: 298

- An inadequacy in the initial investigation can be subsequently wiped clean by a full and fair opportunity to present all existing evidence on the grievant’s behalf. In this case the grievant was afforded a full-blown disciplinary hearing prior to the final decision of removal. He was given a full opportunity to tell his side of the story and was fully aware of the seriousness of the situation prior to the hearing. There was no showing of prejudice to the grievant’s case: 298

- A basic requisite of just cause is a fair investigation conducted by the employer prior to the imposition of discipline. Even though the employer turned the actual investigation over to the police officer, a reasonable action in a prison escape situation, such delegation does not relieve the employer of a duty to review that investigation for accuracy and fairness. The investigation was determined by the arbitrator to be conducted unfairly. The trooper in charge focused all his efforts on proving the grievant was guilty and did not even conduct a true investigation: 314

- The grievant was a Correction Officer, as was his wife. She had filed sexual harassment charges against a captain at the facility. The grievant and the grievant’s wife’s attorney contacted an inmate to obtain information about the captain. The employer removed the grievant for misuse of his position for personal gain, and giving preferential treatment to an inmate, 4 days after the pre-disciplinary hearing, and he received notice of his removal on the 46th day after the pre-disciplinary. The arbitrator held that the employer proved that the grievant offered the inmate personal and legal assistance in exchange for information. The investigation was proper as it was a full investigation and it was conducted by persons not reporting to anyone involved in the events. It was found that the investigation need not contain all information, only relevant information, thus the grievance was denied: 372

- The grievant was employed as a Salvage Processor who was responsible for signing off on forms after dangerous goods had been destroyed. He was removed for falsification of documents after it was found that he had signed off on forms for which the goods had not been destroyed. The arbitrator found that despite minor differences, the signature on the forms was that of the grievant. The employer was found to have violated just cause by not investigating the grievant’s allegation that the signature was forged, and by failing to provide information to the union so that it could investigate the incidents. The employer was found not to have met its burden of proof despite the grievant’s prior discipline: 398
The grievant was removed after 13 years service from her position with the Bureau of Disability Services for unapproved absence, conviction of a drug charge, and failure to report the drug charge as required by the state’s Drug-Free Workplace Act of 1998. The grievant had a history of alcohol problems. She was also involved with a co-worker who, after the relationship ended, began to harass her at work. She filed charges with the EEOC and entered an EAP. The former boyfriend called the State Highway Patrol and informed them of the grievant’s drug use on state property. An investigation revealed drugs and paraphernalia in her car on state property and she pleaded guilty to Drug Abuse. She became depressed and took excessive amounts of her prescription drugs and missed 2 days of work. She was admitted into the drug treatment unit of a hospital for 2 weeks. She was on approved leave for the hospital stay, but the previous 2 days were not approved and the agency sought removal. The arbitrator found that while the employer’s rules were reasonable, their application to this grievant was not. The Drug-Free Workplace policy does not call for removal for a first offense. The employer’s federal funding was not found to be threatened by the grievant’s behavior. The grievant was found to be not guilty of dishonesty for not reporting her drug conviction because she was following the advice of her attorney who told her that she had no criminal record. The arbitrator noted that the grievant must be responsible for her absenteeism, however the employer was found to have failed to consider mitigating circumstances present, possessed an unwillingness to investigate, and to have acted punitively by removing the grievant. The grievant’s removal was reduced to a 10 day suspension with back pay, benefits, and seniority, less normal deductions and interim earnings. The record of her two day absence was ordered changed to an excused unpaid leave. The grievant was found to be not guilty of dishonesty for not reporting her drug conviction because she was following the advice of her attorney who told her that she had no criminal record. The arbitrator noted that the grievant must be responsible for her absenteeism, however the employer was found to have failed to consider mitigating circumstances present, possessed an unwillingness to investigate, and to have acted punitively by removing the grievant. The grievant’s removal was reduced to a 10 day suspension with back pay, benefits, and seniority, less normal deductions and interim earnings. The record of her two day absence was ordered changed to an excused unpaid leave. The grievant was ordered to complete an EAP and that another violation of the Drug-Free Workplace policy will be just cause for removal: 429

The grievant was an Investigator with the Department of Commerce who had been suspended for 5 days for failing to follow his itinerary for travel and filing incorrect expense vouchers. The grievant’s itinerary indicated that he would be in Toledo on a Friday, and he submitted expense vouchers for the trip, however it was discovered that he worked at home during the day in question. The arbitrator found that the employer violated Section 24.04 by failing to provide witness lists and documents and not answering the grievants letters. Section 25.08 was not found to be violated. The employer’s selection of the pre-disciplinary hearing officer was unwise because she had an interest in the outcome and that the investigation was incomplete and unfair. The arbitrator also found that the grievant’s itinerary was a contemplated itinerary and that he had informed his supervisor of schedule changes, however the grievant was AWOL as there was no provision for working at home. Disparate treatment was suspected by the arbitrator, who also noted that the grievant exhibited a contemptuous attitude towards management. The suspension was reduced to a 1 day suspension: 430**

Investigatory Interview

- See also representation, right to Union

- The employer’s right to Union representation under Section 24.04 of the Agreement will arise only if the employee requests representation and if the employee has reasonable grounds to believe that the interview may be used to support the disciplinary action against him/her. The arbitrator found that in defining words “investigatory interview” the phrase refers solely to an investigatory interview conducted by an employer which might lead to discipline: the phrase is not intended to cover a State Police investigation which might lead to conviction for a criminal offense: 325

- The terms of the Agreement are not binding on parties external to the Agreement. Section 24.04 of the Agreement does not contemplate a criminal investigation, and the right to Union representation applies solely to the employer-employee relationship. The term “investigatory interview” applies solely to the parties of the Agreement and to the bargaining unit members represented by the union: 325

- In this case there was no “investigatory interview” as considered under Section 24.04 but the arbitrator would not decide whether a supervisor was present during a State Police investigation and used the information to discipline the grievant, speculating whether there would be a Section 24.04 violation: 325

- A criminal investigation is beyond the four corners of the Agreement between the parties: 325
- The arbitrator does not have the authority to indicate to the State Highway Police where it may or may not conduct its investigations: 325

- The arbitrator was disturbed that no review of the grievant was conducted during the investigation of the possible abuse. The grievant’s reports and presence at the pre-disciplinary meeting mitigate this lapse to some extent. For an employer to be fair and have credibility in its disciplinary actions it must conform not only to the contractual procedures but also to the rules and guidelines it, itself, has established: 326

- There was no investigatory interview when the Highway Patrol merely asked for permission to search cars of the grievants: 334

- Management did not conduct a fair and thorough investigation. While management succeeded in substantiating grievant’s technical violation of the procedures for verifying his inability to work, management did not go the next step and confirm whether or not the employee was indeed able to work. Management made no effort to confirm the doctor’s statement that the grievant offered that stated the grievant was unable to work. Management also failed to contact either the doctor or the grievant to notify the unacceptability of the doctor’s statement: 356

The Arbitrator found nothing in the record to support the falsification charge. The administration and interpretation of the Hours of Work/Time Accounting Policy were inconsistent. The policy in no way restricts an employee’s ability to supplement an approved leave and lunch with an afternoon break. The Employer admitted violating Article 24 .04 by failing to inform the Union about the purpose of the interview. It viewed the violation as de minimus. The Arbitrator found that this cannot be viewed as a mere procedural defect. “Without prior specification of the nature of the matter being investigated, the right of ‘representation’ becomes a hollow shell.” Without a purpose specification, interviews become an unfocused information gathering forum and can often lead to ambiguous results. The Employer attempted to raise certain credibility concerns because the Grievant provided differing justifications for her action at the investigatory interview versus the pre-disciplinary hearing. This difference in justification was plausible since the purpose requirement of Section 24 .04 was violated. A contractual violation of this sort represents a severe due process abridgment, which the Ohio Revised Code, state and federal courts view as a critical element of representation rights. Investigation defect allegations dealing with unequal treatment were supported by the record. Other similarly situated bargaining unit members who had not been disciplined for similar offenses were identified for the Employer. The Employer did nothing to investigate this unequal treatment. 1006

– J –

**Job Abandonment**

- The grievant abandoned his job by not returning to work at the end of his approved disability leave, not calling-in, and not providing adequate medical documentation. When grievant was asked to bring in medical documentation he falsely claimed it was at home, but he never brought it in. These offenses alone would be sufficient to warrant removal: 248

- The arbitrator agreed with arbitrator Dworkin that when an employee abandons his/her job, management has no need to apply progressive discipline. When an employee cannot be found or does not respond to employer communications, it is nonsensical to require the employer to track down the employee so the employer can apply corrective discipline. The grievant took unauthorized leave continuously for four weeks without notifying his employer and therefore, effectively abandoned his job. While the grievant might be excused (or not contacting his employer while incarcerated, there is no excuse (or his failure to do so upon release. The employer made several attempts to contact the grievant. While the employer did not exhaust every possible means of contacting the grievant the arbitrator refused to hold that management was required to do so. While the grievant may not have made a conscious decision to quit he still effectively abandoned his job: 273

- The grievant began his pattern of absenteeism after the death of his grandmother and his divorce. The grievant entered an EAP and informed the employer. He had accumulated 1 04 hours of unexcused absence, 80 hours of which were incurred without notifying his supervisor, and 24 hours of which were incurred without available leave. Removal was recommended for job abandonment after he was absent for three consecutive days. The pre-disciplinary hearing
officer recommended suspension, however the grievant was notified of his removal 5 2 days after the pre-disciplinary hearing. The arbitrator found that the employer violated the contract because the relevant notice dates are the hearing date and the date on which the grievant receives notice of discipline. Other arbitrators have looked to the hearing date and decision date as the relevant dates. Additionally, the employer was found to have given “negative notice” by overlooking prior offenses. The arbitrator reinstated the grievant without back pay and ordered him to enter into a last chance agreement based upon his participation in EAP: 371

- The grievant injured his back in a car accident and was off work for six months while receiving disability benefits. His doctor released him to work if no lifting was allowed. Because the position required lifting, he either left or was asked to leave work. He failed to call in for three consecutive days and was removed for job abandonment. The union requested arbitration more than 30 days after the date on the Step 3 response. No evidence was offered on the interpretation of 25 .02, and as to when the union received the Step 3 response. The employer failed to overcome the presumption that a grievance is arbitrable. The arbitrator found just cause because: the grievant has served a 5 day suspension for failing to follow call-in procedure while on disability, his doctor’s statement that he should avoid lifting was ambiguous, and he failed to respond to the employer’s attempts to contact him. Filing for Workers’ Compensation was not found not to substitute for contact with the employer: 373

- The grievant worked in a Medical Records office when a new supervisor was hired in January 1 985 . The supervisor changed the office location and began to strictly enforce the work rules. The office layout was also change twice due to new equipment purchases. The supervisor also instituted a physician’s verification policy which was stricter than the previous policy. The grievant went on work related disability in February 1 987. She received Disability Leave benefits and Workers’ Compensation. When these benefits expired she began working for a private employer. She received an order to return to work in July 1 987 because of her other employment. The grievant refused to return to work under her prior supervisor. The grievant appealed her denial of further Workers’ Compensation benefits and lost, after which she contacted the facility to come back to work. The arbitrator found that the grievant failed to prove supervisory harassment or constructive discharge. All the supervisor’s acts were within her scope of authority and related to efficiency. The removal was timely because the three year delay was caused by the grievant’s pursuit of her workers’ compensation claim in state court. The arbitrator held that the grievant abandoned her job and denied the grievance: 384

- The grievant was a Correction Officer who had an alcohol dependency problem of which the employer was aware. He had been charged twice for Driving Under the Influence, which caused him to miss work and he received a verbal reprimand. The grievant was absent from work from May 1 8th through the 21st and was removed for job abandonment. The arbitrator found that the grievant’s removal following a verbal reprimand was neither progressive nor commensurate and did not give notice to the grievant of the seriousness of his situation. It was also noted that progressive discipline and the EAP provision operate together under the contract. The grievant was reinstated pursuant to a last chance agreement with no back pay and the period he was off work is to be considered a suspension: 4 1 3

The grievant did not follow call of procedures, but she did indicate that she would return at some uncertain date and visited the facility when she submitted a request for leave form. She provided the Employer with “imperfect notice” regarding her sick leave status but she did not abandon her job: 4 4 4

Where a grievant has submitted a handwritten statement of resignation, establishing the requirements of finality of employment and intent to terminate employment, the grievant has voluntarily quit and has not been constructively discharged: 4 4 5

The grievant was laid off as a result of the abolishment of the Public Assistance Service Organization (PASO) program within the Ohio Bureau of Employment Services (OBES). When lay-off is proper, bargaining unit employees will first exhaust all bumping rights under the Contract: 4 71 (A)

The grievant knowingly violated call-off rules and sick policy, but those violations did not rise to the
level of job abandonment. Once apprised of the Employer’s concerns, she responded immediately:

The Employer only has to show by a preponderance of the evidence that the abolishment was for efficiency and economy. The Employer has clearly demonstrated that the normal workflow for the position was centered in Washington County and sending work to Athens was an obvious waste of time. However, the Union was able to demonstrate bad faith by Management in abolishing the grievant’s job, and the abolishment was overturned:

– The Arbitrator concluded that there was proper and just cause to remove the grievant based on the general principle that the employer usually prevails when it discharges an incarcerated employee on the basis of absenteeism caused by an employee’s incarceration: 

– Considering the fact that the investigation was complete when the indictment was returned, the Arbitrator concluded, pursuant to Article 24, that the employer had the option to terminate the grievant’s administrative leave and, if circumstances warranted, the grievant could have been returned to work. In the instant case the grievant could not return to work. Therefore, it was appropriate for the employer to terminate the grievant’s administrative leave. Additionally, the employer had just cause to terminate the grievant based on the grievant’s Neglect of Duty, Absence Without Leave or Job Abandonment:

The grievant enlisted a third party to contact BWC and request an unpaid leave of absence in her behalf. The Supervisor rejected the request, and apprised him of the proper procedures for such requests, including the need to put such a request in writing. The Arbitrator holds that the grievant failed to make proper contact with BWC for four consecutive days in violation of BWC’s Work Rules. Proper contact is a condition for considering the propriety of any reasons for a leave of absence. BWC learned the grievant was incarcerated, immediately requested a predisciplinary hearing and charged her with abandonment – absence for more than three days without contacting BWC.

The grievant was removed for excessive absenteeism. The arbitrator found that the fact that the grievant used all of her paid leave and failed to apply for leave without pay, shielded management from the consequences of its laxness. It was determined that through Article 5, management has clear authority to remove the grievant for just cause even though her absenteeism was not due to misconduct if it was excessive. The arbitrator found that the grievant’s numerous absences coupled with the fact that she did not file for workers’ compensation until after termination, and never applied for unpaid leave, supported management’s decision to remove her.

The grievant was removed from his position for being absent without proper authorization and job abandonment. The grievant had two active disciplines at the time of his removal – a one-day fine and a two-day fine. Both fines were for absence without proper authorization. At the time of removal, the grievant had no sick, vacation or personal time available. After exhausting his FMLA leave, the grievant was advised to return to work, which he failed to do. The arbitrator concluded that the grievant at least implied that he was abandoning his job by not giving proper notification. The arbitrator noted, “...one could reasonably conclude that the Grievant made either a conscious or an unconscious decision to focus on health related problems and to place his job on the “back burner”.” The arbitrator found that the grievant was in almost continual AWOL status without providing proper notification and the employer provided testimony that it encountered undue hardship due to the grievant’s absences. The arbitrator was sympathetic to the grievant’s situation with a sick parent, however, it was noted that he showed little concern for his job. The employer’s decision to remove the grievant was neither arbitrary nor capricious.

**Job Abolishment**

- See also layoffs

- Layoffs are to be made pursuant to the Ohio Revised Code, Section 1 24 .321 -327 and the Administrative Rules 1 23:1 -4 1 -01 through 22. Other sections of the Revised Code and Administrative Rules are incorporated by Section 4 3.02 of the Agreement. In the situation where state statutes and regulations confer benefits upon employees in areas where the Agreement is silent.
the benefits shall continue. It was a benefit to employees prior to the institution of collective bargaining that the State Personnel Board of Review hear appeals from layoffs. Under Section 25.01 the grievance procedure is the “exclusive method” of resolving grievances. Employees covered by the Agreement no longer have access to the State Personnel Board of Review in order to contest layoffs. The employees must grieve under the plain language of the Agreement. The parties altered the forum review. The grievance procedure, including arbitration now serves as the avenue of appeal. When appeals were taken to the Board of Review they were made pursuant to rules that are not specifically set out in the Agreement. One rule placed the burden upon the employer to demonstrate by “a preponderance of the evidence that a job abolishment was undertaken due to the lack of continuing need for the position, a reorganization, for reasons of economy or for a lack of work expected to last more than twelve months.” ORC 124.701 (A)(1). This rule represents a benefit to employment and is continued under the language of Section 4 3.02 of the Agreement. The two major decisions in the area of layoffs are Bispeck and Esselburne. Bispeck emphasizes that the burden is on the employer and Esselburne sets out the standard of proof the employer must show to carry its burden. The arbitrator decided that the employer must compare current work levels for the employees to a period when a lack of work existed in either of the layoffs. The State did not show that a lack or work existed in either of the layoffs. The State’s reference to the money that could be saved by not having to pay the grievants’ does not prove that there existed a lack of funds. As Bispeck states, “Evidence of not having to pay salaries on its own is not sufficient to prove increased efficiency and economy as required.” Not having to pay the grievants’ salaries is insufficient evidence of the employer’s increased economy and efficiency: 311.

- A grievance dealing with job abolishments and layoffs is arbitrable. The jurisdiction of an arbitrator extends only to those matter which the parties by their Agreement empower the arbitrator. Article 5 is not without limitations, “Such rights shall be exercised in a manner which is not inconsistent with this Agreement.” Section 25.01 enables an arbitrator to decide any difference, complaint or dispute affecting terms and/or conditions of employment regarding the application, meaning or interpretation of the Agreement. The procedural and/or substantive underpinnings of an abolishment decision dramatically impact employees’ terms and conditions’ of employment. A limitation on the powers of an arbitrator need to be clearly and unequivocally articulated: a reserved rights clause does not serve as an adequate bar: 34 0**

- Section 4 3.02 which deals with the preservation of employee benefits also points towards abolishment decisions being reviewable by an arbitrator. The benefits are not limited to economic gains. An appeal from an abolishment or layoff decision is a form of benefit, and arbitral review is preserved: 34 0**

- When the Agreement is silent on who has the burden of proof and the standard of proof, Section 4 3.02 prevails and the relevant regulations and statutory law apply. In this case that means that the employer has the burden of proving by a preponderance of the evidence that the job abolishments were properly implemented:

- When the appointing authority decides to implement an abolishment they must file a statement of rationale with the Department of Administrative Services. This rationale must only specify the reason for the abolishment: reorganization for efficient operation, reasons of economy, or lack of work. No further documentation is required. At this stage of the abolishment process statistical data and additional supporting material are unnecessary: 34 0**

- The arbitrator found that he was not bound by the reasons given in the abolishment rationale in deciding the property of the abolishments: 34 0**

- The arbitrator found that post abolishment data is not only followed into evidence, it may help the employer meet its burden by comparing current work levels versus work levels where the work did not exist. Both the Bispeck and Esselburne decisions underscore the need to address comparative data rather than the steady state analysis proposed by the employer: 34 0**

- A job abolishment contemplates the permanent deletion of a position. It does not mean laying off one person while leaving the position intact for another person to fill. A permanent deletion does not exist when substantially the same work previously performed by the ousted employee is presently performed, as a function of a mere
transfer, by others in a similar capacity. Nothing in the abolishment statutes, however, prohibits an appointing authority from consolidating or redistributing some of the employee’s duties to other employees. Consolidation takes place when job elements are assigned to others within the organization but the consolidated job elements do not represent a substantial percentage of the “new” position. A valid redistribution takes place when various aspects of the abolished position are distributed amongst existing positions. 34 0**

- A mere job transfer does not equal a job abolishment; the position was not permanently eliminated. The employer also violated Section 1 .03 of the Agreement by having a supervisor take over bargaining unit work: 34 0**

- The employer abolishing a position and having the same employee become part-time employee doing the same work as she did previously on a full-time basis points toward the abolishment being improper. The original position was still intact, the grievant instead of working forty hours a week worked thirty-nine. The work was not consolidated or redistributed. The abolishment was illegal: 34 0**

- The employer in this case did redistribute the abolished duties correctly but this does not complete an analysis of a job abolishment. The employer must also prove in this case its efficiency argument. The employees that took over the duties of a Health and Safety Inspector 1, the abolished position, were not shown to be properly trained or knowledgeable. The Union’s introduction of increased citations for not properly filing accident reports shows how inefficient this abolishment was. The State did not prove its case and the abolishment was not proper: 34 0**

- The employer replaced the abolished position’s duties with the services of an outside private institution. If the appointing authority decides to subcontract the work it becomes almost impossible to show that a lack of work existed for this position. If the position is transferred, either internally or externally, it cannot be said to be permanently deleted: 34 0**

- The federal government created, established hiring criteria, and funded job training positions within the Ohio Bureau of Employment Services for Disabled Veterans’ Outreach Specialist (DVOPS), and Local Veterans’ Employment Representative (LVERS). The OBES and Department of Labor negotiated changes in the locations of these employees which resulted in layoffs which were not done pursuant to Article 1 8. Title 38 of the United States Code was found to conflict with contract Article 1 8. There is no federal statute analogous to Ohio Revised Code section 4 1 1 7 which allows conflicting contract sections to supersede the law, thus federal law was found to supersede the contract. As the arbitrator’s authority extends only to the contract and state law incorporated into it, the DVOPS’ and LVERS’ claim was held not arbitrable. Other resulting layoffs were found to be controlled by the contract and Ohio Revised Code sections incorporated into the contract (see Broadview layoff arbitration #34 0). The grievance was sustained in part. The non-federally created positions had not been properly abolished and the affected employees were awarded lost wages for the period of their improper abolishments: 390

- The burden to demonstrate rationale for job abolishment and layoff decisions rests on the Employer: 45 4

- The Employer fulfilled its burden to demonstrate the rationale for its job abolishment and layoff decision. There was either a lack of work or the duties had been absorbed by other bargaining unit members: 45 4

- Article 4 3.04 of the Contract provided some basis for finding that the Employer should have extended ERI to OBES employees indirectly affected by being bumped as a result of Public Assistance service Operations (PASO) being abolished: 45 8

- There is no language in the Collective Bargaining Agreement which specifically defines early retirement incentive plans. The 1989-1991 Collective Bargaining Agreement does not support the claim that people out the PASO unit have a contractual right to be offered ERI’s: 45 8(A)

- There was no violation of the Contract when the Employer abolished boiler operator and stationary engineer positions, laying off ten employees, because the heating system was upgraded from a central coal burning furnace to a satellite gas furnace, eliminating the work of those positions: 45 9

- The Employer has borne its burden of proof that both Planner 2 positions were justifiably
abolished when a reduction or elimination of duties and responsibilities caused by statutory, philosophical and operational changes resulted in a lack of continued need for the positions and a reorganization of MRDD for economy and efficiency: 4 60

- Even if the cause of the grievant’s layoff was a job abolishment further up the line, Ohio revised Code 1 24 .32 (B) makes a job abolishment a layoff: 4 71

- As a result of the abolishment of the Public Assistance Service Organization (PASO) program within the Ohio Bureau of Employment Services (OBES), the arbitrator clarified the award and granted the grievant pay and benefits she would have received had the intermittent been properly laid off: 4 71 (A)

- The Arbitrator is not bound to the contents of the job abolishment rationale because the review of the substantive justification of the abolishment is a trial de novo before the Arbitrator, where the Employer shall demonstrate by a preponderance of the evidence that the job abolishment met the standards imposed by the Ohio Revised Code: 4 76

- The tasks formerly done by the grievant have either been eliminated or consolidated, and therefore, the abolishment was substantively justified and met the standard of the Ohio Revised Code: 4 76

- If the Arbitrator finds a procedural error in a job abolishment, the Arbitrator must allow the abolishment to stand if the appointing authority has substantially complied: 4 76

- To determine if a job abolishment is procedurally correct, one must first define the “appointing authority” before determining if it has substantially complied: 4 76

- The Employer substantially complied with the job abolishment procedure. The Employer showed that there was harmless error and a lack of prejudice to the grievant: 4 76

- The Union has not met the level of proof sufficient to overcome the abolishment on the basis of procedural error: 4 76

- The Secretary and Administrative Assistant Positions were abolished, but all of the work remained, and a substantial part of it was reassigned to non-Union personnel, violating Article 1 .03 of the Agreement: 4 78

- Laying off five of nine psychiatric attendant coordinators left none scheduled for the third shift, further eroding the bargaining unit: 4 78

- It is clear that because of fewer patients and less money, some of the positions were justifiably abolished: 4 78

- The Employer showed that the grievant’s job, Treatment Plant Operations Coordinator, was permanently deleted, i.e., that the tasks were consolidated or redistributed among their other workers who, according to their job specifications, were permitted to carry out such tasks: 4 83

- The Employer carried its burden of proving that by a preponderance of the evidence the job abolishment of the Administrative Assistant I position was justified and in accordance with ORC 1 24 .321 -.327: 4 85

Citing that the normal workflow for the position was centered in Washington County and sending work to Athens was an obvious waste of time and resources is sufficient to meet the State’s burden to prove economy and efficiency. In limited circumstances (i.e. substantial violation of the settlement), agreements can be introduced into evidence if the facts of the grievance substantially concern the substance of the settlement: 4 99

- The grievant was laid off from her position at the Ohio Department of Natural Resources and subsequently applied for a vacancy at the Ohio Department of Transportation under Article 1 8.09 of the contract which defines reemployment rights within the jurisdiction. The arbitrator awarded back pay and benefits when the grievant was improperly denied the position which was filled by an intermittent employee: 5 05

- The Ohio Supreme Court has held that savings the State may realize from not having to pay the wages and benefits to an employee whose position is abolished is not, in and of itself, sufficient to justify the abolishment for reasons of economy. In addition, in order for the State to prove a permanent lack of work, the lack of work must be
real and cannot be created by transferring the grievant's duties to another employee: 5 1 8

In a case where six grievants who were displaced filed claims in an effort to challenge the abolishment of the positions of Air Quality Technician 1 and Electrician 1, the Arbitrator held that the grievance could not be used as a means of challenging the rationale for the original abolishments: 5 5 4

The grievant’s job was abolished by her employer for reasons of economy and/or reorganization for efficiency. Subsequently, the grievant was advised of her lay-off. The Arbitrator held that this abolishment was not a violation of Article 1 8: 5 65

**Job Audits**

- ODOT posted a vacant Equipment Operator 2 position. The grievant and others bidded on the vacancy; however, two applicants also had filed job audits which were awarded prior to the filling of the vacancy. The vacancy was canceled because of the job audits. The arbitrator found the union's pre-positioning argument arbitrable because the grievant would otherwise have no standing to grieve. Managerial intent to pre-position was found to be possible even if committed by a lead worker. The arbitrator also found that job audits are a second avenue to promotions and not subordinate to Article 1 7 promotions. The grievance was, thus denied: 367

**Job Descriptions**

- Work does not have to be explicitly listed in the job description to be part of the job. The arbitrator looks to whether the work is "reasonably compatible with the job description and falls within the scope of its allowable parameters" and seeks to determine whether the work is reasonably related to the essence of the duties and fundamental characteristics of the detailed job description. The arbitrator also took note of a lengthy past practice of assigning certain work to the position as being relevant: 1 27

**Job Performance**

The grievant’s work performance became unsatisfactory to his employer and all parties concerned agreed upon a demotion from an FIE 4 to an FIE 2. The grievant’s work was monitored very closely during the plan by his field supervisor and other supervisory personnel. The grievant met expectations on four out of seven items required on his performance review. The arbitrator found that the review included comments from several supervisors and co-workers and that he could find no malice for the grievant in the comments. The arbitrator concluded that the grievant did not satisfy the terms of the MOU and that the employer did not violate the MOU by failing to promote him. 777

**Job Requirements**

- The requirement of a driver’s license for Correction Officers is not unreasonable: 279

- The State can adjust job requirements over time: 279

- See also commensurate, corrective and progressive discipline

- Even if some doubt remains, the testimony of three State witnesses with nothing to gain by testifying leads the arbitrator to conclude that the State has borne their burden of showing just cause: 281

- The contractual philosophy is to conserve jobs and require the employer to exercise every reasonable effort to correct misconduct: 287

- There is an exception to the general rules of just cause. In the case of employees dismissed for proven patient/client abuse the arbitrator does not have the authority to modify the termination of the employee committing such abuse: 287

- The concept of just cause entails progressive discipline, that is the inherent right of an employee to specifically informed of perceived deficiencies and to be afforded a reasonable opportunity to rectify the problem: 291

- It was proper for the State to terminate the grievant for repeated violations of leaving her desk unattended and taking leave while working at her second job: 291

- In abuse cases the grievant is not entitled to have his/her removal measured by the traditional elements of just cause. It is common for discharge to be modified, not because the grievant is innocent but because the penalty is too harsh to comport with just cause. Arbitrators, under
Section 24.1 have limited authority to modify discipline in abuse cases. If the grievant committed abuse and there is just cause for any discipline at all, there can be no consideration of the grievant’s past work record or the length of grievant’s service. The removal must stand: 292

- While the Agreement eliminates just cause to a large extent in abuse cases, it does not dispose of it entirely. Employees still have entitlements under standard, and an agency that ignores them does so at its own peril. If the grievant was denied contractual or elemental due process, his/her claim for reinstatement and monetary relief will be granted whether or not he/she abused prisoners: 292

- The grievant was fired solely because his prison sentence forced him to violate a work rule. The grievant was incarcerated for drunk driving and did report to work for three consecutive days which the employer deemed job abandonment. The decision to execute the penalty gave no consideration to the length and quality of the grievant’s work record or any other mitigating factors. Despite the employer’s arguments to the contrary, the action was automatic. The employer argued that the rule was reasonable on its face and the arbitrator agreed. The arbitrator also decided that the discharge is based entirely on a rule violation. Management must be cautious in inflicting the penalty. It must perform a judicious study of the employee, his/her record, and the distinctive circumstances attending the misconduct. The employer must determine whether or not elemental justice and true needs of the employer would be better served by corrective rather than terminal discipline. It must bear in mind that just cause standards circumscribe management rights; they do not expand them. Just cause means that the employer can remove only those employees that are not salvageable: 305

- The employer posted a Statistician 3 position which the grievants and other individuals bid for. The two grievants had eighteen and thirteen years seniority, while the successful applicant had only one year seniority. The employer contended that the grievants did not meet the minimum qualifications for the position and the successful applicant was demonstrably superior. The employer was found to have the burden of proving demonstrable superiority which was interpreted as a “substantial difference.” Demonstrable superiority was found only to apply after the applicants have been found to possess the minimum qualification. Also, the arbitrator stated that if no applicant brings “precisely the relevant qualification” to the position, the employer may promote the junior applicant if a greater potential for success was found. The arbitrator found that the employer proved that the junior employee was demonstrably superior and the grievance was denied: 382

- During the processing of several grievances concerning minimum qualifications, #393**, a core issue regarding the union’s right to grieve the employer’s established minimum qualifications was identified. The arbitrator interpreted section 36.05 of the contract as permitting the union to grieve the establishment of minimum qualifications. He explained that the minimum qualifications must be reasonably related to the position, and that the employer cannot set standards which bear no demonstrable relationship to the position: 392**

- The grievant had over 7 years seniority and applied for a posted vacancy. She did not receive the promotion which was given to a more senior employee from the agency despite the fact that she was in Section 7.04 applicant group A (1 7.05 of 1 989 contract) and the successful bidder was in group D. The employer stated that the grievant failed to meet the minimum qualifications and the successful bidder was demonstrably superior. The arbitrator held that Article 7 established groupings which must be viewed independently. Additionally, the contract applies the demonstrably superior exception only to junior employees. The employer violated the contract by considering, simultaneously, employees from different applicant groups and applying demonstrable superiority to a senior employee. The arbitrator found that the grievant met the minimum qualifications for the vacant position, but she had since left state service. The grievance was sustained and the remedy was the lost wages from the time the grievant would have been awarded the position until she left state service: 405

- A General Activity Therapist 2 position was posted for which the grievant bid. The posting listed a valid water safety instructor’s certificate as a minimum qualification. The grievant did not possess the certificate and an outside applicant was selected. The arbitrator found that the
employer improperly posted the position by using a worker characteristic that doesn’t have to be acquired until after the employee receives the job. While the arbitrator cautioned that employees must act timely to become qualified, the employer can only hold bidders to minimum qualifications required by the contract. The grievance was sustained and the grievant was awarded the position with back pay: 4 1 8

- The Bureau of Motor Vehicles posted a vacancy for a Reproduction Equipment Operator 1 position. The employer chose a junior employee over the grievant claiming that he failed to meet the minimum qualifications. The arbitrator found that the employer improperly used the semantic distinction between retrieval, the grievant’s present position, and reproduction, what the posting called for, rather than the actual job duties to determine whether the grievant met the minimum qualification. The arbitrator stated that both consist of making copies of microfilm images on paper. The grievant was found by the arbitrator to possess the minimum qualifications, however the employer was found to not have completed its selection process as the grievant had not been interviewed. The arbitrator ordered the selection process re-opened pursuant to Article 1 7: 4 2 7

- The Bureau of Workers’ Compensation posted a vacancy for a Word Processing 1 position. The grievant, who had 3 years seniority, was not selected. A person who had worked as a student was chosen and in effect was a new hire. The arbitrator stated that applicants must possess and be proficient in the minimum qualifications for the position. The Position Description requires course work or experience in word processing equipment. The grievant’s application does not show that she met this requirement, thus she was found not to meet the minimum qualifications for the position posted. The grievance was denied: 4 3 7

- The Arbitrator determined that the grievant failed to demonstrate that he met the job requirements for a Project Inspector 2 position. Although the grievant met some of the minimum qualifications, the Union failed to show that the grievant either met all the minimum qualifications or that the grievant possessed the equivalence of the Major Worker Characteristics: 5 9 3

**Just Cause**

- A very high standard of "just cause" must be met where the employee has 20 years of service with the state: 3
- The arbitrator held that just cause was not demonstrated where he would have found that the discipline was justified except for procedural defects.: 1 1
- The issue is not whether this arbitrator may himself have meted out a lesser discipline under the circumstances but whether the discipline would be considered fair and appropriate by a reasonable man: 5 7
- Liberal rules for expedited arbitration do not eliminate stales responsibility to present sufficient evidence to justify a finding of just cause: 6 9
- Unfitness due to mental illness does not give just cause for dismissal where grievant was charged with absenteeism: 7 0
- Within the protective boundaries of the contract, for just cause, management has the right to
terminate nonproductive workers. Without this management ability, the jobs of all workers are ultimately at risk: 78

- Under the just cause standard, it is inappropriate to link the severity of the discipline to the degree of harm suffered by the client. The just cause standard requires one to review the foreseeable consequences of the type of negligence in question: 90

- The just cause standard dictates like treatment under like circumstances: 90

- Circumstances, such as extended illness, can mitigate against strict adherence to return to work days. Where grievant failed to return to work as scheduled, but did act reasonably in attempting to return to work as soon as possible and at the same time protecting his health so that he would be able to work when he returned, the arbitrator ruled that the employer did not have just cause for disciplining the grievant even though the employer acted properly when it charged the grievant with the violation. (The employer had not been informed of the extenuating circumstances): 95

- "Just cause" embodies implicitly fair procedures all along the line: 105

- A substantial level of proof that the grievant committed the particulars for which she was removed does not necessarily satisfy the just cause standard. In the current case, the employer violated the notice and equal treatment standards: 108

- Where management gave equal penalties to combatants because it could not determine who was at fault, the arbitrator upheld the punishment as a fair and reasonable result: 109

- Employer violations of 25 -OS (failure to furnish documents) are relevant to whether the employer established just cause for discipline: 116

- The just cause standard is not necessarily satisfied by a substantial level of proof that grievant is guilty of the charges. By blatantly refusing to provide the union with relevant information, the employer's action is tainted with a procedural defect which necessitates a modification of the removal penalty: 118

- Proof that the grievant is guilty as charged does not automatically justify the penalty. The arbitrator is required to weigh the discipline against 3 interrelated contractual standards:

  1) Discipline must follow the principles of progressive discipline

  2) Discipline must be commensurate with the offense and not solely for punishment.

  3) Discipline must be for just cause: 123

- Lack of employer fault in administering discipline was not sufficient to establish just cause. Mitigating circumstances made removal unjust, but the employer had never been informed of those circumstances: 125

- In any judgment, the standard of "just cause" requires that punishment be reasonable in light of all of the circumstances: 137

- A department's unilateral regulations are nothing more than guidelines -communications to the work force of how management intends to exercise its disciplinary authority. They do not supplant negotiated rights and protections. Article 24, section 24 .01 establishes the disciplinary standard which overrides every non-negotiated regulation which the employer may choose to publish. It states that no employee shall be disciplined "except for just cause." : 140

- "Just cause" is an amorphous term. Justice is at its root, and an arbitrator's chief responsibility in a dispute of this kind is to assure that justice is done, but concepts of justice differ from arbitrator to arbitrator. When the parties negotiated the just cause precept as the sine qua non of discipline, they explicitly authorized each arbitrator to explore facts, contentions, mitigating circumstances, ultimately, apply his/her individual view of justice, fairness, ethics, and morality: 140

- The arbitrator's power is only to modify penalties which are beyond the range of reasonableness and are unduly severe. If the penalty is within that range, it may not be modified. 145

- The imposition of discipline must not be arbitrary, unreasonable, discriminatory. In other words, the penalty imposed by the company should be allowed to stand unless it is patently unfair. For example, an excessive penalty out of proportion to
the offense should be modified. All the significant circumstances related to the misconduct should be considered to insure the perspective necessary for a just evaluation: 1 63

- Where the grievant's comment had lead, by a bizarre series of events, to another employee wielding a knife in front of a third employee, the arbitrator held that the grievant was innocent since the consequence of the comment was not reasonably foreseeable: 1 68

- In determining whether the grievant has been disciplined for just cause, the mitigating circumstances must be considered: 1 68

- Failing an exam is not, in itself, just cause for removal where the exam did not accurately test for the skills actually needed by grievant's position (if the classification description requires abilities not actually used, then failure of an exam that tests for those unneeded abilities is not just cause for dismissal). The critical factor is whether the employee is performing up to snuff as indicated by employer evaluations. The contractual requirement that the employer must have just cause to remove an employee is not overridden by Civil Service Law. It is the employer's responsibility to make the implementation of civil service law be consistent with contractual requirements. Removal for failing a civil service exam could be just cause for removal if the exam tested for the abilities actually used on the job: 1 75

- The parties agreed in 4 3.01 that the Agreement takes precedence and supercedes conflicting state laws except ORC Chapter 4 1 1 7 and the rules, regulations, and directives in that statute. That statute in section 1 0(A) provides that the public employer and employees are bound to state and local laws pertaining to wages, hours and terms and conditions of employment for public employees only in situations where there is no agreement or when an agreement exists but it makes no specifications about a matter. If an agreement exists and it specifies a matter, the contract takes precedence. Terminating an employee after his probationary period is a term and condition of employment subject to final and binding arbitration for grievances. The contract is specific about this term and condition of employment. An employee cannot be terminated for any reason except just cause. In the case of applying civil service laws concerning employees who have failed a civil service exam, the employer has the burden of taking actions to follow civil service laws within the constraints of the contract. 1 75

- When just cause is the issue, the ordinary presumption is that the employer must establish both the cause and the ethical justification for discipline. The parties to this dispute have taken the presumption a step further, turning it into a contractual mandate in Section 24 .01 . 1 83

- It is foreseeable that the employer’s burden of proof will occasionally permit a guilty employee to escape justice. That risk is inherent in 24 .01 . 1 83

- Cause for discharge, more specifically, is not necessarily found in the grievant’s final act of misconduct. The grievant’s conduct in its totality (three preventable traffic accidents in three months and failure to report one of them) has reached a critical mass where he has made himself a liability; a liability which the arbitrator cannot expect the employer infinitely to sustain. 1 84

- Establishing the proof facet for just cause does not necessarily mean that a disciplinary action is totally proper and justified. Other considerations must also be evaluated in determining whether the administered discipline is proper. Typically, progressive discipline requires that at least one disciplinary suspension be imposed before removal is justified. This majority position on suspension is based upon notice and rehabilitation factors. Proper notice is important because it demonstrates or affords a tangible indication to the employee that the employer will follow through with its warning. With respect to the rehabilitation factor, Arbitrator Dworkin aptly characterized this principle when he stated, “Discharge is warranted only in such cases where corrective measures appear to be futile.” Normally, futility can only be established when all other measures, including suspension, are logically applied in a progressive fashion. 1 85

- The supervisor who initiated discipline admitted that he discounted the 1 4 -month improvement in the grievant’s record because he concluded that “had he been Grievant’s supervisor previously, he would have disciplined the grievant for absenteeism offenses during that period.” This conclusion violates basic notions of fairness implicit in “just cause.” A member of
management is bound by the employer’s records and actions. A manager cannot arbitrarily and capriciously impose what amounts to “ex post facto” punishment to remedy what in his mind were past management failures. 189

- An implicit component of “just cause” is that equal infractions receive equal discipline. Fair discipline is even discipline. Inconsistent discipline could lead employees to suspect favoritism. Moreover, inconsistent discipline undermines the concept of notice. When an employee sees another employee undisciplined for infractions, a logical inference would be that the employer has “waived” application of the rule. Over time, such a “waiver” could lead to the conclusion that the “rule” no longer existed. In essence, failure to discipline consistently can constitute “notice” that the rule no longer exists. 189

To establish just cause in this case the state must clearly and convincingly show:
1) Acts by the grievant
2) Which constitute the violations charged
3) And that the removal of the grievant was consistent with
   a) The Commission’s progressive disciplinary guidelines, and
   b) Labor agreement requirements, particularly sections 24.02 and 24.04. Furthermore, removal cannot be arbitrary, unreasonable or discriminatory under the circumstances of this case. 190

- It is true that at some point the extra chances end and one infraction serves as a final trigger to bring about removal. Similarly, progressive discipline contemplatesthe rehabilitation of poor performance and does not require indefinite withholding of discharge, where an employee proves incorrigible. But there must be a final trigger. An employee cannot be arbitrarily fired, without triggering disciplinary incident. Management cannot simply cite an employee’s record as the basis for discharge. 191

- Under 24.01, all discipline of any nature whatsoever is to be measured against just cause. Under 24.02, most discipline must be progressive and follow four steps. The requirements are separate and distinct, but just cause is the overriding consideration. Progressive discipline cannot subsume just cause. The disciplinary priorities are the other way around. In other words, the fact that the employer strictly follows progressive discipline steps does not automatically assure that any or all of the disciplinary impositions will be just cause; and discipline is not for just cause unless it is corrective. Progressive penalties which are demonstrably punitive and non-corrective will be set aside by arbitrators. 213

- The just cause standard does not countenance having conduct expectations for an employee, not communicating those expectations to the employee, then subsequently faulting the employee for failing to achieve said expectations. 218

- The arbitrator having found just cause must be careful not to improperly substitute her judgment for the employer’s. 233

- The union claims that ORC 124.32 was applied rather than the just cause standard. However, while the termination letter refers to violations of the ORC, the first sentence in the notice clearly states that the discharge is “in accordance with Article 24” of the labor agreement. The evidence establishes that the just cause standard was applied. 248

- Even if some doubt remains, the testimony of three State witnesses with nothing to gain by testifying leads the arbitrator to conclude that the State has borne their burden of showing just cause: 281

- The contractual philosophy is to conserve jobs and require the employer to exercise every reasonable effort to correct misconduct: 287

- There is an exception to the general rules of just cause. In the case of employees dismissed for proven patient/client abuse the arbitrator does not have the authority to modify the termination of the employee committing such abuse: 287

- The concept of just cause entails progressive discipline, that is the inherent right of an employee to be specifically informed of perceived deficiencies and to be afforded a reasonable opportunity to rectify the problem: 288

- It was proper for the State to terminate the grievant for repeated violations of leaving her desk unattended and taking leave while working at her second job: 291
- In abuse cases the grievant is not entitled to have his/her removal measured by the traditional elements of just cause. It is common for a discharge to be modified, not because the grievant is innocent but because the penalty is too harsh to comport with just cause. Arbitrators, under Section 24.01 have limited authority to modify in abuse cases. If the grievant committed abuse and there is just cause for any discipline at all, there can be consideration of the grievant’s past work record or the length of grievant’s service. The removal must stand: 292

- While the Agreement eliminates just cause to a large extent in abuse cases, it does not dispose of it entirely. Employees still have entitlements under the standard, and an agency that ignores them does so at its own peril. If the grievant was denied contractual or elemental due process, his/her claim for reinstatement and monetary relief will be granted whether or not he/she abused prisoners: 292

- The grievant was fired solely because his prison sentenced forced him to violate a work rule. The grievant was incarcerated for drunk driving and did not report to work for three consecutive days which the employer deemed job abandonment. The decision to execute the penalty gave no consideration to the length and quality of the grievant’s work record or any other mitigating factors. Despite the employer’s arguments to the contrary, the action was automatic. The employer argued that the rule was reasonable on its face and the arbitrator agreed. The arbitrator also decided that the demands of just cause are almost never met when discharge is based entirely on a rule violation. Management must be cautious in inflicting the penalty. It must perform a judicious study of the employee, his/her record, and the distinctive circumstances attending the misconduct. The employer must determine whether or not elemental justice and true needs of the employer would be better served by corrective rather than terminal discipline. It must bear in mind that just cause standards circumscribe management rights; they do not expand them. Just cause means that the employer can remove only those employees that are not salvageable: 305

- When the employer argued that the severe discipline of removal was necessary to preserve the mission of the agency, the burden of proof on this issue was on the employer. The argument that the removal was justified by the need to set an example for other employees was dismissed by the arbitrator. Employees covered by just cause may be disciplined for their own misconduct, but may not be singled out and punished with special severity as an example to others: 305

- In a dispute governed by just cause principles there is a rudimentary issue which overrides everything else. It is: Was the aggrieved employee guilty of the misconduct justifying discipline? Actually, the question contains two parts; the arbitral examination must start with whether or not the employee committed the misconduct. The examination should be circumscribed by the employer’s allegation(s) against the employee. An individual cannot be legitimately punished for something for which he/she was not charged. The employer’s charges seek arbitral approval of the grievant’s removal on the general sweeping grounds that the grievant was a bad employee. The arbitrator declared several of the State’s contentions irrelevant because they did not impact on the charge of not following the proper sick leave notification requirements: 310

- The Union’s argument was that no employee, including the grievant, was ever required to satisfy sick leave notification requirements. This argument went unrebutted by the State and is a complete defense. New and unprecedented rules must be conveyed before they can be enforced. The Labor Relations Officer did not properly inform the grievant was too ill, the Officer told the Union Steward the new procedure. The Steward testified that he was not informed of the new call-off requirement. Rather he was told of the proper leave request forms that the grievant had to fill out. There was not effective communication; as a result, the grievant could not properly be held responsible for his violation: 310

- The arbitrator believed that provided just cause requirements are met and the discipline is within the bounds of reason, the arbitrator should not substitute their judgment for that of the employer: 313

- Even if the unauthorized relationship is not extensive it could give the appearance of wrongdoing and leave the employee open to manipulation by inmates and distrust by fellow coworkers. An officer’s reputation influences his/her ability to perform his/her job through its impact on relationships with inmates and co-
workers. The rule prohibiting unauthorized off-duty relationships has a nexus with employment: 31 3

- When a Correction Officer may have learned of a rowboat for sale from an inmate and went to the inmate’s wife’s house to purchase the boat the officer did violate work rule 4 0 by having an unauthorized relationship, but this did not warranted termination: 31 3

- The past cases of different treatment for work rule 4 0 violations (unauthorized relationships) show the flexibility of discipline. The arbitrator found that there should have been flexibility in this case. The grievant should not have been removed. His violation involved a single financial transaction with only a tenuous and limited connection to inmate or his family member. The grievant was also a three-year employee with a good work record: 31 3

- A basic requisite of just cause is a fair investigation conducted by the employer prior to the imposition of discipline. Even though the employer turned the actual investigation over to a police officer, a reasonable action in a prison escape situation, such delegation does not relieve the employer of a duty to review that investigation for accuracy and fairness. The investigation was determined by the arbitrator to be conducted unfairly. The trooper in charge focused all his efforts on proving the grievant was guilty and did not even conduct a true investigation: 31 4

- The Hearing Officer at the pre-disciplinary hearing weighed the grievant’s silence as a factor against the grievant. The grievant was charged with a crime (aiding inmates to escape); he had a constitutional right to silence; he exercised it wisely. His silence should not be used against him. The employer has the burden of proving just cause. The grievant need not prove the State’s case for them: 31 4

- Because the evidence is confusing and inconsistent the conflict of whether the grievant actually was negligent cannot be resolved with any degree of certainty. Since under Section 24 .01 , the employer is obligated to establish just cause for any disciplinary action, the grievance is sustained: 321

- The grievant did in fact serve improperly prepared food to the client. However, the client did not choke to death on that food item so the grievant’s actions did not directly result in harm to the client. A critical element of just cause is that the employer give notice to the employee of the disciplinary consequence of his or her conduct. If the impermissibility of the conduct is so obvious that employees should not have known it was unacceptable, the notice requirement is not a barrier to a showing of just cause: 330

- The employer cited ORC Section 1 24 .34 which is a lesser standard than just cause for dismissal. The citation does not appear to have prejudiced the grievant of the Union in this case because the matter proceeded to arbitration and has been heard pursuant to the just cause standard of the Agreement: 330

- The way in which the agency controlled the hearing and the speed with which it imposed the removal indicate a cavalier approach to just cause requirements. The question the employer was obliged to ask and answer before deciding on discipline was: In view of the misconduct, its aggravating and mitigating factors, what amount of discipline is likely to be corrective? When an employer acts against an employee precipitously, in knee-jerk fashion, its actions become suspect. Summary discipline opens the door for arbitral intrusion. It licenses the arbitrator to substitute his/her judgment for management’s. It is up to the arbitrator to perform the employer’s job when the employer fails to perform it. Second guessing by an arbitrator should be expected when management neglects its disciplinary duties: 35 7

- The grievant began his pattern of absenteeism after the death of his grandmother and his divorce. The grievant entered an EAP and informed the employer. He had accumulated 1 04 hours of unexcused absence, 80 hours of which were incurred without notifying his supervisor, and 24 hours of which were incurred without available leave. Removal was recommended for job abandonment after he was absent for three consecutive days. The pre-disciplinary hearing officer recommended suspension, however the grievant was notified of his removal 5 2 days after the pre-disciplinary hearing. The arbitrator found that the employer violated the contract because the relevant notice dates are the hearing date and the date on which the grievant receives notice of discipline. Other arbitrators have looked to the hearing date and decision date as the relevant dates. Additionally, the employer was found to have given “negative notice” by overlooking prior
offenses. The arbitrator reinstated the grievant without back pay and ordered him to enter into a last chance agreement based upon his participation in EAP: 371

- The grievant injured his back in a car accident and was off work for six months while receiving disability benefits. His doctor released him to work if no lifting was allowed. Because the position required lifting, he either left or was asked to leave work. He failed to call in for three consecutive days and was removed for job abandonment. The union requested arbitration more than 30 days after the date of the Step 3 response. No evidence was offered on the interpretation of 25.02 and as to when the union received the Step 3 response. The employer failed to overcome the presumption that a grievance is arbitrable. The arbitrator found just cause because: the grievant has served a 5 day suspension for failing to follow call-in procedure while on disability, his doctor’s statement that he should avoid lifting was ambiguous, and he failed to respond to the employer’s attempts to contact him. Filing for Workers’ Compensation was not found not to substitute for contact with employer: 373

- The grievant was a Correction Officer and had received and signed for a copy of the agency’s work rules which prohibit relationships with inmates. The grievant told the warden that she had been in a relationship with an inmate prior to her hiring as a CO. Telephone records showed that the grievant had received 1 97 calls from the inmate which lasted over 1 34 hours. Although the grievant extended no favoritism toward the inmate, just cause was found for the removal: 374

- The grievant had received up to a ten day suspension and had been enrolled in two EAP programs. She was late to work for the third time within a pay period. The arbitrator found that just cause did exist for the removal as the grievant had received four prior disciplinary actions for absenteeism and the employer had warned her of possible removal. The fact that the employer reduced the most recent discipline did not lead to the conclusion that the employer must start the progressive discipline process over: 376

- The grievant was a Correction Officer who was removed for watching inmates play cards while they were outside their housing unit. The grievant admitted this act to his sergeant. The pre-disciplinary hearing had been rescheduled due to the grievant’s absence and was held without the grievant or the employer representative present. The arbitrator found that because the union representative did not object to the absence of the employer’s representative that requirement had been waived. There was also no error by the employer in failing to produce inmates’ statements as they had not been used to support discipline. The removal order was timely as the 45 day limit does not start until a pre-disciplinary hearing is held, not merely scheduled: 377

- The grievant ran out of gasoline as he entered the parking area of his facility. He was unable to buy gasoline on his way to work because the station would not take his fifty-dollar bill. He was seen siphoning gasoline from a state vehicle to use in his truck until he could go to buy more at lunch and replace the gasoline siphoned. He did not speak to management about his situation because his regular supervisor was not present. The arbitrator found that just cause existed for some discipline because the grievant showed poor judgment in not obtaining gasoline before work and not speaking to management personnel. The grievant was found to lack the intent to steal instead of merely borrowing the gasoline, thus the grievant was reinstated without back pay: 378

- The grievant was an investigator who was discovered to have used his state telephone credit card for personal calls, which he afterward offered to repay. He also gave an inter-office memo containing confidential information to his union representative. He was removed for these violations. The arbitrator found that the grievant’s explanation for his use of the telephone card was not credible, however the employer had notice of other employees who had misused their cards but issued no discipline to the others. The document containing the confidential information was not a typical document generated in an investigation and the employer’s rules on disclosure were found to be unclear. The arbitrator distinguished between confidential documents and confidential information, and reinstated the grievant without back pay: 380

- The grievant was a thirteen year employee who developed absenteeism problems. In just over one year he received discipline up to and including a fifteen day suspension. Between December 1 990 and March 1 991 the grievant had eighteen unexplained absence-related incidents for which
he was removed. The arbitrator found that the employer proved that the grievant failed to account for his activities at work and that progressive discipline was followed. The arbitrator noted that while the grievant has a great deal of freedom while working, he must follow the employer’s work rules. The grievance was denied: 381

- The grievant worked in a Medical Records office when a new supervisor was hired in January 1 985. The supervisor changed the office location and began to strictly enforce the work rules. The office layout was also change twice due to new equipment purchases. The supervisor also instituted a physician’s verification policy which was stricter than the previous policy. The grievant went on work related disability in February 1 987. She received Disability Leave benefits and Workers’ Compensation. When these benefits expired she began working for a private employer. She received an order to return to work in July 1 987 because of her other employment. The grievant refused to return to work under her prior supervisor. The grievant appealed her denial of further Workers’ Compensation benefits and lost, after which she contacted the facility to come back to work. The arbitrator found that the grievant failed to prove supervisory harassment or constructive discharge. All the supervisor’s acts were within her scope of authority and related to efficiency. The removal was timely because the three year delay was caused by the grievant’s pursuit of her workers’ compensation claim in state court. The arbitrator held that the grievant abandoned her job and denied the grievance: 384

- The grievant was a Youth Leader 2 who had forgotten that his son’s BB gun was put into his work bag to be taken to be repaired. While at work a youth entered the grievant’s office, took the BB gun and hid it in the facility. Management was informed by another youth and the grievant was informed the next day. He was removed for failure of good behavior, bringing contraband into an institution, and possessing a weapon or a facsimile on state property. It was proven that the grievant committed the acts alleged but removal was found to be too severe. The grievant had no intent to violate work rules, the BB gun was not operational, and the employer withdrew the act of leaving the office door open as a basis of discipline. The grievant’s work record also warranted a reduction to a thirty day suspension: 388

- The grievant was employed as a Salvage Processor who was responsible for signing off on forms after dangerous goods had been destroyed. He was removed for falsification of documents after it was found that he had signed off on forms for which the goods had not been destroyed. The arbitrator found that despite minor differences, the signature on the forms was that of the grievant. The employer was found to have violated just cause by not investigating the grievant’s allegation that the signature was forged, and by failing to provide information to the union so that it could investigate the incidents. The employer was found not to have met its burden of proof despite the grievant’s prior discipline: 398

- The grievant, a Therapeutic Program Worker, received a ten day suspension for sleeping on duty. A supervisor tried to awaken the grievant but was not successful, although the grievant had been heard talking to another employee shortly before the incident. The grievant had no prior discipline up to the time she had become a steward, then she received two verbal reprimands. Also her performance evaluations had been above average until the same time, at which point she was evaluated below average in several categories. Lastly, a paddle had been hanging in the supervisor’s lounge with the words “Union Buster” written on it. The arbitrator found that the grievant may have dozed off, but that the employer’s anti-union animus was the cause for the suspension. The paddle in the lounge was evidence of this and the employer had demonstrated reckless disregard for union relations. The arbitrator held that the employer failed to properly apply its rules, thus, there was no just cause for the 1 0 day suspension. The discipline was reduced to a 1  day suspension: 4 00

- The employer removed the grievant for two reasons: 1) The grievant committed theft because he had been named as the supplier of checks that had been returned to the Bureau of Workers’ Compensation, to another state employee in order to cash the checks (see arbitration decision #370); 2) falsification of his job application because he admitted during the investigation that he had prior felony convictions which he failed to report on his employment application. The arbitrator held that the employer could not use the falsification charge
as a basis for removal because the grievant had sought assistance when he completed his application and lacked intent to falsify the application. The employer was also estopped from using the falsification because the grievant had been employed for 8 years, and had been removed once before, thus the employer was found to have had ample time to have discovered the falsification prior to this point. The employer was not permitted to introduce the Bureau of Criminal Investigation’s report into evidence at arbitration because the employer failed to disclose it upon request by the union. The fact that the investigation was ongoing was irrelevant. Just cause was proven through the investigator’s testimony and testimony of others involved in the scheme. The grievance was denied: 4 01

- The grievant had failed to complete several projects properly and on time and another employee had to complete them. She had also been instructed to set projects aside and focus on one but she continued to work on several projects. The grievant had prior discipline for poor performance including a 7 day suspension. The arbitrator found that the employer had proven just cause for the removal. The grievant was proven unable to perform her job over a period of years despite prior discipline. The fact that another employee completed the projects was found to be irrelevant. Removal was found to be commensurate with the offense because of the prior discipline and the work was found to have been within the grievant’s job description and she had been offered training. Thus, the grievance was denied: 4 02

- The grievant had been a Driver’s License Examiner for 1 3 months. He was removed for falsification when he changed an applicant’s score from failing to passing on a Commercial Drivers’ License examination. The arbitrator found that the grievant knew he was violating the employer’s rules and rejected the union’s mitigating factors that the grievant had no prior discipline and did not benefit from his acts. Falsification of license examination scores was found serious enough to warrant removal for the first offense. The arbitrator also rejected arguments of disparate treatment. The grievance was denied: 4 03

- The grievant was a Psychiatric Attendant who had received prior discipline for refusing overtime and sleeping on duty. He refused mandatory overtime and a pre-disciplinary hearing was scheduled. Before the meeting occurred, the grievant was found sleeping on duty. A 6 day suspension was ordered based on both incidents. The arbitrator found that despite the fact that the grievant had valid family obligations, he had a duty to inform the employer rather than merely refuse mandated overtime and, thus was insubordinate. The employer failed to meet its burden of proof as to the sleeping incident, however due to the grievant’s prior discipline a 6 day suspension was warranted for insubordination. The grievance was denied: 4 04

- The grievant was a Youth Leader who had been removed for abusing a youth. He was accused of pushing and choking the youth. The grievant testified that he had other youths present leave the room so that he could talk to the complaining youth. The employer’s witness testified that the grievant told the youths to leave so he could kick the complaining youth’s ass. The arbitrator held that the employer failed to prove that the grievant abused a youth because that he did not intentionally cause excessive physical harm. The grievant was found to have used excessive force in restraining the youth and the removal was reduced to a one month suspension with back pay, less outside earnings: 4 07

- The grievant was removed for misuse of his position for personal gain after his supervisor noticed that the grievant, an investigator for the Bureau of Employment Services, had received an excessive number of personal telephone calls from a private investigator. The Ohio Highway Patrol conducted an investigation in which the supervisor turned over 1 30-1 5 0 notes from the grievant’s work area and it was discovered that the grievant had disclosed information to three private individuals, one of whom admitted paying the grievant. The arbitrator found that the employer proved that the grievant violated Ohio Revised Code section 4 1 4 1 .21 by disclosing confidential information for personal gain. The agency policy for this violation calls for removal. The employer’s evidence was uncontroverted and consisted of the investigating patrolman’s testimony, transcribed interviews of those who received the information, and the grievant’s supervisor’s testimony. The grievant’s 1 3 years seniority was an insufficient mitigating circumstance and the grievance was denied: 4 08

- The grievant was a Therapeutic Program Worker who was removed for abusing a patient by
restraining him in a manner not provided for in the client’s restraint program. The client was acting out while eating and the grievant either choked or placed the client in a bear hug. The arbitrator found that the employer proved that the grievant abused the client. The grievant was shown to have engaged in acts inconsistent with client’s human rights by restraining the client in a way not permitted by the client’s program or the agency’s policies. The testimony of the employer’s witnesses was found to be more credible than that of the grievant, and there was no evidence of coercion by the employer or collusion among the witnesses. The arbitrator recognized that if abuse was proven, then no authority exists to reduce the penalty of removal, thus the grievance was denied: 4.09

While on disability leave in October 1990 the grievant, a Youth Leader, was arrested in Texas for possession of cocaine. After his return to work, he was sentenced to probation and he was fined. He was then arrested in Ohio for drug-related domestic violence for which he pleaded guilty in June 1991 and received treatment in lieu of a conviction. The grievant was removed for his off-duty conduct. The grievant’s guilty plea in Texas was taken as an admission against interest by the arbitrator and the arbitrator also considered the grievant’s guilty plea to drug related domestic violence. The arbitrator found that the grievant’s job as a Youth Leader was affected by his off-duty drug offenses because of his co-workers knowledge of the incidents. The employer was found not to have violated the contract by delaying discipline until after the proceedings in Texas had concluded, as the contract permits delays pending criminal proceedings. No procedural errors were found despite the fact that the employer did not inform the grievant of its investigation of him, nor permit him to enter an EAP to avoid discipline. No disparate treatment was proven as the employees compared to the grievant were involved in alcohol related incidents which were found to be different than drug related offenses. Thus the grievance was denied: 4.10

- The grievant was a Tax Commissioner Agent and had received a written reprimand for poor performance while still in his probationary period. He was assigned a new supervisor who developed a plan to improve his performance, however the grievant continued to receive discipline for poor performance and absenteeism, including a ten day suspension which was reduced pursuant to a last chance agreement. It was discovered after the last chance agreement had been made, that prior to the signing of the last chance agreement, the grievant had committed other acts of neglect of duty. The grievant was removed for neglect of duty. The arbitrator held that a valid last chance agreement would bar an arbitrator from applying the just cause standard to a disciplinary action and that the agreement made by the grievant was valid. It was also found that there existed hostility between the grievant and his supervisor, the employer stacked charges by basing discipline on events which occurred prior to the last chance agreement but the grievant was awarded 4 weeks back pay because of the employer’s failure to comply with the union’s discovery requests: 4.12

- The grievant was a Correction Officer who had an alcohol dependency problem of which the employer was aware. He had been charged twice for Driving Under the Influence, which caused him to miss work and he received a verbal reprimand. The grievant was absent from work from May 1st through the 21st and was removed for job abandonment. The arbitrator found that the grievant’s removal following a verbal reprimand was neither progressive nor commensurate and did not give notice to the grievant of the seriousness of his situation. It was also noted that progressive discipline and the EAP provision operate together under the contract. The grievant was reinstated pursuant to a last chance agreement with no back pay and the period he was off work is to be considered a suspension: 4.13

- The grievant was a Psychiatric Attendant who had been mandated to work overtime. The grievant notified the employer that he would be unable to work over because he had to meet his childrens’ school bus and was unable to find a substitute, and he signed out at his normal time. The grievant had two prior suspensions for failure to work mandatory overtime. Ordinarily, the “work now or avert later” doctrine applies to such situations, however the arbitrator noted that certain situations alter that policy. The grievant gave a legitimate reason for refusing the overtime and the employer was found to have abused its discretion in not finding a substitute. The grievant was found to have a history of insubordination and inability to arrange alternate child care. Upon a balancing of the parties’ actions, the arbitrator held that there
was no just cause for removal, but reduced the penalty to a 60 day suspension: 4 1 5

- The grievant was a custodial worker at a psychiatric hospital. The grievant asked a patient to smoke outside rather than inside a cottage. The patient told the grievant that he would not, dropped to his knees and repeated his statement, as was the patient’s habit. The patient repeated this action later in the day and grabbed the grievant’s leg. The grievant yanked his leg free, the client accused the grievant of kicking him and the patient was found to have injuries later in the day. The grievant was removed for abuse of a patient, and criminal charges were brought. The criminal charges were dropped pursuant to a settlement with the Cuyahoga County court in which the grievant agreed not to contest his removal. When the grievance was pursued, the employer asked for criminal charges to be reinstated. The charges could not be reinstated, but the grievant agreed not to sue the employer. The grievance was held to be arbitrable despite the settlement between the grievant and the county court. Had the settlement been a three party agreement including the employer, dovetailing into the grievance process, it would have precluded arbitration. Additionally, after filing a grievance it becomes the property of the union. The grievance was sustained because the employer failed to meet its burden of proof that the grievant abused a patient. The arbitrator awarded full back pay less interim earnings, back seniority, back benefits and that the incident be expunged from the grievant’s record: 4 1 6

- The grievant took a magnetic tape containing public information home, which was against agency rules. She intended to return the tape but it became lost, and she was charged with theft of state property. The tape was later recovered by the Highway Patrol during an unrelated investigation. The grievant was transferred to another position without loss of pay or reduction in rank and suspended for 30 days. The arbitrator held that the employer failed to prove that the grievant intended to steal the tape (Hurst arbitration test applied) rather than borrow it. Taking the tape home without authorization was found to be a violation of the employer’s rules. The employer was found not to have applied double jeopardy to the grievant as only one disciplinary proceeding had been brought and the transfer was found not to be disciplinary in nature. The 30 day suspension was found not to be reasonably related to the offense, nor corrective and was reduced to a 1 day suspension with full back pay for the remaining 29 days: 4 1 7

- While on disability leave in October 1990 the grievant, a Youth Leader, was arrested in Texas for possession of cocaine. After his return to work, he was sentenced to probation and he was fined. He was then arrested in Ohio for drug-related domestic violence for which he pleaded guilty in June 1991 and received treatment in lieu of a conviction. The grievant was removed for his off-duty conduct. The grievant’s guilty plea in Texas was taken as an admission against interest by the arbitrator and the arbitrator also considered the grievant’s guilty plea to drug related domestic violence. The arbitrator found that the grievant’s job as a Youth Leader was affected by his off-duty drug offences because of his co-workers’ knowledge of the incidents. The employer was found not to have violated the contract by delaying discipline until after the proceedings in Texas had concluded, as the contract permits delays pending criminal proceedings. No procedural errors were found despite the fact that the employer did not inform the grievant of its investigation of him, nor permit him to enter an EAP to avoid discipline. No disparate treatment was proven as the employees compared to the grievant were involved in alcohol related incidents which were found to be different than drug related offenses. Thus, the grievance was denied: 4 1 0

- The grievant was hired as a Tax Commissioner Agent and had received a written reprimand for poor performance while still in his probationary period. He was assigned a new supervisor who developed a plan to improve his performance, however the grievant continued to receive discipline for poor performance and absenteeism, including a ten day suspension which was reduced pursuant to a last chance agreement. It was discovered after the last chance agreement had been made, that prior to the signing of the last chance agreement, the grievant had committed other acts of neglect of duty. The grievant was removed for neglect of duty. The arbitrator held that a valid last chance agreement would bar an arbitrator from applying the just cause standard to a disciplinary action and that the agreement made by the grievant was valid. It was also found that there existed hostility between the grievant and his supervisor, the employer stacked charges by basing discipline on events which occurred prior
to the last chance agreement but the grievant was awarded 4 weeks back pay because of the employer’s failure to comply with the union’s discovery requests: 4 1 2

- The grievant was a Correction Officer who had an alcohol dependency problem of which the employer was aware. He had been charged twice for Driving Under the Influence, which caused him to miss work and he received a verbal reprimand. The grievant was absent from work from May 1st through the 21st and was removed for job abandonment. The arbitrator found that the grievant’s removal following a verbal reprimand was neither progressive nor commensurate and did not give notice to the grievant of seriousness of his situation. It was also noted that progressive discipline and the EAP provision operate together under the contract. The grievant was reinstated pursuant to a last chance agreement with no back pay hand the period he was off work is to be considered a suspension: 4 1 3

– The grievant was a Psychiatric Attendant who had been mandated to work overtime. The grievant notified the employer that he would be unable to work over because he had to meet his children’s school bus and was unable to find a substitute, and he signed out at his normal time. The grievant had two prior suspensions for failure to work mandatory overtime. Ordinarily, the “work now gripe later” doctrine applies to such situations, however the arbitrator noted that certain situations alter that policy. The grievant gave a legitimate reason for refusing to overtime and the employer was found to have abused its discretion in not finding a substitute. The grievant was found to have a history of insubordination and inability to arrange alternate child- care. Upon a balancing of the parties’ actions, the arbitrator held that there was no just cause for removal, but reduced the penalty to a 60 day suspension: 4 1 5

- The grievant was a custodial worker at a psychiatric hospital. The grievant asked a patient to smoke outside rather than inside a cottage. The patient told the grievant that he would not, dropped to his knees and repeated his statement, as was the patient’s habit. The patient repeated this action later in the day and grabbed the grievant’s leg. The grievant yanked his leg free, the client accused the grievant of kicking him and the patient was found to have injuries later in the day. The grievant was removed for abuse of a patient, and criminal charges were brought. The criminal charges were dropped pursuant to a settlement with the Cuyahoga County court in which the grievant agreed not to contest his removal. When the grievance was pursued, the employer asked for criminal charges to be reinstated. The charges could not be reinstated, but the grievant agreed not to sue the employer. The grievance was held to be arbitrable despite the settlement between the grievant and the county court. Had the settlement been a three party agreement including the employer, dovetailing into the grievance process, it would have precluded arbitration. Additionally, after filing a grievance it becomes the property of the union. The grievance was sustained because the employer failed to meet its burden of proof that the grievant abused a patient. The arbitrator awarded full back pay less interim earnings, back seniority, back benefits, and that the incident be expunged form the grievant’s record: 4 1 6

- The grievant took a magnetic tape containing public information home, which was against agency rules. She intended to return the tape but it became lost, and she was charged with theft of state property. The tape was later recovered by the Highway Patrol during an unrelated investigation. The grievant was transferred to another position without loss of pay or reduction in rank and suspended for 30 days. The arbitrator held that the employer failed to prove that the grievant intended to steal the tape (Hurst arbitration test applied) rather than borrow it. Taking the tape home without authorization was found to be a violation of the employer’s rules. The employer was found not to have applied double jeopardy to the grievant as only one disciplinary proceeding had been brought and the transfer was found not to be disciplinary in nature. The 30 day suspension was found not to be reasonably related to the offense, nor corrective and was reduced to a 1 day suspension with full back pay for the remaining 29 days: 4 1 7

- An inmate was involved in an incident on January 4, 1991, in which a Correction Officer was injured. The inmate was found to have bruises on his face later in the day and an investigation ensued which was concluded on January 28th. A Use of Force Committee investigated and reported to the warden on March 4th that the grievant had struck the inmate in retaliation for the inmate’s previous incident with the other CO on January 4th. The pre-disciplinary hearing was held on April
1 5, and 1 6, and the grievant’s removal was effective on May 29, 1991. The length of time between the incident and the grievant’s removal was found not to be a violation of the contract. The delay was caused by the investigation and was not prejudicial to the grievant. The arbitrator found that the employer met its burden of proof that the grievant abused the inmate. The employer’s witness was more credible than the grievant and the grievant was found to have motive to retaliate against the inmate. The grievance was denied: 4 21

- The grievant was removed for failing to report off, or attend a paid, mandatory four-hour training session on a Saturday. The grievant had received 2 written reprimands and three suspensions within the 3 years prior to the incident. The arbitrator found that removal would be proper but for the mitigating factors present. The grievant had 23 years of service, and her supervisors testified that she was a competent employee. The arbitrator noted the surrounding circumstances of the grievance; the grievant was a mature black woman and the supervisor was a young white male and the absence was caused by an embarrassing medical condition. The removal was reduced to a 30 day suspension and the grievant was ordered to enroll into an EAP and the arbitrator retained jurisdiction regarding the last chance agreement: 4 22

- The grievant was a LPN who had been assaulted by a patient at the Pauline Lewis Center and she had to be off work due to her injuries for approximately 1 month. When she returned she was assigned to the same work area. She informed her supervisor that she could not work in the same work area, and was told to go home if she could not work. The grievant offered to switch with another employee whom she identified, but the supervisor refused. She then told her supervisor she was going home but instead switched work assignments. The grievant had prior discipline including two 6 day suspensions for neglect of duty. The supervisor concluded that the grievant was given a direct order to work in her original work area. The grievant erroneously believed that switching assignments was permitted. Despite the grievant’s motivation for her actions, the grievant’s prior discipline warranted removal, thus the grievance was denied: 4 24

- The grievant was an employee of the Lottery Commission who was removed for theft. The agency’s rules prohibit commission employees from receiving lottery prizes, however the grievant admitted redeeming lottery tickets, but not to receiving notice of the rule. The arbitrator noted that while the employer may have suspected the grievant of stealing the tickets, there was no evidence supporting that suspicion and it cannot be a basis for discipline. The arbitrator found that the grievant did redeem lottery coupons in violation of the employer’s rules and Ohio Revised Code section 3770.07(A) but that he had no notice of the prohibition either through counseling or orientation. The grievant was reinstated without back pay but with no loss of seniority: 4 25

- The grievant was removed after 13 years service from her position with the Bureau of Disability Services for unapproved absence, conviction of a drug charge, and failure to report the drug charge as required by the state’s Drug-Free Workplace Act of 1988. The grievant had a history of alcohol problems. She was also involved with a co-worker who, after the relationship ended, began to harass her at work. She filed charges with the EEOC and entered an EAP. The former boyfriend called the State Highway Patrol and informed them of the grievant’s drug use on state property. An investigation revealed drugs and paraphernalia in her car on state property and she pleaded guilty to Drug Abuse. She became depressed and took excessive amounts of her prescription drugs and missed 2 days of work. She was admitted into the drug treatment unit of a hospital for 2 weeks. She was on approved leave for the hospital stay, but the previous 2 days were not approved and the agency sought removal. The arbitrator found that while the employer’s rules were reasonable, their application to this grievant was not. The Drug-Free Workplace policy does not call for removal for a first offense. The employer’s federal funding was not found to be threatened by the grievant’s behavior. The grievant was found to be not guilty of dishonesty for not reporting her drug conviction because she was following the advice of her attorney who told her that she had no criminal record. The arbitrator noted that the grievant must be responsible for her absenteeism, however the employer was found to have failed to consider mitigating circumstances present, possessed an unwillingness to investigate, and to have acted punitively by removing the grievant. The grievant’s removal was reduced to
a 10 day suspension with back pay, benefits, and seniority, less normal deductions and interim earnings. The record of her two day absence was ordered changed to an excused unpaid leave. The grievant was ordered to complete an EAP and that another violation of the Drug-Free Workplace policy will be just cause for removal: 4 29

- The grievant was an Investigator with the Department of Commerce who had been suspended for 5 days for failing to follow his itinerary for travel and filing incorrect expense vouchers. The grievant’s itinerary indicated that he would be in Toledo on a Friday, and he submitted expense vouchers for the trip, however it was discovered that he worked at home during the day in question. The arbitrator found that the employer violated Section 24.04 by failing to provide witness lists and documents and not answering the grievants letters. Section 25.08 was not found to be violated. The employer’s selection of the pre-disciplinary hearing officer was unwise because she had an interest in the outcome and that the investigation was incomplete and unfair. The arbitrator also found that the grievant’s itinerary was a contemplated itinerary and that he had informed his supervisor of schedule changes, however the grievant was AWOL as there was no provision for working at home. Disparate treatment was suspected by the arbitrator, who also noted that the grievant exhibited a contemptuous attitude towards management. The suspension was reduced to a 1 day suspension: 4 30**

- The grievant was a Therapeutic Program Worker who was removed for stealing baggage. The patient has behavioral problems which include refusing to eat and throwing food. The patient was combative during lunch and the grievant was accused of pouring a bucket of water on him afterwards. The arbitrator found that the employer proved that the grievant did in fact pour a bucket of water on the grievant and that the act, inconsistent with the patient’s restraint program, met the standard for abuse. That others did not report the incident for several weeks and that their motive for reporting it was retaliation against the grievant was found to be irrelevant. The arbitrator applied the analysis of removal for abuse from the Dunning decision which provides that the employer must still have just cause for the removal even if abuse has been proven; Removal is not automatic. The arbitrator found no just cause for removal and because the employer’s disciplinary grid provides for suspensions for first offenses of client neglect/abuse, the arbitrator reinstated the grievant with no back pay: 4 31 ****

- The grievant was removed for unauthorized possession of state property when marking tape worth $96.00 was found in his trunk. The Columbus police discovered the tape, notified the employer and found that the tape was missing from storage. The arbitrator found that the late Step 3 response was insufficient to warrant a reduced penalty. The arbitrator also rejected the argument that the grievant obtained the property by “trash picking” with permission, and stated that the grievant was required to obtain consent to possess state property. It was also found that while the employer’s rules did not specifically address “trash picking” the grievant was on notice of the rule concerning possession of state property. The grievance was denied: 4 32

- The grievant, a Therapeutic Program Worker, took $1 500 of client money for a field trip with the clients. The grievant was arrested en route and used the money for bail in order to return to work for his next shift. The grievant was questioned about the money before he could repay it, he offered to repay it when he was paid on Friday, but failed to offer payment until the next Monday. He was removed for Failure of Good Behavior. While the employer was found to have poorly communicated its rules concerning use of client funds, the grievant was found to have notice of its provisions. The arbitrator found that the grievant lacked the intent to steal the money, however the grievant’s failure to repay was not excused, thus just cause was found for discipline. Because of the grievant’s prior disciplinary record, removal was held commensurate with the offense and the grievance was denied: 4 33

- The grievant was a Mail Clerk messenger whose responsibilities included making deliveries outside the office. The grievant had bought a bottle of vodka, was involved in a traffic accident, failed to complete a breathalyzer test and was charged with Driving Under the Influence of Alcohol. The grievant’s guilt was uncontested and the arbitrator found that no valid mitigating circumstances existed to warrant a reduction of the penalty. The grievant’s denial of responsibility for her drinking problem and failure to enroll into an EAP were noted by the arbitrator. The arbitrator stated that the grievant’s improved behavior after her
removal cannot be considered in the just cause analysis. Only the facts known to the person imposing discipline may be considered at arbitration. The arbitrator found no disparate treatment as the employees compared with the grievant had different prior discipline than the grievant, thus, there was just cause for her removal: 4 34

- The grievant was employed by the Bureau of Workers’ Compensation as a Data Technician 2. He had been disciplined repeatedly for sleeping at work and he brought in medication he was taking for a sleeping disorder to show management. The grievant was removed for sleeping at work. The grievant had valid medical excuses for his sleeping, which the employer was aware of. The arbitrator stated that the grievant was ill and should have been placed on disability leave rather than being disciplined. No just cause for removal was found, however the grievant was ordered to go on a disability leave if it is available, otherwise he must resign: 4 36

- The grievant was a Cosmetologist who was removed for neglect of duty, dishonesty and failure of good behavior. She was seen away from her shop at the facility, off of state property, without having permission to conduct personal business. The arbitrator found the grievant’s explanation not credible due to the fact that the grievant did not produce the person who she claimed was mistaken for her. There were also discrepancies in the grievant’s story of what happened and the analysis of travel time. The arbitrator found no mitigating circumstances, thus the grievance was denied: 4 38

- The grievant was custodian for the Ohio School for the Blind who was removed for the theft of a track suit. The arbitrator looked to the Hurst decision for the standards applicable to cases of theft. It was found that while the grievant did carry the item out of the facility, no intent to steal was proven; removal of state property was proven, not theft. The arbitrator found no procedural error in that the same person recommended discipline and acted as the Step 3 designee. Because the employer failed to meet its burden of proof, the removal was reduced to a 30 day suspension with the arbitrator retaining jurisdiction to resolve differences over back pay and benefits: 4 39

- The Employer had just cause to discipline the grievant, but not to remove her. The Employer was not timely in initiating discipline, it merged separate infractions to apparently build a case against the grievant, preventing progressive discipline, and charged the grievant with a general work rule rather than a more specific charge, which led to ambiguity. The Employer also failed to have a clear doctor’s verification policy. The grievant did not abandon her job. She did, however, fail to follow the call-off and sick leave policies, and so some measure of discipline is warranted. The removal was modified to a 60 day suspension: 4 4 4

Where a grievant was removed for being AWOL for three consecutive days due to an illness, the
removal was overturned because the grievant complied with the requirements of Article 31.01 by providing periodic, written verification from a psychologist. Given the fact that the agency provided information to the doctor, the agency cannot complain of the doctor’s recommendation and substitute its opinion for that of the doctor: 4 4 6

The employer had just cause to discipline the grievant because in addition to not informing her supervisors that her unit was critically understaffed, she had two previous reprimands. However, the Employer failed to show patient abuse or neglect, and failed to show just cause for removing the grievant: 4 4 7

The Employer had just cause to remove the grievant, a Correction Officer, for violating Rule 4 6(e) of the Standards of Employee Conduct. She engaged in an unauthorized personal relationship with a parolee. The grievant engaged in a log-term relationship with a parolee prior to and following her appointment, and she failed to disclose the matter after orientation and training involving the specific work rule: 4 5 1

The Employer had just cause to remove the grievant for making racial slurs. The grievant never apologized, nor did he testify as to his intention or state of mind when he made these racial slurs. His longevity, the harm caused, his prior discipline and any mitigating factors must be balanced. Such balancing is at the prerogative of the Employer unless it is not progressive or commensurate. The Arbitrator cannot substitute her judgment for that of the Employer without such a finding. There is no such finding here: 4 5 2

The Employer had just cause to remove the grievant because he falsified his applications for both temporary and permanent employment, as well as his resumes. He lied about his education and prior employment, and manufactured a letter of recommendation. The Arbitrator rejected the argument that no harm came to the employer because of the grievant’s good work record. The substantial harm is that the employer did not have a free choice to pick and choose its employee upon the real work experience and education of the applicant: 4 5 3

The Employer did not have just cause to remove the grievant, in spite of the fact that the grievant was off work five days while in jail, he had no leave balances to cover the time, and the state does not excuse employees who are in jail. The generally accepted approach in dealing with employees with drug or alcohol problems is to attempt to rehabilitate them rather than terminate them. Several factors led to the Arbitrator’s decision to reinstate the grievant: he had his father call off for him because he could not, he was a satisfactory employee with 5 years seniority, the State was not substantially harmed by the grievant’s absences, and the grievant entered an EAP program before being informed of disciplinary action: 4 5 6

The Employee had just cause to remove the grievant for sexual harassment and failure of good behavior, especially considering the grievant’s disciplinary record. The grievant was provided with proper notice concerning the sexual harassment policy articulated in the Work Rules and Procedures. The Employer’s training efforts were sufficient in providing proper notice concerning the sexual harassment policy. Witness testimony demonstrated that the grievant’s lewd, harassing behavior created an oppressive working environment: 4 61

The grievant admitted hitting the patient, but failed in her assertion that it was in self-defense. The Employer’s finding of patient abuse is well founded, and as such, there was just cause for her removal: 4 63

The Employer and grievant signed a last chance agreement, which included EAP completion, after the Employer ordered the removal of the grievant based on a charge of patient abuse, a charge which was not grieved. The grievant failed to meet the conditions of the last-chance agreement, and so the Employer had just cause to activate the discipline held in abeyance, regardless of any mitigating circumstances: 4 65

The grievant failed to inform a supervisor that he had lost his driving privileges and of continuing to drive state vehicles. Because he lost his license, he was unable to perform his job duties, and it was additionally unlikely in light of his suspension that he could obtain the newly required commercial driver’s license by the deadline. Therefore, the Employer had just cause to remove the grievant: 4 66
The grievance was sustained because the unpaid leave was improperly denied, the medical opinion was too ambiguous to determine whether the grievant could return to work, the grievant had an outstanding offer to return to work, and the interpersonal problems were not solely of the grievant’s: 4 66

The suspension was shortened from seven days to one day because the offense was not serious enough to justify the penalty. The grievant called in late, reported to work well after his call-in, failed to complete a request for leave form for his absence, and failed to obtain a physician’s verification: 4 68

Although the grievant’s commission of inmate abuse constitutes a first offense, Management had just cause to remove him as a threat to the institution’s security: 4 70

The grievant was improperly designated a fiduciary, and therefore, maintained her bargaining unit status. The Employer, therefore, violated Section 24 .01 of the Contract when it terminated the grievant without just cause: 4 72

Unless the individual situation is examined, removal after three days’ unauthorized leave without more is simply an unreasonable, arbitrary cut-off time without evidence of the employee’s intention: 4 77

The Employer had just cause to remove the grievant who had admitted charges of gross sexual imposition of an inmate and was subsequently convicted. The Employer did not abuse its discretion considering the seriousness of the misconduct and its direct relation to the grievant’s responsibilities and job performance as a Correction officer: 4 79

The Employer had just cause to remove the grievant for sleeping on duty, in the light of his disciplinary record: 4 80

The State did not sustain it Section24 .01 burden of proof to establish just cause for discipline. The allegations of inmate abuse were not supported. The testimony if the State’s witnesses, many of whom have criminal records, was inconsistent, and in some cases, not credible. No reports were filed on the incident nor were medical exams conducted until days later. Material evidence was not secured, and a detailed investigation was apparently not conducted by the Employer after the incident: 4 81

Giving the “role model” requirement its most narrow reading, the prison employer can show a rational relationship between the correction officer’s off-duty criminal behavior, whether a felony or misdemeanor, and his ability to function as a Correction Officer. A direct conflict exists if a Correction Officer, whose job essentially consists of confining criminals, is himself a criminal. Such a conflict of interest can seriously undermine his ability to do the job. While the grievant had only minor discipline up to this point, the nature of the crime was serious. The State had just cause to remove the grievant: 4 82

ODOT policy prohibits any ODOT employee from operating or driving any department equipment unless or until their modification of driver’s license suspension is documented on the employee’s driving record at the BMV. The grievant failed to comply with the requirements of the modifying order, and so was not able to obtain limited driving privileges. Because 70 percent of the grievant’s job duties required him to drive ODOT vehicles off-season, and 1 00 percent in snow season, he was unable to perform his job. Therefore, the Employer had just cause to remove the grievant: 4 86

- The Employer had just cause to remove the grievant for being absent without leave (AWOL). Her two previous attendance infractions, coupled with other unrelated infractions during her short employment with the Northwest Ohio Development Center justified sustaining the State’s decision to discharge the grievant: 4 88

The Arbitrator is clearly convinced the grievant Sampson did, on at least the occasions charged, throw away what he knew or should have known to be first class mail. However, the evidence is not clear regarding grievant Lawson. Therefore, the discipline of Lawson was not for just cause. Given the lack of recent discipline, the length of grievant Sampson’s service, and the lack of proof of malice, a 1 0-day suspension is not commensurate. However, given his apparent reckless disregard for the rules and the mail of inmates he is sworn to protect, and the seriousness of the offense, a five-day suspension is warranted: 4 92

Discipline was imposed upon the grievant for just cause. The State provided eyewitness testimony that the grievant was observed standing beside the
open salvage door when no loading was in progress. Given the grievant’s continued dishonesty in the face of credible eye witnesses and his extensive disciplinary record (which including numerous reprimands for dishonesty and neglect of duty, failure to carry out work assignment, willful disobedience of direct order and violations of agency policies and procedures) and the removal was commensurate with the offense: 4 93

Management has the burden of showing just cause for punishing an employee. If the past practice of employees and management had never before been disciplined, then subsequent discipline of an employee for that practice may be denied for lack of just cause: 4 94

Unauthorized relationship, involving a close personal relationship, consistent telephone contact, and a scheme to avoid detection, between a Correction Officer and an inmate is a serious offense. These activities create problems for the correction facility, and therefore there is just cause for appropriate discipline. In these situations, appropriate discipline can be removal of the employee: 4 95

Credible and unbiased testimony implicating a hospital aid’s involvement in patient abuse is sufficient to warrant discipline of the hospital aid. Appropriate discipline may be dismissal. Unauthorized breaks, although indicative of an employee’s lack of responsibility, have no bearing on the severity of the discipline imposed for patient abuse: 4 96

The grievant was removed for just cause. ODOT established a nexus between the shoplifting offense and the grievant’s position as an ODOT employee and Union shop steward. The grievant was actually on duty when the incident occurred and there was notable media coverage of it. The removal was commensurate with the offense, because the grievant had been previously convicted of theft, but not removed. The mitigating circumstances (i.e., kleptomania diagnosis, length of service, involvement in rehabilitative program) did not overcome the circumstances and the severity of the offense: 5 00

The grievant, who did not properly attend to an inmate patient and falsified a report concerning the incident, committed serious violations and deserves to be disciplined, but there is not just cause for removal under the circumstances. This was a first offense and Section 24 .02 of the contract clearly provides for progressive discipline. As such, the grievant may not be removed at this stage of the disciplinary process: 5 01

- The grievant was denied reinstatement to her position as a Correction Officer because she violated work rules designed to protect prison guards by limiting personal contact between the guards and the inmates. The grievant had a physical relationship with an inmate, was involved in an extortion scheme with the same inmate and gave her unlisted phone number to another inmate. The arbitrator found that the grievant was terminated for just cause: 5 02

- The Employer has to establish just cause for removal by clear and convincing evidence when the charge is for serious misconduct such as sexual harassment and sexual imposition. The charging party's claim was not more credible than the grievant's denials. Therefore, the removal was improper: 5 03

- The grievant was removed from her position with the Department of Rehabilitation and Correction for dishonesty and failure to cooperate with an official investigation. The arbitrator felt that removal was inappropriate for a first offense so the grievant was reinstated with no loss of seniority, but without back pay: 5 04

- Given the severity of the assault committed by the grievant and his prior disciplinary record, the arbitrator found just cause for his removal: 5 06**

- In a case where the grievant was accused of trafficking prescription drugs to a fellow prison employee, his reinstatement with back pay was awarded because the State was unable to convince the arbitrator that the grievant did the deed with which he was charged and thus there was not just cause for his removal: 5 07

- Although the Union provided believable testimony and documents exonerating the grievant, the length of grievant's prior disciplinary record and the grievant's dishonesty under oath weakened his credibility and strengthened the State's claim that it removed the grievant for just cause: 5 08
- In a case involving a grievant who had been removed for his disruptive behavior during a meeting, the arbitrator held that just cause for the removal did not exist because the parties were equally at fault for the resulting confrontations. The management representative at the meeting exhibited poor management skills in allowing the conversation to become increasingly heated.

- Under Article 24.01, 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. If the arbitrator finds that there has been an abuse of a patient, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

- In this case, the Employer did not establish just cause as to why the grievant should be removed. The Employer could not demonstrate a casual connection between the grievant's blow and the patient's injuries. The grievant was improperly removed and therefore was reinstated with back pay and no loss of benefits.

- Article 29 authorized management to take corrective and progressive disciplinary action for the unauthorized use and abuse of sick leave. This discipline includes but is not limited to removal.

- The Employer and the Union agreed upon a settlement of the issue of whether or not the grievant was disciplined for just cause. The grievant tendered his resignation, and the Employer accepted it. The settlement package was designed to aid the grievant after his duties with the State were finished.

- The State upheld the principles of progressive discipline by giving oral and written reprimands and suspensions for violations of the call in policy. The State then executed an EAP agreement as a conditional discharge. The grievant was eventually discharged for failing to comply with the terms of the EAP agreement.

- In a case involving a grievant who refused to identify his roommate during an internal investigation, the arbitrator held that it is not up to the grievant to decide what questions are relevant to the investigation. The grievant failed to cooperate in the investigation in violation of work rules and, in combination with other violations, could be removed.

- In a case involving a grievant who violated work rules by threatening a co-worker with bodily injury, the arbitrator found that there was just cause for removal.

- The State unjustly removed the grievant for neglect of duty where the grievant was given a list of tasks to be completed for a major inspection without an explanation, an indication of priority, or a deadline. Because the problem resulted from a lack of communication between the grievant and her supervisor and the grievant's prior disciplinary history was completely unrelated to the instant offense, the penalty was too severe.

- The grievant was essentially a very honest employee with 18 years of service and a minimal disciplinary record. Because she was actively seeking treatment for her drug dependency and because her drug dependency was primarily responsible for non-compliance with the initial EAP agreement, her removal was neither just nor progressive.

- Just cause requires that the Employer establish that the penalty which it imposed was appropriate, taking into consideration both the employee's past record and the offense he was charge with committing.

- In a case involving a grievant who signed an EAP agreement to correct his persistent tardiness due to drinking, the State had just cause to remove the grievant when his problems continued and when he failed to enroll in a detoxification program. Although the EAP agreement was to last ninety days, the arbitrator found that the State did not act prematurely in removing the employee.

- In a case involving a grievant who was progressively disciplined as he accrued twelve violations of work rules, the State had just cause to issue five and ten day suspensions to the grievant, even though the grievant was not offered EAP.

- In a case where a grievant was progressively disciplined as he accrued twelve violations of work rules, the State had just cause to issue five and ten day suspensions to the grievant, even though the grievant was not offered EAP.

- In a case involving a grievant who refused to identify his roommate during an internal investigation, the arbitrator held that it is not up to the grievant to decide what questions are relevant to the investigation. The grievant failed to cooperate in the investigation in violation of work rules and, in combination with other violations, could be removed.
- In a case where a grievant was progressively disciplined as he accrued twelve violations of work rules, the State had just cause to issue five and ten day suspensions to the grievant, even though most of the infractions that gave rise to the ten day suspension occurred while the five day suspension was being processed. The grievant was not wrongfully denied an opportunity to correct his behavior between the suspensions because the grievant was disciplined for similar work-related problems prior to the imposition of both suspensions and thus was on notice that he had to correct his behavior: 5 22

- Management properly removed a grievant who (1) failed to sign in for a break which he took during the first hour after reporting to work in violation of agency policy and (2) was AWOL for more than three consecutive days. First, the grievant was aware of the policy, the Union never challenged it as being unreasonable and the grievant failed to provide a rational excuse for taking the unauthorized break. Second, the agency's awareness of the grievant's incarceration in no way curtailed its right to expect employees to work their scheduled hours and be regular in their attendance: 5 23

- In light of the grievant's disciplinary record, including four attendance-related infractions, the grievant received progressive discipline and his removal was for just cause. The grievant's prior discipline progressed from verbal reprimand, to written reprimand to suspension according to the WRPH's policy, and according to this policy, the next step was removal. Although it was undisputed that the grievant was given a copy of and training on the tardiness policy, the grievant continued to arrive at work late and refused to record the time he actually arrived at work: 5 26

- The grievant's actions were serious enough to constitute just cause. She admitted that she entered numerous false social security numbers into the computer each Saturday for three months. Such actions constitute falsification of records and deliberate sabotage of the next extended hours program. These actions caused substantial harm to customers who were unable to schedule appointments on Saturday: 5 27

- The arbitrator found just cause for the grievant's suspension as reduced from ten days to five days. Given the seriousness of the violations, with two of the four allowing for first offense removal, the arbitrator stated that the grievant must take some time off so as not to convey the message that the conduct was acceptable: 5 30

- The arbitrator found just cause for the removal of the grievant due to the grievants' relatively short-term work histories, their failure to immediately confess, and the malicious intent underlying their actions: 5 33

- In a case involving a grievant who physically struck another employee during a confrontation, there was just cause to suspend the grievant for 15 days. In addition, there was just cause to suspend the grievant for his use of insulting language (calling his supervisor a "wimp"): 5 34

- The grievant was removed for patient abuse. The arbitrator weighed evidence from the grievant that he was simply taking an aggressive client's shoe away from him and that the grievant showed no signs of injury or abuse. The grievant's supervisor claimed to have seen the grievant strike the client "with all possible force." The supervisor then pointed to the client's acne-like skin condition which was supposed to have hidden the bruise. The arbitrator found it plausible that the supervisor misunderstood what he saw upon entering the client's room and, coupled with the grievant's long record of successful work with violent and aggressive persons, she concluded that the State did not prove just cause for removal: 5 35

- The grievant's removal was not just, and the penalty was far too severe in comparison with the offense. A Driver's License Examiner performs a variety of duties which are not only associated with administering driving tests. The grievant could have been assigned to perform any number of other duties during the 90-day suspension of her driver's license. In fact, at least two of the grievant's colleagues volunteered to trade non-driving duties with the grievant, and such accommodations had been extended to other employees in the past. The State even admitted that it probably could have accommodated the grievant during per period of license suspension, but instead chose to remove her: 5 36

- Without credible witnesses, there is insufficient evidence to support a charge of patient abuse: 5 39

- The grievant was removed because he (1) took an inmate who needed emergency medical care to a
hold and signed him in instead of taking the inmate to a waiting station as he was directed to do, (2) refused to immediately transport this inmate to the hospital, (3) refused to report to the lieutenant's office to explain his combative behavior, and (4) refused, in an obscene manner, to work mandatory overtime. Consequently, the arbitrator found that the grievant was discharged for just cause and in a manner consistent with progressive discipline. In fact, the arbitrator held that where an offense is extremely serious, a discharge may occur without progressive discipline, and noted that the instant case would have merited such a result. The grievant's activities were so outrageous that, when compounded with the grievant's prior record, the Employer was left with no alternative except to remove the grievant: 5 4 0

The grievant was removed for just cause, because it was found that the grievant had formed an unauthorized relationship with an inmate by committing a prohibited transaction with an inmate: 5 4 3

The Arbitrator found that the grievant was terminated for just cause because the grievant did not fulfill the terms of his EAP agreement, did not attempt to make use of EAP's services appropriately, and did not report to the EAP on the date she indicated she would: 5 4 4

The grievants did not violate Article 24 .01 of the contract because the State failed to meet its burden of presenting sufficient credible evidence and testimony to prove that the grievants abused the patient. Therefore, their termination was not for just cause: 5 4 7

The making of a bomb threat by an employee which constitutes a criminal violation is just cause for the employees termination: 5 4 9

The grievant’s failure to maintain a commercial driver’s license was a prerequisite for the position and the grievant’s failure to maintain a CDL gave the employer just cause to terminate him: 5 5 0

The burden of proof in cases such as this, in which there are allegations of serious misconduct, should be higher than proof by a preponderance of the evidence. The correct standard was clear and convincing evidence. When the circumstantial evidence was considered with the testimony of the State’s witness relating to the admissions of the grievant, there was no reasonable conclusion other than to find in favor of the employer and against the grievant: 5 5 7

The grievant was wrongfully discharged due to a “no contest” plea to an alleged drug possession arrest. The Arbitrator found that a written reprimand for failure of good behavior was commensurate with the offense and the grievant was returned to his position with full back pay, seniority, and benefits: 5 5 8

The employer had just cause to remove an employee who was convicted of patient abuse/neglect and violated the terms of a last-chance agreement, which called for removal if any of its policies were violated, after a 4 5 day suspension: 5 6 0

The grievant’s behavior was premeditated, unnecessary and cruel. Such cruelty directed to the very animals that the grievant was to care for, has no excuse. The grievant was supposed to train inmates and be a role model of behavior for inmates. Such a propensity for violence cannot be tolerated in a prison setting in a person hired to train and supervise inmates. The termination was for just cause: 5 6 1

The employer had just cause to suspend the grievant in a case where the grievant was progressively disciplined for neglect of duty in the past: 5 6 2

Some offenses are so serious as to justify removal as the first and final discipline. Theft of public monies by a public servant falls within that scope. While the grievant was a long-term employee without prior discipline, the seriousness of the offense outweighed those factors. Therefore, just cause was present for the grievant’s removal: 5 6 3

The Arbitrator held that the grievant was not rightfully removed from his position for allegedly misappropriating funds where there was insufficient evidence and the grievant was later acquitted of the charges in a criminal proceeding: 5 6 6

The Arbitrator held that there was insufficient evidence to remove a grievant for patient abuse in a case where the patient had a history of physical aggression and destruction of property, and also that a witness’ testimony was not corroborated: 5 6 8
The Arbitrator held that there was no just cause for removal in a case where the grievant requested leave and provided documentation pertaining to a medical problem being suffered by the grievant’s wife: 5 69

The Arbitrator held that management showed just cause for the removal of the grievant for insubordination stemming from failure to attend a pre-disciplinary hearing and failing to follow an order to submit to a physical examination. Although the grievant claimed that he never received the correspondence informing him of the hearing and the physical examination, the Arbitrator held that reasonable efforts were made on the part of the management to contact the grievant and that the fact the grievant had received prior discipline was also important: 5 70

Under Article 24 of the Contract “disciplinary action shall not be imposed upon an employee except for just cause.” Furthermore, the discipline shall be progressive and it shall be commensurate with the offense. However, if the offense is of a very serious nature, progressive discipline may not be appropriate. When the employer removes an employee, an Arbitrator cannot overrule this employer’s decision unless there is a good and sufficient reason to do so. In this case there was such reasons: 5 71

There is no hard and fast rule about the quantum of proof Arbitrators should expect in discharge cases. The Agreement between the parties places the burden of proof for discharge cases on the State, but it is to silent as to what quantum of proof is needed. Since there is no standard included in the contract, the Arbitrator would not impose one. The Arbitrator held that since there was no standard included in the contract between the parties for removal, the standard of “clear and convincing” evidence was not to be imposed upon the State. Rather, what is required is “a heavy burden to present sufficient evidence that discharge is warranted: 5 73

- The employer did not have just cause for removing the grievant for three alcohol induced off-duty incidents. The grievant’s termination was reduced to a disciplinary suspension, and the grievant was reinstated to his former position on a conditional last-chance basis: 5 77

- Where the grievant misplaced his security equipment in an area not accessible to inmates for a short time, the Arbitrator determined the employer did not have just cause to suspend the grievant for ten days: 5 78

- The Arbitrator held that the employer did not have just cause to remove the grievant based on the fact that the charges were ambiguous. The exact charges used to support the removal changed a number of times throughout the investigation and grievance handling process. This condition resulted in a clear violation of Article 24 .04 which places a clear obligation on the employer to articulate "the reasons for the contemplated discipline and the possible form of discipline": 5 80

- Considering the grievant's past record it is obvious that progressive discipline has not been successful. Furthermore, the employer has presented sufficient evidence to support its claim that the grievant's removal was for just cause: 5 88

- The grievant was discharged for making threatening, intimidating, coercing and abusive language toward a number of mentally ill inmates. The Arbitrator determined that any corrective measures would be futile because the grievant lacked “actual” remorse, as evidenced by his testimony and demeanor at the arbitration hearing. Therefore, a suspension component of discipline is not required and the removal was for just cause: 5 89

- The Arbitrator concluded that there was proper and just cause to remove the grievant based on the general principle that the employer usually prevails when an employer discharges an incarcerated employee on the basis of absenteeism caused by an employee’s incarceration: 5 90

- The grievant was observed falsifying his time sheets. The Arbitrator stated that just cause rarely sanctions a mechanical removal based solely on a single offense. The only exception to this rule is that a summary dismissal will be upheld in cases of extraordinarily severe conduct. Since the grievant’s behavior, the equivalent of theft, qualifies as extraordinarily severe misconduct, the dismissal was appropriate: 5 94

- Management presented substantial evidence, including eyewitness testimony, that the grievant used excessive force and assaulted a youth inmate.
From the evidence and testimony introduced at the hearing, and a complete review of the record, including pertinent contract provisions, it was the Arbitrator's judgment that the grievant was removed for just cause: 5 95

- The Arbitrator held that there was just cause for the removal of the grievant for patient abuse: 5 97

- The grievant, accused of misusing a State vehicle, admitted to misconduct and waived his right to a pre-disciplinary hearing. He subsequently received a ten-day suspension. The Union contended that management did not have just cause to discipline the grievant. The Arbitrator held that since the grievant admitted the misconduct, management met the just cause standard and the discipline was justified: 5 98

- Where the grievant misplaced his security equipment in an area not accessible to inmates for a short time, the Arbitrator determined the employer did not have just cause to suspend the grievant for ten days: 600

- The grievant was informed that she was being removed because several visitors to the facility complained about her conduct. The Arbitrator concluded that the proper standard to be applied in this case was “good management” reasons not the “just cause” standard, which management met. The grievant’s removal was not arbitrary or capricious, but was based upon incidents reported by two visitors and the warden’s own observation of the grievant. It appears that management simply believed that public relations would be improved by moving the grievant: 602

- The Arbitrator held that just cause existed for the grievant’s removal because the repeated violations were of such a flagrant and appalling nature as to warrant removal: 604

- The Arbitrator held that just cause existed for the grievant’s removal because of the serious nature of his conduct, his awareness of the facility’s rules about alcohol consumption on Ohio Department of Transportation property, and the discretionary nature of Employee Assistance Program (EAP) agreements: 605

- The Arbitrator concluded that the Employer had just cause to remove the grievant who had been charged with an unauthorized relationship with an inmate. The Employer’s position was sustained because the grievant was aware of the Department of Rehabilitation and Correction’ Rule #4 6, as well as the consequences of violating the rule as evidenced by her signature on a document reciting the rule: 607

- The Arbitrator found just cause for the grievant’s removal based on the evidence provided by the Employer, which showed that the grievant had been involved in drug trafficking while off duty. The Arbitrator held that the grievant’s reputation had been sufficiently damaged by his arrest to compromise his authority over the inmates. Therefore, a nexus was established between the off-duty conduct and the grievant’s job as a Correction Officer: 608

- The Employer had just cause to remove the grievant who had been discipline for absenteeism eleven times during her four year tenure. However, the Arbitrator held that the spousal abuse the grievant suffered warranted reinstating the grievant contingent upon her participation in an Employee Assistance Program: 609

- The Employer did not have just cause to remove the grievant for threatening to shoot a co-worker during a confrontation. Just cause requires an Employer to attempt to salvage employees who are salvageable. Thus, an Employer just consider every potentially mitigating factor, as well as aggravating factors. Although the grievant had several disciplines for absence related problems, the Arbitrator found that the grievant’s attendance improved for more than one year following the EAP referral, most of the grievant’s evaluations were at or above standards and the grievant acknowledged that the gun threat was wrong: 61 0

- The Arbitrator found that just cause existed for the grievant’s removal based on the circumstances surrounding his request for sick leave. The Arbitrator stated that the grievant’s credibility regarding the entire situation was significantly dampened by his continued refusal to be forthright with his employer. Furthermore, the Arbitrator found that the sudden onset of the grievant’s medical problems, his failure to inform the department about the suspension of his driving privileges, and his work schedule at the auto parts store all indicated that the grievant engaged in a series of deceitful acts hoping to realize both his sick leave benefits and his wages from a second job. Finally, the Arbitrator concluded that this
was clear and convincing evidence justifying the grievant’s removal: 61

- Where the grievant was a 25 year service employee and had no prior severe discipline or current discipline, the Arbitrator determined that no just cause existed to discharge the grievant: 61

- The Arbitrator stated that the grievant was removed for just cause due to the serious nature of the grievant’s offense: 61

- The Arbitrator held that just cause existed for the grievant’s removal because his actions constituted sexual harassment, a “malum in se” offense, and created a hostile work environment. The Arbitrator emphasized that the grievant’s actions were neither welcome nor encouraged by the victim and ultimately were severe and humiliating enough to adversely affect the victim’s work performance: 61

- Although the State presented a substantial amount of circumstantial evidence showing that the grievant was guilty of the charged offense, the evidence was a result of the “tainted” investigation. Further, considering that the evidence was circumstantial and that the grievant was a long-term employee, the Arbitrator held that the removal was extreme and executed without just cause: 61

- The grievant argued that she was constructively discharged without just cause in violation of Article 24. The Arbitrator concluded that since the grievant refused to sign a written resignation and that the State failed to demonstrate that the grievant voluntarily surrendered her badge and identification, the grievant was constructively discharged without just cause: 61

- The grievant argued that he was removed from his position without just cause. The Arbitrator held that since the Employer’s disciplinary policy was flexible in cases of drug charges, it should have considered the grievant’s good record, lack of evidence of drug abuse or drug trafficking, and five-year employment record. Therefore, the Arbitrator held that the grievant was removed without just cause: 61

The grievant discussed the facility’s new alarm system with two inmates. His comments were a threat to the security of the facility, staff and inmates. Another correction officer overheard the Grievant discussing the fifteen (15) second delay used to cancel an accidental alarm and other pertinent alarm information to another inmate. The testimony from the other officer concerning the Grievant’s conversation with inmates was credible and admitted to a great extent by the Grievant. The arbitrator found that this type of offense does not require the application of progressive discipline and it was the most egregious type of security breach going far beyond exercising poor judgment. The positions of the Union that improper training was given or due process violations occurred were also without merit. The arbitrator noted that the grievant’s short service time was an aggravating factor in support of removal. 823

During her brief employment with the State of Ohio, the grievant accumulated a number of disciplines: an oral reprimand, a written reprimand, a three-day suspension and a five-day suspension. Violations included misplaced files, incomplete claims and claims which were processed improperly. The employer had been aware of the grievant’s poor work performance for some time and the various disciplines were its attempts to correct the problem. The arbitrator found that the progressive disciplines which increased in severity did nothing to correct the grievant’s performance. The employer could not have reasonable confidence that the grievant’s work would reach an acceptable level. The discipline imposed was justified. 904

The Arbitrator found that the Employer exercised sound discretion given the fact that the Grievant had failed to respond in a meaningful way to prior progressive corrective action steps (particularly to a fifteen day suspension) in an effort to improve her dependability. The Grievant also failed to present any convincing mitigating factors that would excuse her late call or her one hour and twenty-four minute absence from work. The Arbitrator did not agree that the Grievant was treated in a disparate manner, that a misstated year on a letter had any impact on the timing of the investigation, and that there was bias when the investigator was a witness to the Grievant’s calling in late. 928

The Grievant admitted that he failed to make all of the required 30-minute hallway checks and a 2:00 a.m. headcount and then made entries in the unit log indicating he had done so. The Arbitrator held that just
cause existed for discipline. Since the Grievant committed a serious offense less than two years after being suspended for six days for the same offense, the Arbitrator held that the principles of progressive discipline had been followed. In addition, the Arbitrator held that long service cannot excuse serious and repeated misconduct. It could be argued that an employee with long service should have understood the importance of the hallway checks and headcount more than a less senior employee. The Union argued that since the Grievant was not put on administrative leave, it suggested that his offense was not regarded as serious. The employer, however, reserved the use of administrative leave for cases where an employee is accused of abuse. The Union also argued that the time it took to discipline the Grievant should mitigate against his termination. The Arbitrator held that the investigation and pre-disciplinary hearing contributed to the delay and the state made its final decision regarding the Grievant’s discipline within the 45 days allowed. 978

In the period leading up to his dismissal the Grievant was having issues with members of his household and his own health. The Grievant did not call in or show up for work for three consecutive days. The Arbitrator held that employers unquestionably have the right to inform his employer of his status. 983

The Employer’s procedural objection as to timeliness was denied because the record failed to indicate that the Union received notification in writing to comply with Article 24.06 of the CBA. The Grievant was involved in breaking up an altercation between two youth offenders and was then accused of injuring one of the youth offenders. The incident was recorded by video camera. The Employer attributed all of the youth offender’s injuries to the Grievant; the Arbitrator disagreed. In the opinion of the Arbitrator the youths were not credible, in either their own statements or their combined statements and testimony, because they were not able to recall with sufficient clarity the material facts of an incident that was not complicated. In addition, in their hearing testimony each youth admitted that his written statement was at odds with the video. The grievance was granted; however, the Arbitrator stated: “If in fact the Grievant committed those violations the finding that this evidence failed to demonstrate just cause should not be viewed as a victory only that, in my opinion the evidence fails to support that the discipline was for just cause.” In other words, the state failed to prove their case, but the Grievant was not found innocent. 984

The Arbitrator held that to sustain a charge of threatening another employee an employer must have clear and convincing proof. Here the proof did not even rise to the preponderance standard, being based solely on the report of the co-worker allegedly threatened, who had a deteriorated relationship with the Grievant since the events of a prior discipline. The investigator did not consider that the co-worker may have exaggerated or over-reacted. Management’s handwritten notes were held to be discoverable under Article 25.09. It had refused to produce them until after the grievance was filed and then had to be transcribed for clarity, which delayed the arbitration. The investigator breached the just cause due process requirement for a fair and objective investigation which requires that whoever conducts the investigation do so looking for exculpatory evidence as well as evidence of guilt. Then, to make matters worse, the same investigator served as the third step hearing officer, essentially reviewing his own pre-formed opinion. 985

The Arbitrator held that the removal lacked just cause and must be set aside. In a related case Arbitrator Murphy held that lax enforcement of the employee-resident personal relationship ban undermines enforcement of other provisions of the policy including the ban on accepting money from residents. This Arbitrator agreed. Management’s actions have to be consistent with the published policy and rules, and similar cases have to be treated in a like manner for them to have value in guiding employee conduct. Because of lax enforcement of far more serious infractions elsewhere in the agency, the Grievant could not
have expected removal for borrowing money from a resident. The Grievant had previous counseling for receiving a bag of gratuities from a resident. She should have learned that accepting gratuities from residents makes her subject to discipline. Her case is aggravated by her contact and attempted contacts with witnesses against her pending the arbitration. For this reason she is reinstated, but without back pay and benefits. 991

The Grievant was removed after two violations—one involving taking an extended lunch break, the second involved her being away from her work area after punching in. Within the past year the Grievant had been counseled and reprimanded several times for tardiness and absenteeism, therefore, she should have know she was at risk of further discipline if she was caught. Discipline was justified. The second incident occurred a week later when the Grievant left to park her car after punching in. The video camera revealed two employees leaving after punching in. The other employee was not disciplined for it until after the Grievant was removed. That the Reviewing manager took no action against another employee when the evidence was in front of him is per se disparate treatment. No discipline for the parking incident was warranted. Management argued that removal was appropriate since this was the fourth corrective action at the level of fine or suspension. The Grievant knew she was on a path to removal. But she also had an expectation of being exonerated at her Non-traditional Arbitration. Her 3-day suspension was vacated by an NTA decision. That fine was not to be counted in the progression. The Grievant was discharged without just cause. 992

An inmate committed suicide while the Grievant was working. Post Orders required rounds to be made on a staggered basis every thirty minutes. On the night the inmate committed suicide, the Grievant did not check on the inmate for two hours. In addition, the Grievant admitted to making false entries in the log book and admitted to not making rounds properly for ten years. The Union’s claim that complacency by Management was the cause was not supported by persuasive evidence. There was evidence that “employees could be written up every day.” But there was also evidence that Management took steps to correct this and employees were given plenty of notice. The Arbitrator reviewed the Seven Steps of Just Cause and found the discipline commensurate. 1010

The employer removed the Grievant contending that he failed to protect a Youth; that he placed the Youth on restriction for seven to ten days without a Supervisor’s approval in order to conceal the Youth’s injuries; and that he failed to report Child Abuse. The Arbitrator held that the discipline imposed was without just cause. The Arbitrator found no evidence that the Grievant failed to protect the Youth. The evidence did not support the contention that the Grievant failed to see that the Youth got medical attention. The Arbitrator opined that “for the employer to assert that the Grievant should have substituted his judgment for that of the medical staff on this set of facts is unrealistic.” The Arbitrator also found that there was clear evidence that Unit Managers receive no training and there is no written policy on restrictions. The Arbitrator found there was no evidence that the Grievant failed to cooperate or to file other reports as required to report Child Abuse. Management was aware of the incident. If the employer wanted the Grievant to complete a specific form, per its own policy, it should have given the Grievant the form. 1022
While on a hunting trip and staying in Mt. Vernon, the Grievant was arrested for operating a vehicle while impaired. The Grievant became very belligerent and verbally abusive. A newspaper report regarding the incident was later published in Mt. Vernon. The Arbitrator held that the Employer had just cause to remove the Grievant. The Arbitrator was unwilling to give the Grievant a chance to establish that he was rehabilitated. Some actions or misconduct are so egregious that they amount to *malum in se* acts—acts which any reasonable person should know, if engaged in, will result in termination for a first offense. Progressive discipline principles do not apply in these situations and should not be expected. The Employer established a nexus for the off-duty misconduct. The Grievant’s behavior harmed the reputation of the Employer. It would be difficult or impossible to supervise inmates who may find out about the charges and their circumstances. This would potentially place other officers in jeopardy; an outcome the Arbitrator was unwilling to risk. 1025

To establish theft, the evidence must show that the Grievant intended to deprive the agency of funds provided to employees to attend conferences. The funds were operated as a short-term loan. No written policy or consistent pattern was present regarding repayment by users. The arbitrator held that it was irrelevant how many days it took the Grievant to repay the fund since the Employer essentially allowed each user to determine the date of repayment. The Arbitrator found that several factors mitigated against removal: lax/inconsistent enforcement of rules/policies governing the fund undermines any contention that the Grievant was put on notice regarding the possible consequences of her actions; the Grievant’s treatment of the fund were explicitly or implicitly condoned by her supervisor; and other similarly-situated users of the fund were treated differently from the Grievant. No theft of public funds was proven; when put on notice by Management that immediate payment was required, the Grievant complied. The Arbitrator held there was no just cause for the discipline issued. 1028

The Arbitrator found that the Grievant was removed without just cause. Management did not satisfy its burden of proving that he acted outside the Response to Resistance Continuum and engaged in the conduct for which he was removed. The Youth’s level of resistance was identified as combative resistance. The Grievant’s response was an emergency defense, which he had utilized one week earlier with the same Youth and without disciplinary action by Management. A fundamental element of just cause is notice. Management cannot discharge for a technique where no discipline was issued earlier. In addition there was no self-defense tactic taught for the situation the Grievant found himself in. 1032

**K**

**L**

**Labor-Management Discussions**

- Although the labor-management discussions are laudable, they cannot usurp specific language negotiated by the parties: 24 1

**Laches**

- Where arbitration hearing was postponed several times and the employer claimed that the union was either estopped by the doctrine of laches or because it had waived the right to arbitration the arbitrator found that both parties were at fault and that no intentional relinquishment of the grievance had occurred. Given the employer's fault and the grievant's right to a day in court, the arbitrator found the grievance arbitrable. But since the union was also at fault, and this fault hurt the employer by affecting the availability of witnesses and the clarity of memories, the arbitrator announced that if the grievance was sustained, the award would be diminished. 236

**Lack of Training**

The employer removed the Grievant contending that he failed to protect a Youth; that he placed the Youth on restriction for seven to ten days without a Supervisor’s approval in order to conceal the Youth’s injuries; and that he failed to report Child Abuse. The Arbitrator held that the discipline imposed was without just cause. The Arbitrator found no evidence that the Grievant failed to protect the Youth. The evidence did not support the contention that the Grievant failed to see that the Youth got medical attention. The Arbitrator opined that “for the employer to assert that the Grievant should have substituted his judgment for that of the medical staff on this set of facts is unrealistic.” The Arbitrator also found that there was clear evidence
that Unit Managers receive no training and there is no written policy on restrictions. The Arbitrator found there was no evidence that the Grievant failed to cooperate or to file other reports as required to report Child Abuse. Management was aware of the incident. If the employer wanted the Grievant to complete a specific form, per its own policy, it should have given the Grievant the form. 1 022

**Last Chance Agreement**

- Does not defeat the purpose of the last chance agreement if employee's performance record and attitude led the employer to believe the grievant deserved one additional chance: 23

- Where employee's removal order bade been placed in abeyance for a last chance agreement including use of EAP. The employee then went on disability leave because of a heart attack. When he returned he was tardy again several times, but the tardiness may have been caused by medication. The arbitrator said the employer cannot remove the employee until the employee has had a chance to fulfill the last chance agreement. The arbitrator noted that it was not obvious from the evidence that, after the employee returned, the employer had counseled and insisted that the employee take advantage of EAP: 1 5 1

- The grievant's disparate treatment argument failed because an employee who is under a last chance agreement is not similarly situated as an employee who is not under such an agreement: 1 62

- The arbitrator found it irrelevant in this case that the agreement did not specify a date when the agreement would terminate. He reasoned that the new violation followed so soon after the agreement that the employee should have known the agreement was still in force. If the violation had occurred a long time after the agreement, the arbitrator said that failure to specify the agreement's termination date would be significant: 1 62

- When parties enter into a last chance agreement certain obligations and responsibilities ensue. The employer basically decided that the circumstances justify a rehabilitative effort; which resulted in the conversion of a disciplinary penalty into a conditional reinstatement. The employee assumes certain responsibilities when he and the union agree to such an undertaking. He pledges that the conditions agreed to will be complied with; if he fails to do so then he agrees that he will shoulder all the attached consequences: 1 62

- Arbitrators have upheld the validity of last chance agreements. Several reasons have been given for the enforcement of special agreements of this variety. First, last chance agreements are supported by consideration, and thus, may serve to modify a collective bargaining agreement or work rules, in their application to special employees. Second, these agreements are generally supported as a matter of public policy. They serve a beneficial social service because they establish a rehabilitative opportunity for errant employees: 208

- It is virtually impossible for an arbitrator to modify the terms of a last chance agreement agreed to and adopted by the parties and the grievant. The terms may be viewed as unreasonable, inequitable, and excessive by an arbitrator. Regardless, an arbitrator must assume the parties and the grievant were fully aware and cognizant of the ramifications attached to signing: 208

- Mere variations in terms of discipline do not prove disparate treatment when a reasonable basis exists for the different penalties imposed. That the grievant was under a last chance agreement, but the employee who received a lesser penalty for the same kind of violation was not, is a reasonable basis for imposing different penalties: 208

- If the grievant does commit a further serious misconduct during the period he is reinstated (until he is eligible for retirement) removal would be appropriate. Nothing in this settlement ensures the grievant a job for a year until he is eligible for retirement: 289

- The grievant had an unauthorized friendship with a youth who was released from the facility. The discipline of termination is not corrective in this case. The grievant is a six-year employee by the employee was not without the potential for learning. The grievant is to be reinstated under a Last Chance Agreement: 338

- The Last Chance Agreement and record of the suspension will be removed from the grievant's personnel file after 24 months if there is no further discipline: 338A
- Since the grievant refused to sign the Last Chance Agreement the arbitrator upheld the removal of the grievant: 352

- The grievant began his pattern of absenteeism after the death of his grandmother and his divorce. The grievant entered an EAP and informed the employer. He had accumulated 104 hours of unexcused absence, 80 hours of which were incurred without notifying his supervisor, and 24 hours of which were incurred without available leave. Removal was recommended for job abandonment after he was absent for three consecutive days. The pre-disciplinary hearing officer recommended suspension, however the grievant was notified of his removal 52 days after the pre-disciplinary hearing. The arbitrator found that the employer violated the contract because the relevant notice dates are the hearing date and the date on which the grievant receives notice of discipline. Other arbitrators have looked to the hearing date and decision date as the relevant dates. Additionally, the employer was found to have given “negative notice” by overlooking prior offenses. The arbitrator reinstated the grievant without back pay and ordered him to enter into a last chance agreement based upon his participation in EAP: 371

- The grievant was a field employee who was required to sign in and out of the office. He began to experience absenteeism in 1990 and entered drug abuse treatment. He continued to be excessively absent and was removed for periods of absence from October 2nd through the 10th and October 26th to the 30th, during which he called in sporadically but never spoke to a supervisor. The grievant was found to have violated the employer’s absenteeism rule. Additionally, the employer was found not to be obligated to enter into a last chance agreement nor to delay discipline until the end of the grievant’s EAP. Mitigating circumstances existed, however, to warrant a reduced penalty. The arbitrator noted the grievant’s length of service from 1981 to 1990, and the fact that he sought help himself, therefore the arbitrator reinstated the grievant with no back pay pursuant to a last chance agreement after a physical examination which must show him to be free of drugs: 391

- The grievant was hired as a Tax Commissioner Agent and had received a written reprimand for poor performance while still in his probationary period. He was assigned a new supervisor who developed a plan to improve his performance, however the grievant continued to receive discipline for poor performance and absenteeism, including a ten day suspension which was reduced pursuant to a last chance agreement. It was discovered after the last chance agreement had been made, that prior to the signing of the last chance agreement, the grievant had committed other acts of neglect of duty. The grievant was removed for neglect of duty. The arbitrator held that a valid last chance agreement would bar an arbitrator from applying the just cause standard to a disciplinary action and that the agreement made by the grievant was valid. It was also found that there existed hostility between the grievant and his supervisor, the employer stacked charges by basing discipline on events which occurred prior to the last chance agreement but the grievant was awarded 4 weeks back pay because of the employer’s failure to comply with the union’s discovery requests: 412

- The Employer and grievant signed a last-chance agreement, which included EAP completion, after the Employer ordered the removal of the grievant based on a charge of patient abuse, a charge was not grieved. The grievant failed to meet the conditions of the last-chance agreement, and so the Employer had just cause to activate the discipline held in abeyance, regardless of any mitigating circumstances: 465

- The employer had just cause to remove the grievant due to her violation of the terms of a last chance agreement whereby any violation of the employer’s attendance policies would result in her discharge: 559

- The employer had just cause to remove an employee who was convicted for patient abuse/neglect and violated the terms of a last chance agreement, which called for removal if any of its policies were violated after a 45 day suspension: 560

- The grievant was arrested for DUI while driving a State vehicle and was subsequently removed. The Arbitrator concluded that this removal should be modified and that the grievant should be reinstated without back pay but without loss of seniority or benefits. Furthermore, the Arbitrator concluded that the grievant should execute a last chance agreement: 571

- This Arbitrator concluded that the choice made by the grievant to complete the dietary requisition
before putting away the frozen commodities was completely lacking in common sense. The Arbitrator found that the grievant was in violation of the work rules, specifically neglect of duty, and the last chance agreement.

The 1996 Last Chance Agreement signed by the grievant and the Department did not encompass “off-duty” drug use. The grievant’s absences on the last two occasions prior to removal were a result of his drug use off-duty. The Arbitrator found that the grievant did not violate the agreement.

**Last Chance Agreement**

The Arbitrator found that the grievant did not exercise poor judgment in informing the grievant of her findings, or that the department changed those findings. The Arbitrator, however, stated that the grievant’s act of telling the complainant to “not let it go” crossed the line from information to encouragement. This act constituted poor judgment. Although the Arbitrator found that the grievant engaged in misconduct and some form of discipline was warranted, removal was not appropriate in this case. He stated that removal was unreasonable, but only slightly so.

The grievance was denied in part and granted in part. The grievant was given a last chance agreement without back pay from the time of her removal to the time that DR&C complied with the award. Seniority was to remain intact.

_PLEASE NOTE:_ After the award was issued, the parties contacted the arbitrator for clarity on the Last Chance Agreement (LCA), etc. The arbitrator stated that the LCA was meant to last for one (1) year, and it was tied to the one rule violation found by the arbitrator.

**Bench Decision** – The grievant was returned to his former position. His termination was to be removed from his personnel record. The time since his removal was to be converted to Administrative Leave without pay. The grievant was ordered into a Last Chance Agreement for two years for violations of Rule 40 – _Any act that could bring discredit to the employer_. The grievant was not removed for just cause.

The grievant reported for work under the influence of alcohol. He signed a Last Chance Agreement (LCA) which held his removal in abeyance pending his participation in, and completion of, an EAP program. Random drug/alcohol testing was a component of the LCA. He was told to report for a random test. He failed to comply and was removed. The arbitrator found that the employer’s failure to notify the chapter president of a change in the LCA was a violation of good faith but did not negate the grievant’s obligation to adhere to the agreement. The grievant had ample opportunity to confer with his union representative prior to signing the agreement and without specific reason for the
necessity to speak to his representative prior to the test, the grievant’s procedural arguments did not justify his refusal to submit to the test. The grievant had the option to “obey now and grieve later” and he did not elect to do so. 838

Grievant was terminated from his position as Cook 1 at the Department of Youth Services for reporting to work 22 minutes late on June 1 5, 2003 and one minute late on June 1 6, 2003. In addition, the grievant was arrested at the facility for failing to pay a fine for a traffic offense. The arbitrator denied the Union’s contention that the state must allow the grievant to return to work on a last chance agreement because nothing in the collective bargaining agreement required it to offer a last chance agreement to the employee. 862

The grievant had numerous disciplines in his record including a removal. The disciplines centered on attendance issues. The removal was converted into a Last Chance Agreement (LCA) which specified that if the LCA was violated the grievant would be removed. Approximately three and one half months following the execution of the LCA, the grievant was fifty-two minutes tardy for work. He was subsequently removed. The arbitrator found that the LCA was negotiated in good faith and prohibited conduct which included tardiness. There was no evidence presented to indicate that an effort was made to nullify the LCA. There were no mitigating factors to conclude that the grievant’s removal was not proper. 921

The grievant was observed arriving late for work on two separate dates and upon arrival did not clock in. The grievant stated that he did not clock in because he was on an LCA and did not want to get into additional trouble. During his pre-disciplinary meeting the grievant stated he was forced to sign the agreement, his representative misled him regarding the agreement and its effects, and he had been wrongly placed on an LCA because his disciplinary record was incorrect. A ten-day suspension had been reduced to a five-day suspension through NTA. The arbitrator found that the grievant and the Union should have sought to correct the grievant’s record prior to the LCA and based upon the untimely manner in which the issue was raised there was no longer appropriate relief. The agency’s conduct complied with the intent of the LCA and no mitigating factors were presented to warrant reversing the removal. 931

The central question was whether the Grievant lost control of security keys to an inmate through no fault of his own. The Arbitrator felt that the Grievant used poor judgment in holding the keys in front of an inmate and letting him take them without protest. The Grievant’s actions afterward suggested he knew he had made a mistake and was trying to cover it up. These were not actions in-and-of-themselves warranting termination; however, a proven act of misconduct must be viewed in context. This was the Grievant’s sixth performance related misconduct in his less than two years service and he was on a Last Chance Agreement strictly limiting an arbitrator’s authority to that of reviewing whether he violated the Last Chance Agreement and/or the rule. When he violated the rule he broke the Last Chance Agreement and the Employer had the right to terminate his employment. The grievance was denied in its entirety. 961

Neither the Employer nor the Union were entirely right or wrong in the case. The Grievant’s discipline did not stand in isolation. She had 29+ years of service with the state with a satisfactory record until 2004. In addition, she had been diagnosed with sleep apnea and begun treatment. Under the circumstances her discharge could not stand. The Employer acted properly in administering progressive discipline to the Grievant; on the other hand, the Grievant was ill. Because she had called-off the two days prior to the day in question she had a reasonable belief, albeit erroneous, that the Employer knew she would not report. As a veteran of many years of service she should have known that she should call in. She had been subject to recent and increasingly serious discipline. Therefore a make-whole remedy could not be adopted. 964

The Employer waited 55 days to notify the Grievant that a problem existed with two assignments. The Arbitrator agreed that this delay was unreasonable under Article 24 .02 and was not considered grounds to support removal. Given that his direct supervisors considered the Grievant a good worker, any conduct which could accelerate his removal should have been investigated in a timely manner. The Arbitrator found that sufficient evidence existed to infer that the Grievant’s conduct surrounding one incident—in which proper approval was not secured nor was the proper leave form submitted—was directly related to a severe
medical condition. Twenty one years of apparent good service was an additional mitigating factor against his removal. DPS met its burden of proof that the Grievant violated DPS’ Work Rule 5.01.01 (C) (1 0) (b) on two dates and that discipline was appropriate, but not removal. However, as a long-term employee the Grievant was knowledgeable about DPS’ rules relating to leave and any future violation would act as an aggravating factor warranting his removal. 969

The Grievant had a prescheduled medical appointment on the afternoon of July 24. Then the Grievant called off for her entire shift early in the morning of July 24. An Employee is under a duty to provide a statement from a physician who has examined the employee and who has signed the statement. The statement must be provided within three days after returning to work. The Grievant should have submitted a physician’s statement on the new request—the second request for an eight (8) hour leave. The Grievant, instead, submitted the physician’s statement that comport entirely with her initial request for a leave on July 13 for three (3) hours. The record does not show that the reason for the prescheduled appointment was for the same condition that led her to call of her shift. The letter from the doctor made it clear that they could not provide an excuse for the entire shift absence requested by the Grievant. There was no testimony from the Grievant about why she called off her entire shift. The record does not support the finding that the Employer “demanded” a second physician’s verification. The physician’s verification submitted by the Grievant supported only a leave for three (3) hours, and the record is sufficient to show that the Employer did note this inadequacy to the Grievant on August 7. Based on the record, the Arbitrator found that the Grievant failed to provide physician’s verification when required—an offense under Rule 3F of the Absenteeism Track set forth in the disciplinary grid. This constituted a breach by the Grievant of her Last Chance Agreement. Proof of this violation required that “termination be imposed.” Furthermore, the Arbitrator did not have any authority to modify this discipline. 993

The Arbitrator held that, management demonstrated by a preponderance of the evidence that the Grievant violated General Work Rules 4.1 2, 5.1 , and 5.1 2, and therefore, some measure of discipline was indicated. Mitigating factors were the Grievant’s three years of tenure, satisfactory performance record, and no active discipline. In addition, the Agency established only one of the three major charges that it leveled against the Grievant. Also, nothing in the record suggested that the Grievant held ill will against the Youth. The Arbitrator held that removal was unreasonable, but only barely so, in light of the Grievant’s poor judgment and his less than credible performance on the witness stand. The primary reason for his reinstatement is that the Grievant never intended to harm the Youth. The Grievant was reinstated under very strict conditions: he was entitled to no back pay or other benefits during the period of his separation, and he was reinstated pursuant to a two-year probationary plan, under which he shall violate no rule or policy involving any youth. Failure to comply will be grounds to remove the Grievant. 995

The Arbitrator found that the evidence showed the Grievant had violated Work Rule Neglect of Duty (d) and Failure of Good Behavior (e). The evidence failed to demonstrate any words or conduct that rose to the level of a threat or menacing. The Arbitrator held that the removal was excessive due to the Grievant’s medical condition; the Grievant’s acute personal issues; a relatively minor discipline record at time of removal; eleven years of satisfactory service; and the absence of threatening conduct. The Arbitrator reinstated the Grievant with conditions: she will successfully complete an EAP program for anger management and stress—failure to do so would be grounds for immediate removal; discipline of a 1 5 day suspension without pay for violating the work rules; she shall receive no back pay, seniority and/ or any other economic benefit she may have been entitled to; she shall enter into a Last Chance Agreement, providing that any subsequent violation of the work rules for a year following her reinstatement will result in immediate removal. 999

The Grievant had entered into a Last Chance Agreement with the agency. She then violated the Corrective Action Standard, AWOL—No approved request for leave. The Arbitrator held that the Last Chance Agreement was fair, just, and reasonable. The Grievant was knowledgeable of the corrective action standard and there was no evidence showing that those corrective action standards were not published or selectively used rather than even-handedly applied. The Arbitrator found that the Grievant’s excuse for the absence lacked corroboration in any manner or respect. The Arbitrator reminded the parties that if a termination is based upon a Last Chance Agreement the just cause provisions may not apply, but rather the application is under the Last Chance Agreement. 1 031

The Arbitrator held that BWC had just cause for removing the Grievant, since the Grievant was either unwilling or unable to conform to her
employer’s reasonable expectation that she be awake and alert while on duty. The agency and the Grievant had entered into a settlement agreement, wherein the Grievant agreed to participate in a 180-day EAP. However, the Arbitrator found that the sleeping while on duty was a chronic problem which neither discipline or the EAP had been able to correct. The Grievant raised the fact that she had a common aging problem with dry eyes and was taking a drug that made the condition worse. However, she never disclosed to the supervisor her need to medicate her eyes. The Arbitrator held that this defense amounted to post hoc rationalization and couldn’t be credited. The Arbitrator felt that a person on a last-chance agreement for sleeping at work and who had been interviewed for an alleged sleeping infraction would take the precaution of either letting her supervisor know in advance about this treatment, take the treatment while on break and away from her work area, or get a witness.

**Lax Enforcement of Work Rules**

- See Notice of disciplinary rules and/or the consequences of violations

- Well settled principle of arbitration: arbitrator may disturb penalties where employer had condoned violation of the rule in the past. Lax enforcement may lead employees to believe that behavior in question is sanctioned by management. Elkouri, *How Arbitration Works*: 35

- By its neglect, supervision temporarily waived the rule against insulting and obscene language and is estopped from punishing retroactively on a selective basis. Before the rule may be enforced all employees must receive prior warning: 117

- The grievant had extensive absenteeism during the 4 months he had worked for ODOT. Nevertheless he had not received any corrective discipline, but was removed at the end of the four months. The employer's lax enforcement condoned the grievant's repeated violations and led him to believe that nothing would happen to him when he did not report to work. Thus the employer shares some fault for the grievant's conduct and, consequently, discharge is inappropriate. Nevertheless, the rule requiring employee attendance is reasonable and the grievant must be put on notice that continued violations could result in removal. Thus the arbitrator held that the grievant should receive a ten-day suspension. The arbitrator noted that the removal would have been sustained if the employer had only overlooked an isolated incident of unauthorized absence or failure to call-in properly: 249

- It is fairly well established that "[Although having been lax an employer can turn to strict enforcement of a policy] after giving clear notice of the intent to do so". (Elkouri) In this case, the supervisor held a meeting where she told employees that there would be no authorized absences unless doctor's excuses are submitted or employees were hospitalized and were out of available time. She also put a hand written note on the bulletin board saying "No more AA leave' without Kirby's approval. Even though the normal method of informing employees of a new policy was to carry around an interoffice communication and have employees sign off, the arbitrator held that the notice of the change was adequate. He noted that it was of great weight that the grievant did not deny that he had knowledge of the change. The arbitrator interred from the grievant's lack of denial that he in fact knew of the change: 251

- The testimony that the grievant had committed the same offense (deliberately missing the work truck) before and never had been disciplined could create an impression that the employer would tolerate the offense. In this case, though, the pattern of shirking work is unreasonable on its face. Sitting idle when there is work to be done fails to meet even most basic expectations of an employer. The employer’s expectation of compliance outweighs any considerations of leniency which may have occurred in the past: 298

- The evidence shows that the grievant was indeed unable to work through and past the time of his removal. He provided credible confirmation of this to management, which was rejected solely because of a technicality. The grievant’s offense was one of negligence in sending a tardy response to management’s very tardy information request. Given management’s lackadaisical approach to enforcing its rules against absence without leave, grievant should have been given the benefit of a specific warning in impending discharge prior to any final decision: 356

- The grievant was an investigator who was discovered to have used his state telephone credit card for personal calls, which he afterward offered
to repay. He also gave an inter-office memo containing confidential information to his union representative. He was removed for these violations. The arbitrator found that the grievant’s explanation for his use of the telephone card was not credible, however the employer had notice of other employees who had misused their cards but issued no discipline to the others. The document containing the confidential information was not a typical document generated in an investigation and the employer’s rules on disclosure were found to be unclear. The arbitrator distinguished between confidential documents and confidential information, and reinstated the grievant without back pay: 380

- The grievant, a Therapeutic Program Worker, took $1,500 of client money for a field trip with the clients. The grievant was arrested en route and used the money for bail in order to return to work for his next shift. The grievant was questioned about the money before he could repay it, he offered to repay it when he was paid on Friday, but failed to offer payment until the next Monday. He was removed for Failure of Good Behavior. While the employer was found to have poorly communicated its rules concerning use of client funds, the grievant was found to have notice of its provisions. The arbitrator found that the grievant lacked the intent to steal the money, however the grievant’s failure to repay was not excused, thus just cause was found for discipline. Because of the grievant’s prior disciplinary record, removal was held commensurate with the offense and the grievance was denied: 4,33

- The Union proved that other employees who had committed assaults against co-workers were not removed. Instead, they were given verbal reprimands, suspensions or offered participation in EAP. Still, the arbitrator found neither disparate treatment nor lax enforcement of work rules because the agency had never imposed a lesser discipline where the offending employee had a prior disciplinary record or where the assault was especially severe: 5,06**

The arbitrator found that from approximately 1,995 until 2006 the Employer did not investigate relationships and/or other improprieties involving gifts or money received by employees from residents. The arbitrator cited a 2007 decision: “Arbitrator Murphy found that the Employer’s lax enforcement of its policies ‘. . . lulled the employees into a sense of tolerance by the Employer of acts that would otherwise be a violation of policy.’” There was no evidence that the Employer made any efforts to put its employees on notice that certain policies/procedures which were previously unenforced would no longer be ignored. The arbitrator noted that statements made by the Grievant and her co-workers indicated evasiveness, but not falsification. The arbitrator held that just cause did not support the decision to suspend the Grievant for ten (10) days. Furthermore, the Grievant’s failure to report any information under Policy No. 4 prior to November, 2006 occurred in an environment indicating that relationships or the exchange of items of value was known and tolerated by OVH Management: 1,001

The grievance was upheld. The Grievant was reinstated with all back pay, seniority, and any other economic benefit. To establish theft, the evidence must show that the Grievant intended to deprive the agency of funds provided to employees to attend conferences. The funds were operated as a short-term loan. No written policy or consistent pattern was present regarding repayment by users. The arbitrator held that it was irrelevant how many days it took the Grievant to repay the fund since the Employer essentially allowed each user to determine the date of repayment. The arbitrator found that several factors mitigated against removal: lax/inconsistent enforcement of rules/policies governing the fund undermines any contention that the Grievant was put on notice regarding the possible consequences of her actions; the Grievant’s treatment of the fund were explicitly or implicitly condoned by her supervisor; and other similarly-situated users of the fund were treated
differently from the Grievant. No theft of public funds was proven; when put on notice by Management that immediate payment was required, the Grievant complied. The Arbitrator held there was no just cause for the discipline issued. 1 028

Layoff Order

- Section 1 8.02 of the Contract specifically mandates layoff in inverse order of seniority to protect bargaining unit employees: 4 71

- Before the grievant could be laid off as permanent full-time employee in the classification of Unemployment Claims Examiner 2, intermittent employees in that same classification must be laid off first: 4 71

- Appointment categories are irrelevant within the bargaining unit with regard to the order of layoff because the seniority provisions of the Contract take precedence: 4 71 (A)

- When layoff is proper, bargaining unit employees will first exhaust all bumping rights under the Contract. If no bumps are available, they may bump outside the bargaining unit into lesser appointment category according to the order of layoff provisions found in the Ohio Revised Code and the Ohio Administrative Code and incorporated by reference into the Contract: 4 71 (A)

- Bargaining unit employees who bump employees in lesser appointment categories which are outside the bargaining unit shall be given the maximum retention points available for their performance evaluations. This award shall be calculated according to the Code provisions: 4 71 (A)

- Citing that the normal workflow for the position was centered in Washington County and sending work to Athens was an obvious waste of time and resources is sufficient to meet the State’s burden to prove economy and efficiency. In limited circumstances (i.e. substantial violation of the settlement), agreements can be introduced into evidence if the facts of the grievance substantially concern the substance of the settlement: 4 99

Layoffs and Recall

- The federal government created, established hiring criteria, and funded job training positions within the Ohio Bureau of Employment Services for Disabled Veterans’ Outreach Specialist (DVOPS), and Local Veterans’ Employment Representative (LVERS). The OBES and Department of Labor negotiated changes in the locations of these employees which resulted in layoffs which were not done pursuant to Article 1 8. Title 38 of the United States Code was found to conflict with contract Article 1 8. There is no federal statute analogous to Ohio Revised Code section 4 1 1 7 which allows conflicting contract sections to supersede the law, thus federal law was found to supersede the contract. As the arbitrator’s authority extends only to the contract and state law incorporated into it, the DVOPS’ and LVERS’ claim was held not arbitrable. Other resulting layoffs were found to be controlled by the contract and Ohio Revised Code sections incorporated into the contract (see Broadview layoff arbitration #34 0). The grievance was sustained in part. The non-federally created positions had not been properly abolished and the affected employees were awarded lost wages for the period of their improper abolishments: 390

- Three Bureau of Employment Services employees grieved that their seniority dates were wrong. They had held positions with the employer until laid off in 1 982. They were called back to intermittent positions within 1 year but not appointed to full-time positions until more than 1 year had elapsed from their layoff. The employer determined that they had experienced a break in service as placement in intermittent positions was not considered to meet the definition of being recalled or re-employed. The arbitrator found that the term “re-employment” carries its ordinary meaning and not that meaning found in the Ohio Administrative Code when used an Article 1 6 and the 1 989 Memorandum of Understanding on Seniority, thus the grievants did not experience a break in service because they had been re-employed to intermittent positions. The grievants were found to continue to accrue seniority while laid off. The employer was ordered to correct the seniority dates of the grievants to show no break in service and that any personnel moves made due to the seniority errors must be corrected and lost wages associated with the moves must be paid: 4 26

The grievant was laid off from her full-time position at Ross Correctional. Although she was
eligible to bump into Lebanon Correctional, which is in the same geographic jurisdiction, the grievant chose to go to a facility closer to her home. She was also offered a part-time position at a developmental center, which she declined with the understanding that her refusal would remove her from the part-time recall list. She was also removed from the full-time recall list in error and without her knowledge. The grievant became aware of the error when she was not recalled to a full-time LPN position at Ross. A less senior individual was appointed to the position. The grievant remained at the facility she bumped into for approximately 2 and one-half years, at which time she was recalled back to Ross. This grievance was appealed in the attempt to recover the additional expense of a longer commute to and from work (84-mile round trip, at 30¢/mile x 21 4 trips). The arbitrator determined that the employer improperly removed the grievant from the full-time recall list; thus, violating Article 18, and that the grievant should be compensated for the expense of maintaining her employment.

**Layoffs**

- Burden of proof with regard to demonstrating rationale for the layoff is on employer, 12

- In an arbitration dealing with layoffs, the arbitrator directed both parties to meet with him and discuss informally the potential decision. The arbitrator attempted to get parties to fashion their own settlement that would go beyond what arbitrator could require as a remedy. They would not, but they did agree to expand arbitrator's authority to include technically unorthodox remedies. An award was issued in accordance with that stipulation: 12

- Where the employee had been laid off, and later given a position in the same classification but a different agency, the arbitrator held that the employee carried his prior disciplinary record from the original position with him into the new position. The arbitrator stated that this was fair since, under Article 18, the employee is not required to undergo a new probationary period in the new position: 195

- Section 16.02 defines seniority and continuous service. Service is continuous unless certain enumerated events have occurred. A lay off is not one of the events. Thus, the grievant's seniority and continuous service must include the period of the lay off and of the employment prior to the lay off. Contract language signifies that seniority can be adjusted retroactively for periods prior to the contract. The arbitrator ordered that the grievant's longevity pay and vacation accrual be calculated on the basis of the grievant's seniority which includes the lay off and the time prior to the lay off: 215

- The arbitrator has the power to review whether the job abolishment and layoff was proper: 280

- The State has the burden to prove the layoff was proper: 280

- Lack of Work: Employer must show specific lack of work with comparisons of the individual duties of the employees before and after the job abolishments: 280

- See Esselburne v. Ohio Department of Agriculture, 49 Ohio App. 3d 37, 41 (1988)

- Economy and Efficiency: Employer must show specific day to day functions that since abolished have provided economy and efficiency: 280

- See Bispeck v. Trumbull County, 37 Ohio St. 3d 26 (1988)

- The State may not erode the bargaining unit through the layoff procedure. Supervisors and other employees working out of class may not take over the laid off employee’s duties: 280

- Layoffs are to be made pursuant to the Ohio Revised Code, § 124 .321 -327 and the Administrative Rules 123:1 -4 -1 through 22. Other sections of the Revised Code and Administrative Rules are incorporated by Section 43.02 of the Agreement. In the situation where state statutes and regulations confer benefits upon employees in areas where the Agreement is silent, the benefits shall continue. It was a benefit to employees prior to the institution of collective bargaining that the State Personnel Board of Review hear appeals from layoffs. Under Section 25.01 the grievance procedure is the “exclusive method” of resolving grievances. Employees covered by the Agreement no longer have access to the State Personnel Review Board in order to contest layoffs. The employees must grieve under the plain language of the Agreement. The parties altered the forum of review. The grievance procedure, including arbitration, now serves as the same avenue of appeal. When appeals were taken
to the Board of Review they were made pursuant to rules that are not specifically set out in the Agreement. One rule placed the burden upon the employer to demonstrate by “a preponderance of the evidence that a job abolishment was undertaken due to the lack of the continuing need for the position, a reorganization, for the efficient operation of the appointing authority, for reasons of economy or for a lack of work expected to last more than twelve months.” ORC 1 24 .701 (A)(1). This rule represents a benefit to employees and is continued under the language of Section 4 3.02 of the Agreement. The two major decisions in the area of layoffs are Bispeck and Esselburne. Bispeck emphasizes that the burden is on the employer and Esselburne sets out the standard of proof the employer must show to carry its burden. The arbitrator decided that the employer must compare current work levels for the employee to a period when a lack of work existed in either of the layoffs. The State’s reference to the money that could be saved by not paying the grievants does not prove that there existed a lack of funds. As Bispeck states, “Evidence of not having to pay the salaries on its own is not sufficient to prove increased efficiency and economy as required.” Not having to pay the grievants’ salaries is sufficient evidence of the employer’s increased economy and efficiency: 31 1 **

- Nothing in any of the Article 1 8 sections .02 through .08 contradict, modify or eliminate the Five Year rule. The Arbitrator rejected the argument that Article 1 8 superseded the Ohio Revised Code and the Ohio Administrative Rules. The Article specifically states that the ORC and OAC sections are included. If the parties intended that Sections 1 8.02 through .05 should completely supersede the ORC and OAC, the Contract would so state. In addition, nowhere is any time limit stated on these rights: 4 5 0

- The burden to demonstrate rationale for job abolishment and layoff decisions rests on the Employer: 4 5 4

- The Employer fulfilled its burden to demonstrate the rationale for its job abolishment and layoff decisions. Their was either lack of work or the duties had been absorbed by other bargaining unit members: 4 5 4

- Ohio Revised Code 1 4 5 .298 requires that under certain conditions of layoff, the Employer is required to establish a retirement incentive plan for employees of the employing unit in which the layoffs are to take place: 4 5 8

- For the purpose of ERI “employing unit” is defined as “any entity of the state including any department, agency, institution of higher education, board, bureau, commission, council, office, or administrative body or any part of such entity that is designated by entity as employing unit: 4 5 8

- The State had discretion to designate the employing unit: 4 5 8

- Article 4 3.04 of the Contract provided some basis for finding that the Employer should have extended ERI to OBES employees indirectly affected by being bumped as a result of Public Assistance Service Operations (PASO) being abolished: 4 5 8

- The Employer has not shown that even though the retirement of public employees is a matter of law and because an early retirement plan benefit is not specifically a contractual benefit, there are sufficient reasons to preclude the grievances from being arbitrable: 4 5 8

- There is no language in the Collective Bargaining Agreement which specifically defines early retirement incentive plans. The 1 989-1 991 Collective Bargaining Agreement does not support the claim that people out the PASO unit have a contractual right to be offered ERI’s: 4 5 8(A)

- There was no violation of the Contract when the Employer abolished boiler operator and stationary engineer positions, laying off ten employees, because the heating system was upgraded from a central coal burning furnace to a satellite gas furnace, eliminating the work of those positions: 4 5 9

- The Employer has borne its burden of proof that both Planner 2 positions were justifiably abolished when a reduction or elimination of duties and responsibilities caused by statutory, philosophical and operational changes resulted in a lack of continued need for the positions and a reorganization of MRDD for economy and efficiency: 4 60

- Section 1 8.02 of the Contract specifically mandates layoff in inverse order of seniority to protect bargaining unit employees: 4 71
Before the grievant could be laid off as a permanent full-time employee in her classification, intermittent employees in that same classification must be laid off first: 4 71

Even if the cause of the grievant’s layoff was a job abolishment further up the line, Ohio Revised Code 1 24 .321 (B) makes a job abolishment a layoff: 4 71

Appointment categories are irrelevant within the bargaining unit with regard to the order of layoff because the seniority provisions of the Contract take precedence: 4 71 (A)

When layoff is proper, bargaining unit employees will first exhaust all bumping rights under the Contract. If no bumps are available, they may bump outside the bargaining unit into the lesser appointment category according to the order of layoff provisions found in the Ohio Revised Code and the Ohio Administrative Code and incorporated by reference into the Contract: 4 71 (A)

Bargaining unit employees who bump employees in lesser appointment categories that are outside the bargaining unit shall be given the maximum retention points available for their performance evaluations. This award shall be calculated according to the Code provisions: 4 71 (A)

Once bargaining unit employees bump outside the bargaining unit, subsequent displacements shall occur according to the appropriate provisions of the ORC and OAC: 4 71 (A)

The Arbitrator is not bound to the contents of the job abolishment rationale because the review of the substantive justification of the abolishment is a trial de novo before the Arbitrator, where the employer shall demonstrate by a preponderance of the evidence that the job abolishment meets the standards imposed by Ohio Revised Code: 4 76

The tasks formerly done by the grievant have either been eliminated or consolidated, and therefore, the abolishment was substantively justified and meets the standard of the Ohio Revised code: 4 76

If the Arbitrator finds a procedural error in a job abolishment, the Arbitrator must allow the
abolishment to stand if the appointing authority has substantially complied: 4 76

To determine if a job abolishment is procedurally correct, one must first define the “appointing authority” before determining if it has substantially complied: 4 76

The Employer substantially complied with the job abolishment procedure. The Employer showed that there was harmless error and a lack of prejudice to the grievant: 4 76

The Union has not met the level of proof sufficient to overcome the abolishment on the basis of procedural error: 4 76

It is clear that because of fewer patients and less money some of the positions were justifiably abolished: 4 78

The Secretary and Administrative Assistant Positions were abolished, but all of the work remained, and a substantial part of it was reassigned to non-Union personnel, violating Article 1 .03 of the Agreement: 4 78

Laying off five of the nine psychiatric attendant coordinators left none scheduled for the third shift, further eroding the bargaining unit: 4 78

The Employer showed that the grievant’s job, treatment Plant Operations Coordinator, was permanently deleted, i.e., that the tasks were consolidated or redistributed among other workers who, according to their job specifications, were permitted to carry out such tasks: 4 83

The Employer carried its burden of proving that by a preponderance of the evidence that the job abolishment of the Administrative Assistant I position was justified and in accordance with ORC 1 24 .321 -.327: 4 85

Citing that the normal workflow for the position was centered in Washington County and sending work to Athens was an obvious waste of time and resources is sufficient to meet the State’s burden to prove economy and efficiency. In limited circumstances (i.e. substantial violation of the settlement), agreements can be introduced into evidence if the facts of the grievance substantially concern the substance of the settlement: 4 99
The grievant was laid off from her position at the Ohio Department of Natural Resources and subsequently applied for a vacancy at the Ohio Department of Transportation under Article 1 8.09 of the contract which defines reemployment rights within the jurisdiction. The arbitrator awarded back pay and benefits when the grievant was improperly denied the position which was filled by an intermittent employee: 5 05

The Ohio Supreme Court has held that savings the State may realize from not having to pay the wages and benefits to an employee whose position is abolished is not, in and of itself, sufficient to justify the abolishment for reasons of economy. In addition, in order for the State to prove a permanent lack of work the lack of work must be real and cannot be created by transferring the grievant's duties to another employee: 5 1 8

The arbitrator held that an employee who was laid-off could exercise his displacement rights (bumping rights). An employee exercising these rights under Article 1 8.04 need not be more qualified than the incumbent, but must be qualified to perform the duties of the new position: 5 2 9

The grievant’s job was abolished by her employer for reasons of economy and/or reorganization for efficiency. Subsequently, the grievant was advised of her lay off. The Arbtrator held that this abolishment was not a violation of Article 1 8: 5 6 5

A grievance dealing with job abolishments and layoffs is arbitrable. The jurisdiction of an arbitrator extends only to those matters which the parties by their Agreement empower the arbitrator. Article 5 is not without limitations, “Such rights shall be exercised in a manner which is not inconsistent with this Agreement.” Section 24 .01 enables an arbitrator to decide any difference, complaint or dispute affecting terms and/or conditions of employment regarding the application, meaning or interpretation of the Agreement.

The Arbitrator found that the Department’s mistake was in its failure to reclassify the position prior to the layoff and either reclassify grievant’s co-worker or post the vacancy. 7 1 4

**Layoff Procedure**

The Employer did not have just cause to terminate the Grievant, but did have just cause to suspend her for a lengthy suspension for accepting money from a resident. There was sufficient basis to convince the arbitrator that the Grievant did accept money from a resident. The lax enforcement of Policy No.4 lulled the employees into a sense of toleration by the Employer of acts that would otherwise be a violation of policy. This lax enforcement negates the expectation by the Grievant that termination would have occurred as a result of the acceptance of money from a resident. The age of the resident and the amount of money involved called for a lengthy suspension. The Arbitrator held that there was no evidence to support the claim that the Grievant had received a defective removal order and that the requirement that the Grievant be made aware of the reasons for the contemplated discipline was met. 9 7 0

**Leave of Absence**

The arbitrator held that the forty-eight hour rule is a more practical and reasonable means to implementing the “promptness requirement” in the fifth paragraph of Article 28.03. The portion of the grievance challenging the ninety-minute rule is moot because the agency unilaterally discontinued that rule. The agency’s imposition of the forty-eight hour rule does not violate the contract. 8 7 7

**Leave, Administrative**

That the grievant is an African-American and was not given excused time to attend United Way meetings does not establish evidence of race discrimination. Also that two employees who attended such meetings were Caucasian does not provide evidence of race discrimination. Nothing showing racial hostility in order to support a claim of racial discrimination prohibited by the Agreement there must be some evidence, in some direction, beyond the coincidence pointed to by the Union: 5 5 2

**Leave of Absence**

- Since the grievant had been orally informed of the denial of his request for leave, the employer
substantially complied with the procedural requirements of Article 31 even though there was a two week delay in receiving a written verification of the denial: 91

- Request for leave for childcare purposes does not fail into the categories listed in 31.01 under which the employer is mandated to grant leave. Where employer has discretion to deny a leave request, he must articulate a legitimate nondiscriminatory reason. Denial because of understaffing, caused by several staff being on disability leave, is a qualifying reason: 91

- Fallsview's Leave without Pay Policy is not in conflict with Article 31 of the contract. It merely outlines the procedures to be followed in processing a request and does not purport to vary the contractual basis for obtaining such leaves: 91

- Where supervisor had told grievant that she would get back to the grievant about her request for leave of absence, but did not, that failure did not constitute an implied authorization for the grievant to take an extended leave: 137

- Section 31.01 confers discretion upon the state to grant unpaid leaves of absence for family responsibilities to employees upon request for a period not to exceed one year. In exercising its discretion the state is prohibited from arbitrary or capricious action. Where the grievant may have had good reason for leave, but took the leave without waiting for authorization, the arbitrator held that the state's discretion must first be exercised before it is considered arbitrary or capricious. The arbitrator also held that any delay in the State's processing of the application for leave was outweighed by the grievant's taking the leave without authorization: 137

- Where the employer had not given a response to the application for leave by the end of the day in which the application was made, the arbitrator found that the state had not failed to promptly provide an authorization or denial of the leave. The arbitrator treated the statements in the employee handbook about how long it takes to respond to a request for leave as relevant in determining what is reasonable: 137

Where the grievant took her leave prior to receiving authorization, the arbitrator held that the grievant failed to give the state the opportunity to 'promptly' furnish authorization or denial of her request for leave. 137

- The agency's knowledge of the grievant's unauthorized leave (due to incarceration) cannot be equated with the agency giving the grievant permission to be AWOL. At present, there exists no law or regulation requiring an Employer to hold open an employee's position or grant him leave for the duration of his incarceration. Thus, the Employer's denial of the grievant's leave request was neither arbitrary nor capricious: 523

**Leave requests**

- The employer unreasonably refused the application of available leave balances. If employees have available leave balances, leaves are normally approved except where pattern abuse has occurred. The grievant had available leave balances and his record did not evidence pattern abuse. When an employer makes a decision under these circumstances it has an affirmative obligation to substantiate the reasonableness of its decision. In this particular instance, the decision seems arbitrary: 241

- Under Article 1 3.10 of the Contract, prior approval is required for the use of compensatory time. Based on the language of this article, the grievant’s supervisor refused to sign the grievant’s request for leave form because the grievant failed to obtain approval prior to his leave. Furthermore, there was no documentation approving the grievant’s request for leave form where the grievant demanded that his supervisor sign the form several times: 576

**Leave Requests**

A Consent Award was issued by the Arbitrator. The Employer shall not implement a policy which eliminates vacation usage in the Claims Management Department. Vacation requests shall be considered on an ad hoc basis based on the totality of the facts and circumstances. A yearly vacation canvas shall be conducted in October or November of each year for the upcoming calendar year. Vacation requests that are approved will be for one week or more and will be based on seniority. All other vacation requests will be considered on an ad hoc basis. Those vacation requests that are approved will be approved on a first come, first served basis. When the Claims Management Department determines that it needs
to implement leave restrictions beyond minimum staffing levels it will communicate those circumstances to the Union President and/or designee prior to issuing notice to the bargaining unit members of the department. 934

Legislative Investigations

- The results of the other proceedings and investigations which were carried out by the FBI, the grand jury, the state highway patrol, the Legislature's Correctional Institution Committee, and the Unemployment Compensation Board of Review were produced under different rules and for different purposes than those which govern this arbitration. Thus, those results carry no weight in this arbitration: 1 80

Licensure

- The Employer partially justified the abolishment of the Treatment Plan operations Coordinator by showing that the grievant’s position description did not require appropriate licensure for such operations, and the Employer showed that there was little need for a position where the alleged lead worker does have the appropriate license to lead his subordinate: 4 83

- The Arbitrator rejected the Union’s allegation that the Employer did not inform the grievant of opportunities to become licensed: 4 83

Long Service

- Long and unblemished service was held to mitigate offense, of setting up improper dosages (which were never administered) of medication in cups, sufficiently to modify discharge to reinstatement without back pay: 1 4

- It would be inconsistent and unfair to consider employment history without considering work habits and increased absenteeism: 4 7

- Length of service is a mitigating factor only if the employee has a goody record: 1 23

- Six years of satisfactory service is not a sufficient mitigating factor to outweigh the excessive use of force and physical abuse incurred and grievant's failure to disclose the truth to the Use of Force Committee. Furthermore, Section 24.01 of the contract prohibits the arbitrator from modifying the termination of an employee who abuses a person in the care of the state: 1 80

- The grievant was an 11-year employee with no prior discipline. While the arbitrator must hesitate to substitute her judgment for management’s, the imposition of a ten day suspension in this incident is not commensurate with the offense nor progressive with regard to this grievant. On the other hand, horseplay is dangerous on the job and abusive language beyond sho talk can provoke reactions which also cause unsafe conditions and potential injury: 1 82

- Removal of an employee after 28 years of good service with no prior discipline is unreasonable, arbitrary and capricious: 1 90

- The disciplinary actions in this case were unreasonable because several mitigating circumstances were not considered when levying the discipline. The grievant was employed for a number of years with an above average performance and disciplinary record. Also, her attempts to resolve her problems via employee assistance effort indicates that she took positive steps to remedy her difficulties: 225

- The arbitrator ruled that the 10-day suspension was excessive and punitive rather than corrective and progressive given the grievant's 9-year record as a good employee. The arbitrator stated that the purpose of discipline is not to punish arbitrarily but to correct: 277

The Grievant admitted that he failed to make all of the required 30-minute hallway checks and a 2:00 a.m. headcount and then made entries in the unit log indicating he had done so. The Arbitrator held that just cause existed for discipline. Since the Grievant committed a serious offense less than two years after being suspended for six days for the same offense, the Arbitrator held that the principles of progressive discipline had been followed. In addition, the Arbitrator held that long service cannot excuse serious and repeated misconduct. It could be argued that an employee with long service should have understood the importance of the hallway checks and headcount more than a less senior employee. The Union argued that since the Grievant was not put on administrative leave, it suggested that his offense was not regarded as serious. The employer, however, reserved the use of administrative leave for cases where an employee is accused of abuse. The Union also argued that the time it took to discipline the Grievant should mitigate against his termination. The Arbitrator held that the
investigation and pre-disciplinary hearing contributed to the delay and the state made its final decision regarding the Grievant’s discipline within the 45 days allowed. 978

Verbal exchanges between two corrections officers resulted in a physical struggle between the two officers. The Arbitrator held that the Agency failed to prove that the Grievant violated either Rule No. 19 or Rule No. 37. The Arbitrator held that more likely than not, the other officer was the aggressor in the events leading up to the struggle. The Grievant acted in self-defense and believed that any reasonable person would have acted similarly. Rule 19 was not intended to deprive the Grievant or other corrections officers of the right to defend themselves against a physical attack from a fellow staff member. The Arbitrator held that it strained credibility to argue that the purpose or spirit of Rule No. 37 was to deprive correctional officers of the right to protect themselves against attacks from coworkers. The Grievant’s behavior was the kind of misconduct that undermines the Grievant’s position as a role model for the inmates. However, the altercation took place where only a handful of inmates were present. The Grievant’s fault or misconduct in this dispute was her voluntary participation in verbal exchanges with the other corrections officer that led to a physical struggle between the Grievant and that Officer. That misconduct warranted some measure of discipline. The Arbitrator held that the Grievant was not removed for just cause. The Agency should not terminate a fourteen-year employee for self-defense conduct or for engaging in juvenile verbal exchanges with a coworker, even though the behavior is clearly unacceptable. Some measure of discipline is clearly warranted to notify the Grievant and the other corrections officer that verbal barbs have no place in the Agency and will not be tolerated. A three-month suspension without pay should sufficiently deter the Grievant and others from embracing such conduct. The agency was ordered to reinstate the Grievant. 987

The Arbitrator relied on the video evidence. The video indicated that the youth was not engaged in any conduct that required imminent intervention by the Grievant. The Arbitrator held that, given the seriousness of the use of unwarranted force by the Grievant and his failure to follow proper procedures when judgment indicated that a planned use of force was required, just cause for discipline existed. However, removal was inappropriate. The Grievant’s record of fourteen years of good service as well as his reputation of being a valued employee in helping diffuse potential problem situations mitigated against his removal. The incident was hopefully an isolated, one-time event in the Grievant’s career. 996

The Arbitrator held that a statement by the Grievant in an email was a false, abusive, and inflammatory statement concerning his supervisor. The Grievant did provide false information in an investigation. The Arbitrator found that the Grievant was not permitted to complete closing inventory on the Operation in question; consequently, he did not breach his job duty to complete the inventory properly. The record supported the finding that the Grievant did not provide even a minimal level of support to the Operator in dealing with customer complaints about the operation of her facility. Therefore, the Arbitrator held that the Grievant did fail to carry out one of his assigned job duties and failed to follow administrative rules. Because some of the Grievant’s work was for his personal business and for his job at Columbus State Community College, the work was for his personal gain. The Arbitrator held he did fail to follow administrative regulations in the use of his computer equipment assigned to him. The Grievant did have 27 years service to the Commission and had no disciplinary record. However, his ease in involving his blind clients in the investigation of his own conduct as a Specialist demonstrates a lack of sensitivity to the vulnerability of his clients. His supervisor was visually impaired and he wrote a false statement about her in the course of an investigation. Both actions show that the Grievant exhibits little concern for the blind. The Arbitrator found that the grievant cannot be trusted to return to an organization devoted to the service of the blind. 1005

**Longevity Pay**

- Section 1 6.02 defines seniority and continuous service. Service is continuous unless certain enumerated events have occurred. A layoff is not one of the events. Thus, the grievant's seniority and continuous service must include the period of the lay off and of the employment prior to the lay off. Contract language signifies that seniority can be adjusted retroactively for periods prior to the contract. The arbitrator ordered that the grievant's longevity pay and vacation accrual be calculated on the basis of the grievant's seniority which includes the lay off and the time prior to the lay off: 215

- The grievant retired from the State Highway Patrol and was hired by the Department of Health four days later. His new employer determined that the Ohio Revised Code section 1 24.181 did
not provided for longevity pay supplements based on prior state service for rehired retirees. The arbitrator found the grievance arbitrable despite the employer’s argument that because of the grievant’s retiree status that longevity was a retirement benefit, and under Ohio Revised Code section 4117.10(A) longevity for a retired employee was not a bargainable subject. Section 124.181 was found to be applicable and section 36.07 of the contract confers longevity pay based solely on length of service. That the grievant experienced a change in classification was found to be irrelevant for the purpose of calculating longevity and the grievance was sustained: 389

**Loss of Control of Instrument/Security Breach**

The grievant lost his keys at the institution and did not report the loss for five hours. The arbitrator determined that he used poor judgment and was inattentive when he left his keys unattended. The keys could have been used as a weapon against personnel or other inmates. A violation of the alleged charge as a second offense permitted removal as a discipline. The grievant had disciplines from reprimands to fines prior to this violation. The arbitrator found that management did not abuse its discretion in removing the grievant from his position. 830

**Lying**

February 27, 2002, the grievant was working second shift at the Toledo Correctional Institution in the segregation unit control center. Due to the ensuing events, he was removed from his position as Correction Officer. The institution has a policy prohibiting two unsecured inmates being placed together in the same recreation cage. Despite this policy, that evening two officers placed two unsecured segregation inmates together in a recreation cage for the purpose of allowing them to settle their differences. The grievant entered the cage as the second inmate was being uncuffed, but he turned to walk away in order not to see what happened. As he exited he claimed that he saw Officers Mong and McCoy overlooking the cage at the control booth. None of the officers reported the incident, but management became aware of it the following morning and an investigation ensued. When he was first interviewed later that day, the grievant denied having any knowledge of what had transpired. However, ten days later, he gave a written statement and interview admitting to what he had observed. The grievant was later terminated from his position. The Union argued that the punishment was not appropriate for the offense. Officer Mong committed the same offense but he received only five days suspension thought he saw the fight and the grievant did not. In addition, the grievant fully cooperated in the investigation after his first interview. The arbitrator ruled, however, that the grievant cannot be compared to Office Mong because he was not in the position to intervene. Additionally, the fact that the grievant eventually did tell the truth is not enough by itself to mitigate the penalty. She concluded that both offenses, failing to intervene while knowing officers were putting inmates and staff in harm’s way and then lying about it, are individually and collectively terminable acts. Despite the fact that the grievant did not have an active role in the incident, his inaction threatened security and the safety of the inmates as well. 827

The Arbitrator held that the burden of proof needed in this case to support the removal was absent. DYS removed the Grievant for two distinct reasons: use of excessive force with a youth and lying to an investigator regarding an incident in the laundry room. The evidence, even if viewed in light most favorable to DYS failed to establish that the Grievant’s inability to recall the laundry room matter was designed purposely to deceive. Both parties agreed that nothing occurred in the laundry room that would warrant discipline. The record failed to support a violation of Rule 3.1 for deliberately withholding or giving false information to an investigator, or for Rule 3.8-interfering with the investigation. The Grievant’s misstatement of fact was nothing more than an oversight, caused by normal memory lapses. He handles movement of multiple juveniles each day, and the investigatory interview occurred eight days after the incident in question. No evidence existed to infer that the Grievant exhibited dishonest conduct in the past or had a propensity for untruthfulness. The evidence did not support that the Grievant violated Rules 4.14 and 5.1. The use of force by the Grievant was in accord with JCO policy aimed at preventing the youthful offender from causing imminent harm to himself or others. The grievance was granted. 943

– M –

**Making a False Statement About a Supervisor**
The Arbitrator held that a statement by the Grievant in an email was a false, abusive, and inflammatory statement concerning his supervisor. The Grievant did provide false information in an investigation. The Arbitrator found that the Grievant was not permitted to complete closing inventory on the Operation in question; consequently, he did not breach his job duty to complete the inventory properly. The record supported the finding that the Grievant did not provide even a minimal level of support to the Operator in dealing with customer complaints about the operation of her facility. Therefore, the Arbitrator held that the Grievant did fail to carry out one of his assigned job duties and failed to follow administrative rules. Because some of the Grievant’s work was for his personal business and for his job at Columbus State Community College, the work was for his personal gain. The Arbitrator held he did fail to follow administrative regulations in the use of his computer equipment assigned to him. The Grievant did have 27 years service to the Commission and had no disciplinary record. However, his ease in involving his blind clients in the investigation of his own conduct as a Specialist demonstrates a lack of sensitivity to the vulnerability of his clients. His supervisor was visually impaired and he wrote a false statement about her in the course of an investigation. Both actions show that the Grievant exhibits little concern for the blind. The Arbitrator found that the grievant cannot be trusted to return to an organization devoted to the service of the blind. 1 005

Malfeasance

The grievant was charged with conducting a pay-for-parole scheme, which resulted in at least two inmates inappropriately placed on parole. The arbitrator determined that this matter was based on circumstantial evidence that had not been corroborated by the investigation. The employer’s case was inconclusive. The arbitrator found one exception to his findings. The grievant raised suspicion of his activities by the volume of phone calls made to him by one of the inmates during an 18-month period. This suspicion compromised the grievant ability to perform his duties as a hearing officer. 783

Malum in se Offense

- The Union’s contention that the pre-disciplinary hearing officer was not neutral and detached was unfounded. The Union has not shown that the investigation conducted by the State was perfunctory or that it lead to a rush judgment: 4 68

- No contractual language exists that requires the Employer to provide a third-step hearing officer who is anything other than a representative of the State: 4 68

- Management has the burden of showing just cause for punishing an employee. If the past practice of employees and management had never before been disciplined, then subsequent discipline of an employee for that practice may be denied for lack of just cause: 4 94

The Arbitrator found that the grievant received a full and fair investigation within the meaning of Article 24. The Arbitrator also determined that ODOT was not predisposed to remove the grievant: 5 00

- The Union argued that the grievant should have received at least on disciplinary suspension prior to removal. The Union further asserted that discharge without a prior suspension is only appropriate in limited circumstances: one, where the employer has a formal “warnings only” policy; two, where the employer has been “patience personified” and the employee fails to respond to reprimands; or three, where the employee is engaged in “malum in se” offense, a serious offense such as theft, striking a supervisor, or malicious destruction of company property: 61 3

While on a hunting trip and staying in Mt. Vernon, the Grievant was arrested for operating a vehicle while impaired. The Grievant became very belligerent and verbally abusive. A newspaper report regarding the incident was later published in Mt. Vernon. The Arbitrator held that the Employer had just cause to remove the Grievant. The Arbitrator was unwilling to give the Grievant a chance to establish that he was rehabilitated. Some actions or misconduct are so egregious that they amount to malum in se acts--acts which any reasonable person should know, if engaged in, will result in termination for a first offense. Progressive discipline principles do not apply in these situations and should not be expected. The Employer established a nexus for the off-duty misconduct. The Grievant’s behavior harmed the reputation of the Employer. It would be difficult or impossible to supervise inmates who may find out about the charges and their circumstances. This would potentially place
other officers in jeopardy; an outcome the Arbitrator was unwilling to risk. 1 025

Management Also at Fault

- It is a well established arbitral principle that if management is also at fault in connection with the grievant's misconduct, that fault constitutes a mitigating circumstance which would warrant a diminution, or perhaps an obliteration, of the discipline meted out: 2 1 1

- Where the arbitrator determined that management was also at fault with regard to the grievant's misconduct, but the record was devoid of any evidence that management's fault had been considered in determining the severity of discipline, the arbitrator concluded that the discipline must be modified: 2 1 1

- While the grievant is paid for the entire shift including his breaks and is considered to be on duty the whole time and therefore violated the rules by falling asleep during his break, management also has some fault since the grievant's supervisor told the grievant he could take a break and therefore the grievant could reasonably rely upon his supervisor to watch over the dormitory while the grievant was on break. The arbitrator reduced the grievant's discipline since management was also at fault: 2 5 5

- Where an employee is guilty of wrongdoing but management is also at fault in some respect in connection with the employee's conduct, the arbitrator may be persuaded to reduce or set aside the penalty: 2 5 5

Management Bias in Disciplinary Process

- The arbitrator found that other disciplinary instances by the State were distinguishable from this case and that the grievant did not offer sufficient evidence to show disparate treatment, racial discrimination or management bias. The arbitrator upheld the State's discretion for removal because it was in the spirit of the principles or progressive discipline: 5 1 6

Management Rights

- Management retains the right to set standards of work quality and quantity of production: 7 8

- Within the protective boundaries of the contract, for just cause, management has the right to terminate nonproductive workers. Without this management ability, the jobs of all workers are ultimately at risk: 7 8

- The employer has an inherent right to direct the work force. It is entitled to give orders and employees are obliged to obey. Except in exceptional circumstances, if an employee believes that an order violates his rights, he should "obey now, grieve later." : 1 2 3

- Generally, many arbitrators have recognized that unless the agreement says otherwise, the right to schedule overtime remains in management. This "right" of manage- can be limited if the union can prove that scheduling changes have been implemented to avoid the payment of overtime. Article 5 and ORC 4 1 1 7.08(c) clearly provide the employer with the right to determine matters of inherent managerial policy; maintain and improve the efficiency of operations; and to schedule employees. Thus, these provisions allow the employer to alter work schedules to improve efficiency based on operational needs. Sections 1 3.01 and 1 3.02 underscore the employer's ability to schedule work. Section 1 3.02 defines work schedules as 'an employee's assigned shift.' Obviously, if the employer can make work schedule assignments, the employer can also establish work schedules: 1 4 9

- The employer retains the right to manage its operation in a manner which is consistent with the various provisions set forth in the agreement. The inherent rights of management include scheduling work, assigning employees and operating efficiently. Management's authority in this regard has been recognized by many arbitrators, including Arbitrator Pincus in the Kinney decision. Arbitrator Pincus held that the State has the right to establish work schedules and to alter original work schedules based upon operational needs. This arbitrator agrees and is of the further opinion that article 1 3 suggests that the parties anticipated that work schedules would be changed. Section 1 3.07 restricts management's right to change a work schedule when it can be shown that the schedule was arbitrarily changed to avoid overtime, as for the Holton case. The wording of 1 3.07, paragraph 7 further suggests that the employer may change employee's schedules for operational needs: 1 6 9
The employer argued that the phrase "deemed necessary or desirable" (in Article 39) evidenced its intention to retain the absolute right to subcontract. Thus, despite the Employer's good faith intention to use bargaining unit employees, it still reserved the right to contract out work. The arbitrator held that the State did not possess an arbitrary or unfettered right to subcontract, and to hold otherwise would have rendered the rest of the first paragraph meaningless. The arbitrator concluded that the second sentence of the first paragraph gave the State the right to contract out work normally performed by bargaining unit employees when the State had a good faith belief that contracting out was necessary or desirable because the end result would be greater efficiency, economy, programmatic benefits or other related factors.

Employer initially took a firm position that the Grievant was not qualified for the promotion of Electronic Design Coordinator position, but agreed to place the Grievant in the position following a grievance settlement/NTA award. A considerable amount of assistance was given to the Grievant in performing his work; however, after the probationary period the Grievant was removed from the position. The Arbitrator found that the Union failed to prove that the Employer, following a reasonable and contractually adherent period of probationary observation, acted in an unreasonable, arbitrary, or capricious manner in determining the Grievant was not able to perform the job requirements of the position of Electronic Design Coordinator. The testimony of the Employer’s witnesses contained the important element of specificity that was not refuted by the Grievant in any specific or substantial manner. In contrast, the Grievant’s direct testimony was far more general, vague, and for the most part accusatory in nature. There was little evidence to demonstrate the Grievant knew enough and was sufficiently skilled to successfully perform the work of an Electronic Design Coordinator in accordance with acceptable standards.

Maximum Disability Leave

The Arbitrator found that a contractually mandated event had not transpired in this case because the grievant was not denied his benefits.

Mediation

In an arbitration dealing with layoffs, the arbitrator directed both parties to meet with him and discuss informally the potential decision. The arbitrator attempted to get parties to fashion their own settlement that would go beyond what arbitrator could require as a remedy. They would not, but they did agree to expand arbitrator's authority to include technically unorthodox remedies. An award was issued in accordance with that stipulation.

Medical Benefits

The arbitrator refused to award lost medical benefits because there was no data presented on the question.

Medical Condition

The Employer waited 5 days to notify the Grievant that a problem existed with two assignments. The Arbitrator agreed that this delay was unreasonable under Article 24.02 and was not considered grounds to support removal. Given that his direct supervisors considered the Grievant a good worker, any conduct which could accelerate his removal should have been investigated in a timely manner. The Arbitrator found that sufficient evidence existed to infer that the Grievant’s conduct surrounding one incident—in which proper approval was not secured nor was the proper leave form submitted—was directly related to a severe medical condition. Twenty one years of apparent good service was an additional mitigating factor against his removal. DPS met its burden of proof that the Grievant violated DPS’ Work Rule 5.01.01 (C) (10) (b) on two dates and that discipline was appropriate, but not removal. However, as a long-term employee the Grievant was knowledgeable about DPS’ rules relating to leave and any future violation would act as an aggravating factor warranting his removal.
Medical Problems

- A 65-year-old person removed for absenteeism, tardiness, and failures to call-in was reinstated without pay since she had been a good employee before being made full-time, had developed several medical problems afterwards which management had not been informed of (although they had some knowledge) when they made the removal decision: 65, 125

- Circumstances. Such as extended illness, can mitigate against strict adherence to return to work days. Where grievant failed to return to work as scheduled, but did act reasonably in attempting to return to work as soon as possible and at the same time protecting his health so that he would be able to work when he returned, the arbitrator ruled that the employer did not have just cause for disciplining the grievant even though the employer acted properly when it charged the grievant with the violation. (The employer had not been informed of the extenuating circumstances): 95

- Arbitrator found no neglect of duty where the grievant had taken a brief trip to her automobile to retrieve her ulcer medication, when grievant had notified other staff she was going, numerous staff remained and no evidence was given to show any resident received less than adequate supervision: 116

- Where arbitrator was sympathetic to Grievant's illness, his decision is controlled by the agreement. His sympathies are immaterial: 123

- The grievant's attempt to justify his absenteeism by reference to a previous injury was not accepted. The injury had occurred 2 months before the absences. The arbitrator did not believe there could be a connection: 176

- No mitigating weight was given to the grievant's claim that her medical problems were responsible for her tardiness where the grievant did not supply a physician's statement or consistent testimony to support her claim that a medical problem was the cause of her violations: 258

Medical Verification

- The Employer failed to support its job abandonment charge on the basis of the doctor's verification requirement. The institutional practice regarding valid physicians' verifications is confused, and it becomes quite difficult for any employee to comply with a shifting standard: 444

- Section 31.01 of the Contract requires a doctor's verification for medical unpaid leave, which the grievant provided consistently. The Employer waived its right to insist retroactively on a medical doctor's verification, as opposed to a psychologist's verification, because the Employer never raised this issue with the grievant. In the future, the Employer may insist that any diagnosis of mental illness be verified by a psychiatrist: 446

- Unpaid leave was improperly denied the grievant. The second medical opinion received by the Agency was ambiguous and not the proper basis for a decision that the grievant was physically capable in mind and body to return to work: 446

- That the grievant called in late, reported to work well after his call-in, failed to complete a request for leave form for his absence, and failed to obtain a doctor's verification is not enough to justify a seven-day suspension. With just a one-day suspension on the record, only a two-day suspension is warranted: 468

- The Department of Public Safety had granted the grievant's request for sick leave but also required that he produce additional clarification about the cause of his alleged health problems. Although the Union contended that this was a violation of 29.03, the Arbitrator found that the grievant had purposefully deceived the department; and, therefore, the issue did not affect his decision: 611

- The grievant was on a Last Chance Agreement (LCA) when she called off sick. She was advised to present a physician's verification. The grievant continuously stated she would obtain one, but failed to do so. She was charged with insubordination and an attendance violation and subsequently removed. The arbitrator found that the grievant failed to present the verification within a 3-day limit per the LCA and that the note she eventually produced gave no evidence of a legitimate use of sick leave. The arbitrator noted that the grievant demonstrated through the interview that she understood the consequence of
not producing verification and if she had a problem with the directive she should have applied the “obey now, grieve later” principle. 81

**Medication of Patients**

- While medication errors were common and no one had ever been disciplined for a medication error before, the arbitrator held that the grievant was not subject to disparate treatment because she was guilty of more than a medication error; the arbitrator held that she had made several misrepresentations or attempts at misrepresentations concerning her failure to administer the medication. These misrepresentations concerning the medication of patients constitute a serious violation of her duties: 267

- Misrepresentation of facts conveying that medication has been given when in fact it has not, is an extremely serious offense: 267

**Memorandum of Understanding (MOU)**

The grievant’s work performance became unsatisfactory to his employer and all parties concerned agreed upon a demotion from an FIE 4 to an FIE 2. An MOU was reached that created a plan to monitor the grievant’s performance and also spelled out the consequences of failing to satisfy his employer. The arbitrator noted that the MOU stated that if the grievant did not satisfactorily complete the plan he would remain in the FIE 2 classification. The arbitrator concluded that the grievant did not satisfy the terms of the MOU and that the employer did not violate the MOU by failing to promote him. 777

**Medical/Psychological Examination**

The grievant was scheduled for a medical and psychological examination. The examination was discussed and the EAP forms were completed at the meeting. The evidence also suggested that some animosity existed between the grievant and management would have welcomed an opportunity to properly remove the grievant. The arbitrator found the preponderance of the evidence supported the grievant’s position. However, the arbitrator stated that the grievant was not totally blameless and under different circumstances, some form of discipline would have been warranted. He found that neither party presented information regarding the effect of the first EAP the grievant completed. The grievant was reinstated on the condition that he enroll in and complete an EAP. The arbitrator ordered that any additional or different forms needed for the program be executed. 794

**Mental Illness**

- Given the depression associated with Bipolar Disease and the sleeping attendant upon such depression, administration of a two day suspension for failure to call-in is of such magnitude as to be considered impermissible: 63

- Unfitness due to mental illness does not give just cause for dismissal where grievant was charged with absenteeism: 70

**Mentoring/Tutorial Program**

The parties agreed to create a Mentoring/Tutorial Program to improve test scores. The parties agreed that the tests would be content valid. Employees involved in the grievance were compensated and additional grievances were withdrawn. Prior to testing, both parties would agree upon scoring and administration of the test. 771

**Mileage Reimbursement**

The Arbitrator concluded that the grievant was entitled to reimbursement for miles driven in addition to the distance between the grievant’s residence and the grievant’s report –in location, even if the grievant does not first report into her normal location: 564

**Military Service Leave**

- The arbitrator rejected management's claim that the grievant's extended day of military service was "unauthorized." While the authorization was not proper according to army regulations, the mistake was the Sergeant's rather than the grievant. The grievant was not at fault since he was acting properly as a soldier and following his sergeant's orders: 140

**Minimum Qualifications**

- The employer posted a Statistician 3 position which the grievants and other individuals bid for. The two grievants had eighteen and thirteen years
seniority, while the successful applicant had only one year seniority. The employer contended that the grievants did not meet the minimum qualifications for the position and the successful applicant was demonstrably superior. The employer was found to have the burden of proving demonstrable superiority which was interpreted as a “substantial difference.” Demonstrable superiority was found only to apply after the applicants have been found to possess the minimum qualification. Also, the arbitrator stated that if no applicant brings “precisely the relevant qualification” to the position, the employer may promote the junior applicant if a greater potential for success was found. The arbitrator found that the employer proved that the junior employee was demonstrably superior and the grievance was denied: 382

- During the processing of several grievances concerning minimum qualifications, #393**, 397**, a core issue regarding the union’s right to grieve the employer’s established minimum qualifications was identified. The arbitrator interpreted section 36.05 of the contract as permitting the union to grieve the establishment of minimum qualifications. He explained that the minimum qualifications must be reasonably related to the position, and that the employer cannot set standards which bear no demonstrable relationship to the position: 392**

- The grievant applied for a posted Tax Commissioner Agent 2 position but was denied the promotion. She was told that she failed to meet the minimum qualifications, specifically 9 months experience preparing 10 column accounting work papers. The grievant was found to have experience in 12 column accounting work papers which were found to encompass 10 column papers. Additionally, the employer was found to have used Worker Characteristics, which are to be developed after employment, in the selection process. The grievant was found to possess the minimum qualifications and was awarded the position as well as any lost wages: 393** (see 392**)

- The grievant applied for a posted Word Processing Specialist 2 position and was denied the promotion. The employer claimed that she did not meet the minimum qualifications because she had not completed 2 courses in word processing. The grievant was found not to possess the minimum qualifications at the time she submitted her application. The fact that she was taking her second word processing class cannot count toward her application; she must have completed it at the time of her application. Additionally, business data processing course work cannot substitute for word processing as the position is a word processing position: 394** (see 392**)

- The grievant applied for a posted Programmer Analyst 2 position and was denied the promotion. The employer claimed that she did not possess the required algebra course work or the equivalent. The arbitrator found that because the grievant completed a FORTRAN computer programming course, she did possess the required knowledge of algebra. The minimum qualifications allow alternate ways of being met, either through course work, work experience, or training. The grievance was sustained and the grievant was awarded the position along with lost wages: 395** (see 392**)

- The grievant applied for a posted Microbiologist 3 position in the AIDS section position and was denied the promotion because she failed to meet the minimum qualifications. The successful applicant was a junior employee who was alleged to have met the minimum qualifications. The arbitrator found that the junior applicant should not have been considered because the application had not been notarized, and it was thus incomplete at the time of its submission. The arbitrator also found that the employer used worker characteristics which are to be developed after employment (marked with an asterisk) to determine minimum qualifications of applicants. Lastly, neither the successful applicant nor the grievant possessed the minimum qualifications, however the employer was found to have held this against only the grievant. The arbitrator stated that the employer must treat all applicants equally. The grievant was awarded the position along with any lost wages: 396** (see 392**)

- The grievant applied for a posted Microbiologist 3 position in the Rabies section and was denied the promotion because the employer found that she failed to possess the minimum qualifications. Neither the successful applicant nor the grievant possessed the minimum qualifications for the position but this fact was held only against the grievant. The arbitrator stated that the employer must treat all applicants equally. The arbitrator found that the grievant did
possess the minimum qualifications and that the requirement for rabies immunization and other abilities could be acquired after being awarded the position. The grievant was awarded the position along with any lost wages: 397** (see 392**)

- The grievant had over 7 years seniority and applied for a posted vacancy. She did not receive the promotion which was given to a more senior employee from the agency despite the fact that she was in Section 1 7.04 applicant group A (1 7.05 of 1 989 contract) and the successful bidder was in group D. The employer stated that the grievant failed to meet the minimum qualifications and the successful bidder was demonstrably superior. The arbitrator held that Article 1 7 established groupings which must be viewed independently. Additionally, the contract applies the demonstrably superior exception only to junior employees. The employer violated the contract by considering, simultaneously, employees from different applicant groups and applying demonstrable superiority to a senior employee. The arbitrator found that the grievant met the minimum qualifications for the vacant position, but she had since left state service. The grievance was sustained and the remedy was the lost wages from the time the grievant would have been awarded the position until she left state service: 4 05

- A General Activity Therapist 2 position was posted for which the grievant bid. The posting listed a valid water safety instructor’s certificate as a minimum qualification. The grievant did not possess the certificate and an outside applicant was selected. The arbitrator found that the employer improperly posted the position by using a worker characteristic that doesn’t have to be acquired until after the employee receives the job. While the arbitrator cautioned that employees must act timely to become qualified, the employer can only hold bidders to minimum qualifications required by the contract. The grievance was sustained and the grievant was awarded the position with back pay: 4 1 8

- The Bureau of Motor Vehicles posted a vacancy for a Reproduction Equipment Operator 1 position. The employer chose a junior employee over the grievant claiming that he failed to meet the minimum qualifications. The arbitrator found that the employer improperly used the semantic distinction between retrieval, the grievant’s present position, and reproduction, what the posting called for, rather than the actual job duties to determine whether the grievant met the minimum qualification. The arbitrator stated that both consist of making copies of microfilm images on paper. The grievant was found by the arbitrator to possess the minimum qualifications, however the employer was found to not have completed its selection process as the grievant had not been interviewed. The arbitrator ordered the selection process re-opened pursuant to Article 1 7: 4 27

- The grievant was an Auto Mechanic 2 who had been assigned on an interim basis as an Auto Mechanic 3 from June until September 1 989 when he was placed back into his former position due to poor performance. The employer posted the Auto Mechanic 3 position when it became vacant in January 1 990; the grievant bid but the promotion was awarded to a junior employee. The arbitrator found that the grievant possessed the minimum qualifications found on the position description. Section 1 7.05 was interpreted to also require proficiency in the minimum qualifications found on the class specification. Due to the grievant’s performance while assigned on an interim basis, the arbitrator found that the employer had not acted in bad faith, that no purpose would be served by allowing a probationary period to prove the grievant’s proficiency, thus the grievance was denied: 4 28

- The Bureau of Workers’ Compensation posted a vacancy for a Word Processing 1 position. The grievant, who had 3 years seniority, was not selected. A person who had worked as a student was chosen and in effect was a new hire. The arbitrator stated that applicants must possess and be proficient in the minimum qualifications for the position. The Position Description requires course work or experience in word processing equipment. The grievant’s application does not show that she met this requirement, thus she was found not to meet the minimum qualifications for the position posted. The grievance was denied: 4 37

- The State may not hold bidders to qualifications it desires, only to qualifications that are required. The State may not go beyond what it sets forth on the specific Position Description and generic Classification Specification as requirements for the position. The applicants should not have been measured against additional requirements stated in the posting: 4 5 7
- It is the Union’s burden to show that senior bidders are qualified: 457

- The Arbitrator rejected the argument that the grievant did not meet the minimum qualifications for the Utility Rate Analyst 3 position. The State effectively conceded that the grievant was minimally qualified by granting her an interview: 487

- Applicants (and grievant) for vacant positions must demonstrate that they actually meet each requirement set forth in a job posting and/or position description in order to meet the minimum qualifications which will secure them an interview for a promotion: 511

- In a case involving a senior male employee who applied for a position alongside a junior female employee, the State's decision to promote the junior female employee because she was demonstrably superior due to affirmative action considerations was consistent with the language in Contract Article 1 7.06. The language in Article 1 7.06 is clear. Affirmative action is a criterion for demonstrably superior and, so long as the employee meets the minimum qualifications, considerations based on affirmative action, by themselves, can justify the promotion. At such point, the burden of proof shifts to the Union to demonstrate that the standard was improperly applied: 541

- The Arbitrator held that the grievant did not meet the minimum qualifications for the position of Insurance Contract Analyst 3 since she did not have the required products development experience. Therefore, the position was awarded to a junior employee who met the minimum qualifications: 567

- The Arbitrator determined that the grievant failed to meet the minimum qualifications for Project Inspector 2 even though he was senior to the chosen applicants. The Arbitrator determined: 1) the grievant failed to meet the minimum qualifications; 2) the grievant never held a Project Inspector 1 position; and 3) the Union failed to provide equivalent evidence of the Major Worker Characteristics: 593

- The Arbitrator determined that is was not necessary for the grievant to meet the minimum class qualifications included in both parts of the minimum class qualifications due to the presence of the work “or” between the first and second parts. Additionally, the Arbitrator found that the grievant’s work experience met the requirement of “equivalent work experience” as specified in the second part of the minimum class qualifications: 614

The arbitrator found that the grievant was not proficient in minimum qualifications of heavy equipment operation. It was determined that the employer acted reasonably and did not violate the agreement in concluding that the grievant did not meet the minimum qualifications for the Highway Maintenance Worker 3 position. 760

The grievant was employed for over 19 years in the Information and Technology Division of the Ohio Bureau of Worker's Compensation as a Telecommunications Systems Analyst 3. He, along with five other employees, applied for a promotion to the position entitled Information Technology Consultant 2. Another applicant was awarded the position despite the fact that the grievant had more seniority and had a bachelor’s degree that was pertinent to the position. The successful applicant did not meet the minimum qualifications for the job and lied on his application when he stated that he possessed an undergraduate core curriculum in computer science and an undergraduate degree in math. The arbitrator recognized that management has wide discretion in managing its workforce and selecting employees for promotion. However, “the Employer is governed by the rule of reasonableness and the exercise of its management rights must be done in the absence of arbitrary, capricious, or unreasonable discretion.” The arbitrator found that the Employer’s decision to promote the successful applicant to a position for which he did not meet the minimum requirements was arbitrary. 863

The employer did not violate Article 1 7.05 when it did not select the grievant for a training officer position. The successful applicant was found to be more qualified, based upon documentation submitted with his application. The grievant did not provide materials sufficient to prove that he and the successful applicant were substantially equal. 912

While the Grievant claimed to have the necessary background in research methods in her summary of her qualifications, the information contained in her application and resume did not support her
claim. She failed to show any experience with operational, mathematical, analytical, or statistical research methods. The Arbitrator rejected the claim that when the state denied her an interview for the Planner 3 position and awarded it to someone else, it engaged in sex and/or age discrimination in violation of Article 2. A large portion of the employees in the Emergency Management Agency are women and three of the top five leadership positions are held by women. The Arbitrator held that the Grievant failed to show that she satisfied the minimum qualifications for the Planner 3 position when she applied. The grievance was denied.

The PSMQ at issue required Account Clerk 2’s to have six months experience in Workforce Management Systems and in the PeopleSoft system. The Arbitrator held that the State acted properly per its authority under Article 5. It acted reasonably considering the specialized knowledge required to fill the positions involved in the issuance of the PSMQ. In addition, the Arbitrator found that there was no harm to the bargaining unit. There were no bargaining unit positions lost as a result of this action.

Mining Laws Section 4151.34

- This section does not support dismissal where grievant was not aware of the "imminent danger.". 70

Misuse of Agency Billing System for Personal Purposes

- Although the grievant claimed he truly believed that his wife sent the check, the arbitrator finds that the grievant must still assume responsibility. In May, he said that he would provide the cancelled check, but made no effort to advise management that he had been mistaken regarding the payment; he made no effort to pay the bill until the pre-disciplinary meeting when he was forced to admit that the payment had not been made. The facts of this matter support the charge of misuse of the agency's billing system for personal reasons. The grievant jeopardized the Department of Health by failing to pay the bill in a timely manner. His dishonesty in handling his responsibilities here then jeopardized the employer/employee relationship: 248

Misuse of Confidential Materials

- The grievant, an attorney for the Department of Commerce – Enforcement Section of the Division of Securities (Division), was engaged in making criminal referrals to the prosecuting attorney of the proper county “any evidence of criminality” discovered by the Division. The grievant forwarded a case to the SEC, and was subsequently directed by her supervisor, not to pursue any more criminal referrals regarding the investigation. The grievant’s supervisor stated that the Division had an attorney-client relationship with the Attorney General’s office, and the grievant’s action – sending the documents to the SEC- waived the privilege over the documents. The arbitrator found that there were no Division rules – written or oral – instructing the grievant in her selection of documents to share with the SEC, under the access agreement the Division had with the SEC. The record failed to prove that the communication from the AG’s office was a communication between attorney and client. It was noted that telephone calls between the prosecutor’s office and the grievant were initiated by the prosecutor’s office as a result of a complaint by a citizen. The grievant had a duty to cooperate with an official investigation. The arbitrator found that the grievant did fail to prepare subpoenas in a timely manner and the grievant offered several reasons for the neglect. The arbitrator noted that the employer had a disciplinary grid which established sanctions for the first four offenses. Therefore, the arbitrator converted the removal to a written warning to be placed in the grievant’s personnel records. 797

Misuse of Position

- The grievant was removed for misuse of his position for personal gain after his supervisor noticed that the grievant, an investigator for the Bureau of Employment Services, had received an excessive number of personal telephone calls from a private investigator. The Ohio Highway Patrol conducted an investigation in which the supervisor turned over 130-150 notes from the grievant’s work area and it was discovered that the grievant had disclosed information to three private individuals, one of whom admitted paying the grievant. The arbitrator found that the employer proved that the grievant violated Ohio Revised Code section 4141.21 by disclosing confidential information for personal gain. The agency policy for this violation calls for removal. The employer’s evidence was uncontroverted and
consisted of the investigating patrolman’s testimony, transcribed interviews of those who received the information, and the grievant’s supervisor’s testimony. The grievant’s 13 years seniority was an insufficient mitigating circumstance and the grievance was denied. 408

Misuse of Sick Time

The arbitrator determined that the charges of failing to notify a supervisor of an absence or follow call-in procedure and misuse of sick leave were without merit. He found that the charge of AWOL did have merit. Management attempted to assert that a pre-disciplinary meeting did not occur. The arbitrator determined the meeting did take place and that management’s tactic was in violation of the contract. He concluded that the prejudicial process contaminated the charge for which the arbitrator found the grievant guilty to the point that no discipline was warranted. 765

Misuse of State Funds/Property

- The grievant was properly removed where he admitted that he unethically and intentionally used the Bureau’s facilities and confidential client records for personal profit. Moreover, the grievant’s offer to make restitution, which was motivated more by a desire to avoid criminal prosecution than by any real feelings of remorse, did not serve to mitigate the offense. Given the severity of the offense, the grievant’s long length of service and discipline-free work record was insufficient to mitigate the misconduct in the instant case. Therefore, the State did not violate the principle of progressive discipline: 525

- The grievant was properly suspended for submitting a falsified order to report for National Guard training even though the grievant did perform services for the National Guard during the period covered by his excuse, and he was not responsible for the forged signature on the military leave form. The arbitrator concluded that the grievant should have known that, without accompanying orders, a military leave form was insufficient to place him on active duty. Consequently, the arbitrator decided that the grievant was absent from work without proper leave and that he improperly received payment from both the State and the Federal governments for the same period of time. Even so, the arbitrator reduced the penalty from removal to a suspension because the State had not proved its entire case: 528

- The grievant, an Activities Therapist 1 at a youth facility, was removed for unauthorized use of an employer credit card. Misuse of an employer credit card is tantamount to theft in the office which subjects the employee to removal if the employer is able to carry its burden of proof: 587

- The grievant, accused of misusing a State vehicle, admitted the misconduct and waived his right to a pre-disciplinary hearing. He subsequently received a ten-day suspension. The Union contended that management failed to follow the proper due process because it waited to discipline the grievant until after the conclusion of a criminal investigation into the matter. The Arbitrator held that there was no violation of the contract between the parties due to management delaying discipline while the Ohio Highway Patrol was conducting its criminal investigation: 598

Mitigation

- 65 year old person removed for absenteeism, tardiness, and failures to call-in was reinstated without pay since she had been a good employee before being made full time, had developed several medical problems afterwards which management had not been informed of (although they had some knowledge) when they read the removal decision: 65

- Mental disability: 64

- Mental illness: 63, 70

- Given the depression associated With Bipolar Disease and the sleeping attendant upon such depression, administration of a two day suspension for failure to call-in is of such magnitude as to be considered impermissible: 6:3

- Past practice of laxity: 17

- Long service: 14, 47, 86

- Arbitrator reduced a removal for fighting to a 6 month suspension where grievant had 13 years of service with no previous discipline: 86
- It would be inconsistent and unfair to consider employment history without considering work habits and increased absenteeism: 47

- Avoidance of liability was not an excuse where grievant had alternative means such as seeking advice from union officials and assistant manager: 33

- Stupidity is not an excuse if dishonest intent is present: 33

- Failure to fictional duties was found not to be a violation when grievant had many duties and properly prioritized them: 40

- Honest admission of previous offense triggering progressive discipline that led to removal in present case is commendable, but does not detract from the seriousness of the offense and therefore is not a mitigating factor: 42

- Since honest admission did not detract from the seriousness of offense, it was found to have no mitigating effect: 42

- That one volunteered one's services is not an excuse. Once the grievant decided to volunteer his services, he became responsible for his activities while on duty: 59

- While violation was the sort that justifies discharge on the first offense, since this grievant, from day one, admitted his fault and agreed to correct his behavior, if discipline is to be corrective rather than punitive, the application of progressive discipline would seem to have been ideal in this case: 83

- Arbitrator accepted the following as mitigating against neglect of duty charge.

  (1) Communication problem resulted in grievant not being present at pre-disciplinary hearing

  (2) Lack of directions from management for improving work process

  (3) Grievant had informed supervisor of increasing work load

  (4) "Neglect of Duty" lacks clarity: 85

- 24.05 requires that discipline be reasonable and commensurate with the offense and not be used solely for punishment. If mitigating factors are available, then every violator must have those factors considered. If a disciplinary grid gives notice of a lesser discipline, then that notice creates a reasonable expectation that where appropriate a lesser discipline will be imposed: 86

- The arbitrator gave weight to the following mitigating factors:

  (1) Fatigue due to being on overtime status.

  (2) Understating (although the lack of uniqueness of this feature serves to undercut the weight of this factor)

  (3) Grievant's hands were full with the patients that remained

  (4) Long and worthy service and good work record: 90

- Harassment by other employees was found to be mitigating in a case involving sleeping on duty: 110

- Grievant's failure to turn in her identification and time cards and keys for several weeks is de minimis in light of her testimony that she was following the advice of the union and the lack of evidence that she made any attempt to enter the grounds of Apple Creek in the interim: 116

- Where arbitrator was sympathetic to Grievant's illness, his decision is controlled by the agreement. His sympathies are immaterial: 123

- Grievant received a conditional reinstatement, in spite of a drug trafficking conviction, because of employer's disparate treatment, and the grievant's long service with good record where fellow employee's testified about grievant's good performance and commitment: 129

- Where the grievant had been removed for taking leave without waiting for her request to be approved, the arbitrator found that the discipline did not reflect the severity of the offense in light of the circumstances which included medical problems and family problems such as the need to care for a chemically dependent child: 137

- Even though the arbitrator thought the grievant's rehabilitation activities are highly commendable, the arbitrator did not feel that sufficient grounds for mitigation existed: 145
- Where employee's removal order had been placed in abeyance for a last chance agreement including use of EAP, the employee then went on disability leave because of a heart attack. When he returned he was tardy again several times, but the tardiness may have been caused by medication. The arbitrator said the employer cannot remove the employee until the employee has had a chance to fulfill the last chance agreement. The arbitrator noted that it was not obvious from the evidence that, after the employee returned, the employer had counseled and insisted that the employee take advantage of EAP: 1 5 1

- The arbitrator found that a 1 5 -day suspension was not commensurate with the offense or progressive where

1) The grievant was guilty of both wearing headphones and engaging in an act which constitutes a threat to the security of the institution when he made a false report that a fence was secured without visibly checking the site;

2) The headphone offense by itself would only carry a verbal counseling if it were the only offense;

3) The employee had no previous disciplines;

4) There was some evidence that the employee's training was less than rigorous:

5) There was a lack of on site post orders;

6) The grievant failed to fully comprehend either that his conduct constituted a false report or the limits of his discretion in a paramilitary organization: 1 7 1

The variety of excuses offered as justification merely reduced the Grievant's credibility and heightened the propriety of the employer's administrative decision. All of these excuses were viewed as examples of incorrigible behavior: behavior which cannot be condoned or modified by continued progressive discipline attempts: 1 7 6

- Traditional application of discipline requires that mitigating factors be considered: 1 8 2

- The hazards of the intersection where the traffic accident occurred do not mitigate the grievant's conduct (a preventable accident). The grievant frequented the intersection which should have sensitized him to the hazards: 1 8 4

- In determining that the grievant did not have the choice to rescind his quit the arbitrator was of the view that "Anxiety is a common disease in our society, and its presence does not. In and of itself, excuse sufferers from responsibility for their voluntary acts: 1 8 6

- That state knew that the grievant's son was ill and that she had recently suffered from depression. In the circumstances of this case. It must be determined that the concepts of "extenuating and mitigating circumstances" set out in the agreement at 1 3 0 6 are applicable. The employer must not be permitted to disregard them, as to do so would deprive them of their vitality: 2 1 0

- The grievant absented himself from work because of a conflict between his duties with the state and his duties to the family farming enterprise. Acknowledging that this conflict was real and severe, that does not serve to justify the taking of leave without pay to operate the family farm: 2 1 9

- The arbitrator held that the employer had failed to fully and clearly articulate a reasonable mandatory overtime policy where employees were excused from mandatory overtime only if they had already worked 1 6 hours or they had been hurt. All other excuses were viewed as improper and disciplinary action would result. Such an iron-clad policy could lead to consistent disciplinary actions and minimize subjective assessments. One, however, cannot always, equate consistency with reasonableness standards when an entire litany of plausible exemptions me automatically rejected: 2 2 5

- The disciplinary actions in this case were unreasonable because several mitigating circumstances were not considered when levying the discipline. The grievant was employed for a number of years with an above average performance and disciplinary record. Also, her attempts to resolve her problems via an employee assistance effort indicates that she took positive steps to remedy tier difficulties: 2 2 5

- It is apparent that the Grievant has made some efforts to correct his behavior by seeking help for his various problems. That he did not follow through on these efforts (by, for example, entering gamblers Anonymous and using a medication that does not produce drowsiness) raises questions in this arbitrator' s mind as to the sincerity of these attempts: 2 2 7
- Color blindness was not given any weight where
  (1) it was not noted in the grievant's employment
  application under conditions that could impair
  one's ability to perform job and
  (2) color blindness did not prevent grievant from
  noticing the evidence of the inmate's escape: 229

- Where employee violated his responsibilities, the
  fact that no harm resulted, or that others may also
  have been careless, has no mitigating force: 232

- Section 1 3.06 does not automatically require but
  allows the employer to consider extenuating and
  mitigating circumstances. Proper consideration,
  however, necessitates that the Employer is
  cognizant of these circumstances at the time of the
  occurrences: 241

- While the arbitrator sympathizes with the
  grievant's problems causing him to fall asleep on
  duty, the grievant chose to work rather than take
  leave and thus created a dangerous situation. The
  arbitrator sustained the grievant's removal: 243

- The grievant's violations (fraternization with
  inmate and failing to cooperate with art official
  investigation) are so serious that one proposing a
  mitigation defense has to submit convincing and
  extensive support for the argument. Performance
  evaluations and a recommendation from a
  supervisor do not establish a basis for mitigation:
  257

- The grievant was a Correction Officer who was
  enrolled in an EAP and taking psychotropic drugs.
  He got into an argument with an inmate who had
  used a racial slur and struck the inmate. The
  grievant was removed for abuse of an inmate and
  use of excessive force. The arbitrator found that
  the grievant struck the inmate with no justifying
  circumstances such as self defense, or preventing
  a crime. The employer, however, failed to prove
  that the grievant knowingly caused physical harm
  as required by Ohio Revised Code section
  2903.33(B)(2), because the grievant was taking
  prescription drugs. The grievant’s removal was
  reduced to a thirty day suspension because the
  employer failed to consider the grievant’s
  medication. The grievant was not faulted for not
  notifying the employer that he was taking the
  psychotropic drugs because he had no knowledge
  of their possible side effects. Thus, the use of
  excessive force was proven, but excessive use of
  force is not abuse per se: 368

- The grievant began his pattern of absenteeism
  after the death of his grandmother and his divorce.
  The grievant entered an EAP and informed the
  employer. He had accumulated 104 hours of
  unexcused absence, 80 hours of which were
  incurred without notifying his supervisor, and 24
  hours of which were incurred without available
  leave. Removal was recommended for job
  abandonment after he was absent for three
  consecutive days. The pre-disciplinary hearing
  officer recommended suspension, however the
  grievant was notified of his removal 52 days after
  the pre-disciplinary hearing. The arbitrator found
  that the employer violated the contract because
  the relevant notice dates are the hearing date and
  the date on which the grievant receives notice of
  discipline. Other arbitrators have looked to the
  hearing date and decision date as the relevant
  dates. Additionally, the employer was found to
  have given “negative notice” by overlooking prior
  offenses. The arbitrator reinstated the grievant
  without back pay and ordered him to enter into a
  last chance agreement based upon his
  participation in EAP: 371

- The grievant was a Youth Leader who had
  forgotten that his son’s BB gun was put into his
  work bag to be taken to be repaired. While at
  work a youth entered the grievant’s office, took
  the BB gun and hid it in the facility. Management
  was informed by another youth and the grievant
  was informed the next day. He was removed for
  failure of good behavior, bringing contraband
  into an institution, and possessing a weapon or a
  facsimile on state property. It was proven that the
  grievant committed the acts alleged but removal
  was found to be too severe. The grievant had no
  intent to violate work rules, the BB gun was not
  operational, and the employer withdrew the act of
  leaving the office door open as a basis of
  discipline. The grievant’s work record also
  warranted a reduction to a thirty day suspension:
  388

- The grievant was a field employee who was
  required to sign in and out of the office. He began
  to experience absenteeism in 1990 and entered
  drug abuse treatment. He continued to be
  excessively absent and was removed for periods
  of absence from October 2nd through the 10th and
  October 26th to the 30th, during which he called in
  sporadically but never spoke to a supervisor. The
grievant was found to have violated the employer’s absenteeism rule. Additionally, the employer was found not to be obligated to enter into a last chance agreement nor to delay discipline until the end of the grievant’s EAP. Mitigating circumstances existed, however, to warrant a reduced penalty. The arbitrator noted the grievant’s length of service from 1 981 to 1 990, and the fact that she sought help himself, therefore the arbitrator reinstated the grievant with no back pay pursuant to a last chance agreement after a physical examination which must show him to be free of drugs: 391

- The grievant was a Psychiatric Attendant who had received prior discipline for refusing overtime and sleeping on duty. He refused mandatory overtime and a pre-disciplinary hearing was scheduled. Before the meeting occurred, the grievant was found sleeping on duty. A 6 day suspension was ordered based on both incidents. The arbitrator found that despite the fact that the grievant had valid family obligations, he had a duty to inform the employer rather than merely refuse mandated overtime and, thus was insubordinate. The employer failed to meet its burden of proof as to the sleeping incident, however due to the grievant’s prior discipline a 6 day suspension was warranted for insubordination. The grievance was denied: 4 04

- The grievant was removed for misuse of his position for personal gain after his supervisor noticed that the grievant, an investigator for the Bureau of Employment Services, had received an excessive number of personal telephone calls from a private investigator. The Ohio Highway Patrol conducted an investigation in which the supervisor turned over 1 30-1 5 0 notes from the grievant’s work area and it was discovered that the grievant had disclosed information to three private individuals, one of whom admitted paying the grievant. The arbitrator found that the employer proved that the grievant violated Ohio Revised Code section 4 1 4 1 .21 by disclosing confidential information for personal gain. The agency policy for this violation calls for removal. The employer’s evidence was uncontroverted and consisted of the investigating patrolman’s testimony, transcribed interviews of those who received the information, and the grievant’s supervisor’s testimony. The grievant’s 1 3 years seniority was an insufficient mitigating circumstance and the grievance was denied: 4 08

- The grievant was a Psychiatric Attendant who had been mandated to work overtime. The grievant notified the employer that he would be unable to work over because he had to meet his children’s school bus and was unable to find a substitute, and he signed out at his normal time. The grievant had two prior suspensions for failure to work mandatory overtime. Ordinarily, the “work now and arrange later” doctrine applies to such situations, however the arbitrator noted that certain situations alter that policy. The grievant gave a legitimate reason for refusing to overtime and the employer was found to have abused its discretion in not finding a substitute. The grievant was found to have a history of insubordination and inability to arrange alternate childcare. Upon a balancing of the parties’ actions, the arbitrator held that there was no just cause for removal, but reduced the penalty to a 60 day suspension: 4 1 5

- The grievant was removed for failing to report off, or attend a paid, mandatory four-hour training session on a Saturday. The grievant had received 2 written reprimands and three suspensions within the 3 years prior to the incident. The arbitrator found that removal would be proper but for the mitigating factors present. The grievant had 23 years of service, and her supervisors testified that she was a competent employee. The arbitrator noted the surrounding circumstances of the grievance; the grievant was a mature black woman and the supervisor was a young white male and the absence was caused by an embarrassing medical condition. The removal was reduced to a 30 day suspension and the grievant was ordered to enroll into an EAP and the arbitrator retained jurisdiction regarding the last chance agreement: 4 2 2

- The grievant was removed after 1 3 years service from her position with the Bureau of Disability Services for unapproved absence, conviction of a drug charge, and failure to report the drug charge as required by the state’s Drug-Free Workplace Act of 1 988. The grievant had a history of alcohol problems. She was also involved with a co-worker who, after the relationship ended, began to harass her at work. She filed charges with the EEOC and entered an EAP. The former boyfriend called the State Highway Patrol and informed them of the grievant’s drug use on state property. An investigation revealed drugs and paraphernalia in her car on state property and she pleaded guilty to Drug Abuse. She became depressed and took excessive amounts of her
The grievant, an employee for 21 years, sustained neck and back injuries in an automobile accident and received State disability benefits. However, the grievant failed to file all the forms necessary to cover his absence. The State eventually issued an AWOL notice and charged him with insubordination for failure to complete the required forms. The Arbitrator held that the discipline was justified. However, the grievant’s long service with the State should serve to mitigate the discipline. The Arbitrator ordered a thirty-day suspension without pay: 601

- The grievant's work performance history was introduced by the Union as a form of mitigation during the arbitration over the grievant's removal. During the grievant's ten year tenure, he achieved high employee evaluations in the areas of dealing with demanding situations and directing and coordinating the behavior of others. He was also promoted to an interim supervisory position because of these qualities. The Arbitrator sustained the grievance and ordered the State to reinstate the grievant: 603

- The grievant was disciplined eleven times for absenteeism during her four-year tenure which resulted in her removal. The Arbitrator held that the serious and continuing spousal abuse suffered by the grievant was a mitigating factor that warranted reinstating the grievant: 609

- The grievant was removed for fighting with and threatening a co-worker. Although the grievant had several disciplines for absence related problems, the Arbitrator found that the grievant’s attendance improved for more than one year following the EAP referral, most of the grievant’s evaluations were at or above standards and the grievant acknowledged that the gun threat was wrong. Therefore, the grievant was reinstated without back pay or reinstatement of benefits, but with full seniority: 610

The grievance was sustained in part and denied in part. The removal was reduced to a suspension. The Grievant was placed on administrative leave that continues until he completes an EAP-designed comprehensive anger-management program for a minimum of twenty consecutive work days. If the Grievant fails to successfully complete the EAP program, his removal shall be immediately reinstated.

**REASONS:** The evidence does support a finding that just cause exists for discipline under Rule #6 because it was the clear intent of the Grievant to threaten the co-worker. A picture posted in the break room by the Grievant was offensive and was intended to threaten and intimidate the co-worker. However, just cause does not exist for
The evidence fails to indicate that during the confrontation in the break room the Grievant engaged in any menacing or threatening behavior toward the co-worker. The co-worker’s initial response to the posting of the picture failed to demonstrate any fear or apprehension on his part. In fact, his reaction in directly confronting the Grievant in the break room underscores his combative nature, and was inconsistent with someone allegedly in fear or apprehension.

The Arbitrator took into consideration several mitigating factors. None of the Grievant’s allegations against the co-worker were investigated. The facts are unrefuted that the Employer failed to provide any documents or witness list before the pre-disciplinary hearing, in violation of Article 24 .05 . The Grievant’s immediate supervisor was directed by his supervisors to alter his evaluation of the Grievant. The revised evaluation contained four “does not meet” areas, whereas his original evaluation had none. Witnesses from both sides, including management, were aware of the animus between the co-workers. The Employer was complicit in not addressing the conduct or performance issue of the Grievant and the co-worker, which escalated over time and culminated in the break room incident. 1 01 3

The Arbitrator held that the Bureau had just cause to discipline the Grievant for a willful failure to carry out a direct order and for her failure to produce a Physician’s Verification for an absence. This also constituted an unexcused absence for the same date. The Bureau also had just cause to discipline the Grievant for the improper call-off on a later day. The Grievant’s refusal to answer any questions in both investigatory interviews constituted separate violations of the fourth form of insubordination, in that the Grievant failed to cooperate with an official investigation. The Arbitrator held that the record did not support the mitigating factor that the Grievant’s work was placed under “microscopic” review. Nor did the record provide substantial information that the supervisors were universally committed to finding any violations of work rules by the Grievant. 1 021

Mitigating Circumstances

There were two CO’s involved in this matter. The Arbitrator found that CO1’s act of physical violence towards the inmate was without mitigation and must be considered a “blatant exercise of brute force.” The Arbitrator noted that while the inmate’s actions towards the CO1’s co-worker was uncalled for and required an appropriate response, that response should not be a vigilante act. 705

The Arbitrator found that the role played by the grievant in this incident warranted a “stiff corrective action,” but it did not warrant removal.. 706

On February 27, 2002, the grievant was working second shift at the Toledo Correctional Institution in the segregation unit control center. Due to the ensuing events, he was removed from his position as Correction Officer. The institution has a policy prohibiting two unsecured inmates being placed together in the same recreation cage. Despite this policy, that evening two officers placed two unsecured segregation inmates together in a recreation cage for the purpose of allowing them to settle their differences. The grievant entered the cage as the second inmate was being uncuffed, but he turned to walk away in order not to see what happened. As he exited he claimed that he saw Officers Mong and McCoy overlooking the cage at the control booth. None of the officers reported the incident, but management became aware of it the following morning and an investigation ensued. When he was first interviewed later that day, the grievant denied having any knowledge of what had transpired. However, ten days later, he gave a written statement and interview admitting to what he had observed. The grievant was later terminated from his position. The Union argued that the punishment was not appropriate for the offense. Officer Mong committed the same offense but he received only five days suspension thought he saw the fight and the grievant did not. In addition, the grievant fully cooperated in the investigation after his first interview. The arbitrator ruled, however, that the grievant cannot be compared to Office Mong because he was not in the position to intervene. Additionally, the fact that the grievant eventually did tell the truth is not enough by itself to mitigate the penalty. She concluded that both offenses, failing to intervene while knowing officers were putting inmates and staff in harm’s way and then lying about it, are individually and collectively terminable acts. Despite the fact that the grievant did not have an active role in the incident, his inaction threatened security and the safety of the inmates as well. 827

The Arbitrator concluded that the decision to remove the Grievant was not unreasonable, arbitrary, or capricious and denied the grievance. The Arbitrator concluded that the Grievant did everything wrong. He used an unauthorized
“physical action” in the form of kicks; he made no effort to modulate the force of the kicks in compliance with Policy No. 301 .05; he used the unauthorized form of “physical action” to punish or retaliate against the Youth rather than to control him; and, he failed to report that he kicked the Youth three times, but readily reported that the Youth had assaulted him. An aggravating factor was that a JCO cannot afford to lose his temper and lash out at youth. The Agency need not or should not tolerate such conduct. The strongest mitigating factors were that the Grievant had not been trained and had little experience with cell extractions. In addition, the Grievant had a record of satisfactory performance and an unblemished disciplinary record. These mitigating factors did not diminish the Grievant’s misconduct. The Arbitrator opined that one must afford JCOs some “field discretion.” JCOs are not perfect and one cannot reasonably expect perfect implementation of applicable rules and regulations without fail in the “heat of battle.” As a practical matter, slight deviations from the strict application of rules governing interactions with youth must be tolerated—consistent with prohibitions against abuse and use of excessive force. 95

Neither the Employer nor the Union were entirely right or wrong in the case. The Grievant’s discipline did not stand in isolation. She had 29+ years of service with the state with a satisfactory discipline did not stand in isolation. Her past record, as well as the years of service she should have known that she should stand. The Employer acted properly in administering progressive discipline to the Grievant; on the other hand, the Grievant was ill. Because she had called off the two days prior to the day in question she had a reasonable belief, albeit erroneous, that the Employer knew she would not report. As a veteran of many years of service she should have known that she should call in. She had been subject to recent and increasingly serious discipline. Therefore a make-whole remedy could not be adopted. 964

The Employer waited 5 5 days to notify the Grievant that a problem existed with two assignments. The Arbitrator agreed that this delay was unreasonable under Article 24 .02 and was not considered grounds to support removal. Given that his direct supervisors considered the Grievant a good worker, any conduct which could accelerate his removal should have been investigated in a timely manner. The Arbitrator found that sufficient evidence existed to infer that the Grievant’s conduct surrounding one incident—in which proper approval was not secured nor was the proper leave form submitted—was directly related to a severe medical condition. Twenty one years of apparent good service was an additional mitigating factor against his removal. DPS met its burden of proof that the Grievant violated DPS’ Work Rule 5 01 .01 (C) (10) (b) on two dates and that discipline was appropriate, but not removal. However, as a long-term employee the Grievant was knowledgeable about DPS‘ rules relating to leave and any future violation would act as an aggravating factor warranting his removal. 969

In the period leading up to his dismissal the Grievant was having issues with members of his household and his own health. The Grievant did not call in or show up for work for three consecutive days. The Arbitrator held that employers unquestionably have the right to expect employees to come to work ready to work when scheduled. However, just cause also demands consideration for the surrounding circumstances of a violation, both mitigating and aggravating. The Arbitrator found the circumstances in this case did not indicate a “troubled employee” such as one suffering from addiction or serious mental illness. Rather, the Grievant was an otherwise good employee temporarily in crisis (because of circumstances beyond his control) and unable to help himself. This case, in which professional intervention may eventually rehabilitate the employee, was ripe for corrective discipline rather than discharge. The Grievant received a thirty-day suspension to impress upon him his responsibility to inform his employer of his status. 983

The failure of the Grievant to timely call off by 4 7 minutes is not in dispute, nor is the past disciplinary record which contains various interventions and four separate, but similarly related infractions that resulted in discipline. The Grievant maintained that over-the-counter medication she took for severe leg cramps caused her to oversleep. The Grievant was certified for certain medical conditions recognized under the FMLA; however, none of the Grievant’s certified FMLA medical conditions affected her ability to call off properly. The facts failed to support a finding that “circumstances” precluded proper notification. The Arbitrator held that BWC exercised discretion under Art. 29.03 and the Work Rules when it determined removal should not occur and instead imposed the suspension. Given the choice of removal versus suspension, BWC acted properly. “Just cause” existed and no standards were violated in disciplining the
Grievant. The record is undisputed that the Grievant received increasing levels of discipline, including economic penalties, to impress upon her the significance of her non-compliance with the attendance procedures. The absence of attendance infractions since her last discipline indicates that the Grievant can correct her behavior. 986

The Arbitrator held that, management demonstrated by a preponderance of the evidence that the Grievant violated General Work Rules 4.1, 5.1, and 5.12, and therefore, some measure of discipline was indicated. Mitigating factors were the Grievant’s three years of tenure, satisfactory performance record, and no active discipline. In addition, the Agency established only one of the three major charges that it leveled against the Grievant. Also, nothing in the record suggested that the Grievant held ill will against the Youth. The Arbitrator held that removal was unreasonable, but only barely so, in light of the Grievant’s poor judgment and his less than credible performance on the witness stand. The primary reason for his reinstatement is that the Grievant never intended to harm the Youth. The Grievant was reinstated under very strict conditions: he was entitled to no back pay or other benefits during the period of his separation, and he was reinstated pursuant to a two-year probationary plan, under which he shall violate no rule or policy involving any youth. Failure to comply will be grounds to remove the Grievant. 995

The Arbitrator relied on the video evidence. The video indicated that the youth was not engaged in any conduct that required imminent intervention by the Grievant. The Arbitrator held that, given the seriousness of the use of unwarranted force by the Grievant and his failure to follow proper procedures when judgment indicated that a planned use of force was required, just cause for discipline existed. However, removal was inappropriate. The Grievant’s record of fourteen years of good service as well as his reputation of being a valued employee in helping diffuse potential problem situations mitigated against his removal. The incident was hopefully an isolated, one-time event in the Grievant’s career. 996

The Arbitrator found that the Grievant should have been aware of Rule 26. He held that there was no disparate treatment. The choice of the charge of the Grievant was reasonable and quite distinguishable from the facts concerning another corrections officer. The record contained evidence of evasion by the Grievant as to the reason why he did not report his arrest immediately. Any violation of Rule 26 would have been the first offense by this Grievant of Rule 26 and, as such, the maximum sanction for the first offense is a 2-day fine, suspension, or working suspension. However, there was a last chance agreement signed by the Grievant, the warden, and by a union representative. The Arbitrator was limited by the rules which the Grievant accepted in the last chance agreement; therefore, the Arbitrator has no authority to modify the discipline in this case. Rule 26, an SOEC Rule on the performance track of the disciplinary grid, was violated by the Grievant. Once such a finding is made, the Grievant himself agreed in the last chance agreement “that the appropriate discipline shall be termination from (his) position.” 998

The Arbitrator found that the evidence showed the Grievant had violated Work Rule Neglect of Duty (d) and Failure of Good Behavior (e). The evidence failed to demonstrate any words or conduct that rose to the level of a threat or menacing. The Arbitrator held that the removal was excessive due to the Grievant’s medical condition; the Grievant’s acute personal issues; a relatively minor discipline record at time of removal; eleven years of satisfactory service; and the absence of threatening conduct. The Arbitrator reinstated the Grievant with conditions: she will successfully complete an EAP program for anger management and stress—failure to do so would be grounds for immediate removal; discipline of a 1 5 day suspension without pay for violating the work rules; she shall receive no back pay, seniority and/ or any other economic benefit she may have been entitled to; she shall enter into a Last Chance Agreement, providing that any subsequent violation of the work rules for a year following her reinstatement will result in immediate removal 999.

The Arbitrator concluded that more likely than not the Grievant transported a cell phone into the institution within the period in question, violating Rule 30, by using it to photograph her fellow officers. The Arbitrator held that the Agency clearly had probable cause to subpoena and search 1 3 months of the Grievant’s prior cell phone records. The prospect of serious present consequences from prior, easily perpetrated violations supported the probable cause. The Arbitrator held that the Grievant violated Rule 38 by transporting the cell phone into the institution and by using it to telephone inmates’ relatives. The Arbitrator held that the Grievant did not violate Rule 4 6(A) since the Grievant did not have a “relationship” with the inmates, using the restricted definition in the language of the rule. The Arbitrator held that the Grievant did not violate Rule 24 . The Agency’s interpretation of the rule infringed on the Grievant’s right to develop her defenses and to assert her
constitutional rights. The mitigating factors included: the Agency established only two of the four charges against the Grievant; the Grievant’s almost thirteen years of experience; and her record of satisfactory job performance and the absence of active discipline. However, the balance of aggravative and mitigative factors indicated that the Grievant deserved a heavy dose of discipline. Just cause is not violated by removal for a first violation of Rules 30 and 38. 1003

The grievance was upheld. The Grievant was reinstated with all back pay, seniority, and any other economic benefit. To establish theft, the evidence must show that the Grievant intended to deprive the agency of funds provided to employees to attend conferences. The funds were operated as a short-term loan. No written policy or consistent pattern was present regarding repayment by users. The arbitrator held that it was irrelevant how many days it took the Grievant to repay the fund since the Employer essentially allowed each user to determine the date of repayment. The Arbitrator found that several factors mitigated against removal: lax/inconsistent enforcement of rules/policies governing the fund undermines any contention that the Grievant was put on notice regarding the possible consequences of her actions; the Grievant’s treatment of the fund were explicitly or implicitly condoned by her supervisor; and other similarly-situated users of the fund were treated differently from the Grievant. No theft of public funds was proven; when put on notice by Management that immediate payment was required, the Grievant complied. The Arbitrator held there was no just cause for the discipline issued. 1028

Modification of Discipline

- The parties mutually agreed to language in the agreement dealing with notice requirements. To minimize the importance of this language would in effect subtract from or modify the terms of this agreement: 108

- From the Elkouris' How Arbitration Works: "...there is a line of cases in which the [Employer's] evidence was held inadequate to establish the offense for which the employee had been disciplined but was held to be adequate to establish a related lesser offense for which an appropriate penalty...was in order": 192

- A neutral should be circumspect in modifying discipline when discipline is clearly warranted. If the discipline is progressive, and if it is supported by the circumstances giving rise to it, a neutral should hesitate to modify a penalty: 201

- While the arbitrator agreed that the discipline was unusually harsh given the employee had no prior discipline and was highly regarded by the state, the arbitrator refused to modify saying "neutrals should act circumspectly when modifying penalties when an offense has been found to have been committed. As long as discipline is within the bounds of reasonableness when considering the offense an arbitrator should be reluctant to disturb it. This is the case even though the arbitrator or the proverbial man-in-the-street might have levied a different penalty when confronted by the same facts: 203

- Where the application of discipline shocks the proverbial "reasonable man", the discipline may be modified. While an arbitrator who finds discipline to be appropriate should be circumspect in substituting his judgment for that of management the arbitration process itself contemplates that such substitution will occur when the employer has acted in a harsh and overly severe fashion: 210

- "...there is a line of cases in which the [Employer's] evidence was held inadequate to establish the offense for which the employee had been disciplined but was held to be adequate to establish a related lesser offense for which an appropriate penalty...was in order."(From Elkouri): 211

- Reasonable people may differ over the propriety of a specific discipline. Arbitrators should be careful not to usurp managerial authority when it has been correctly utilized: 214

- Arbitrators should be reluctant to modify penalties imposed by employers when it is determined that the ad cons that prompt discipline have actually occurred: 226

Modification of removal for abuse:

- Section 24 .01 provides that if there is found patient abuse. Discharge is the only appropriate penalty. Neutrals are afforded no discretion to modify penalties. However, in order for the discharge penalty to be implemented, there must be a finding of patient abuse: 216

- The word "abuse" m 24 .01 is not defined, nor is it referenced to another contract section or the
Abuse has varying definitions among agencies. However, abuse in 24 .01 is a significant word because once abuse is found. The arbitrator loses power to modify the termination. Thus, in the context of the contract, the word "abuse" is latently ambiguous - that is, the word has at least two plausible meanings The duty of the arbitrator is to define the word as "intended" by the parties. The arbitrator is clear that abuse in the contract has to be a singular clear standard and cannot be defined each time by a different agency's standard. The finding of abuse under 24 .01 is an exceedingly powerful finding and must be a firmly fixed lodestar. The arbitrator is very persuaded by the cogent opinion of Arbitrator Pincus (G-87-001 (A) 1 0-31 -87) and the persuasive elaboration by arbitrator Michael: 238

- When the parties negotiated the just-cause protection of employment, they carved out an exception. They stated in Article 24 , 24 .01 that an arbitrator may not modify a termination where patient abuse is the cause. Grievant is not entitled to a full blown examination of just cause In fact, only a trace of the standard remains for hint - the question of whether or not he committed patient abuse. If the evidence establishes that be did, the arbitrator will have no choice but to uphold the discharge and deny the grievance. Thus, the union can only prevail if the state fails to meet its burden of proof: 25 3

- Where "just cause" was not present because the grievant was summarily dismissed without any consideration of the grievant's many years of high quality service or other mitigating circumstances, the grievance was nevertheless denied. By removing arbitral discretion to modify penalties in a case involving patient abuse, the parties either pre-define just cause or divorced such misconduct from the protections of just cause. In either case, the removal cannot be modified once abuse has been found. Section 24 .01 prohibits an arbitrator from modifying the discharge penalty when patient abuse is the cause. Section 25 .03 requires an arbitrator to apply the negotiated provisions of the agreement as they are written and intended to be applied, without additions, subtractions, amendments, or alterations. It is a mandate the Arbitrator must obey; one which allows no roam for individual concepts of fairness or justice: 25 3

**Moral Turpitude**

- Fraud and perjury are matters involving moral turpitude; they are to be established beyond a reasonable doubt. 1 87

**Multiple Charges**

- A discharge grounded in a "multiplicity of errors" may well not stand up under the applicable just cause standard if but one of the multiple "errors" relied on is not made out: 1 92

**Multiple Duties**

- Failure to perform duties was found not to be a violation when grievant had many duties and properly prioritized them: 4 0

- N –

**National Guard Time**

A full time employee who was a member of the Ohio National Guard serving on duty one weekend per month and two weeks out of every year is entitled to one year prior service credit for each year of service for the purpose of computing the amount of his vacation leave pursuant to RC1 21 .1 61 , OAG 81 -066. 763

**Neglect of Client or Resident**

- Grievants neglected their duty when they failed to take a head count before leaving on a trip in a van which failure resulted in leaving a patient behind unattended: 1 01

- Where grievant's reason for speaking with co-workers was to ask a question pertinent to her duties the arbitrator ruled that there was no evidence that grievant was not tending to her patients and duties: 1 02

- Arbitrator rescinded discipline where, while grievant may not have been at arms length from his 1 :1 client, he was not far enough away that Grievant could not take care of him should something occur that would require immediate attention of Grievant: 1 03

- Employees charged with the care of retarded persons have responsibilities that exceed those of employees in industrial establishments: 1 08
- Arbitrator found no neglect of duty where the grievant had taken a brief trip to her automobile to retrieve her ulcer medication, when grievant had notified other stall she was going, numerous staff remained, and no evidence was given to show any resident received less than adequate supervision: 1

- The arbitrator found neglect where the grievant had tied a fire exit door shut in order to prevent a patient froth running away. The word "neglect" implies giving insufficient attention to something that has a claim to one's attention. It also suggests disregarding or ignoring through haste or lack of care. In this case, the grievant could have asked his supervisor how to handle Ks repeated attempts to leave the floor. He tailed to do so. Alternatively the grievant could have closely supervised the patient which he failed to do. Instead he used an unusual method: tying the exit closed: 1

- That grievant had reported the faulty lock on the rear entrance security door does not excuse the grievant from compliance with the well established and reasonable work rule requiring him to know the whereabouts of all residents in his care at all times. To the contrary, that knowledge of increased risk of resident escape heightened the standard of care to be exercised by the grievant: 1

- While the patient's injuries turned out to be superficial, It was not the province of the grievant to unilaterally make that determination and to proceed on that assumption in the face of Institutional policy and orders from his supervisor to the contrary: 1

- At least in the context of Phoenix 2 (where the residents have multiple handicaps and very low intelligence) disciplinary policy OP/P-5 is not an unreasonable work rule even though it does not distinguish between negligence and intentional abuse or recklessness. The arbitrator said that

  (1) the distinction was "of no moment" to the resident's given their low intelligence,

  (2) the danger is the same whether the grievant was negligent, reckless, or intentionally abusive, and

  (3) it is not unreasonable for the employer to require a high standard of care from employees: 1

- The issue of bathtub training is irrelevant to determining whether or not the grievant was guilty of neglect in this case. Grievant's admitted knowledge of D.B.'s physical infirmities was enough to put the grievant on notice that he should not leave that resident unattended and to tug own devices in a bathtub: 1

- The grievant's judgment must be questioned in toileting one resident at the same time he was bathing another In so doing, he created the unnecessary risk which placed him in the position of making what the union has characterized as a "wrong decision" in going to the first resident's aid: 1

- A contention that the criminal standard of proof should attach since the violation is conduct that carries a criminal penalty was rejected on the grounds that the combo l does not carry a criminal penalty. The grievant was charged with neglect but not necessarily of being reckless. The arbitrator pointed out that criminal neglect requires recklessness (a blatant disregard of known risk) rattier than mere negligence (failure to act with the care that would be exercised by an ordinary reasonable person) 1

- It goes without saying that the weakest members of society who are in the custody of the State must be treated wills the utmost respect. The State is charged with a high responsibility for the well being of those who cannot fend for themselves. Those in the employ of the state who provide the necessary care are the front line representatives of the state and must be held to a high standard of conduct: 2

The Arbitrator held that there was ample evidence that the Grievant failed to take care of a resident of the Ohio Veteran's Home. The Grievant left the resident, who was unable to take care of himself, unattended for five and one-half hours. In light of the Grievant's prior discipline, the Arbitrator found the removal to be progressive. The Union made a procedural objection to the use of video evidence on a CD, because it was not advised of the CD's existence until less than a week prior to the hearing. Since the employees and the Union are aware that video cameras are placed throughout the institution, the Arbitrator ruled that the CD could be used; however, he reserved the right to
rule on its admissibility in relation to the evidence. The Union’s objection to the use of video evidence was sustained as to all events that occurred in a break room. The Arbitrator found little independent evidence of those events and did not consider any of that evidence on the video in reaching his decision. 1 007

The grievance was sustained in part and denied in part. The removal was modified to a five-day suspension. The Grievant was granted full back pay and benefits less the five-day suspension. The Arbitrator found that Management satisfied its burden of proving that the Grievant failed to maintain the close supervision for one patient and one-on-one supervision for another patient. The Grievant chose to work without adequate sleep, rather than to seek leave, and her choice placed the residents in her supervision, and the Center at risk. However, Management had created an arbitrary distinction in supervision cases arising from sleeping on duty. The Union established that other similarly situated employees received suspensions and/or other disciplinary action far short of removal for similar conduct. Therefore, the Arbitrator held that discipline was warranted, but the removal was without just cause. 1 037

Neglect of Duty

- Client Care. 1 02, 1 03
- Foreseeability of consequences. 90
- Tardiness and absenteeism. 65
- Arbitrator accepted the following as mitigating against neglect of duty charge.
  (1) Communication problem resulted in grievant not being present at pre-disciplinary hearing
  (2) Lack of directions from management for improving work process
  (3) Grievant had informed supervisor of increasing work load
  (4) “Neglect of Duty” lacks clarity. 85
- Where grievant’s reason for speaking with coworkers was to ask a question pertinent to her duties the arbitrator ruled that there was no evidence that grievant was not tending to her patients and duties. 1 02
- Arbitrator did not uphold discipline when coworkers often behaved as grievant behaved and had not been disciplined. 1 02
- Arbitrator found no neglect of duty where the grievant had taken a brief trip to her automobile to retrieve her ulcer medication, when grievant had notified other staff she was going, numerous staff remained, and no evidence was given to show any resident received less than adequate supervision. 1 1 6
- Where “major” neglect of duty was defined as neglect of duty that endangers life, property, or public safety, the arbitrator held that to “endanger” means “to bring into danger or peril” or “to create a dangerous situation.” He held that a crew leader who had not told another employee to put away his knife had not endangered anyone given the limits on his authority (crew leaders cannot discipline members of the crew). 1 68
- The charges of failure of good behavior and neglect of duty are subsumed by the more serious charges of insubordination, fighting or striking supervisor, and absent without leave/leaving work without permission of supervisor. 1 73
- In rejecting a neglect of duty charge the arbitrator said that there was no persuasive evidence based on reasonable standards that the numbers or types of carelessness” by grievant was unusual or inordinate. 1 90
- The grievant was upgraded through Class Modernization to a Systems Analyst 2 position. She received an adequate mid-probationary rating but received a verbal reprimand for poor performance afterwards. She alleged supervisory harassment and was transferred to another supervisor who also rated her below average in all six categories. Her performance failed to improve and she received further discipline up to and including the ten day suspension which is the subject of this grievance. She was charged with failure to follow a direct order, breach of security for failing to turn her computer terminal off at the end of the day, and various items relating to proper completion of work assignments. However, the employer failed to send a Step 3 response to the Union. The arbitrator found that the employer did violate section 24 .02 by not sending a Step 3 response to the union, however there was no harm to the grievant. The employer proved that the grievant was guilty of the acts alleged and that there was no supervisory harassment. Progressive discipline was followed (a 1 0 day suspension following a 1 day
suspension) but the procedural violation warranted a reduction to a seven day suspension:

- The grievant began to experience absenteeism problems and received notification of his removal on February 8, 1991. The Union’s Executive Director received a copy of the removal order on February 1, twenty days after the removal order. The grievance was held to be not timely filed and thus not arbitrable. The triggering event was the grievant’s receipt of his removal order. Section 25.01 employs calendar days, not work days. Also, while the day of receipt of the removal order is not counted, the day the grievance is postmarked is counted. No basis for an extension of time was proven: 387

- The grievant was a Psychiatric Attendant who had been mandated to work overtime. The grievant notified the employer that he would be unable to work over because he had to meet his children’s school bus and was unable to find a substitute, and he signed out at his normal time. The grievant had two prior suspensions for failure to work mandatory overtime. Ordinarily, the “work now grieve later” doctrine applies to such situations, however the arbitrator noted that certain situations alter that policy. The grievant gave a legitimate reason for refusing to overtime and the employer was found to have abused its discretion in not finding a substitute. The grievant was found to have a history of insubordination and inability to arrange alternate childcare. Upon a balancing of the parties’ actions, the arbitrator held that there was no just cause for removal, but reduced the penalty to a 60 day suspension: 4 1 5

- The grievant was a Cosmetologist who was removed for neglect of duty, dishonesty and failure of good behavior. She was seen away from her shop at the facility, off of state property, without having permission to conduct personal business. The arbitrator found the grievant’s explanation not credible due to the fact that the grievant did not produce the person who she claimed was mistaken for her. There were also discrepancies in the grievant’s story of what happened and the analysis of travel time. The arbitrator found no mitigating circumstances, thus the grievance was denied: 4 3 8

- The charges against the grievant for neglect of duty were sustainable based on the record presented. It was clear that even with two employees assigned, the Unit was understaffed when measured against existing policies and guidelines, and the situation worsened when one employee left sick. The grievant cannot be blamed for becoming distraught as a result of her asthma condition, and discipline is not warranted as a result of her failure to explain to her supervisors that her unit was without any staff when she left the premises, but she should have alerted her supervisors earlier. Failure to do so, however, is not an act of recklessness, warranting removal: 4 4 7

- Discipline was imposed upon the grievant for just cause. The State provided eyewitness testimony that the grievant was observed standing beside the open salvage door when no loading was in progress. Given the grievant’s dishonesty in the face of credible eye witness and his extensive disciplinary record (which include numerous reprimands for dishonesty and neglect of duty, failure to carry out work assignments, willful disobedience of direct order and violations of agency policies and procedures) the removal was commensurate with the offense: 4 9 3

- The grievant, who did not properly attend to an inmate patient and falsified a report concerning the incident, committed serious violations and deserves to be disciplined, but there is not just cause for removal under the circumstances. This was a first offense and Section 24 .02 of the contract clearly provides for progressive discipline. As such, the grievant may not be removed at this stage of the disciplinary process: 5 0 1

- Where an employee's failure to complete assigned tasks was directly caused by a lack of communication between the grievant and her director, removal was too severe a penalty. Especially since the limited amount of prior discipline in the grievant's work record was unrelated to neglect of duty, and the lack of communication occurred because the grievant was given a list of work tasks without an explanation, an indication of priority, or a deadline: 5 1 9

- The grievant repeatedly failed to complete a list of tasks assigned to her. In light of a poor discipline record, this amounts to a neglect of duty even where a lack of communication between the supervisor and grievant contributed to the grievant's misunderstanding of her duties: 5 1 9 A
The grievant was properly suspended for submitting a falsified order to report for National Guard training even though the grievant did perform services for the National Guard during the period covered by his excuse, and he was not responsible for the forged signature on the military leave form. The arbitrator concluded that the grievant should have known that, without accompanying orders, a military leave form was insufficient to place him on active duty. Consequently, the arbitrator decided that the grievant was absent from work without proper leave and that he improperly received payment from both the State and the Federal government for the same period of time. Even so, the arbitrator reduced the penalty from removal to a suspension because the State had not proved its entire case: 5 28

In reaching a decision to terminate the grievant, the Arbitrator considered the grievant’s past disciplinary record which included several reprimands for Neglect of Duty due to her attendance-related problems. The Arbitrator found the grievant to be less credible witness because of her past disciplinary record: 5 4 4

The employer had just cause to remove an employee for Neglect of duty and inefficiently in a case where the grievant was progressively disciplined in the past for those two reasons. However, the employer did not have just cause to discipline the employee for dishonesty because the employer failed to differentiate between acts of the grievant that might have been characterized as Neglect of Duty and acts that may have been characterized as dishonest: 5 6 2

Considering the fact that the investigation was complete when the indictment was returned, the Arbitrator concluded, pursuant to Article 24, that the employer had the option to terminate the grievant’s Administrative Leave. If circumstances warranted, the grievant could have been returned to work. In the instant case the grievant could not return to work. Therefore, it was appropriate for the employer to terminate the grievant’s Administrative Leave. Additionally, the employer had just cause to terminate the grievant based on the grievant’s Neglect of Duty, Absence Without Leave, Job Abandonment: 5 9 1

This Arbitrator concluded that the choice made by the grievant to complete the dietary requisition before putting away the frozen commodities was completely lacking in common sense. The Arbitrator found that the grievant was in violation of the work rules, specifically neglect of duty, and the last chance agreement: 6 1 2

There was no record to illustrate “Neglect of Duty” as a legitimate charge against grievant for refusing to answer Department questions. Only Neglect of Duty allows removal as a form of discipline for the first offense. Thus, the grievant’s removal was unwarranted. The grievant’s refusal answer the Department’s questions clearly harmed the Department’s interest, particularly after the Department’s efforts to inform the grievant and her attorney of her duty to answer. It was on that basis that the grievant’s removal was converted to a six-month suspension. 7 0 3

The Arbitrator found that errors in procedure and contract violations precluded him from addressing the merits of the case. 7 1 1

The grievant was charged with failing to tag and immediately slaughter a suspect/downed animal. He failed to note that a chicken processing plant did not properly perform fecal checks; thus it was not in compliance. He also failed to conduct an adequate inspection and neglect to note unsanitary conditions at a processing plant. The arbitrator concluded that the factual transactions amounted to neglect by the grievant of his duties as a meat inspector, endangering the public (Rule 30) and potentially harming the public (Rule 25). 7 5 3

The grievant was removed for excessive absenteeism. The arbitrator stated that the grievant’s absenteeism was extraordinary as was management’s failure to discipline the grievant concerning her repetitive absenteeism. The arbitrator found that the fact that the grievant used all of her paid leave and failed to apply for leave without pay, shielded management form the consequences of its laxness. It was determined that through Article 5, management has clear authority to remove the grievant for just cause even though her absenteeism was not due to misconduct if it was excessive. The arbitrator found that the grievant’s numerous absences coupled with the fact that she did not file for workers’ compensation until after termination, and never applied for unpaid leave, supported management’s decision to remove her. 7 9 1
The arbitrator concluded that the documents the Union was denied access to would have buttressed the Union’s position that other examiners were copying, but were not disciplined for their actions; and while the others may be guilty of neglect of duty or poor judgment, they were not guilty of insubordination since they were not under orders not to copy. Therefore, the charges of neglect of duty and poor judgment were not justified. 799

The grievant was charged with failing to initiate payments, which resulted in negative cash flows in projects, and making an inappropriate payment. She was also charged with failing to reconcile documents and failing to file documents in a timely manner. He concluded that the circumstances surrounding the charges against the grievant clouded the State’s proof of misconduct. The alleged errors occurred when the existing system was being automated. 810

At the conclusion of his Transitional Work Program, the grievant provided a required return to work slip from his physician which stated he could return to work with no restrictions; however, the doctor also stated the grievant should work the day shift and no mandatory overtime. The grievant was advised that if he could not return to full duty he should other benefits, i.e. workers compensation. The grievant was ordered to work overtime which he refused on three separate days. He was subsequently late for roll call. His normal post was taken by a co-worker. When he arrived he was offered another post; he refused the post and left the facility. The arbitrator concluded that all JCOs, including the grievant, understood that mandatory overtime was a requirement. Evidence and witness statements proved that the grievant left the facility upon being informed that he could not work his regular post. The arbitrator noted that if the behavior displayed by the grievant continued, he would surely be terminated. 828

The grievant was charged with the use of a State gasoline card for a personal vehicle, misuse of a parking pass, personal telephone calls, being insubordinate and AWOL. Once removed, the Union sought to schedule this matter for arbitration citing Article 25 .02 of the Contract regarding the timeline for arbitration of discharge grievances. The employer refused to schedule an arbitration in this matter because a criminal investigation was pending. The Union filed an action in state court and it was agreed by both parties that an arbitrator would hear the dispute. Arbitrator John Murphy found that there must be a formal criminal action pending against the employee in order to defer the sixty (60) day deadline for discharge grievances to be heard. A criminal investigation was not sufficient reason for delaying arbitration.

The grievance was scheduled for arbitration. The arbitrator found that due to the employer’s misinterpretation of the Contract language, the employer violated Article 25 .02. The grievance was granted due to procedural defect and not on substantive charges. The arbitrator stated that an “unfortunate consequence, is this award will be viewed as a win by the Grievant and it should not. The overall conduct of the Grievant is not addressed, herein, but serious concerns were evident in the evidence presented by the employer and if continued unabated the end result will include future disciplinary action(s) by the employer.” 834

The grievant was given a 1 0-day suspension for various alleged violations including Neglect of Duty, Insubordination, Exercising Poor Judgment; Failure of Good Behavior and Working Excess Hours Without Authorization. The Union argued that the same person conducted the third step proceeding, the pre-disciplinary meeting, another third step meeting and also prepared the notice of the pre-disciplinary meeting notice. In essence, the grievant’s “Accuser, Judge and Employer Representative.” The arbitrator determined that there was no conflict and that the contract does not require that different individuals preside over the various steps in the process. He noted that the pre-disciplinary meeting was not an adjudicatory hearing, stating that it is described in Article 24 .04 as a meeting.

The arbitrator found that five examination reports were not submitted by the grievant. The supervisor was “extraordinarily patient with the grievant” and gave him several reminders to submit the examination reports. The grievant clearly understood he was to submit the reports. The grievant’s failure to submit the reports was a failure to perform a fundamental part of his job. The Employer failed to make its case with regards to the grievant’s time sheets. The employer did not show just cause to discipline the grievant for working excess hours without authorization. Though the time sheet was not clear, it was obvious that the grievant was not claiming hours beyond his scheduled hours. The arbitrator determined that there was no just cause for
Working in Excess Poor Judgment, Failure of Good Behavior and Exercising Poor Judgment; however, he found just cause for Insubordination and Neglect of Duty.

The arbitrator found the 10-day suspension reasonable. The decision by the employer to suspend the grievant for 10 days in this case was based in part on an act of insubordination that occurred approximately one month prior to the charges in this matter. 85 4

The grievant, a TPW with 1 2 ½ years of service, no active disciplines and satisfactory evaluations was removed from his position for leaving a client alone in a restroom. The client was under an “arms length”, “one-on-one supervision” order. The client was discovered on the restroom floor by the grievant who did not report the incident. The arbitrator stated that the employer’s definition of client neglect was two-fold. First, there must be a failure to act. Second, the failure to act must result in, or cause “potential or actual harm.” The arbitrator found that the grievant failed to act when he allowed the client to enter the restroom alone; however, there was no evidence to establish “causal link” to the client’s injuries. The arbitrator determined that the grievant’s neglect exposed the client to potential harm and that his act of neglect was more than simply poor judgment. The arbitrator found that the mitigating and aggravating circumstances did not outweigh the severity of the violations allegedly committed by the grievant. 880

The grievant was charged with failing to stop a physical altercation between two inmates. She also allegedly stopped a co-worker from intervening. The arbitrator found that the employer substantiated the charges. It was noted that the employer’s delay in its investigation and report could have been detrimental not only to the employer’s case, but also to the Grievant’s; however, the Union did not claim undue harm was done to the Grievant. Therefore, the issue of timeliness had little bearing upon the decision. The delay was seen as a technical error. The arbitrator found that the grievant made a mistake in judgment and should be given the opportunity to learn from her mistake. Removal was too harsh. 91 8

A patient escaped and was subsequently hurt. The grievant did not notice the patient’s absence and reported that the patient was present when making her rounds. The Grievant’s actions did not rise to the level of recklessness because she was not indifferent to the consequences, nor did she intend that there be harmful outcomes. The facts were not enough to establish “abuse.” However, the Grievant was negligent. She allowed herself to be fooled by a pile of blankets and cold room by not taking greater care during her rounds to see what was under the blankets. This was not abuse, but it was neglect of duty and warranted corrective discipline. Language in the written policies was not specific and there was room for a range of interpretations about what the grievant knew was required or what she should have known. The burden management places on an employee to speak up if they don’t understand the written policy, overlooks the possibility that an employee may be confident he or she understands what to do and yet, in reality, be wrong about their understanding. Management did not prove that patient abuse occurred and, therefore, did not have just cause to remove the Grievant. But Management did have just cause for discipline. The Grievant was reinstated to her former position with full back pay, seniority, and benefits, less two days pay. Her discipline record reflects a 2-day suspension for a first offense of Neglect of Duty. 95 1

The grievant was a TPW working third shift at a group home. When he arrived at work he was told that a resident was found with knives and Tylenol. He was instructed to position himself so he could visually monitor the resident. Co-workers testified that they saw the grievant sleeping while on duty. They also testified that the grievant was not in a physical position to see the resident if he were on the stairs. During his shift the grievant placed three telephone calls to the supervising nurse at home. He was allegedly rude and disrespectful each time he called. The arbitrator found that the grievant’s removal was just. In addition to his rude behavior the grievant had previously been given a verbal warning and two (2) five-day working suspensions for similar offenses within his four years of employment. 95 8

The Arbitrator found that the evidence showed the Grievant had violated Work Rule Neglect of Duty (d) and Failure of Good Behavior (e). The evidence failed to demonstrate any words or conduct that rose to the level of a threat or menacing. The Arbitrator held that the removal was excessive due to the Grievant’s medical condition; the Grievant’s acute personal issues; a relatively minor discipline record at time of
removal; eleven years of satisfactory service; and the
absence of threatening conduct. The Arbitrator
reinstated the Grievant with conditions: she will
successfully complete an EAP program for anger
management and stress—failure to do so would be
grounds for immediate removal; discipline of a 1 5
day suspension without pay for violating the work
rules; she shall receive no back pay, seniority and/or
any other economic benefit she may have been entitled
to; she shall enter into a Last Chance Agreement,
providing that any subsequent violation of the work
rules for a year following her reinstatement will result
in immediate removal. 999

Negligence

- Burden of proof. 1 6

Negligent Performance of Duty

- See Carelessness

- Where the arbitrator found that the grievant’s use
of an improper hold to restrain the patient was
accidental and thus did not constitute abuse, the
arbitrator nevertheless found that the grievant was
guilty of a lesser-related offense: negligent
performance of duty. The grievant should have
sought help to restrain the patient. He should
have known that the patient would struggle given
the patient’s demeanor. He should also have
known that such a struggle was likely to result in
injury given that the room was crowded with
several metal beds. 1 92

Nepotism

The grievant was charged with allegedly carrying
an unlicensed, concealed weapon in his travel bag.
He was required to conduct training classes and it
was necessary to stay at a hotel close to the
training facility overnight. It was discovered by
another guest who stayed in the room following
the grievant’s check out. Additionally, an issue of
nepotism was raised because the grievant’s wife
was Superintendent of the Agency. The
Arbitrator found that the evidence in the record
did not prove that the spouse’s presence as
Superintendent somehow caused the Agency’s
penalty decision to be unreasonable, arbitrary, and
capricious or an abuse of discretion. The
Arbitrator determined that management
established that the grievant committed the
violation and that some measure of discipline was
warranted. The mitigating factors included the
grievant’s fifteen years of satisfactory and
sometimes exemplary state service. The grievant
also had no active disciplines on his record. 909

Nexus

- Where there was no connection between
conviction for falsifying insurance claims and the
employer’s work duties, where employee had 27
years of service without being disciplined,
arbitrator revoked removal, but did not give back
pay. 5 4

- Widely accepted criteria for determining when off
duty criminal activity justifies discharge or other
discipline: the behavior harms the employer’s
reputation or product; the behavior renders the
employer unable to perform the job satisfactorily
and/or leads other personnel to refuse to work
with the employer. 1 29

- Adverse impact standards used to establish nexus
between off duty conduct and job duties do not
require formal prior notice. 1 29

- The arbitrator found a nexus between a hospital
aide’s duties and her off duty conduct in drug
trafficking:

  (1) the highly impressionable mental patients
  might get the wrong idea that the conduct is
  acceptable and
  (2) the conduct evidenced lack of judgment that
  might jeopardize future patient care. 1 29

- No basis exists for an arbitrator to find a grievant
guilty of drug trafficking where (1 ) the grievant
received a criminal conviction for “drug
trafficking” because he drove a person carrying 4
pounds of marijuana from Hamilton County to
Columbus and (2) there is no evidence that the
grievant was involved in drug trafficking on the
premises. 1 4 1

Where:

(1) the grievant has received a criminal
conviction for drug trafficking which evidences
that grievant may a drug user,
(2) The superintendent testified that he would
employ convicted felons if they were qualified
and if they have paid for their crime,
(3) The grievant is being monitored so that he
will be fired and resentenced if he is found to be
using, and
Grievant is paying for his crime with a fine, a short jail term, and probation, the arbitrator held that the superintendent’s willingness to employee felons should include the grievant.

- The fact that the grievant was convicted of trafficking in drugs (while off duty) is not sufficient evidence to prove that he buys and sell drugs with the inmates or coworkers. Consequently, that same fact is not sufficient to prove a nexus between the conviction and the grievant employment duties.

- The following criteria have been widely accepted for determining when off duty criminal activity justifies discharge or other form of discipline: the behavior harms the employer’s reputation or product; the behavior renders the employee unable to perform the job satisfactorily; the behavior leads to the refusal, reluctance or inability of other employees to work with him.

- The connection must be of such a quality that one could logically expect it to engender some consequence in the enterprise’s affairs.

- Hospital Aides’ responsibilities in the role modeling area are an integral component of their job description. A high percentage of patients are plagued with secondary substance abuse disorders. One could logically expect that habilitation of these patients could be thwarted or misdirected if a convicted drug felon served as their role model.

- A nexus between the criminal conviction and a correction officer’s duties was found to exist for several reasons:

  1. Adverse publicity to the facility
  2. Reinstatement would disrupt the facility’s mission of rehabilitating and reintegrating convicts into society.
  3. The correction officer would be subject to manipulation and harassment.
  4. The institution may be subject to increased liability, and
  5. Reinstatement would send the wrong message to inmates.

- The grievant, a correction Officer, was found to have intentionally exposed himself to a busload of female inmates. This behavior occurred while the grievant was off duty. Off duty behavior is normally not the employer’s business. To allow

  discipline, a clear nexus must exist between the behavior and the job. The arbitrator found that nexus in this case. The grievant charged with the safekeeping of inmates deliberately chose while in uniform a group of female inmates as the victims of his indecent behavior. The end result would be that female inmates not knowing which male Correction Officer was involved could justifiably fear that the Officer in question might have power over them. Sexual abuse of prisoners by Correction Officers is not unknown. Although the removal was the harshest penalty in the disciplinary grid, the factors weighed by the Warden were reasonable and fair. The grievant’s lack of remorse or any indication that the grievant understood and was seeking help for his problem rules against mitigation.

- The grievant was involved in a check-cashing scheme involving stolen state checks from another agency, along with two other state employees. His role was that of an intermediary between the person who stole, and the person who cashed the checks. He served 45 days of a criminal sentence. The grievant was found to be deeply involved with the scheme and received a substantial portion of the proceeds. The violations were found to be connected to the grievant’s job as theft of state property is harm to the employer. The grievant was found to be not subjected to disparate treatment when compared to other employees not removed for absenteeism while incarcerated: The other employees cited for disparate treatment purposes had not stolen state property.

- While on disability leave in October 1990 the grievant, a Youth Leader, was arrested in Texas for possession of cocaine. After his return to work, he was sentenced to probation and he was fined. He was then arrested in Ohio for drug-related domestic violence for which he pleaded guilty in June 1991 and received treatment in lieu of a conviction. The grievant was removed for his off-duty conduct. The grievant’s guilty plea in Texas was taken as an admission against interest by the arbitrator and the arbitrator also considered the grievant’s guilty plea to drug related domestic violence. The arbitrator found that the grievant’s job as a Youth Leader was affected by his off-duty drug offenses because of his co-workers’ knowledge of the incidents. The employer was found not to have violated the contract by delaying discipline until after the proceedings in Texas had concluded, as the
The grievant had been on a disability separation and had been refused when he requested reinstatement. The arbitrator found the grievance arbitrable because section 4 3.02 incorporated Ohio Administrative Code section 1 23:1 -33.03 as it conferred a benefit upon state employees not found within the contract. The grievant thus had three years from his separation to request reinstatement, which he did. The grievance was also found to be timely filed because there was no clear point at which the employer finally denied the grievant’s request for reinstatement and the union was not notified of the events by the employer. Additionally, the employer was estopped from asserting timeliness arguments because the employer was found to have delayed processing the grievant’s request for reinstatement. The physician who performed a state-ordered examination released the grievant to work, thus the employer improperly refused the grievant’s reinstatement request. The grievant was reinstated with back pay less other income for the period, holiday pay, leave balances credited with amounts he had when separated, restoration of seniority and service credits, medical expenses which would have been covered by state insurance, PERS contributions, and he was to receive orientation and training upon reinstatement: 375

- The grievant was upgraded through Class Modernization to a Systems Analyst 2 position. She received an adequate mid-probationary rating but received a verbal reprimand for poor performance afterwards. She alleged supervisory harassment and was transferred to another supervisor who also rated her below average in all six categories. Her performance failed to improve and she received further discipline up to and including the ten day suspension which is the subject of this grievance. She was charged with failure to follow a direct order, breach of security for failing to turn her computer terminal off at the end of the day, and various items relating to proper completion of work assignments. However, the employer failed to send a Step 3 response to the Union. The arbitrator found that the employer did violate section 24 .02 by not sending a Step 3 response to the union, however there was no harm to the grievant. The employer proved that the grievant was guilty of the acts alleged and that there was no supervisory harassment. Progressive discipline was followed (a 10 day suspension following a 1 day suspension) but the procedural violation warranted a reduction to a seven day suspension: 386

- The grievant began to experience absenteeism problems and received notification of his removal on February 8. 1 991. The Union’s Executive Director received a copy of the removal order on February 19. The grievance was written on February 22nd and received by the employer on March 1, twenty days after the removal order. The grievance was held to be not timely filed and thus not arbitrable. The triggering event was the grievant’s receipt of his removal order. Section 25 .01 employs calendar days, not work days. Also, while the day of receipt of the removal order is not counted, the day the grievance is postmarked is counted. No basis for an extension of time was proven: 387

- The grievant had held several less than permanent positions with the state since March 1 989. In December 1 990 the grievant bid on and received a Delivery Worker position from which he was removed as a probationary employee after 117 days. The grievant grieved the probationary removal, arguing that his previous less than permanent service should have counted towards the probationary period. The arbitrator found the grievance not arbitrable because it was untimely. The triggering event was found to have been the end of the shortened probationary period, not the removal. The union or the grievant were held obligated to discover when an employee’s probationary period may be abbreviated due to prior service. The employer was found to have no duty to notify a probationary employee of the grievant’s eligibility for a shortened probationary period when it is disputed. There was no intentional misrepresentation made by the employer, thus the employee waived his right to grieve the end of his probationary period and the employer was not estopped from removing the grievant. The grievance was not arbitrable: 4 1 1
- The grievant was an employee of the Lottery Commission who was removed for theft. The agency’s rules prohibit commission employees from receiving lottery prizes, however the grievant admitted redeeming lottery tickets, but not to receiving notice of the rule. The arbitrator noted that while the employer may have suspected the grievant of stealing the tickets, there was no evidence supporting that suspicion and it cannot be a basis for discipline. The arbitrator found that the grievant did redeem lottery coupons in violation of the employee’s rules and Ohio Revised Code section 3770.07(A) but that he had no notice of the prohibition either through counseling or orientation. The grievant was reinstated without back pay but with no loss of seniority: 4 25

- The grievant was removed for unauthorized possession of state property when marking tape worth $96.00 was found in his trunk. The Columbus police discovered the tape, notified the employer and found that the tape was missing from storage. The arbitrator found that the late Step 3 response was insufficient to warrant a reduced penalty. The arbitrator also rejected the argument that the grievant obtained the property by “trash picking” with permission, and stated that the grievant was required to obtain consent to possess state property. It was also found that while the employer’s rules did not specifically address “trash picking” the grievant was on notice of the rule concerning possession of state property. The grievance was denied: 4 32

- The grievant, a Therapeutic Program Worker, took $1,500 of client money for a field trip with the clients. The grievant was arrested en route and used the money for bail in order to return to work for his next shift. The grievant was questioned about the money before he could repay it, he offered to repay it when he was paid on Friday, but failed to offer payment until the next Monday. He was removed for Failure of Good Behavior. While the employer was found to have poorly communicated its rules concerning use of client funds, the grievant was found to have notice of its provision. The arbitrator found that the grievant lacked the intent to steal the money, however the grievant’s failure to repay was not excused, thus just cause was found for discipline. Because of the grievant’s prior disciplinary record, removal was held commensurate with the offense and the grievance was denied: 4 33

- In order for the State to discipline its employees for off-duty conduct, there must be a rational relationship (nexus) between the questioned conduct and the employee’s ability to do the job. Giving the “role model” requirement its most narrow reading, the prison employer can show a rational relationship between the correction officer’s off-duty criminal behavior and his ability to function as a Correction officer: 4 82

- The grievant was removed for just cause, ODOT established a nexus between the shoplifting offense and the grievant’s position as an ODOT employee and Union shop steward. The grievant was actually on duty when the incident occurred and there was notable media coverage of it. The removal was commensurate with the offense, because the grievant had been previously convicted of theft, but not removed. The mitigating circumstances (i.e., kleptomania diagnosis, length of service, involvement in a rehabilitative program) did not overcome the circumstances and the severity of the offense: 5 00

- Although the grievant was off-duty when he drove by an ODOT worksite to give his supervisor and co-worker “the finger", the arbitrator found a sufficient nexus to consider the incident an on-duty offense. The arbitrator reasoned that the grievant injected himself into the "workplace" by intentionally driving by the worksite: 5 08

- The Arbitrator emphasized that when a removal was based on off-duty conduct, the Employer bears the burden of establishing a nexus between that conduct and the ability of the grievant to perform his/her job duties. In this case, the Arbitrator found that being arrested for drug trafficking damaged the grievant’s reputation to such an extent that he would no longer be able to properly perform his duties as a Correction Officer: 6 08

The grievant was charged with failing to provide a nexus form to his employer regarding the incarceration of his brother. He was also charged with threatening an inmate with bodily harm. The employer failed to prove that the grievant did not inform it of his relationship with an individual under the supervision of the State of Ohio. However, the employer provided substantial proof that the grievant threatened an inmate. The grievant had only been a fulltime correction officer for seven months prior to the incident.
There were no mitigating factors to warrant reducing the removal to a lesser discipline. 922

While on a hunting trip and staying in Mt. Vernon, the Grievant was arrested for operating a vehicle while impaired. The Grievant became very belligerent and verbally abusive. A newspaper report regarding the incident was later published in Mt. Vernon. The Arbitrator held that the Employer had just cause to remove the Grievant. The Arbitrator was unwilling to give the Grievant a chance to establish that he was rehabilitated. Some actions or misconduct are so egregious that they amount to *malum in se* acts—acts which any reasonable person should know, if engaged in, will result in termination for a first offense. Progressive discipline principles do not apply in these situations and should not be expected. The Employer established a nexus for the off-duty misconduct. The Grievant’s behavior harmed the reputation of the Employer. It would be difficult or impossible to supervise inmates who may find out about the charges and their circumstances. This would potentially place other officers in jeopardy; an outcome the Arbitrator was unwilling to risk. 1025

"No Contest" Criminal Plea, Effect of

- A plea of no contest in a criminal proceeding may not be used against the grievant in a subsequent civil or disciplinary proceeding. Criminal charges of sexual harassment and sexual imposition may not be used by the Employer against the grievant to establish just cause for removal: 503
- An employee received a written reprimand for failure of good behavior after he was arrested off duty and pled no contest to a drug possession charge. Since the employee had no prior violations, a written reprimand was proper: 558

Non-Discrimination

- The Arbitrator held that the disparate treatment of two employees’ EAP requests did not necessarily constitute discrimination. The employee claiming discrimination must prove that the treatment of his/her request was motivated by race, sex, or other related factors: 605

Non-Exempt Duties

The issue was previously found arbitrable in Arbitration Decision 989. The Arbitrator held that the evidence did not demonstrate that the Agency possessed the intent to erode the bargaining unit. Nothing in the arbitral record suggested that the Agency exerted less than reasonable effort to preserve the bargaining unit. The Arbitrator also held that the record did not demonstrate that the Agency intended to withdraw the vacancy to circumvent the agreement. Constructive erosion occurs where a new position is erroneously labeled exempt when it should have been labeled nonexempt. Constructive erosion restricts the future size of a bargaining unit; direct erosion reduces the present size of a bargaining unit. The Arbitrator used the label “hybrid” to explain the nature of the contested position, reflecting the presence of both exempt and nonexempt duties in one position. Furthermore, he posed that the fundamental issue of the grievance was: Whether the contested position was exempt or nonexempt? Consequently, the Arbitrator proposed a screening device for hybrid positions that might be useful in resolving subsequent classification disputes. This screening test puts the focus on essential duties (“Essence Test”): whether exempt or nonexempt duties are required in (essential to) daily job performance. A hybrid position is exempt if daily job performance entails exempt duties; a hybrid position is nonexempt if daily job performance necessitates nonexempt duties. The Arbitrator held that exempt duties do not somehow become nonexempt merely because bargaining-unit employees have performed them; nor do nonexempt duties become exempt because supervisors perform them. The Arbitrator’s application of the “Essence Test” indicated that the contested position was exempt. Although the duties were not fiduciary, many of the duties were central to managerial decision-making authority. 1024

Non-Standard Work Schedule

The Union filed separate grievances from Guernsey, Fairfield, Licking, Knox, Perry, and Muskingum Counties that were consolidated into a single case. Implicit in the authority to schedule employees is the ability to alter the work schedule, subject to the limitations in Article 13.07 that the work schedule was not made solely to avoid the payment of overtime. The Arbitrator found that there was no evidence that the schedule change was motivated by a desire to avoid overtime; therefore, no violation of the contract occurred. Based upon the weather forecast known to the Employer on February 12, 2007 justifiable reasons existed to roll into 12 hour shifts. Prior notification under Article 13.02 was not required. No entitlement existed that the employees were guaranteed 16-hour shifts under a snow/ice declaration. The Employer’s conduct did not violate Section 13.07(2)’s Agency specific language. The snow storm was a short term
operational need. To conclude that a snow storm is not a short term need but that rain over an extended period of time is, would be nonsensical. The record consisted of over 5 00 pages of exhibits and three days of hearing. That record failed to indicate that the Employer violated the parties’ agreement. 997

**Notice**

- The fourth violation of an identical rule violation improperly counting inmates supports the idea that the grievant was on notice and that further rehabilitative efforts would not work: 282

- Fourth occurrence of same offense along with employee counseling equals notice: 282

- The question of whether a meeting is viewed as a counseling session or an encounter initiated by the grievant is immaterial from a notice perspective. The grievant still had notice of the proper procedure for counting inmates: 282

- The warning of a supervisor to an employee of “be careful with the girls” does not qualify as an adequate warning of what behavior will be deemed sexual harassment: 286

- Discipline, commensurate and progressive discipline, is designed to have a “corrective” educational effect, not just on the recipient but also on all employees. If the discipline meted out to employees differs or varies arbitrarily or with discrimination among employees the corrective effect is lost. Moreover the “notice” elements of procedural fairness is also destroyed. An employee cannot be on “notice” of consequences, if the consequences vary unreasonably or arbitrarily: 296

- When the notice is so vague as to convey nothing of substance it does not show the employer’s intent. The arbitrator found that the distribution of the revised standards of conduct (work rules with level of discipline) did not discharge its obligations under Section 24.04 of the Agreement. Employers must notify employees of the discipline contemplated on a case-by-case basis. The employer’s breach of the Section was in this case trivial and non-substantive and clearly did not detract from the grievant’s ability to defend themselves: 302

- The grievant and the Union were notified that the grievant was facing removal when the document set forth ten charges including prisoner abuse. Failure to provide specific notice that the grievant was facing removal was a technical flaw without real meaning: 302

- See Seaway Food Town, 94 LA 389 (Braverman 1990).

- The arbitrator found that issuance of a disciplinary grid does not meet the requirements of Section 24.04. The Agreement mandates that the employee and their representative “shall” be informed in writing of the possible form of discipline. The violation was not sufficient to set aside the grievant’s removal for abuse. The Union knew the type of discipline contemplated. The State’s technical violation of the Agreement did not affect the grievant’s removal for abuse. The Union knew the type of discipline contemplated. The State’s technical violation of the Agreement did not affect the grievant’s rights under the Agreement or the ability of the Union to defend them: 306

- In an abuse case the arbitrator first looked at whether the procedural violations by the State were enough to set aside the grievant’s removal. The arbitrator found that the procedural violations did not affect the grievant or the Union so he proceeded to make a decision on the merits. After deciding that the State proved its charge of abuse the arbitrator could not modify the discipline under Section 24.01 of the Agreement: 306

- The employer should not be held accountable for the absence of the grievant pre-disciplinary hearing and her representative when both have been properly notified: 317

- The grievant received a three-day suspension for altering payroll records. This suspension was notice of the possible consequences of a similar violation: 318

- The grievant did in fact serve improperly prepared food to the client. However, the client did not choke to death on that food item so the grievant’s actions did not directly result in harm to the client. A critical element of just cause is that the employer give notice to the employee of the disciplinary consequence of his or her conduct. If the impermissibility of the conduct is so obvious that employees should have known it was unacceptable the notice requirement is not a barrier to a showing of just cause: 330

- The grievant was informed by his supervisor that he was not to use his State computer system for personal business. This directive was not necessary. There is a generalized prohibition in
society against use of an employer’s equipment, supplies or facilities for personal business. When employees do so against that prohibition it is known as theft. It is unnecessary for the employer to issue a policy against such activity – the moral compass of people should serve to guide them not to do so: 332

- The grievant was provided with proper notice concerning the sexual harassment policy articulated in the Work rules and Procedures. The Employer’s training efforts were sufficient in providing proper notice concerning the sexual harassment policy: 4 61

The Employer complied with Section 4 4 .03 when it adopted grooming policy work rules, and notified the Union about the new policy and provided a draft copy: 4 74

The Arbitrator found that the grievant did not exercise poor judgment in informing the grievant of her findings, or that the department changed those findings. The Arbitrator, however, stated that the grievant’s act of telling the complainant to “not let it go” crossed the line from information to encouragement. This act constituted poor judgment. Although the Arbitrator found that the grievant engaged in misconduct and some form of discipline was warranted, removal was not appropriate in this case. He stated that removal was unreasonable, but only slightly so. After the award was issued, the parties contacted the arbitrator for clarity on the Last Chance Agreement (LCA), etc. The arbitrator stated that the LCA was meant to last for one (1) year, and it was tied to the one rule violation found by the arbitrator. 790

Notice:

By Mail
In General

- The grievant was charged with fighting with another employee and patient abuse. The Union argued that there was no definition of what constitutes "abuse" of an inmate/patient. Without a definition of what constitutes "abuse," a grievant is not placed on notice of what acts are prohibited: 5 85

- The Union argued that it was unfair that the grievant did not receive pay from 1 1 /4 /94 to 1 1 /7/94 because he did not receive notification that he was removed from pay status until 1 1 /7/94 . The Arbitrator concluded that the grievant is entitled to have been paid through 1 1 /7/94 , the day before the grievant was ordered to report to work: 5 91

Of Change in Work Schedule

The Union filed separate grievances from Guernsey, Fairfield, Licking, Knox, Perry, and Muskingum Counties that were consolidated into a single case. Implicit in the authority to schedule employees is the ability to alter the work schedule, subject to the limitations in Article 1 3.07 that the work schedule was not made solely to avoid the payment of overtime. The Arbitrator found that there was no evidence that the schedule change was motivated by a desire to avoid overtime; therefore, no violation of the contract occurred. Based upon the weather forecast known to the Employer on February 1 2, 2007 justifiable reasons existed to roll into 1 2 hour shifts. Prior notification under Article 1 3.02 was not required. No entitlement existed that the employees were guaranteed 1 6-hour shifts under a snow/ice declaration. The Employer’s conduct did not violate Section 1 3.07(2)'s Agency specific language. The snow storm was a short term operational need. To conclude that a snow storm is not a short term need but that rain over an extended period of time is, would be nonsensical. The record consisted of over 5 00 pages of exhibits and three days of hearing. That record failed to indicate that the Employer violated the parties’ agreement. 997

of Charges and Possible Discipline

- See charges defective

Charge of alleged threats and coercion toward witness Beachy by grievant may not serve as a basis for sustaining grievant’s termination since that charge was not the subject of a pre-disciplinary hearing. 1 0

A broad change cannot fairly embrace a highly specific charge detailed in a statute which carries a serious penalty. 33

New charge cannot be entered at arbitration since grievant lacks notice of charge: 33

Due process requires that grievant be notified of all disciplinary charges: 33

Due process fairness requires a grievant to [receive] actual notice of the violation and its
consequences. Management's claim that no notice of the 1 2(b) was required because "the facts were the same" is at best disingenuous. Once management became apprised of the nature of the behavior (i.e., 1 2(b)) fairness required the grievant be renotified and that the hearing be reconvened. 'Me concept of fair notice is basic to the notion of due process. The violation of this principle cannot be overlooked by the arbitrator: 1 05

- Consideration of other alleged violations discussed at the hearing, but excluded from the removal order, would violate the grievant's due process rights: 1 08

- The requirement that employer give grievant sufficient notice of the charges is not satisfied where grievant is given a variety of documents which she must integrate in order to conclude the specific reasons for the removal. Specificity is particularly important in abuse and neglect cases. In addition, the employer must properly delineate the possible form of discipline, especially where the employer feels that mitigating or aggravating circumstances support the issuance of a major penalty rather than progressive penalties: 1 08

- Notice was found sufficient where employer stated the date, the alleged behavior, and the violations. That removal/suspension were at stake could be determined by a review of the grid. Arbitrator noted that more specificity might indicate pre judgment by the employer: 1 28

- There are certain examples of employee misconduct for which no express notice need be given that discharge can be the consequence. In other words, drug trafficking is so serious that the grievant and the union should have anticipated the consequences: 1 29

- Adverse impact standards used to establish nexus between off duty conduct and job duties do not require formal prior notice: 1 29

- Arbitrator found that notice of charges was sufficient when notice of pre-disciplinary meeting informed grievant of charges by referring to the staff incident report: 1 36

- Where the notice of the pre-disciplinary meeting stated that the possible discipline was "suspension/removal," the arbitrator held that the notice of possible discipline was sufficient even though it was not more specific. The arbitrator said "the parties used the word 'possible' in Section 24 .04 because they realized that the discipline to be imposed would become definite, after, rather than before, the pre-discipline meeting": 1 37

- Where grievant had been suspended 6 times and each time had been expressly warned that another violation could result in his removal, the arbitrator was unwilling to believe that an inartfully worded sentence in a form notice for the pre-disciplinary conference would cause this disheartened employee any confusion whatsoever: 1 38

- Prior to the pre-discipline, management had recommended a 5 -day suspension. The grievant ultimately received a 1 5 -day suspension. The arbitrator held that the increase in the suspension is not in violation of 24 .04 . The section provides, in relevant part, that prior to the meeting, the grievant is to be informed in writing of the possible form of discipline. The word "possible" means "something that may or may not be the or actual": 1 68

- To be subject to discipline for actions or non-actions, the employee must have foreknowledge of possible or probable disciplinary consequences of his conduct. Ordinarily the Employer must provide such forewarning, either orally and/or in writing. IL is true that certain kinds of conduct may be so clearly incompatible with the employment relationship that commission of the conduct subjects the employee to discipline. The employer has the burden of clearly showing the employee's conduct was of the "heinous" nature: 1 73

- Persons in an industrial society are expected to know that they should not fight with or strike their supervisor: 1 73

- Certain discrepancies between the violations listed on a pre-disciplinary conference notice and data contained in the grievant's attendance record are viewed as not undermining the grounds for discipline. While the two documents referred to different violations (failure to call-in vs. failure to supply proper documentation) they both indicate absenteeism problems: 1 76

- Given the gravity of the offense, abuse of a patient, I find that it was so self-evident that discharge was well within the realm of possibility as a form of discipline, that a specific spelling out
of the same was not necessary to comply with 24 .04 : 1 92

- Where the grievant had never been confronted with a certain allegation until the arbitration phase, the arbitrator found that it was a due process shortcoming violative of 24 .04 which justifies a modification of the penalty meted out on the earlier charges: 21 1

- Where grievant had not maintained channels by which management could communicate with him, his failure to receive notice of the charges against him was not the employer's fault and was not viewed as a procedural error by the employer. It is grievant's duty to make himself available: 21 3

- The arbitrator found the removal order defective where it contained different particular violations than the pre-disciplinary hearing notice. The latter document referred to one insubordinate event but the removal order referred to several. This circumstance failed to provide the grievant with proper and timely notice as required by 24 .01 and 24 .04 . This may have prevented a full and exact defense for the entire episode: 220

- Section 24 .04 was violated where the grievant was never specifically informed that his actions could result in removal. The employer attempted to skirt this issue by alleging that the grievant's actions (refusal to obey an order on the basis of a claim that working conditions were unsafe) amounted to a malum in se offense. This arbitrator disagrees because the nature of this specific insubordinate offense differs significantly from the "obey now grieve later" situation. (Note that in this case the arbitrator did find that the grievant should have obeyed the order because a reasonable person would not have believed the working conditions unsafe): 220

- Being informed both as to the charge and the possible form of discipline is a right guaranteed by the collective bargaining agreement (24 .04 ). The arbitrator found that this requirement was violated where:

1) the possible form of discipline was not specified in either the notice of investigation of the notice of pre-disciplinary conference,
2) the established practice was to issue suspensions for sleeping on duty, even where the offender had 2 previous violations, and
3) no one knows when the new rule which specifies removal for sleeping on duty took effect: 227

- The employer violated 24 .04 by failing to specify in writing the contemplated forms of discipline: 227

- The employer violated 24 .01 by imposing discipline under a directive not clearly in force at the time of the incident and different from the directive specified on the notice of investigation. While the employer has the right to promulgate reasonable work rules, it cannot deprive employees or the union rights guaranteed to them under the contract. Nor can it initiate discipline under one set of work rules and complete it under another when the result is to the employee's disadvantage: 227

- Section 24 .04 does not require the Employer to communicate "the" form of discipline but "the possible" form of discipline. An interpretation which required the employer to state the actual discipline on the pre-disciplinary notice would tend to chill the pre-disciplinary hearing process because it could preclude a penalty modification at a fact finding stage. This option was not contemplated by the parties as evidenced by the contract language. Of course, any modification needs to be within certain reasonable parameters based upon the circumstances. Although labor-management discussions surrounding this issue are laudable, they cannot usurp specific language negotiated by the parties: 24 1

- That the state did not notify the grievant of the charges against him until it notified him of the date for the pre-disciplinary hearing did not prejudice the grievant. There is no substantial difference between notification at one time or the other. The union does not claim that the reasons submitted for the grievant's conduct would be different had he been informed of the charges earlier: 25 0

- The arbitrator found a problem with the notice the employer had given of the possible discipline where the only basis for claiming that the employee received notice was the reference to a certain policy. The policy contained a list of infractions and a disciplinary grid. The problem was that the employer had not stated which particular violation the grievant was charged with: 25 4
- The charge of choking a client is so serious that the grievant should have known his job was at risk: 254

- The employer failed to give notice before the pre-disciplinary conference of what the possible discipline would be. The notice of the pre-disciplinary meeting only referred to the notice of investigation which referred to a rule which did not specify the possible discipline. The first mention of removal was eight weeks after the incident, 2 and 1/2 weeks after the decision to remove was made, and one day before the removal took effect. The violation was intentional because management was afraid it could not replace the grievant. That is no excuse for the employer's violation of the contractual requirement that the grievant be notified of the possible discipline: 255

- By signing off on the new directive, the grievant gave the arbitrator basis for concluding that the grievant knew that the directive applied to his future conduct: 255

- Several documents specified directive B-19 as the rule violated by the grievant. Throughout the process the grievant was charged with violations of B-19. Yet the employer relied extensively on B-38 and work rule 9. The different rules specify different penalties and give different accounts of what constitutes a violation. This raises serious notice concerns: 270

- The employer violated 24.04 by failing to give notice, prior to the pre-disciplinary meeting, that the grievant might be removed for sleeping on duty. The rules under which he was disciplined were not clear on this point. The pre-disciplinary notice only stated that the grievant would be subject to discipline. The employer's past disciplinary practices indicated that a suspension would be imposed. All these factors operated together to deprive the grievant of notice that his job was in danger: 276

**Defects**

The Arbitrator held that the Employer had just cause to remove the Grievant for falsification. When an employee is found to have falsified a series of request forms to receive compensation for which he is not entitled, this misconduct is equivalent to "theft." The Grievant used education leave for periods of time when no classes were scheduled and falsified a request for sick leave on a date he was not sick. The Arbitrator found no notice defects. The Grievant's credibility was hurt based on the differing justifications for his misconduct. 982

**of Disciplinary Rules and/or the Consequences of Violations**

- Prior leniency by agency: 36

- It seems virtually implausible that the grievant would engage in activities that conformed with one of the provisions without having knowledge of certain other provisions found in the same document: 7

- Employer's ability to discharge grievant was negated by its failure to make consequences of violating the rule clear to the grievant: 8

- Where testimony indicated that employees were either docked pay for tardiness or their justifications were approved, and employer failed to provide sufficient evidence that the grievant or any other employee could have expected any other disciplinary action, where lax enforcement indicated that such misconduct was acceptable, and where employer had intentionally neglected to reprimand grievant because grievant's next discipline would be a removal, the arbitrator determined that the grievant did not have notice that his conduct would result in a removal: 7

- "Lax enforcement" establishes a form of "negative notice" that such misconduct is acceptable. The arbitrator took this negative notice as a reason for not escalating the disciplinary penalties despite the provisions in article 5 (management rights) and section 24.02 (progressive discipline) calling for escalation of discipline: 7

- Where

  (1) grievant had been put on notice at previous discipline that next step in progressive discipline would be a thirty day suspension, but the implementation of the new contract caused the rules to change so that removal would be the next step, and

  (2) certain records of previous disciplines had not been removed from grievant's ides as required by the new contract, so that director was made
aware of those disciplines when selecting appropriate discipline,

the arbitrator set aside the removal even though he held that a removal would have been justified in the absence of these procedural defects: 1 1

- Even if specific rules cited in suspension order had never been communicated to grievant, he should have known he was subject to discipline for careless or unsafe operation of State vehicles resulting hr damage to state equipment: 1 3

- Since ODOT is not under a duty to assume its employees will behave fraudulently, lax enforcement does not mitigate employees' falsification of test reports. If employer knew that tests were falsified and tolerated it, the arbitrator would have found that the employee lacked notice of possible disciplinary consequences. But, for this Purpose, knowing that falsification could occur is not the same as knowing it did occur: 1 7

- Since all the grievant's knew that testing was the primary purpose of their job. They all knew or should have known that discharge or discipline would result from their submitting false test results: 1 7

- Removal for incompetence improper without notice of disciplinary consequences of level of performance: 20

- Where an employee was suffering from alcoholism and committed tardiness and absenteeism type offenses, failure to formally issue reprimands on several occasions does not imply bad faith or negligence, but only a patience and willingness to help the grievant. Failure to formally issue reprimands on several occasions was not treated by arbitrator as defeating the notice function of the other progressive discipline actions taken: 23

- Employer cannot discipline employee for providing physician's statement with improper form if the employer never requested that statement have a particular form: 24

- Charge can only reach arts which a reasonable person in grievant's position knows or should know to be prohibited: 33

- Notice requirement met as long as employee has hart published to him the rules under which he is employed, even dither centers or departments work under different rules: 37

- Notice requirement was assumed to be met when no evidence was offered to show that the rules were not published: 37

- Where earlier memo had made location off limits to certain employees, but rule was regularly violated and violations were not sanctioned, and where there was no fixed schedule for taking breaks, Arbitrator found that an employee who had gone to that location to tend to an injury after informing control center he was doing so was on an authorized requested break in a room regularly used for such purposes. The arbitrator rescinded the discipline: 87

- Where co-workers had regularly engaged in the same conduct without discipline, arbitrator declined to uphold discipline: 1 02, 1 03

By its neglect, supervision temporarily waived the rule against instilling and obscene language and is estopped from punishing retroactively on a selective basis. Before the rule may be enforced all employees must receive prior warning: 1 1 7

- The employer may not need to supply notice where theft is the offense. The consequences of stealing property are so patently unacceptable that employees should know that discipline can be expected: 1 1 8

Where the code of rules had not been given to the employees, where it was available at the work site, and where the employees had not been required to read the code, the arbitrator found that the employees had not received notice of the rules in the code: 1 3 0

- It has been reported, on the basis of examining over 1 ,000 cases, that one of the two most commonly recognized principles in arbitration of such cases is that there must be reasonable rules or standards, consistently applied and enforced and widely disseminated: 1 3 0

- In order for a rule to be considered reasonable, at a minimum. An employee should know that certain conduct fails to confirm to the Rule, and thus constitutes a violation of the Rule: 1 3 0
The grievant should have known that fastening the fire exit door was forbidden for the purpose of preventing a resident from leaving: 1 30

While the department's standards of employee conduct do not explicitly state that an employee must do his job, or that a Correction officer doing perimeter check must maintain radio contact and remain at his post, these requirements are obviously implicit in the Correction officer's employment situation. It is axiomatic and implicit in the Correction employment situation, that an employee is accountable and may be disciplined for obvious, major, unjustified misfeasance and malfeasance of basic job requirements which jeopardize the security of the institution: 1 31

Where the rules were posted in the break room and nothing in the record indicated that grievant was unaware of the rules, the arbitrator held that notice was sufficient: 1 37

Off duty drug trafficking by a Hospital Aide (Department of Mental Health), involved in the direct care of mentally ill patients, is so serious an offense that express notice need not be given that discharge can be the consequence. The nature of the offense and the job setting involved should have raised certain anticipated expectations: 1 4 4

Where the rules had been posted on the bulletin board but the grievant had never read it, the arbitrator held that the grievant had constructive knowledge of the rules: 1 68

The arguments that rules 37 and 22 are overbroad, and that grievant had no notice that the penalty would be removal, were found to "have no merit" since the grievant's actions were "nothing less than outrageous" and "he should have known that they would result in an extremely serious penalty": 1 80

The employee had notice of the possible disciplinary consequences of his conduct even though the discipline was imposed shortly after the previous discipline was imposed. The employee received the employer's work rules, was given a verbal reprimand and a written reprimand for similar conduct and was placed art notice concerning an upcoming pre-disciplinary meeting dealing with the consequences of similar misconduct: 1 81

Prior warnings and suspensions are both important cornerstones in the progressive discipline process because they serve as formal reprimands and provide an employee with notice. Warnings have two closely related functions. A reprimand may become part of an employee's total disciplinary record which may eventually be used to justify more severe penalties for future offenses. They not only place an employee on notice that his conduct is unacceptable, it also places the employee on notice that he can no longer count on a clean disciplinary record if the employee commits another act of misconduct, and that more severe discipline is likely to follow. Suspensions serve as a critical aspect in the progressive discipline process because loss of wages is a more effective form of notice than a simple warning: 1 84

Only a person oblivious to the work environment could fail to comprehend that attendance is the sine qua non of holding a job. The employer is not required to inform employees of the obvious precondition to retention of employment, that attendance at work is mandatory: 1 86

The arbitrator finds it hard to believe that in 8 years of service the grievant had not learned the rule in question. However, the employer is not allowed to rely on notice of a rule transmitted by either inference or long time experience: 1 89

An implicit component of "just cause" is that equal infractions receive equal discipline. Fair discipline is even discipline. Inconsistent discipline could lead employees to suspect favoritism. Moreover, inconsistent discipline undermines the concept of notice. When an employee sees another employee undisciplined for infractions, a logical inference would be that the employer has "waived" application of the rule. Over time, such a "waiver" could lead to the conclusion that the "rule" no longer existed. In essence, failure to discipline consistently can constitute "notice" that the rule no longer exists: 1 89

It is now well established that lenient employer policies can be made more stringent following clear notice to employees that such will be the case: 1 93

Because of the seriousness of the offense of theft the arbitrator was unimpressed with the union's contention that the managerial option of
suspension or removal somehow misled or failed to put the grievant on notice that theft could well result in discharge. The arbitrator pointed out that it is appropriate for the employer to maintain such a range of possible disciplines so that mitigating factors can be taken into account: 1 93

- In an ODOT garage, the employees are reasonably expected to read the bulletin board and hence are deemed to know its contents. Additionally, given the small work force, the inescapable inference is that following the posting of the directive and the employee meeting stressing its contents, employees discussed the matter and in this manner the grievant came to know it: 1 93

- When an employee signs documents which have specific oaths affixed and this action is further documented via a formalized notary procedure certain expectations arise which should be shared by the employee and the employer. An applicant should expect negative consequences if the material proves inaccurate. Although the documents did not include a warning that termination might be a consequence, the Grievant's responsibilities are not diminished. The notary and oath taking processes serve as identical or superior notification mechanisms and provide the grievant with clear direction: 1 97

- The arbitrator inferred that the grievant was aware that her excessive absenteeism was not condoned by the state given its scheduling of 2 medical examinations of her condition and in light of her supervisors orders on two occasions to return to work: 1 98

- Management does not have to post a rule or obtain contractual language to inform employees of what they already know. For example, every rational adult human being knows, without being told, that stealing from one's employer is disciplinary misconduct. A posted rule or a contractual prohibition to that effect would be surplusage; it would do nothing to enhance the employee's understanding. By the same token, employees are presumed to know that they must be available for communications from their employer when on indefinite leaves of absence. The arbitrator upheld discipline of the employee for failing to do so: 21 3

- The just cause standard does not countenance having conduct expectations for an employee, not communicating those expectations to the employee, then subsequently faulting the employee for failing to achieve said expectations: 21 8

- Given the grievant's recent discipline, he ought to have been particularly sensitized to all his work place obligations: 21 8

- The arbitrator ruled that the grievant had notice of the rides against fraternization will, inmates saying, "The rules about fraternization with inmates are among the most well known and are clearly and at length stated in the Rules of Conduct. The grievant admits receiving the Rules": 224

- Theft of employer's property is so obviously wrong that no prior notification of discharge is necessary: 235

- Where "gambling" was not prohibited by any of the rules submitted to the arbitrator, the arbitrator held that insufficient evidence was presented to prove "gambling.": 237

- The grievant should have known that removal was a possible consequence of his conduct because his past suspensions had become increasingly severe. The employer's change of directives which increased the sever- of discipline for sleeping on duty did not deprive the grievant of notice of possible discipline because the grievant had seen the directive and had not been disciplined after tike initiation of the directive in a manner inconsistent with the directive: 24 3

- The grievant had extensive absenteeism during the 4 months he had worked for ODOT. Nevertheless he had not received any corrective discipline, but was removed at the end of the four months. The employer's lax enforcement condoned the grievant's repeated violations and led him to believe that nothing would happen to him when he did not report to work. Thus the employer shares some fault for the grievant's conduct and, consequently, discharge is inappropriate. Nevertheless, the rule requiring employee attendance is reasonable and the grievant must be put on notice that continued violations could result in removal. Thus the arbitrator held that the grievant should receive a ten-day suspension. The arbitrator noted that the removal "could have been sustained if the employer had only overlooked an isolated incident of unauthorized absence or failure to call-in properly: 24 9
It is fairly well established that "[Although having been lax an employer can turn to strict enforcement] of a policy] after giving clear notice of the intent to do so". (Elkouri) In the case at bar, the supervisor held a meeting where she told employees that there would be no authorized absences unless doctor's excuses are submitted or employees were hospitalized and were out of available time. She also put a handwritten note on the bulletin board saying "No more AA leave "without Kirby's approval. Even though the normal method of informing employees of a new policy was to carry around a rut interoffice communication and have employee's sign off, the arbitrator held that the notice of the change was adequate. He noted that it was of great weight that the grievant did not deny that he had knowledge of the change. The arbitrator inferred from the grievant's lack of denial that he in fact knew of the change: 25

- The grievant's claim she lacked knowledge of the rules against inmate fraternization was discredited by her admissions that she initially lied to save her job and smuggled certain notes in her socks to avoid disclosure: 25

- The employer informed different groups of employees of the new rule (1 3-38) at different times. Management never announced when the rule would apply to the entire bargaining unit. The employer cannot rely upon the date specified in the rule as providing sufficient notice. Neither do discussions at labor-management meetings automatically provide clear notice of the effective date of implementation. This information must be clearly and unequivocally conveyed to all bargaining unit members: 270

- The grievant was on notice that removal was a possible consequence of his conduct since

(1) abuse is a serious offense and
(2) the grievant already had two suspensions for abuse: 272

- The grievant was not given notice that sleeping on duty was a dischargeable offense by rule B-1 9 since first rule describes general policy, but none of the listed offenses are broken out by seriousness. Nor was the grievant made aware that he could be removed for sleeping on duty by B38. The latter rule does not make sleeping on duty a dischargeable offense except where danger to life, property or public safety is involved. The arbitrator found the concept of danger to be sufficiently ambiguous to deprive the grievant of notice that his conduct could result in removal on the first offense: 276

The arbitrator found that from approximately 1 995 until 2006 the Employer did not investigate relationships and/or other improprieties involving gifts or money received by employees from residents. The arbitrator cited a 2007 decision: “Arbitrator Murphy found that the Employer’s lax enforcement of its policies ‘. . . lulled the employees into a sense of toleration by the Employer of acts that would otherwise be a violation of policy.’” There was no evidence that the Employer made any efforts to put its employees on notice that certain policies/procedures which were previously unenforced would no longer be ignored. The arbitrator noted that statements made by the Grievant and her co-workers indicated evasiveness, but not falsification. The arbitrator held that just cause did not support the decision to suspend the Grievant for ten (1 0) days. Furthermore, the Grievant’s failure to report any information under Policy No. 4 prior to November, 2006 occurred in an environment indicating that relationships or the exchange of items of value was known and tolerated by OVH Management. 1 001

The arbitrator found that the Grievant told her co-worker that she was taking a bathroom break at 6:30 a.m., left her assigned work area, and did not return until 7:30 a.m. This length of time was outside the right to take bathroom breaks, and therefore, the Grievant had a duty to notify her supervisor. Failing to notify the supervisor would have given rise to a duty to notify the grounds office supervisor who is available 24 hours a day, 7 days a week. The Grievant’s prior discipline record should have put her on notice of the seriousness of the offense. The supervisor should have raised the matter of the absence with the Grievant sooner, but there was nothing in the record to show that this failure in any way inhibited the case presented by the Union, or enhanced the case presented by the Employer. The arbitrator held that there was no proof that the discharge was tainted by any claim of due process or unfairness, when the same supervisor conducted both the fact-finding and the investigation. The most damaging testimony to the Grievant was presented by her co-employees, not by the supervisor. The arbitrator found that the Grievant exhibited disregard for the performance of her duties to care for the residents, a matter for which she had been amply warned on previous occasions. 1 01 2
The Arbitrator found that the Grievant was removed without just cause. Management did not satisfy its burden of proving that he acted outside the Response to Resistance Continuum and engaged in the conduct for which he was removed. The Youth’s level of resistance was identified as combative resistance. The Grievant’s response was an emergency defense, which he had utilized one week earlier with the same Youth and without disciplinary action by Management. A fundamental element of just cause is notice. Management cannot discharge for a technique where no discipline was issued earlier. In addition there was no self-defense tactic taught for the situation the Grievant found himself in. 1 032

**Notice of Issues to be Raised at Arbitration**

- Where issue was raised in letter 1 week before hearing and other party agreed to brief issue and did not object at hearing to arbitrator's consideration of issue, arbitrator found that the issue was properly before her: 5 3

- Where assertion of discrimination was not raised prior to arbitration, the arbitrator ruled that due process notions of fairness would be violated if the arbitrator were to consider the claim: 5 8

- Cases which eventually reach the arbitration stage of the grievance procedure are often more thoroughly prepared than at earlier stages. Contentions which do not change the facts or substantially alter the scope of the issue should always be available to the parties. One needs to distinguish the present situation from a different situation where important facts, as distinguished from arguments, pray have been withheld by one of the parties during the earlier stages of the grievance procedure: 1 4 9

- Issues of timeliness can be raised for the first time at arbitration. Arbitrators are creatures of the contract and may not expand their jurisdiction to consider matters outside their authority. Contractual limitations periods are jurisdictional, and arbitrators typically hold in the absence of waivers that such matters may be raised for the first time at the hearing. An added factor in this case is that the parties did not significantly discuss the grievance prior to arbitration: 1 72

- Arbitration is merely a method for determining a preexisting dispute which the parties have been unable to resolve at earlier steps in the grievance process. The arbitration hearing is not the place for the presentation of new claims, although obviously a more thorough investigation prior to arbitration often surfaces evidence not theretofore known and additional arguments not theretofore conceived by the parties. The essential facts supporting the claims of either party, however, should be revealed in the earlier stages of the grievance procedure, if such facts are known to the parties. In this particular instance, the grievant was aware of these facts (although the union was not). Whether the grievant's unwillingness to reveal the information was a consequence of his naiveté or an intentional act of subversion is irrelevant in terms of the due process ramifications. Both alternatives subvert the grievance process. With respect to the present infraction, this Arbitrator must limit the previous analysis to the specific: charges levied against the grievant. He was not charged with dishonesty but that does not mean that this due process infringement will not be factored into the equation when the propriety of the penalty is considered: 1 81

- The unions claim that employer had not notified them of a prior discipline was disallowed because the union had not raised the issue prior to arbitration: 233

**Notice by Mail**

- Arbitrator Rivera's appropriate observation concerning the concept of notice finds strong support in an arbitral (and legal) consensus on the point. Actual receipt of "written notice" is not required; proof of mailing will suffice to establish the presumption that the written notice was received, notwithstanding the inability of the recipient to produce it: 1 87

- Where the grievant recalled signing off on the receipt on certified mail, but not the contents of the letter, the arbitrator held that she was placed on notice of the contents of the letter: 1 98

- Where an employee had received letters from the employer at home before, and did not receive a letter on time because she had moved away from her previous address. The arbitrator held that she did receive notice because she should have notified the state of the change in address: 1 98

– O –
Obscene Language

The grievant was discovered eating food that he had not purchased, in a supermarket. When he was approached by security and told he would have to pay for the food, the grievant refused to do so, using obscene language to emphasize his point. He threatened the store’s security officer stating that he would take the officer’s weapon. He also attempted to use his State ID to intimidate the security officer, store manager and police officers who were summoned. The arbitrator found that the grievant violated the employer’s Standards of Employee Conduct and failed to display exemplary behavior in the store. The obscene language used was undignified and humiliating to the store employees, law enforcement and to the general public. The aggravating factors in this grievance were the obscene language and his threatening or intimidating behavior. The grievant also deliberately involved his employer and its reputation when he presented his State ID in hope of receiving favoritism during the incident. Mitigating factors were the grievant’s twenty years of state service. The arbitrator found that the aggravating factors outweighed the mitigating factors in this instance, and the removal was for just cause. 910

Occupational Injury Leave

- The grievant was conducting union business at the Warrensville Development Center when a client pushed her and injured her back. Her Occupational Injury Leave was denied because she was conducting union business. A settlement was reached concerning a grievance filed over the employer’s refusal to pay, in which the employer agreed to withdraw its objection to her OIL application based on the fact that she was performing union business. Her application was then denied because her injury was an aggravation of a pre-existing condition. The arbitrator found the grievance arbitrable because the settlement was mistakenly entered into. The grievant believed that her OIL would be approved while the employer believed that it was merely removing one basis for denial. The arbitrator interpreted Appendix K to vest discretion in DAS to make OIL application decisions. The employees’ attending physician, however, was found to have authority to release employees back to work. Additionally, Appendix K was found not to limit OIL to new injuries only. The grievant’s OIL claim was ordered to be paid: 4 20

The Arbitrator found that the contract does not provide for vacation leave to accrue while the grievant is on Worker’s Compensation leave. Articles 27 and 29 both contain language which provide for employees to accrue benefits while on Workers Compensation leave. Article 28, dealing with vacations, does not provide for this. The failure of the contract to provide similar entitlements for vacations time as it does in Article 27 and 29 is evidence that no entitlement was intended: 5 4 6

Off-Duty Conduct

- Where there was no connection between conviction for falsifying insurance claims and the employee's work duties, where employee had 27 years of service without being disciplined, arbitrator revoked removal, but did not give back pay: 5 4

- Widely accepted criteria for determining when off-duty criminal activity justifies discharge or other discipline: the behavior harms the employer's reputation or product; the behavior renders the employee unable to perform the job satisfactorily and/or leads other personnel to refuse to work with the employee: 1 29

- The arbitrator found a nexus between a hospital aide's duties and tier off duty conduct in drug trafficking: (1) the highly impressionable mental patients might get the wrong idea that the conduct is acceptable and (2) the conduct evidenced lack of judgment that might jeopardize future patient care: 1 29

- No basis exists for an arbitrator to find a grievant guilty of drug trafficking where (1) the grievant received a criminal conviction for "drug trafficking" because he drove a person -carrying 4 pounds of Marijuana from Hamilton County to Columbus and (2) there is no evidence that the grievant was involved in drug trafficking on the premises. 1 4 1

- Where

(1) the grievant had received a criminal conviction for drug trafficking which evidences that grievant may be a drug user,
(2) the superintendent testified that he would employ convicted felons if they were qualified and if they have paid for their crime,

(3) the grievant is being monitored so that he will be fired and resentedenced if he is found to be using, and

(4) grievant is paying for his crime by fine, short jail term, and probation,

the arbitrator held that the superintendent's willingness to employ felons should include the grievant: 141

- The fact that the grievant was convicted of trafficking in drugs (while off duty) is not sufficient evidence to prove that he buys and sells drugs to the inmates or coworkers. Consequently, that same fact is not sufficient to prove a nexus between the conviction and the grievant employment duties: 141

- The following criteria have been widely accepted for determining when off duty criminal activity justifies discharge or other form of discipline: The behavior harms the employers reputation or product; the behavior renders the employee unable to perform the job satisfactorily; the behavior leads to the refusal, reluctance or inability of other employees to work with him: 144

- The connection must be of such a quality that one could logically expect it to engender some consequence in the enterprise's affairs: 144

- Hospital Aides' responsibilities in the role modeling area are an integral component of their job description. A high percentage of patients are plagued with secondary substance abuse disorders. One could logically expect that the habilitation of these patients could be thwarted or misdirected if a convicted drug felon served as their role model: 144

- The grievant was involved in a check-cashing scheme involving stolen state checks from another agency, along with two other state employees. His role was that of an intermediary between the person who stole, and the person who cashed the checks. He served 45 days of a criminal sentence. The grievant was found to be deeply involved with the scheme and received a substantial portion of the proceeds. The violations were found to be connected to the grievant’s job as theft of state property is harm to the employer. The grievant was found to be not subjected to disparate treatment when compared to other employees not removed for absenteeism while incarcerated: The other employees cited for disparate treatment purposes had not stolen state property: 370

- While on disability leave in October 1990 the grievant, a Youth Leader, was arrested in Texas for possession of cocaine. After his return to work, he was sentenced to probation and he was fined. He was then arrested in Ohio for drug-related domestic violence for which he pleaded guilty in June 1991 and received treatment in lieu of a conviction. The grievant was removed for his off-duty conduct. The grievant’s guilty plea in Texas was taken as an admission against interest by the arbitrator and the arbitrator also considered the grievant’s guilty plea to drug related domestic violence. The arbitrator found that the grievant’s job as a Youth Leader was affected by his off-duty drug offenses because of his co-workers’ knowledge of the incidents. The employer was found not to have violated the contract by delaying discipline until after the proceedings in Texas had concluded, as the contract permits delays pending criminal proceedings. No procedural errors were found despite the fact that the employer did not inform the grievant of its investigation of him, nor permit him to enter an EAP to avoid discipline. No disparate treatment was proven as the employees compared to the grievant were involved in alcohol related incidents which were found to be different than drug related offenses. Thus, the grievance was denied: 410

- The grievant knew or should have known that a drug related crime was off-duty conduct subject to discipline, as specified in Rules of Conduct: 482

- Giving the “role model” requirement its most narrow reading, the prison employer can show a rational relationship between the correction officer’s off-duty criminal behavior, whether a felony or misdemeanor, and his ability to function as a Correction Officer. A direct conflict exists if a Correction Officer, whose job essentially consists of confining criminals, is himself a criminal. Such a conflict of interest can seriously undermine his ability to do the job. While the grievant had only minor discipline up to this
point, the nature of the crime was serious. The State had just cause to remove the grievant: 4 82

- The grievant was removed for just cause. ODOT established a nexus between the shoplifting offense and the grievant’s position as an ODOT employee and Union shop steward. The grievant was actually on duty when the incident occurred and there was notable media coverage of it. The removal was commensurate with the offense, because the grievant had been previously convicted of theft, but not removed. The mitigating circumstances (i.e., kleptomania diagnosis, length of service, involvement in a rehabilitative program) did not overcome the circumstances and the severity of the offense: 5 00

- The grievant was removed for dishonesty and failure to cooperate in an official investigation when she ignored doctor's orders and went bowling during a training session and then lied about her activities. The grievant violated Rules #1 and #26 of the Standards of Employee Conduct but since removal was improper for a first offense, the grievant was reinstated with no loss of seniority but was denied back pay: 5 04

- The employer did not have just cause for removing the grievant for three alcohol induced off-duty incidents. The grievant’s termination was reduced to a disciplinary suspension, and the grievant was reinstated to his former position on a conditional last-chance basis: 5 77

- The Arbitrator stressed that when a removal is based on off-duty conduct, the Employer bears the burden of not only proving that the conduct occurred but also that the grievant’s ability to perform his/her job duties was compromised by that conduct: 6 08

- The 1996 Last Chance Agreement signed by the grievant and the Department did not encompass “off-duty” drug use. The grievant’s absences on the last two occasions prior to removal were a result of his off-duty conduct. Though the Arbitrator found the grievant’s absenteeism record insufficient as just cause for removal, it was found that the grievant’s off-duty drug abuse was subject to discipline: 7 04

The grievant was charged with engaging in a sex act on school grounds in the grievant’s vehicle during school hours. The incident was reported in the local newspaper. The arbitrator found that evidence presented supported the allegations. The grievant compromised his position as a CO, brought discredit to his employer and engaged in immoral conduct when he solicited sex for money, brought the prostitute/drug offender to school grounds, engaged in a sex act and then used his position with the agency to defend himself. The arbitrator stated that the grievant’s “lack of candor and lack of remorse shows him not to be taking responsibility for his own mistake or making a commitment to better safeguard his employer’s reputation and mission”. 9 05

The grievant was discovered eating food that he had not purchased, in a supermarket. When he was approached by security and told he would have to pay for the food, the grievant refused to do so, using obscene language to emphasize his point. He threatened the store’s security officer stating that he would take the officer’s weapon. He also attempted to use his State ID to intimidate the security officer, store manager and police officers who were summoned. The arbitrator found that the grievant violated the employer’s Standards of Employee Conduct and failed to display exemplary behavior in the store. The obscene language used was undignified and humiliating to the store employees, law enforcement and to the general public. The aggravating factors in this grievance were the obscene language and his threatening or intimidating behavior. The grievant also deliberately involved his employer and its reputation when he presented his State ID in hope of receiving favoritism during the incident. Mitigating factors were the grievant’s twenty years of state service. The arbitrator found that the aggravating factors outweighed the mitigating factors in this instance, and the removal was for just cause. 9 1 0

While on a hunting trip and staying in Mt. Vernon, the Grievant was arrested for operating a vehicle while impaired. The Grievant became very belligerent and verbally abusive. A newspaper report regarding the incident was later published in Mt. Vernon. The Arbitrator held that the Employer had just cause to remove the Grievant. The Arbitrator was unwilling to give the Grievant a chance to establish that he was rehabilitated. Some actions or misconduct are so egregious that they amount to malum in se acts—acts which any reasonable person should know, if engaged in, will result in termination for a first offense. Progressive discipline principles do not apply in these situations and should not be expected. The Employer established a nexus for the off-duty misconduct. The Grievant’s behavior harmed the reputation of the
Employer. It would be difficult or impossible to supervise inmates who may find out about the charges and their circumstances. This would potentially place other officers in jeopardy; an outcome the Arbitrator was unwilling to risk. 1 025

Offset of Back Pay Award

- The grievant was reinstated and awarded full back pay and benefits, less any interim earnings because his removal was improper. The Employer could not establish by clear and convincing evidence that the charging party's claims of sexual harassment and sexual imposition were more credible than the grievant's denials: 5 03

- The arbitrator reserved jurisdiction to resolve all matters of back pay and benefits which cannot be agreed upon between the parties: 5 03

Where the State was not able to prove that the grievant had done what the State had accused the grievant of doing, reinstatement of the grievant was awarded with back pay from the date of his removal to the date of the award, less interim earnings: 5 07

Ohio Revised Code (O.R.C.)

- ORC 4 1 1 7.1 0 requires that where the contract makes no specifications about a matter, then the applicable law applies: 21

Order of Layoff

- Section 1 8.02 of the Contract specifically mandates layoff in inverse order of seniority to protect bargaining unit employees: 4 71

- Before the grievant could be laid off as a permanent full-time employee in her classification, intermittent employees in the same classification must be laid off first: 4 71

- Appointment categories are irrelevant within the bargaining unit with regard to the order of layoff because the seniority provisions of the Contract take precedence: 4 71 (A)

- When layoff is proper, bargaining unit employees will first exhaust all bumping rights under the Contract. If no bumps are available, they may bump outside the bargaining unit into the lesser appointment category according to the order of layoff provisions found in the Ohio Revised Code and the Ohio Administrative Code and incorporated by reference into the Contract: 4 71 (A)

- Bargaining unit employees who bump employees in lesser appointment categories that are outside the bargaining unit shall be given the maximum retention points available for their performance evaluations. This award shall be calculated according to the Code provisions: 4 71 (A)

- Citing that the normal workflow for the position was centered in Washington County and sending work to Athens was an obvious waste of time and resources is sufficient to meet the State’s burden to prove economy and efficiency. In limited circumstances (i.e., substantial violation of settlement), agreements can be introduced into evidence if the fact of the grievance substantially concern the substance of the settlement: 4 99

Orders Defective, Manager Lacked Authority

- Where departmental directive said superintendent may require sick leave documentation, arbitrator refused to uphold discipline for not providing sick leave documentation when manager other than superintendent had requested the documentation: 35

OSHA Guidelines
Health physicists were assigned on a rotating basis to respond to incidents, including those at landfills. The Grievant sought pre-exposure vaccinations and protective gear for onsite inspections. OSHA guidelines state that vaccine is to be offered to employees who have occupational exposure to the hepatitis B virus. Occupational exposure has the same definition as in the OSHA guidelines. The expert witness, a PERRP program administrator, reviewed the Bureau’s written policy and the duties of health physicists and testified that these employees were not reasonably expected to have contact with blood or other potentially infectious materials and were not required to have pre-exposure vaccinations. The incident of falling in the muck at the landfill, as related by the grievant, was an accident for which the right to post-exposure evaluation and treatment was created. The Arbitrator concluded that Health Physicists did not have “occupational exposure” and therefore were not entitled to hepatitis B vaccine pre-exposure. The grievance was denied. 962

- With respect to Article 11.02, the grievance was denied. With respect to Article 33.01, the grievance was granted. However, the make whole remedy was limited to five months and was awarded only to Todd Braden. Throughout 2007 there was confusion about what was required to be purchased and what was optional for fire-resistant (FR) clothing. The Traffic Engineer, the Grievants’ supervisor, relied on information from the ODOT Central Office and required the Grievants to wear the FR shirt and pants beginning in October, 2007. The supervisor rescinded the order in February, 2008 when she received the following email: “All FR Safety Apparel which has already been purchased can be distributed to employees if they wish to wear it. Since the apparel is only recommended, it will be the employer’s responsibility to wash and maintain the safety apparel.” The supervisor instructed the Grievants to wear the pants and suit if they wished, but cleaning and maintenance was their responsibility. The contract between the parties states that the arbitrator cannot impose an obligation that is “not specifically required by the expressed language of this Agreement.” OSHA does not require FR clothing as personal protective equipment for the Grievants in the text of Section 1910.335. The Arbitrator held that the Employer was not obligated under Article 11.02 to provide FR shirts and pants to the Grievants and, consequently, did not have any obligation to clean and maintain same. Because the traffic engineer ordered the five Grievants to wear the FR shirt and pants from October, 2007 to February, 2008, the Employer was contractually responsible for the cost of cleaning and maintaining the FR clothing during these five months. Evidence was submitted showing that Todd Braden had a per week expense for care and maintenance of this clothing. The make whole remedy was requested for this Grievant only. 1018

**Overtime**

- Definition: 93
- Rest periods between double shifts: 135
- Schedule change to avoid overtime 32, 93. 149
- Five day schedules are like 7 day schedules in that they cannot be changed to avoid overtime: 32
- Unapproved overtime: 146
- Payment for unapproved overtime is not mandated by the agreement and would run counter to existing policy and provisions contained in the agreement: 146
- Section 13.07 allows the implementation of overtime arrangements by the employer, and equally anticipates an authorization requirement. Both of these conditions were not merely negotiated for the traditional overtime equalization situation. They, more specifically, are contained for the paragraph dealing with both overtime situations, and therefore, must be applied consistently whether one operates under the traditional or iron-traditional paradigm: 146
- Generally, many arbitrators have recognized that unless the agreement says otherwise, the right to schedule overtime remains in management. This "right" of management can be limited it the union can prove that scheduling changes have been implemented to avoid the payment of overtime. Article 5 and ORC 4117.08(c) clearly provide the employer with the right to determine matters of inherent managerial policy, maintain and improve the efficiency of operations and to schedule employees. Thus, these provisions allow the employer to alter work schedules to improve efficiency based on operational needs. Sections 13.01 and 13.02 underscore the employer's ability to schedule work. Section 13.02 defines work schedules as "an employee's assigned shift." Obviously, if the employer can make work schedule assignments, the employer can also establish work schedules: 149
- The employer retains the right to manage its operation in a manner which is consistent with the various provisions set forth in the agreement. The inherent rights of management include scheduling work, assigning employees and operating efficiently. Management's authority in this regard has been recognized by many arbitrators, including Arbitrator Pincus in the Kinney decision. Arbitrator Pincus held that the State has the right to establish work schedules and to alter original work schedules based upon operational needs. This arbitrator agrees and is of the further opinion that article 13 suggests that the parties anticipated that work schedules would be changed. Section 13.07 restricts management's right to change a work schedule when it can be shown that the schedule was arbitrarily changed to avoid overtime, as in the fiction case. The wording of 13.07, paragraph 7 further suggests that the employer may change employee's schedules for operational needs: 169

- Section 13.01 defines the workweek in a manner which allows for flexibility in scheduling; this suggests that work shall be scheduled in order to meet operational needs. When this provision is read in conjunction with 13.07, paragraph 7, it is clear that management may establish and alter schedules as long as the primary intent is not avoidance of overtime. 13.07 does not guarantee a certain amount of overtime nor does it prevent management from implementing schedule changes based on operational requirements, even though those changes may result in less available overtime: 169

- The arbitrator held that there was operational need justifying a schedule change where:

(1) The employees whose schedule was changed from day to night shift performed the duties in their position descriptions and their absence from the day shift did not result in inefficiency between 7:30 A.M. and 4:30 P.M.

(2) Response time to nighttime hazardous road conditions caused by storms was cut significantly

(3) The night workers could better monitor the condition of the roads for ODOT.

(4) Overtime was still offered to both day and night employees: 169

- A reduction in the total number of available overtime hours is not evidence that avoidance of overtime was intended: 169

- That ODOT had changed the schedule in one county to include night patrol and had not done so in another county does not prove that right patrol was not an operational need for the schedule change in the former county where more people commute through the County in the morning: 169

- Arbitrators have consistently recognized management's right to require mandatory overtime unless there exists a contractual restriction which specifically limits or takes away this right. It has also been determined that employers may enforce their rights by the assessment of disciplinary action for the failure of an employee to comply with such a request. This managerial prerogative, however, is not totally unfettered because employers are not absolved of their obligation to observe fairness and reasonableness in demanding overtime, or to overlook the consideration of health and welfare when requiring that overtime be worked. Reasons often relied upon by arbitrators when reversing management's right to require overtime include: excessive overtime assignments, doubt of their need, lack of reasonable advance notice, and careful consideration to reasons advanced by employees for refusing to accept the overtime assignment: 225

- The arbitrator invalidated a discipline for refusing mandatory overtime because management had failed to give a full and good faith consideration to the reasons advanced by the grievant for refusing to accept the overtime assignment. The grievant had placed management on notice of her medical problems and had supplied documentation from her physician. Only limited attempts were undertaken to determine the veracity of the grievant's assertions. The grievant's physicians were never contacted. Investigation weaknesses on the employer's part cannot housed as a veil to skirt critical just cause responsibilities: 225

- The arbitrator held that the employer had failed to fully and clearly articulate a reasonable mandatory overtime policy where employees were excused from mandatory overtime only if they had already worked 6 hours or they had been hurt. All other excuses were viewed as improper and disciplinary action would result. Such an ironclad policy could lead to consistent disciplinary
actions and minimize subject assessments. One, however, cannot always equate consistency with reasonableness standards when an entire litany of plausible exemptions are automatically rejected: 225

- The grievant was a Psychiatric Attendant who had been mandated to work overtime. The grievant notified the employer that he would be unable to work over because he had to meet his children’s school bus and was unable to find a substitute, and he signed out at his normal time. The grievant had two prior suspensions for failure to work mandatory overtime. Ordinarily, the “work now, grieve later” doctrine applies to such situations, however the arbitrator noted that certain situations alter that policy. The grievant gave a legitimate reason for refusing to overtime and the employer was found to have abused its discretion in not finding a substitute. The grievant was found to have a history of insubordination and inability to arrange alternate childcare. Upon a balancing of the parties’ actions, the arbitrator held that there was no just cause for removal, but reduced the penalty to a 60 day suspension: 4 1 5

- Where the mandatory overtime policy only allowed an employee to be excused if they had already worked 1 6 hours or been injured, and the grievant was disciplined for refusing to do overtime even though she had a medical excuse, the arbitrator ruled that the reasonableness of the policy was called into question by the fact that
  (1) another employee had been excused even though not falling into one of the specified exceptions and
  (2) management had not attempted to distinguish that employee's situation from the grievant's: 225

- In the absence of overtime required by the contract or evidence as to the grievant's attendance and overtime record as well as overtime worked by other employees in his classification and workplace during his absence, determination of overtime pay is too speculative to be considered earnings lost: 25 4

- The employer's overtime policy stated that when one volunteered to work overtime, normal attendance rules would apply. Section 1 3.07 which concerns overtime does not preclude the application of other relevant disciplinary policies when an employee fails to fulfill an overtime obligation and engages in collateral misconduct.

If the parties had intended such a result, the language in 1 3.07 would have said so explicitly: 264

- The determination of overtime pay was found to be too speculative to be considered “earnings lost”: 300
- The reinstated grievant was given holiday pay but not overtime pay: 31 7
- Grievant was awarded full back pay at straight time rate but did not receive money for missed overtime opportunities: 327
- Since the employees were not eligible for pay beyond their regular hours under Section 37.04 they are not eligible for overtime under Section 1 3.01 of the Agreement: 34 5
- Section 1 .03 is intended to give bargaining unit employees first crack at overtime before work goes to non-bargaining unit employees, but in this case, one cannot conclude that inmates were non-bargaining unit employees. Furthermore, since the work was carried out during the regular work day, Unit 6 employees did not lose work or overtime opportunities: 4 67
- Despite the findings that the Employer did not act in bad faith, the overtime rights of each grievant were breached when they were temporarily left off the second shift roster: 4 91
- Providing overtime opportunities within the same purging period and for the same day and shift rosters as those on which overtime is missed can be consistent with the local overtime agreement so long as it is not done in a way to impose hardship: 4 91
- There is no evidence that extra opportunities within the same purge period made up for the grievant’s lost opportunities: 4 91
- Despite the fact that the Union presented the testimony of the grievant and numerous other ODOT project inspectors who had been sent home while consultant inspectors remained on job sites performing bargaining unit work on an overtime basis, the arbitrator concluded that the testimonials lacked precision and were anecdotal in nature. As a consequence, the arbitrator decided that the Union failed to meet its burden of proof: 5 1 4 **
- Payment for missed overtime opportunities is not included in back pay calculations: 5 31

- The grievant improperly refused to work mandatory overtime. The contract provides a procedure for waiving mandatory overtime where the employee can prove a medical or other legitimate reason, but the grievant simply refused to sign the notice. The arbitrator also agreed that potentially losing transportation home was an insufficient reason to defy a direct, emergency order. The grievant was obligated to "work now and grieve later": 5 4 0

The grievance was not dismissed as untimely. The Arbitrator held that the grievant was mistaken in her belief about what the grievable event was. However, only work performed by others during the ten days preceding her grievance, which was work normally performed by the grievant, would be compensable. The Arbitrator found that the project work of developing, testing, and implementing changes to the processes and programs of registration renewals was clearly outside the domain of the Grievant’s normal work. Since the Union had the burden to show by a preponderance of evidence that the Grievant “normally performed the work,” and/or the Arbitrator could only make an educated guess, the grievance must be denied. 977

Overtime, Avoiding Payment of

- The employer changed the grievant’s work schedule in 1 987 during the golf season (the grievant is a Golf Course Worker) from a Monday through Friday workweek to a Tuesday through Saturday workweek. The Union argued that this was a violation of Section 1 3.07 of the Agreement which prohibits the State from changing an employer’s work schedule to avoid overtime. The arbitrator found that the State did not violate Section 1 3.07. When the State placed the grievant on a Monday-Friday schedule in the years before the Agreement it did not create a practice which would bind it forevermore. The parties were confronted with a changed environment. For the first time in 1 987 they were operating under a collective bargaining agreement. One event or action does not serve to bind the employer or the Union. It takes constant repetition to create past practice: 303

- The grievant was found to be working within his classification and whether a supervisor is present at work is a matter for the employer to determine. The presence or absence of a supervisor does not go to the issue of whether the employer is scheduling the grievant to avoid overtime: 303

- A “regular” schedule as contemplated by Section 1 3.07 of the Agreement is not limited to Monday-Friday. In the case where the grievant works six months on a Monday-Friday schedule and six months on a Tuesday-Saturday schedule neither schedule is irregular than the other. The standard workweek must be forty hours followed by two consecutive days off. Section 1 3.07 is instructive in its silence; a standard workweek does not necessarily mean a Monday-Friday schedule: 303

- The Union bears the burden to demonstrate that the State staffed the machine so as to avoid the payment of overtime. The State deciding to use that particular machine is permissible under the Management Rights section of the Agreement, Article 5. It is not shown that the operation of this machine was done to avoid overtime pay to employees. Section 1 3.08 is inapplicable since the employer did not change the work schedules. The employees themselves volunteered: 329

- That some tasks by the grievants were left undone is insufficient to determine that outcome of this dispute. The Union charged that the State was rescheduling employees to avoid payment of overtime. Management can allocate scarce resources. This case did not involve the employees working out of their classification or work area. The fact that another county chose to allow employees to work overtime does not control the management actions of the agency: 329

- Where management establishes a new regular schedule designed to meet operational needs, the Contract has not been violated even if the change has the incidental effect of reducing overtime. Furthermore, there is nothing in the Contract that guarantees employees any particular amount of overtime. Finally, the conclusion that management has the right to change the schedule is strongly supported by four prior arbitration decisions: OCSEA/AFSCME Local 11 and State of Ohio, Department of Transportation, Case No. G-87-1 992; OCSEA/AFSCME, Local 11 and State of Ohio, Department of Natural Resources, Case No. 25 -1 2(5 -23-90)-75 -01 -06; November 5, 1 990; State of Ohio, Department of Transportation and Ohio Civil Service Employees
The Union filed separate grievances from Guernsey, Fairfield, Licking, Knox, Perry, and Muskingum Counties that were consolidated into a single case. Implicit in the authority to schedule employees is the ability to alter the work schedule, subject to the limitations in Article 13.07 that the work schedule was not made solely to avoid the payment of overtime. The Arbitrator found that there was no evidence that the schedule change was motivated by a desire to avoid overtime; therefore, no violation of the contract occurred. Based upon the weather forecast known to the Employer on February 12, 2007 justifiable reasons existed to roll into 12 hour shifts. Prior notification under Article 13.02 was not required. No entitlement existed that the employees were guaranteed 16-hour shifts under a snow/ice declaration. The Employer’s conduct did not violate Section 13.07(2)’s Agency specific language. The snow storm was a short term operational need. To conclude that a snow storm is not a short term need but that rain over an extended period of time is, would be nonsensical. The record consisted of over 5000 pages of exhibits and three days of hearing. That record failed to indicate that the Employer violated the parties’ agreement. 997

Overtime (Payment for missed overtime opportunity)

- Despite the finding that the Employer did not act in bad faith, the overtime rights of each grievant were breached when they were temporarily left off the second shift roster: 491

Providing overtime opportunities within the same purging period for the same day and shift rosters as those on which the overtime is missed can be consistent with the local overtime agreement so long as it is not done in a way to impose hardship: 491

There is no evidence that extra opportunities within the purge period compensated the grievant’s for lost opportunities: 491

Parolee, being a

- Raises a conflict of interest for correction officers: 18

Part-time Employment Policy

Article 28 is clear in that permanent part-time employees earn and are to be credited with paid vacation leave the same as permanent full-time employees but pro-rated for the hours worked. The Agency has complied with column one of the schedule; however, it has ignored the second column in the milestone years, thus denying these employees their entitlement to the full pro-rata amount earned in the milestone year. While it was true that neither the CBA nor the part-time policy mention “vacation dump”, this was the method used for years for other public employees in Ohio in the milestone years. A “vacation dump” is a lump sum credit of earned vacation that has not accrued on a biweekly basis by virtue of the fact that accrual rate increase lag increases in earned annual vacation leave by one year. The mere fact that there has been a practice of not making similar adjustments for most part-time State employees does not evince a binding past practice. A past practice is binding only when it rests on a mutual agreement. There was no such evidence here. 973

Part-Time Employees

No dispute exists that non part-time employees are entitled to be paid the “normal” number of hours they would be scheduled to work as holiday/straight time pay. The dispute centers upon number of hours part-time employees are to be paid as holiday pay under Article 26.02 and/or straight time pay under Article 26.03. The language to standardize the computation of holiday pay for part-time employees was accomplished during negotiations and the evidence offered by the Union fails to contradict the final written agreement. The reading of Article 26.03 in conjunction with Article 26.02 does not modify the language to make it ambiguous or unclear. The parties could have made it clear in Article 26.02 that part-time employees who work holidays were entitled to holiday pay based upon the actual hours worked that day. They did not. There is no evidence to find that a mutual mistake occurred which would require reformation. 990
Section 26.02 was newly negotiated contract language in the 2006-2009 collective bargaining agreement. The disputed language was proposed by the Employer and accepted by the Union. The Arbitrator held that the Employer did not violate Section 26.02 when it implemented and applied a formula for calculating part-time employees’ holiday pay. Section 26.02 contains language which is clear and unambiguous because holiday pay is pro-rated and based on the daily average of actual hours worked. The parties admitted the primary goal with the provision was to standardize outcomes across and within agencies. The Union argued that the parties did not intend to have any workers harmed as a consequence of the new formula. The Arbitrator held that maintaining holiday pay outcomes within this circumstance were highly unlikely, since the parties agreed to a standardized methodology, where various methodologies were employed in the past. This would result in some employees having holiday pay increases or decreases from pre-negotiated methods of calculation. 1 008

Past Practice
- Where arbitrator is prevented from resolving the factual issues such as whether the employer's rule is in conflict with a clear and consistent practice, or whether the employee received notice. The arbitrator must presume the propriety of the code and its application: 21

- It makes little sense to utilize pre-agreement past practice to interpret contract language unless language is silent or vague and ambiguous: 32

- Past practice of permitting smoking in certain areas is not binding because smoking is peripheral to the employment relationship and is not "a term or condition of employment." It is not the sort of benefit which when given by long practice modifies or amends management's rights: 4 8

- The laxity of previous supervisors is no excuse where the new supervisor has given clear notice that the rules would be enforced: 1 21

- Even thought he State's claim that holiday pay has never been included in the parties' computation of back pay was not rebutted, the State admitted that inclusion of back pay has never been disputed. The disputes regarding back pay have centered upon the number of days on which to compute back pay. The grievant is not precluded from raising the issue of holiday pay in this case, particularly where the parties have never specifically addressed the issue: 1 91 A

- Where the grievant had been called in to work the hour prior to his shift, the arbitrator held that 1 3.08 requires the payment of 4 hours call back pay. The past practice of paying overtime only if the extra time worked abuts the regular shift was irrelevant since the contract language was unambiguous in requiring call back pay, the language was different than the language in the previous agreements under which the past practice had occurred, and the employer had an opportunity to negotiate language which would have been more specific and narrowed the scope of 1 3.08 but did not: 1 99

- Where the employer's policy had been in place for several years without being grieved. The arbitrator determined that the union had acquiesced and concurred with the employer's interpretation of the contract that allowed for such a policy: 25 9

- Contractual silence coupled with honest disagreement between the parties as to whether a certain right exists creates fertile ground for a binding past practice. While many arbitrators view past practices as unwritten quasi-statements of rights and liabilities, the arbitrator in this case seems to prefer the notion that past practices are evidence of how the parties meant to bind themselves by the contract. While the arbitrator asserts there are several more factors to consider in determining the force of a past practice, 3 that he discusses are:
  (1) the past practice must be unequivocal (such as a right that is routinely allowed),
  (2) it must be clearly enunciated and acted upon, and
  (3) the practice must be readily ascertainable over a period of time as a fixed and established practice accepted by both parties: 269

- Past practice is not binding on the parties during the term of the agreement. However, prior disciplinary practice can be relied upon by either party as an indication of what to expect in the future, unless and until there is specific notice to the contrary. Where, as here, the disciplinary rules do not give clear notice of what penalties will be attached to which violation, the union can rely on the employer's past disciplinary practices: 276

- The employer changed the grievant’s work schedule in 1987 during the golf season (the grievant is a Golf course Worker) from a Monday through Friday workweek to a Tuesday through Saturday workweek. The Union argued that this
was a violation of Section 1 3.07 of the Agreement which prohibits the State from changing an employer’s work schedule to avoid overtime. The arbitrator found that the State did not violate Section 1 3.07. When the State placed the grievant on a Monday-Friday schedule in the years before the Agreement it did not create a practice which would bind it forevermore. The parties were confronted with a changed environment. For the first time in 1987 they were operating under a collective bargaining agreement. One event or action does not serve to bind the employer or the Union. It takes constant repetition to create past practice: 303

- The grievant was found to be working within his classification and whether a supervisor is present at work is a matter for the employer to determine. The presence or absence of a supervisor does not go to the issue of whether the employer is rescheduling the grievant to avoid overtime: 303

- A “regular” schedule as contemplated by Section 1 3.07 of the Agreement is not limited to Monday-Friday. In the case where the grievant works six months on a Monday-Friday schedule and six months on a Tuesday-Saturday schedule neither schedule is irregular than the other. The standard workweek must be forty hours followed by two consecutive days off. Section 1 3.07 is instructive in its silence; a standard workweek does not necessarily mean a Monday-Friday schedule: 303

The record is clear that the State has never paid a sponsored life insurance claim to anyone who was employed with the State for less than one year. The State, therefore, established a bona fide past practice: 4 69

Management has the burden of showing just cause for punishing an employee. If the past practice of employees and management had never before been disciplined, then subsequent discipline of an employee for that practice may be denied for lack of just cause: 4 94

- The Union demonstrated that it has been a past practice to grant employees unpaid leaves in order for them to accept Union representative positions. Article 31 .01 specifically instructed employers to grant unpaid leave to Union representatives not just Union officers. The language was clear and unambiguous: 4 97

- The grievant testified that his supervisor trained him to complete the dietary order before putting commodity away. Thus, the grievant based his decision to complete the dietary order prior to putting the frozen commodity away on past practice: 61 2

- The grievant testified that his supervisor trained him to complete the dietary order before putting commodity away. Thus, the grievant based his decision to complete the dietary order prior to putting the frozen commodity away on past practice: 61 2

The grievant, an EEO Investigator for DR&C’s Internal Investigation Department, was responsible for investigating and responding to complaints of discrimination from DR&C employees. During a telephone conversation with the complainant, the grievant informed the complainant that she found probable cause but that the Department had changed that finding to no probable cause. The grievant also encouraged the complainant to continue to pursue her complaint. The Arbitrator found no evidence to support the Union’s position, that the grievant’s disclosure of her investigation’s findings to the complainant was pursuant to past practice. However, he determined that the grievant had no concrete knowledge of the impropriety of discussing her probable cause findings with the complainant.

The Arbitrator found that the real issue is whether a past practice of long standing has changed the “plain meaning” of the language in Appendix M to the Collective Bargaining Agreement. At Trumbull and other institutions the Ohio State Patrol conducts reasonable suspicion testing for alcohol abuse testing. The Union queried 27 institutions as to their methods of handling the testing. Of the 25 institutions that responded 14 said they did not use the Ohio State Patrol and 11 said they did. This creates a past practice that is not followed by a plurality of the institutions. The Arbitrator found that the requirements for management to make a past practice argument were not met. 988

**Patient Abuse**

Sufficient evidence showing that the grievant failed to follow the proper course of action and did not use good judgment in dealing with the client is not enough, by itself, to show abuse, but
it is enough to warrant a degree of discipline: 4 4 3

- The evidence failed to establish that the grievant committed any act of abuse as defined by Directive A-4 8. She did not intentionally cause any physical harm to any patient, she did not engage in any reckless conduct which actually caused physical harm to a patient: 4 4 7

- The grievant admitted hitting the patient, but failed in her assertion that it was in self-defense. The Employer’s finding of patient abuse is well founded, and as such, there was just cause for her removal: 4 63

- The Employer and grievant signed a last-chance agreement, which included EAP completion, after the Employer ordered the removal of the grievant based on a charge of patient abuse, a charge which was not grieved. The grievant failed to meet the conditions of the last-chance agreement, and so the Employer had just cause to activate the discipline held in abeyance, regardless of any mitigating circumstances: 4 65

Credible and unbiased testimony implicating a hospital aid’s involvement in patient abuse is sufficient to warrant discipline of the hospital aid. Appropriate discipline may be dismissal. Unauthorized breaks, although indicative of an employee’s lack of responsibility, have no bearing on the severity of discipline imposed for patient abuse: 4 96

- The grievant was removed for allegedly violating work rules by abusing an agitated patient during treatment. The State could not establish a causal connection between the grievant's blow and the patient's injuries. Therefore, the grievant was improperly removed: 5 1 0

- The grievant was removed for patient abuse. The arbitrator weighed evidence from the grievant that he was simply taking an aggressive client's shoe away from him, and that the client showed no signs of injury or abuse. The grievant's supervisor claimed to have seen the grievant strike the client with a shoe "with all possible force". The supervisor then pointed to the client's acne-like skin condition which was supposed to have hidden the bruise. The arbitrator, finding the grievant to be more credible, reinstated the grievant: 5 3 5

- Without credible witnesses, there is insufficient evidence to support a charge of patient abuse: 5 3 9

The grievant did not violate Article 24 01 of the Contract, because the State failed to meet its burden of presenting sufficient credible evidence and testimony to prove that the grievant's abused the patient. Therefore, their termination was not for just cause: 5 4 7

The case came down to a resolution of the credibility of two opposing witnesses, the grievant and the State’s witness. The circumstantial evidence pointed toward the grievant, the person with the responsibility for the care of the resident and the person with the access and possession of alcohol products. The testimony of her co-worker was very credible. The testimony of her co-worker to make untruthful statements. The grievant, of course, was motivated to protect her job security and to protect her reputation: 5 5 7

From the grievant’s history of discipline and the evidence presented, it appeared to the Arbitrator that the suspension was proper. Both of the supervisors testified to substantially similar facts. Each stated that at the time and place complained of, the grievant was out of control, was disruptive, was abusive to the patient, was abusive to the supervisors, and was disruptive to the entire activity that the psychiatric institution was to accomplish: 5 7 2

The resident had repeatedly and consistently named the grievants as the employees who caused the bruises that are the subject of this grievance. This was corroborated by the credible testimony of two other residents who stated that the grievants had physical contact with the resident in question.

- The Arbitrator determined that the record supported a finding that the grievants were guilty of patient abuse and that action warranted the penalty of discharge: 5 7 3

- The grievant violated hospital policy against resident abuse when he grabbed a patient by the neck and slammed his head against a concrete block wall. Although there was no criminal prosecution of the grievant and disputed proof of actual physical injury, the consistent and credible
The Arbitrator held that the grievant was properly removed for physical abuse. If the charge of abuse is properly supported, Article 24.01 precludes an Arbitrator from modifying the imposed termination based on any procedural defects or any other type of potentially mitigating evidence or testimony. The Arbitrator concluded that there was reliable corroborating evidence and testimony regarding the abuse charge and a causally linked injury. In sum, the Arbitrator believed the witness’s version of the incident over the grievant’s version: 5 81

A patient escaped and was subsequently hurt. The grievant did not notice the patient’s absence and reported that the patient was present when making her rounds. The Grievant’s actions did not rise to the level of recklessness because she was not indifferent to the consequences, nor did she intend that there be harmful outcomes. The facts were not enough to establish “abuse.” However, the Grievant was negligent. She allowed herself to be fooled by a pile of blankets, a cold room, and by not taking greater care during her rounds to see what was under the blankets. This was not abuse, but it was neglect of duty and warranted corrective discipline. Language in the written policies was not specific and there was room for a range of interpretations about what the grievant knew was required or what she should have known. The burden management places on an employee to speak up if they don’t understand the written policy, overlooks the possibility that an employee may be confident he or she understands what to do and yet, in reality, be wrong about their understanding. Management did not prove that patient abuse occurred and, therefore, did not have just cause to remove the Grievant. But Management did have just cause for discipline. The Grievant was reinstated to her former position with full back pay, seniority, and benefits, less two days pay. Her discipline record reflects a 2-day suspension for a first offense of Neglect of Duty. 95 1

**Pay Range**

- It was decided that the grievant was not a new State employee but she was a new employee for the agency. According to the Civil Service rules, employees for the State maintain certain benefits when they move from job to job, but the Union did not represent specific language showing that an employee moving from one state agency to another must always move at the same or greater wage rate. The new agency considered the grievant a new hire and it was generally accepted that she had a 20-day probationary period and presumably after successful completion, she would move a step per Section 36.02 of the Agreement. The grievant’s claim that she merely transferred to the new agency was not supported. Article 17 of the Agreement defines promotions as moving to a higher pay range and a lateral transfer as a movement to a different position at the same pay range. It does not specify that a lateral transfer from one agency to another agency within the State must be at the same step within the same pay range. The employer did not transfer the grievant she applied for a vacant position: 360

When the grievant was promoted, he moved from the top step of Correctional Officer Pay Range 27 to the top step of Correction Farm Supervisor Pay Range 7. Although the two Pay Ranges were different, they were similar enough to prevent the grievant from achieving a four percent increase, as required by Article 36.04. This section provides that employees who are promoted “shall be placed in a step” to guarantee them an increase of at least four percent. Since there is no step in the grievant’s current pay range that could achieve the four percent raise, there is a conflict which must be resolved by Appendix L, Pay Schedules. By the parties’ negotiations, they have determined that there is to be no step above Step 6 in Pay Range 7 and thus to create an additional step under these circumstances would expand the contract, an act which would be outside the authority granted by Article 25.03 of the Contract to the Arbitrator: 4 62

**Performance Evaluations**

- Special performance evaluations: 1 9
- Employer has the right to conduct special performance evaluations: 1 9
- Yearly performance evaluations are insufficient to notify employee that her work is below required standards: 1 9
- Performance evaluations are permitted to state that grievant’s conduct may lead to disciplinary action: 1 9
- The grievant's violations (fraternization with inmate and failing to cooperate with an official investigation) are so serious that one proposing a mitigation defense has to submit convincing and extensive support for the argument. Performance evaluations and a recommendation from a supervisor do not establish a basis for mitigation: 25

- When an employee was removed for falsification of her employment application, her performance evaluations did not provide a sufficient mitigating factor where they rated her performance as meeting expected performance levels except for one which indicated that the grievant's performance was above expected levels. The arbitrator inferred that the employee's work was acceptable but far from superior: 268

The grievance was sustained in part and denied in part. The removal was reduced to a suspension. The Grievant was placed on administrative leave that continues until he completes an EAP-designed comprehensive anger-management program for a minimum of twenty consecutive work days. If the Grievant fails to successfully complete the EAP program, his removal shall be immediately reinstated. The evidence does support a finding that just cause exists for discipline under Rule #6 because it was the clear intent of the Grievant to threaten the co-worker. A picture posted in the break room by the Grievant was offensive and was intended to threaten and intimidate the co-worker. However, just cause does not exist for removal. The evidence fails to indicate that during the confrontation in the break room the Grievant engaged in any menacing or threatening behavior toward the co-worker. The co-worker's initial response to the posting of the picture failed to demonstrate any fear or apprehension on his part. In fact, his reaction in directly confronting the Grievant in the break room underscores his combative nature, and was inconsistent with someone allegedly in fear or apprehension. The Arbitrator took into consideration several mitigating factors. None of the Grievant's allegations against the co-worker were investigated. The facts are unrefuted that the Employer failed to provide any documents or witness list before the pre-disciplinary hearing, in violation of Article 24 .05 . The Grievant's immediate supervisor was directed by his supervisors to alter his evaluation of the Grievant. The revised evaluation contained four “does not meet” areas, whereas his original evaluation had none. Witnesses from both sides, including management, were aware of the animus between the co-workers. The Employer was complicit in not addressing the conduct or performance issue of the Grievant and the co-worker, which escalated over time and culminated in the break room incident. 1 01

**Perimeter Security Patrol**

- Even-though the perimeter security patrol is the institution's last line of defense, and the post orders for that positron require being "ready to take any steps including deadly force to maintain the security of the institution". The arbitrator found the grievant had not violated the post order when he did not act to prevent the escape because the situation was already beyond stopping by the time the grievant became aware of the escape: 223

**Perjury**

- Arbitration is merely a method for determining a preexisting dispute which the parties have been unable to resolve at earlier steps in the grievance process. The arbitration hearing is not the place for the presentation of new claims, although obviously a more thorough investigation prior to arbitration often surfaces evidence not theretofore known and additional arguments not theretofore conceived by the parties. The essential facts supporting the claims of either party, however, should be revealed in the earlier stages of the grievance procedure, if such facts are known to the parties. In this particular instance the grievant was aware of these facts (although the union was not). Whether the grievant's unwillingness to reveal

- Intentional act of subversion is irrelevant in terms of the due process ramifications. Both alternatives subvert the grievance process. With respect to the present Infraction this Arbitrator must limit the previous analysis to the specific charges levied against the grievant, He was not charged with dishonesty but that does not mean that this due process infringement will not be factored into the equation when the propriety of the penalty is considered: 1 81

- Fraud and perjury are matters involving moral turpitude and are to be established therefore beyond a reasonable doubt: 1 87

- Where there was a question of whether removal was commensurate with the offense of fraternization with an inmate, the arbitrator relied on the fact that the grievant had perjured himself, in order to uphold the grievant's removal: 224

**Permanent Lack of Work**
- The Ohio Supreme Court has held that savings the State may realize from not having to pay the wages and benefits to an employee whose position is abolished is not, in and of itself, sufficient to justify the abolishment for reasons of economy. In addition, in order for the State to prove a permanent lack of work, the lack of work must be real and cannot be created by transferring the grievant's duties to another employee: 518

**Personal Leave**

- It was unreasonable of the employer to deny the grievant's personal leave. While the grievant did not apply in advance, the circumstances under which grievant was absent would qualify as an emergency since they were unexpected and involved the personal safety of the grievant's wife. The application was made as soon as possible. The denial violated Article 27: 191

- Where

  (1) grievant had been disciplined for being AWOL after his application for personal leave was refused,

  (2) the grievant presented the towing receipt proving mitigating circumstances at the pre-disciplinary hearing, but the evidence was rejected as irrelevant.

  (3) the supervisor admitted that she might have approved the personal leave if she had known the grievant's family car had broken down,

  the arbitrator ruled that the grievant complied with the most appropriate notice requirement, and the agency had improperly disciplined the grievant for failing to comply with an inappropriate one: 191

- The sentence "the leave shall not be unreasonably denied" in Article 27 applies only to personal leave requested less than 24 hours in advance. If the leave is requested more than 24 hours in advance, personal leave shall be granted. The sentence in question does not imply that management can deny personal leave requested more than 24 hours in advance: 228

- The arbitrator's ruling that the employer does not have the discretion to deny personal leave requests submitted at least one day in advance should not be interpreted as approving a wildcat strike through personal leave applications. Such strikes are illegal and contrary to the agreement. It is apparent beyond debate that the bargaining unit cannot accomplish something by indirectness that it is prohibited from doing directly. When and if Article 27 is used to support such action, there is no doubt that the State and any member of its panels of arbitrators will deal with that problem appropriately: 228

The Employer violated Section 27.04 of the Agreement when it denied the grievant’s timely request for personal leave: 475

  Section 27.04 contains clear and unambiguous language, and thus, its meaning must be determined from the Agreement without resort to evidence external to it: 475

- The language in the first sentence of Section 27.04, Personal leave shall be granted if any employee makes the request with one (1) day notice, is mandatory: 475

The Arbitrator rejected the Employer’s argument that Section 1 3.02 gives Management the authority to deny personal leave under Section 27.04. Since Section 1 3.02 was so hotly contested, the parties would have been very careful to say exactly what they meant in drafting the language. There is no express language in the Contract stating that Section 1 3.02 would apply to 27.04 : 4 75

**Permissible Scope of Subpoena**

The Arbitrator concluded that more likely than not the Grievant transported a cell phone into the institution within the period in question, violating Rule 30, by using it to photograph her fellow officers. The Arbitrator held that the Agency clearly had probable cause to subpoena and search 1 3 months of the Grievant’s prior cell phone records. The prospect of serious present consequences from prior, easily perpetrated violations supported the probable cause. The Arbitrator held that the Grievant violated Rule 38 by transporting the cell phone into the institution and by using it to telephone inmates’ relatives. The
Arbitrator held that the Grievant did not violate Rule 4 6(A) since the Grievant did not have a “relationship” with the inmates, using the restricted definition in the language of the rule. The Arbitrator held that the Grievant did not violate Rule 24 . The Agency’s interpretation of the rule infringed on the Grievant’s right to develop her defenses and to assert her constitutional rights. The mitigating factors included: the Agency established only two of the four charges against the Grievant; the Grievant’s almost thirteen years of experience; and her record of satisfactory job performance and the absence of active discipline. However, the balance of aggravative and mitigative factors indicated that the Grievant deserved a heavy dose of discipline. Just cause is not violated by removal for a first violation of Rules 30 and 38. 1 003

Personal Leave

The employer neither violated Section 31 .01 of the Collective bargaining Agreement nor relevant sections of the Ohio Revised Code when it failed to allow the accrual of vacation and personal leave while the Grievant was on a leave of absence and on active duty in the military. Vacation leave accruals as specified in Section 28.01 required active pay status which the grievant did not possess. Similarly, personal leave accruals only arise when an employee is on a paid leave of absence, and Section 31 .01 (E) defines military leave as unpaid leave with a proviso. The Revised Code also fails to articulate the type of benefit sought by the Union. A reading of R.C. 5 923.05 surfaces the Legislature’s intent to ensure that an employee on military leave not suffer a loss of pay; however, leave accruals are never specified in this statute. 889

The Veterans Home dealt with chronic shortages of direct care staff. Mandatory overtime and harsh disciplines caused burn-out and staff turnover. Article 27 clearly states that personal leave shall be granted with proper notification. The arbitrator found that if the staffing levels fell below legal minimums, it was management’s responsibility to find a way to achieve its goal (increase staffing levels) without denying proper requests for personal leave. Because there was no proof of harm other than a postponement of a benefit for those individuals affected, a cease and desist was awarded. 930

The Grievant injured her back at work. She was off on leave and received payments from Workers’ Compensation. She was then placed in the Transitional Work Program. After 90 days, she was placed back on leave and Workers’ Compensation. The state implemented an involuntary disability separation and her employment with the state ended on January 1, 2006. Under Section 1 23:1 -30-01 of OAC the grievant had reinstatement rights for two years. She was cleared to work by her doctor and was reinstated on December 27, 2006. At that time, she requested to have the state restore her personal and sick leave accruals from when she began work in the Transitional Work Program on June 1, 2005, through December 27, 2006. The Arbitrator held that the contract articles did not support the Grievants’s request to have the leave balances restored. The Grievant was subjected to an involuntary disability separation on January 1, 2006, so that on December 27, 2006, she was not an employee returning to work under the contract but was an individual who was re-hired pursuant to Section 1 23:1 -30-01 of the OAC, which has no provision for the restoration of accrued personal or sick leave. The Arbitrator held that he must ignore the clarification letter relied upon by the state. The letter represents the Office of Collective Bargaining’s interpretation of the contract and its instructions to the agencies about how to handle the restoration of accrued leave. In addition, while Section 1 23:1 -33-1 7(F) of the OAC provides for the accrual of sick leave while an employee is on occupational injury leave, there is no such requirement in Chapter 1 23:1 -30 relating to separations. 1 019

Personnel Files

- A failure by the State to supply the personnel records of non-State employees or exempt employees is not in error. The State should have to provide information that is available to the general public but the Union’s request was not sufficiently specific and the Union did not show that the complete files were relevant to the grievance: 286

- The Union’s request for the personnel records of women that claimed the grievant sexually harassed them was not specific enough and did not make a showing of relevance that the failure by the State to hand over the files was not a procedural defect: 286

The arbitrator found that the phrase “records of other disciplinary action” as stated in Article 24 .06 includes notice of discipline and the accompanying personnel actions. DAS was ordered to develop and implement a system for removing disciplinary records within three years for all bargaining unit members. The Union may
request updates. All disciplinary records for the grievant that were outside the schedule established in 24.06 or any settlement were to be removed.

Photographs

- When the employer sought to admit photographs taken of the alleged victim, the Union objected on the grounds that they had not been provided at the pre-disciplinary or Step 3 meetings. There is no evidence as, for example, keeping secret their existence or refusing a request by the Union to see them. The photographs do not establish a new fact, but merely corroborate the statements of several witnesses — including a Union witness — that the youth had marks on his face. The arbitrator therefore found no undue hardship in admitting and crediting the evidence of the photographs.

- The employer violated Section 24.04 of the Agreement by not making the youths statements and photographs available to the Union and this is considered when fashioning a remedy and Section 25.08 by not releasing the pre-disciplinary conference report to the Union when it was requested. The conference report was held to be discoverable once the final disciplinary decision has been made and the grievance is filed.

Physical Abuse of Co-Worker

- In a case involving a grievant who was disciplined for physically striking another employee during a confrontation, there was just cause to suspend the grievant for fifteen days.

- The Arbitrator found that the grievant had sprayed the grievant’s accuser with hot water from a dishwashing hose and that this level of physical abuse was just cause for the grievant’s removal.

Physical Abuse of Inmate

A heavy master lock left the Grievant’s hand and struck an inmate in the groin area. This occurred in the context of an argument that resulted in the Grievant firing the inmate. There were no reliable witnesses to the incident. The accusing inmate waited to report the incident for over 24 hours, thus giving time to conspire with other inmates present at the time. The nature of the injuries suggests a different source for the injuries. The Arbitrator could not tell if the incident occurred as the inmate said or as the Grievant said; therefore, the State’s case lacked the required quantum of proof on the physical abuse charge. The Grievant struck an inmate while engaged in horseplay and should have reported it and did not. Since the abuse charge was unproven and the Grievant’s record only had a 2-day fine on it, he received a 5-day penalty for the Rule 25 violation. The Arbitrator found that the Grievant was removed without just cause.

The grievant was involved in a response to a “Signal 14” call for assistance at the institution. The State charged the grievant with dishonesty in regards to the incident. Neither the grievant nor the Union was informed of the “abuse” charge prior to the imposition of discipline. The Agency also refused to allow the Union to review the video tape of the incident prior to arbitration. Both of these procedural issues were presented at arbitration. Following the State’s presentation of its case at arbitration, the Union Representative requested a directed verdict. The arbitrator found that the grievance was sustained in part and denied in part. The grievant’s removal was reduced to a one (1) day suspension. The grievant received all the straight time pay he would have incurred if he had not been removed. Deductions for any interim earnings were to be made, except for any earnings received from a pre-existing part-time job. All leave balances and seniority were to be restored. The grievant was to be given the opportunity to repurchase leave balances. The grievant was to be reimbursed for all health-related expenses incurred that would have been paid through health insurance. The grievant was to be restored to his shift and post and his personnel record was to be changed to reflect the suspension.

In accordance with Section 24.01 the Arbitrator found the Grievant abused another in the care and custody of the State of Ohio. The force used by the Grievant was excessive and unjustified under the circumstances. The inmate’s documented injuries were a direct result of the Grievant’s actions. The Grievant admitted the entire situation could have been avoided if he had walked toward the crash gate and asked for assistance. Since abuse was found, the Arbitrator did not have the authority to modify the termination. This provision precluded the Arbitrator from reviewing the reasonableness of
the imposed penalty by applying mitigating factors. 967

Physical Assault on a Youth Offender

The Employer’s procedural objection as to timeliness was denied because the record failed to indicate that the Union received notification in writing to comply with Article 24 .06 of the CBA. The Grievant was involved in breaking up an altercation between two youth offenders and was then accused of injuring one of the youth offenders. The incident was recorded by video camera. The Employer attributed all of the youth offender’s injuries to the Grievant; the Arbitrator disagreed. In the opinion of the Arbitrator the youths were not credible, in either their own statements or their combined statements and testimony, because they were not able to recall with sufficient clarity the material facts of an incident that was not complicated. In addition, in their hearing testimony each youth admitted that his written statement was at odds with the video. The grievance was granted; however, the Arbitrator stated: “If in fact the Grievant committed those violations the finding that this evidence failed to demonstrate just cause should not be viewed as a victory only that, in my opinion the evidence fails to support that the discipline was for just cause.” In other words, the state failed to prove their case, but the Grievant was not found innocent. 984

Physical or Verbal Abuse of a Client

The Arbitrator could not find that the injuries sustained by the client were consistent with falling over chairs. Therefore, she accepted the physician’s and investigator’s opinions stating that the client’s injuries were not caused by tripping and falling over chairs. The Arbitrator felt compelled to find the grievant guilty of the Physical Abuse charge, and therefore, she denied the grievance. 71 3

Physical Restraint of Patient

- After determining that the grievant was not guilty of abuse of a patient, the arbitrator then considered whether he had used an improper hold on the grievant. The arbitrator found no evidence that the hold was improper where the manuals did not mention the hold, either to endorse it or to reject it: 25 4

- The Arbitrator concluded that the employer violated the Agreement when it removed the grievant for client abuse. The employer failed to provide the Arbitrator with sufficient evidence and testimony to sustain the grievant's removal. Specifically, the employer failed to prove that the grievant punched the client in the stomach. Further, the Arbitrator was inclined to believe the grievant’s version over the surveyor's version based on the fact that the surveyor only observed the tail-end of an appropriate intervention (physical restraint of a patient) and she failed to see the entire episode due to her obstructed view: 603

The Arbitrator determined that while the grievant was not guilty of physical abuse, handcuffing the inmate did constitute an inappropriate use of force in this case. She found that the grievant’s conduct warranted discipline, but removal was too severe. The removal was converted to a five-day suspension. 74 9

The Arbitrator determined that the circumstantial evidence presented by the Employer lacked sufficient probative value to meet a “just cause” burden. He noted that there were no witnesses who could testify that the grievant was upset. He also noted that the resident was self-abusive and had a history of displaying the abuse in specific patterns. The injuries suggested the resident had been in a scuffle, but the grievant’s physical appearance did not indicate that he had been in the kind of altercation that would cause the injuries present on the resident’s body. 75 1

The grievant was charged with alleged abuse of a resident. The grievant argued that the resident had become attached to her, was self-abusive and tended to act out in an attempt to get the grievant’s attention. The grievant contended that management was aware of the problem and failed to address it. The arbitrator found that there was a formal program in place to handle the resident’s aggressive behavior. The arbitrator noted that even if management had been less responsive to the problem, it is a part of the duties of the caregivers to handle difficult residents without abusing them. The arbitrator concluded that on the date in question the grievant was unable to do that; therefore, she was removed for just cause. 75 4

The employer did not meet its burden of proof that what occurred in this instance could be characterized as physical abuse. The arbitrator found that there were elements of the evidence presented which supported the grievant’s testimony of what transpired. 75 5
The grievant was accused of client abuse. The arbitrator found that the lack of evidence, including numerous blank pages in a transcript of an interview of the State’s witness by a police officer, did not support the employer’s position in this instance. 75

Physician's Statement

- See Sick leave

- Prior to implementation of sick leave policy referred to in section 29.03, section 29.02 vests discretion in employer to require submission of physician's statement within reasonable period of time to verify employee illness for purpose of sick leave approval, except where there is evidence of discrimination or arbitrary application: 22

- Prior to implementation of sick leave policy referred to in section 29.03, if the employee's attendance record justifies a request for medical verification, section 29.02 does not prohibit employer from requiring a physician verification even if the illness does not require a Doctor's treatment: 22

- Given to wrong person: 24

- Employer cannot discipline employee for providing physician's statement with improper form if the employer never requested that statement have a particular form: 24

- That letter was hand written does not lessen its value as appropriate documentation: 24

- Statement that did not state grievant's illness, but only that grievant appeared in the doctor's office, is not sufficient to establish that grievant was being treated for a condition that prevented him from working. (Thus, the statement was not accepted as sufficient to meet the requirement of a physician's statement: 82

- Typically, where medical (act is at the very heart of the issue, such as the case where the parties are litigating whether an employee is permanently disabled, medical evidence is normally admissible. There is no guarantee, however, that it will be credited to the extent that it would otherwise be if the physician were present at the hearing. Greater weight, however, may be placed on affidavits of the sort presently discussed where the issue is whether an employee has a valid excuse for missing work and relies on the doctor's excuse as the proof of illness: 181

- Falsification of the physician's statement is sufficiently serious to support a ten-day suspension. Such violations are viewed as extremely onerous because they jeopardize the cement of the employer/employee relationship. This relationship can only thrive and prosper if it is based on trust. The use of physician's excuses is typically a highly sensitive enterprise and is often subject to abuse. When an employee violates and employer's trust and the trust of the physician by falsifying an excuse it jeopardizes the validity of the entire excuse verification process. A process which needs to be rigidly enforced to protect the interests of fellow employees who are legitimately absent for medical reason: 181

- Employees occasionally obtain a doctor's note even though they are not ill or disabled. Such notes may be available for a price. However deplorable this practice may be, the arbitrator cannot identify the situations in which notes are being improperly issued. That is a matter of proof. Only if the employer takes the initiative and develops evidence of fraud can the arbitrator respond: 198

- For a doctor's note to be valuable, it must reveal when the employee was seen, what the doctor's diagnosis was, and whether the employee was disabled. Without such specificity, the note is not likely to prove that the absence was justified: 208

- The arbitrator discounted the credibility of physician's statement when the statement was not shown to be consistent with other statements by the same and other physicians: 217

- The physician's statement stating grievant could not work because of back pain was overcome by photographs of the grievant engaging in work on the family farm. "If he could engage in farming, a strenuous activity, without pain and without harming himself . . . he could have been at work: 219

- The grievant abandoned his job by not returning to work at the end of his approved disability leave, not calling in, and not providing adequate medical documentation. When grievant was asked to bring in medical documentation he falsely claimed it was at home, but he never brought it in. These
The grievant had been on a disability separation and had been refused when he requested reinstatement. The arbitrator found the grievance arbitrable because section 4.3.02 incorporated Ohio Administrative Code section 1213:1-33.03 as it conferred a benefit upon state employees not found within the contract. The grievant thus had three years from his separation to request reinstatement, which he did. The grievance was also found to be timely filed because there was no clear point at which the employer finally denied the grievant’s request for reinstatement and the union was not notified of the events by the employer. Additionally, the employer was estopped from asserting timeliness arguments because the employer was found to have delayed processing the grievant’s request for reinstatement. The physician who performed a state-ordered examination released the grievant to work, thus the employer improperly refused the grievant’s reinstatement request. The grievant was reinstated with back pay less other income for the period, holiday pay, leave balances credited with amounts he had when separated, restoration of seniority and service credits, medical expenses which would have been covered by state insurance, PERS contributions, and he was to receive orientation and training upon reinstatement: 375

The expert witness presented by the State, a physician, stated that there was no medical reason to doubt the testimony of the grievant’s accuser: 615

**Physician's Verification**

The grievant had been disciplined on three (3) prior occasions for absenteeism. She was charged with an unauthorized absence and misuse of
FMLA leave. The arbitrator noted that the grievant’s prior disciplines and stated that a fourth violation may occur to justify removal, but the facts in this instance did not convince the arbitrator that the employer met its burden of proof of just cause. After receiving her assignment, the grievant informed her supervisor that she was sick, that her sickness was due to a medical condition recognized under FMLA and she wanted to go home. Her supervisor granted her request, but ordered her to provide a physician’s verification when she came back to work. The employer over-stepped its bounds when the grievant’s supervisor demanded a physician’s verification upon the grievant’s return to work. The arbitrator determined that “if an employee is FMLA certified and calls off stating FMLA, then no physician statement for that absence can be required.” He found no difference between an employee using a telephone outside the institution and calling off while at the institution. 878

The Grievant had a prescheduled medical appointment on the afternoon of July 24. Then the Grievant called off for her entire shift early in the morning of July 24. An Employee is under a duty to provide a statement from a physician who has examined the employee and who has signed the statement. The statement must be provided within three days after returning to work. The Grievant should have submitted a physician’s statement on the new request—the second request for an eight (8) hour leave. The Grievant, instead, submitted the physician’s statement that comported entirely with her initial request for a leave on July 13 for three (3) hours. The record does not show that the reason for the prescheduled appointment was for the same condition that led her to call of her shift. The letter from the doctor made it clear that they could not provide an excuse for the entire shift absence requested by the Grievant. There was no testimony from the Grievant about why she called off her entire shift. The record does not support the finding that the Employer “demanded” a second physician’s verification. The physician’s verification submitted by the Grievant supported only a leave for three (3) hours, and the record is sufficient to show that the Employer did note this inadequacy to the Grievant on August 7. Based on the record, the Arbitrator found that the Grievant failed to provide physician’s verification when required—an offense under Rule 3F of the Absenteeism Track set forth in the disciplinary grid. This constituted a breach by the Grievant of her Last Chance Agreement. Proof of this violation required that “termination be imposed.” Furthermore, the Arbitrator did not have any authority to modify this discipline. 993

The Arbitrator held that the Bureau had just cause to discipline the Grievant for a willful failure to carry out a direct order and for her failure to produce a Physician’s Verification for an absence. This also constituted an unexcused absence for the same date. The Bureau also had just cause to discipline the Grievant for the improper call-off on a later day. The Grievant’s refusal to answer any questions in both investigatory interviews constituted separate violations of the fourth form of insubordination, in that the Grievant failed to cooperate with an official investigation. The Arbitrator held that the record did not support the mitigating factor that the Grievant’s work was placed under “microscopic” review. Nor did the record provide substantial information that the supervisors were universally committed to finding any violations of work rules by the Grievant. 1021

**Pick-a-Post**

- See Section II of Index
- This decision deals with the definition of a work area. The definition of a work area governs the rights of employees to transfer and rotate within the work area. The case is limited to direct care employees. These employees work in State institutions and are employed in full-time, custodial and security positions. The institutions covered by this decision are Rehabilitation and Correction; youth Services; Mental Health and Mental Retardation/Developmental Disabilities; Ohio Veterans Home; and the Ohio Veterans Children’s Home. Rehabilitation and Correction was separated from the other agencies in the decision. The Union and the State each submitted proposals to Mr. Elliott Goldstein, the arbitrator. The Union argued for strict seniority bidding, for work selection in the smallest feasible unit, post, ward or cottage, with unlimited selection rights and no limitations on the “ripple effect.” The ripple effect is the bumping and confusion caused by constant reassignments. This proposal is feasible and is working in other AFCSME represented institutions and facilities.

- The State argued that the Union’s proposal was impossible. The Union agreed to negotiate on several points. The Union could establish a waiting period before seniority can be exercised, limit the frequency of exercising seniority rights and limit the number of times an employee could
be assigned. The arbitrator awarded the following:

3) In all Agencies except for Rehabilitation and Correction the arbitrator found that the work area is defined as the smallest subdivision of regular work assignment in the physical setting wherein an employee performs his or her assigned work on a regular basis. Seniority is to be one of the criteria utilized in the selection of work area; other criteria are skills and abilities and the professional needs of the facility. If the latter two factors are equal, seniority shall control. Employees are limited to exercising their right to select a post to twice in one year. Job reassignments resulting from a selection are limited to two in number.

4) In the area of rehabilitation and Correction the arbitrator urged the parties to come to an agreement. The arbitrator retained jurisdiction that if the parties could not come to an agreement Arbitrator Goldstein would accept the last best offer.

- The union and the State could not reach an agreement. The arbitrator accepted the State’s last best offer. The Union argued that the key distinction between work areas was stress level and not physical location. The Union proposed that employees should be rotated among the most and least desirable positions in an even-handed and structured way. The Union’s plan would result in an individual Correction Officer being required to spend no more than one six month period out of every eighteen months in a high stress position.

- The State contended that the Union’s proposal did not follow the actual manner in which jobs are actually categorized. The State offered four designated zones of rotation – Housing A, Housing B, Non-housing and Relief. The arbitrator rejected the seniority principle and the “Pick-A-Post.” A reservation of some discretion in the employer to assign work duties in an institutional structure must be recognized. There is a need for rotation that provides a mix of experienced personnel and there is a need for training opportunities. The arbitrator found that the Union’s proposal did not consider geographical or physical location, concerns for training, security for a mix of experienced and inexperienced. The State’s proposal considered these factors and also included in their plan certain stress levels. The Union’s proposal would not solve the problem of work area merely fracture the institutional work are.

- With reference to Rehabilitation and Correction, a rotation to occur every six months. There will be four different types of work to be defined by the parties and the rotation shall include one job assignment in each over the course of two years.

- The Employer’s ability to implement scheduling changes is restricted by the “work area” language negotiated by the parties in the “Memorandum of Understanding.” This was supported by the job groupings contained in the pick a post selection by changing a work area would directly violate the negotiated work area provisos. Operational needs cannot be used to bypass the work area requirements contained in the Memorandum of Understanding: 4 4 8

- Once the grievance is sustained, the grievances should be returned to work with all pick-a-post and seniority rights restored to him: 5 31

- The following rules apply in determining “good Management reasons” for denying an employee a pick-a-post position.

A performance evaluation that meets expectations should not preclude an employee from being awarded a bid job unless the collective bargaining agreement specifically provides that the employee with the best performance review will be awarded the job.

Ordinary, run of the mill discipline which has been removed from the employees personnel file after two years cannot form the basis for a “good management reason” to deny the grievant the bid to special duty post.

Finally, when considering attendance deficiencies of an employee, only those deficiencies that subject the employee to discipline can be considered for purposes of exclusion from a bid job: 5 74

- The grievant was informed that she was being removed from her position for good management reasons based on several letters of complaint from visitors to the facility. The Arbitrator concluded that the proper standard to be applied in this case was “good management” reasons not the “just cause” standard, which management met. The grievant’s removal was not arbitrary or capricious, but was based upon incidents reported by two visitors and the warden’s own observation of the grievant. It appears that management simply believed that public relations would be improved by moving the grievant: 602
Pick-a-Post

One-page decision. The arbitrator concluded that the employer was not abolishing Pick-A-Post, but made a necessary reorganization. The arbitrator ruled that no further change in Pick-A-Post could be made at the Circleville facility for the remaining the current contract was in effect. 767

The arbitrator found that the employer did not violate Appendix Q-Correction Officer Pick-A-Post. The employer was able to demonstrate through evidence and testimony that a series of unforeseen circumstances existed generated by the desired closing of the Lima Correctional Institution. As a Consequence, these circumstances provided a valid contractual basis for the changes in the Pick-A-Post agreements. He noted that a determination regarding the propriety of Appendix Q, B Pick-A-Post need not be reached. 860

The Arbitrator found that the Employer did not violate Section 1111 because the Employer engaged in a good faith effort to provide alternative comparable work and equal pay to the two pregnant Grievants. On four of five scheduled work days the employees would work “relief” in “non-contact” posts. On the fifth day the Union requested that the two employees be assigned an “extra” or “ghost” post or be permitted to take the day off and use accrued leave for coverage purposes. However, the Warden placed the Union on notice that the institution could no longer have pregnant employees assigned to posts as extras. Certain posts were properly rejected based on the Grievants’ doctor recommendations. The Union’s proposals would have resulted in “ghost posts.” The Grievants would have worked in positions at the expense of other established posts. Also, unapproved “ghost posts” would violate the spirit of the local Pick-A-Post agreement. Proposed uses of accrued leave balances, personal leave, and sick leave failed. Nothing in the record indicated the Grievants had sufficient leave balances available to cover one day off per week. In addition, if the Grievants were allowed to take vacation time on dates previously selected, the Employer would be violating a mutually agreed to number of vacation days made available for bid. Other correction officers’ seniority rights would be violated if vacations were preferentially granted to pregnant employees. Section 27.02 entitles an employee to four personal leave days each year; however those four days could not possibly cover the entire pregnancy period. Section 29.02 grants sick leave to employees “unable to work because of sickness or injury.” A pregnancy cannot be viewed as an “illness or injury.” 941

Police Investigations

- The results of the other proceedings and investigations which were carried out by the FBI, the grand jury, the state highway patrol, the Legislature's Correctional Institution Committee, and the Unemployment Compensation Board of Review were produced under different roles and for different purposes than those which govern this arbitration. Thus, those results carry no weight in this arbitration: 180

Policies

- The grievant was removed for violating BMV Rule 6 ©, failure to follow policies or procedures. The grievant knowingly violated the rule which stated that the salvage door was to be locked at all times except for loading and unloading due to the high “street value” of the materials locked inside: 493

The method chosen by the grievant to enter his application was within the proper procedure as set forth by the employer and the employer had no safeguards in its procedure to record the filing of an application: 548

Political Activities at Workplace

Wearing a campaign sticker on state owned hardhat is dearly partisan political activity: 81

- Political activity includes passing out material generated by PAC's where the material supports candidates or expresses dismay with policies of elected officials as opposed to, for example, educating the public about the dangers of AIDS: 81

Polygraph Evidence

The Arbitrator held that the Agency failed to establish by preponderant evidence that the Grievant engaged in either sexual activity or sexual contact with a Youth. In addition,
preponderant evidence in the record did not establish that the Grievant violated Rule 6.1, Rule 3.9, and 4.10. The Arbitrator concluded that the Youth was less credible than the Grievant. The Grievant's refusal to submit to a polygraph test did not establish his guilt. The slight probative value of polygraphic examinations disqualifies them as independent evidence and relegates them to mere corroborative roles. Because the Agency established the Grievant’s failure to cooperate under Rule 3.8, some discipline was indicated. The strongest mitigative factor was the Grievant’s satisfactory and discipline-free work record. The major aggravative factor was the Grievant’s dismissive attitude toward the Agency’s administrative investigation. 972

The Arbitrator held that the Agency failed to establish by preponderant evidence that the Grievant engaged in either sexual activity or sexual contact with a Youth. In addition, preponderant evidence in the record did not establish that the Grievant violated Rule 6.1, Rule 3.9, and 4.10. The Arbitrator concluded that the Youth was less credible than the Grievant. The Grievant’s refusal to submit to a polygraph test did not establish his guilt. The slight probative value of polygraphic examinations disqualifies them as independent evidence and relegates them to mere corroborative roles. Because the Agency established the Grievant’s failure to cooperate under Rule 3.8, some discipline was indicated. The strongest mitigative factor was the Grievant’s satisfactory and discipline-free work record. The major aggravative factor was the Grievant’s dismissive attitude toward the Agency’s administrative investigation. 972

Polygraph Testing

- The arbitrator did not trod the testimony of the main witness against grievant to be credible since the witness was a convicted felon whose testimony was not consistent with testimony given at an earlier hearing. Polygraph evidence that witness was telling the truth was admitted but given little weight on the grounds that the accuracy of polygraphs has not been established to a scientific degree sufficient to justify reliance on them for the most important of our everyday affairs: 124

- The parties did not intend to expressly bar the use of polygraph evidence. If they had, they would have done so expressly in 24.07 which deals with polygraph evidence: 124

- The arbitrator accepted the fact that the inmate (who had accused the grievant of an unauthorized relationship with the inmate) was polygraphed solely as evidence of the employer's good faith investigation: 224

- “The results of polygraph examinations are generally not accepted as reliable evidence of truthfulness.” United States Steel Corp., 70 LA 1 46 (Powell, 1977): 293

- “Under the overwhelming weight of arbitral authority…where an employee does submit to lie detector testing, the test results should be given little or no weight in arbitration.” Elkouri and Elkouri How Arbitration Works (BNA, 1985) p.315: 293

- The arbitrator could understand the polygraph test being used by the State to aid its investigation concerning the grievant, but decided to give the results of the test little weight: 293

- The grievant’s refusal to take a polygraph is a bargained for right and is therefore without value in determining the grievant’s credibility. Grievant’s belligerence is as easily characterized as fury over perceived injustice as it is guilt. It was improper for the grievant refused to take the polygraph test: 307

- The grievance was being investigated for theft. The Highway Patrol in its investigation asked the grievant and another employee to take a polygraph examination. The grievant agreed to take the test which was administered two or three weeks after the alleged incident of theft. The grievant “failed” the test. When given an option of resigning with no mark on her personnel record, the grievant resigned. The Union challenged whether the resignation was voluntary. The basic criteria to decide whether the grievant’s resignation was voluntary is:
  1) Was the grievant competent to make the decision? Was she operating under such an emotional deficit as to render as to render her incompetent?
  2) Was the grievant’s decision made voluntarily or was it induced by misinterpretation, coercion, or duress?
In order to resolve the question of whether the grievant was guilty of theft, the Arbitrator determined the credibility of the witnesses. The Arbitrator found that the witness’s polygraph test results provided further supporting and corroborating evidence that the witness was being truthful. The Arbitrator based this finding on his statement that “polygraph test results should only be used as further corroborating evidence in cases where there are reliable indicators of the witness’s truthfulness.” In conclusion, the Arbitrator found that there was clear and convincing evidence that the grievant was involved in the theft of State property: 592

Poor Job Performance

- The grievant had failed to complete several projects properly and on time and another employee had to complete them. She had also been instructed to set projects aside and focus on one but she continued to work on several projects. The grievant had prior discipline for poor performance including a 7 day suspension. The arbitrator found that the employer had proven just cause for the removal. The grievant was proven unable to perform her job over a period of years despite prior discipline. The fact that another employee completed the projects was found to be irrelevant. Removal was found to be commensurate with the offense because of the prior discipline and the work was found to have been within the grievant’s job description and she had been offered training. Thus, the grievance was denied: 402

Poor Judgment

The Arbitrator found that the grievant exercised poor judgment in dropping visual contact of the resident on two occasions in a short span of time. He also found this offense to be minor under the Center’s disciplinary policy. The grievant had no prior disciplinary history and it was determined that this was the grievant’s first offense which required an oral or written reprimand with a notation placed in the grievant’s personnel file indicating a first offense. 717

The Arbitrator noted that it was the grievant’s responsibility to be observant and report any impropriety. She noted that there was no evidence that the grievant ever filed any written report of unusual incidents. 733

The grievant was charged with failing to tag and immediately slaughter a suspect/downed animal. He failed to note that a chicken processing plant did not properly perform fecal checks; thus it was not in compliance. He also failed to conduct an adequate inspection and neglect to note unsanitary conditions at a processing plant. The arbitrator concluded that the factual transactions amounted to neglect by the grievant of his duties as a meat inspector, endangering the public (Rule 30) and potentially harming the public (Rule 25). 753

Poor Judgment

The arbitrator concluded that the documents the Union was denied access to would have buttressed the Union’s position that other examiners were copying, but were not disciplined for their actions; and while the others may be guilty of neglect or poor judgment, they were not guilty of insubordination since they were not under orders not to copy. Therefore, the charges of neglect and poor judgment were not justified. 799

The grievant was charged with various alleged violations including unexcused tardiness, AWOL, and Failure of Good Behavior for not following the directions of a superior when he was told to take a midday lunch break before going to his next appointment. He chose not to take the break and to proceed to his next appointment. The arbitrator found that the initial determination by the employer that the AWOL and Failure of Good Behavior charges were “serious” was correct. However, these charges were ultimately found to have been improperly leveled against the grievant. The unexcused tardiness allegation was considered diminished in severity by the fact that some of the tardiness charges were simply in error, others were withdrawn and one was improper. The arbitrator found that the employer gave proper weight to the insubordination charge and that the remaining tardiness charge was recidivist in nature. He found that the charge of Exercising Poor Judgment was proper in this instance because the offense followed specific counseling regarding how to handle his lunch break. This charge was concededly less serious than insubordination and the 10-day suspension was reduced to an 8-day suspension. 809

The grievant, a TPW with 1 2½ years of service, no active disciplines and satisfactory evaluations was removed from his position for leaving a client
Position Description

- See working outside of classification or position

Position-Specific Minimum Qualifications

The PSMQ at issue required Account Clerk 2’s to have six months experience in Workforce Management Systems and in the PeopleSoft system. The Arbitrator held that the State acted properly per its authority under Article 5. It acted reasonably considering the specialized knowledge required to fill the positions involved in the issuance of the PSMQ. In addition, the Arbitrator found that there was no harm to the bargaining unit. There were no bargaining unit positions lost as a result of this action.

Post-Discharge Actions

The Arbitrator rejected the argument that the grievant’s post-discharge actions should not have been considered. In a case where the grievant continues to have an unauthorized relationship with a parolee who became an inmate once again, the grievant’s post-discharge actions are so closely related to the events leading to discharge that they are viewed as exacerbating circumstances justifying removal.

Possession of Weapon on State Property

The arbitrator found that the grievant lied about having a handgun in his truck on State property. The State did not prove that the grievant threatened a fellow employee. The arbitrator stated that it was reasonable to assume that the grievant was either prescribed too many medications or abusing his prescriptions. The arbitrator determined that the grievant’s use of prescription medications played a major role in his abnormal behavior. The grievant’s seniority and good work record were mitigating factors in this case and his removal was converted.

The grievant was charged with allegedly carrying an unlicensed, concealed weapon in his travel bag. He was required to conduct training classes and it
Posting Vacancies

- The resignation of an OBES Claims Examiner 2 created a vacancy which the employer did not post, but instead transferred in a Claims Examiner 2 from an office outside the district. The transferred employee received a new Position Control Number, but not the one vacated by the employee who resigned. A violation of the contract was conceded by the employer and the sole issue was the appropriate remedy. The arbitrator ordered the position in question to be vacated and posted for bids. The transferred employee was allowed to remain in the position until the status of her application was determined. If she fails to obtain the position she occupied, the employer was ordered to place her back into the office which she had left so as to prevent any lost wages due to the transfers. If a person other than the transferred employee receives the position, that employee must be made whole for any lost wages and benefits: 399

- A General Activity Therapist 2 position was posted for which the grievant bid. The posting listed a valid water safety instructor’s certificate as a minimum qualification. The grievant did not possess the certificate and an outside applicant was selected. The arbitrator found that the employer improperly posted the position by using a worker characteristic that doesn’t have to be acquired until after the employee receives the job. While the arbitrator cautioned that employees must act timely to become qualified, the employer can only hold bidders to minimum qualifications required by the contract. The grievance was sustained and the grievant was awarded the position with back pay: 418

- The Department of Natural Resources determined a need for more Geologist 4 employees and that all employees in the groundwater division would be classified as geologists. Geologist positions were posted in ODNR offices but in the grievant’s office the most senior Environmental Engineer was reassigned to a Geologist 4 position. The reassigned employee testified that her job responsibilities had changed since the reassignment. The arbitrator found that the employer used the reassignment as a disguised attempt to disrupt the seniority benefits of the bargaining unit. It was stated that the crucial factor is the job duties, not the name attached, and that supervision of others was a substantial and significant change. The grievant was awarded the position retroactively with the employer ordered not to recoup any additional wages earned while she was wrongly reassigned: 419

On April 24, 2006 the Agency posted a position for an Environmental Specialist 1 (ES1). Later the Agency withdrew that posting and applicants were sent letters on or about May 26, 2006 that the position would not be filled. Then the agency posted for an Administrative Assistant 2, with a job description which was essentially the same as that of the ES1. That position was filled on June 26, 2006. On July 6, 2006 the Union filed a grievance arguing that assigning an exempt employee to that position violated Articles 1.05 and 1.705 of the CBA. The Agency raised a timeliness objection. The Union contended that the triggering event was the June 26 filling of the AA2 position with an exempt employee and not the announced withdrawal of the ES1 position. The Arbitrator held that the Agency effectively waived its right to raise the issue of procedural arbitrability by waiting until the arbitration hearing to assert that issue. Each Party has an obligation to scrutinize the substantive and procedural aspects of a grievance while processing it through the negotiated grievance procedure and to raise relevant procedural and/or substantive objections before going to arbitration. When procedural objections are not raised earlier in the grievance process, there is a risk of losing relevant information or losing opportunities to negotiate settlements. The Arbitrator was persuaded that Article 25.03 does not impose a duty on the Union to establish a prima facie case before arbitrating the merits of a dispute. The Agency’s argument rests on their own interpretation of that Article. However the Arbitrator
held that reasonable minds may differ on their interpretations; consequently, reinforcing the need for a review of the issues in an arbitration. The Agency arguments also rest on several assertions that have not been established as facts in the dispute (e.g. “bargaining unit work does not exist in the ESS.”) These assertions are better left to an arbitration. The Arbitrator held that because of the special nature of collective bargaining relationships, there is a heavy presumption in favor of arbitration when disputes arise.

989

Postings

- In this case the Union grieved that the State violated Article 17 of the Agreement. The State filled a position without posting the position. An employee received a provisional appointment to a supervisor position outside the bargaining unit. The employee had to pass an exam to stay in that position and failed. The State returned this employee back to his old position in the bargaining unit. The arbitrator found that returning the employee to his old position was a “vacancy” under Section 17.03 of the Agreement. The arbitrator found that a job in the bargaining unit was opened to accommodate a demoted non-bargaining unit employee in violation of Section 17.03. The arbitrator found in favor of the Union. The State had to post the position and identify the most senior employee eligible to bid on that position: 297

- The employer transferred an employee to another area that was understaffed. The position was permanent and full-time. When filling such positions the Agreement clearly, unmistakably and unreservedly requires that the position be posted. Then employees are permitted to bid. The qualified employee with the most State seniority was deprived of the opportunity for being awarded the position under Section 17.05 of the agreement. Employees must be provided the opportunity to exercise their rights to bid on a vacancy before a transfer may be affected: 349

- The transfer without posting the position is different from the situation where the employer may use managerial discretion (#329). In this situation there is specific language governing and limiting the rights of management in Article 17 of the Agreement: 349

- The State may not hold bidders to qualifications that are required. The State may not go beyond what it sets forth on the specific Position Description and generic classification Specification as requirements for the position. The applicants should not have been measured against additional requirements stated in the posting: 457

- Section 17.03 is violated if the employer posts a notice for an opening but the posting does not list all of the qualifications which the employer actually requires when filling the position: 170 (vacated but under appeal)

- Despite the State's admission of its violation of Article 17 of the contract, the arbitrator determined that the entire matter turned upon whether or not management made proper use of the 1,000-hour employee in lieu of hiring a permanent employee after posting the permanent vacancy. The arbitrator decided that the grievant was entitled to the position because management improperly denied her employment under Articles 17 and 18 of the contract in favor of a 1,000 hour employee: 505

The PSMQ at issue required Account Clerk 2’s to have six months experience in Workforce Management Systems and in the PeopleSoft system. The Arbitrator held that the State acted properly per its authority under Article 5. It acted reasonably considering the specialized knowledge required to fill the positions involved in the issuance of the PSMQ. In addition, the Arbitrator found that there was no harm to the bargaining unit. There were no bargaining unit positions lost as a result of this action: 1036

Precedent

- In an arbitration concerned with whether the grievant had been discharged for just cause under a charge of abuse, other cases offered by the state in favor of its argument were given no weight since all of the cases involved grievants who had been removed for violations other than abuse: 262

Pre-Contract Discipline

- Pre-contractual discipline is not to be counted within the contractual disciplinary progression. (It is manifestly unreasonable to assume that a pre-contractual discipline would have been sustained under contractual requirements). However, pre-contractual discipline is relevant to
the question of whether the employer is required to follow the discipline schedule of 24 .02. Implicit in the language of 24 .02 is the mutual recognition that some offenses are so severe as to permit bypassing disciplinary steps. (The contract calls for adherence to "the principles of progressive discipline" rather than directly to the schedule.) Pre-contractual discipline is relevant in two ways to determining the seriousness of the offense.

(1) It shows that grievant had notice that he would be disciplined for the wrongful conduct.
(2) Long service will count as a mitigating factor only if it is long service with a good work record:

Pre-Disciplinary Hearing

- Pre-disciplinary rights: 1 0

- Arbitrator ordered employer to reinstate grievant without back pay where employer had violated grievant's right to a pre-disciplinary conference by being derelict in fulfilling its responsibility to schedule and conduct the conference: 7

- Employer was found derelict in scheduling pre-disciplinary conference where employer had solicited other employees for pre-disciplinary conferences during working hours and the employer's records indicated that grievant had been present at work for 8 consecutive days after management's initial attempt to contact grievant and 3 consecutive days after the final attempt: 7

- This right to a pre-disciplinary meeting existed prior to the contract and was negotiated into the contract by the parties: 7

- The purpose of the pre-disciplinary hearing is to place the grievant on notice of the precise nature of the charges against him so that he can respond appropriately. The pre-disciplinary process does not require the employer to furnish an adjudication hearing to an employee: 1 06

- The employer is not required to provide witnesses' statements, investigatory reports, and incident reports at or prior to the pre-disciplinary conference. Section 24 .04 , which is titled "pre-discipline", only requires the employer to furnish a list of witnesses and documents that will be relied upon in imposing discipline. This comports with the generally accepted view that pre-disciplinary hearings are usually not considered to be "full-blown": 1 92

- Where the grievant was on disability leave and requested a continuance for the pre-disciplinary hearing, and the employer rejected the request without taking the employee's circumstances into consideration, the employer violated its duty to provide a fair and objective investigation because it never truly provided the grievant with an opportunity to justifiably postpone the pre-disciplinary hearing and thereby deprived the grievant a fair opportunity to respond to the alleged falsification accusations: 1 97

- If the hearing is held at a jail to accommodate an imprisoned grievant the hearing is not procedurally effective: 279

- The pre-disciplinary hearing officer does not have to play a neutral role. The fact that the inspector promised that the inmate would be protected does not prove that the inmate witness was coerced into false testimony: 291

- The employer must provide the full and complete witness statements before the pre-disciplinary hearing not summaries of witness statements. The rationale that the State provided of protecting the youth was nebulous and failed to overcome the clear language of Section 24 .04 . Altered or unavailable evidence can be severely prejudicial to the Union’s effort to defend the grievant. The arbitrator would have reinstated the grievant without back pay but because of the State’s violations back pay was awarded after the 1 81 st day of the grievant’s removal: 308**

- The grievant was a Correction Officer removed for using vulgar language, conducting union business on work time, and fondling an inmate. The arbitrator rejected the claim that the Union had the right to question witnesses at the pre-disciplinary hearing. Nor did the employer violate Article 25 .08 because the union made excessive document requests. The employer did violate Article 25 .02 by not issuing a Step 3 response for six (6) months, however the grievant was not prejudiced. Therefore, the arbitrator found, because the inmate was more credible than the grievant, that just cause did exist for the removal: 366

- The grievant was a Correction Officer who was removed for watching inmates play cards while
they were outside their housing unit. The grievant admitted this act to his sergeant. The pre-disciplinary hearing had been rescheduled due to the grievant’s absence and was held without the grievant or the employer representative present. The arbitrator found that because the union representative did not object to the absence of the employer’s representative that requirement had been waived. There was also no error by the employer in failing to produce inmates’ statements as they had not been used to support discipline. The removal order was timely as the 4 5 day limit does not start until a pre-disciplinary hearing is held, not merely scheduled: 377

- The grievant attended a pre-disciplinary hearing for absenteeism at which his removal was recommended, but deferred pending completion of his EAP. He failed to complete his EAP and was absent from December 28, 1 990 to February 1 1 , 1 991 . The grievant was then requested to attend a meeting with a union representative to discuss his absence and failure to complete his EAP. The grievant was removed for absenteeism. The arbitrator found the grievant guilty of excessive absenteeism and prior discipline made removal the appropriate penalty. The employer was found to have committed a procedural error. Deferral because of EAP participation was found proper, however the second meeting was not a contractually proper pre-disciplinary hearing. No waiver was found on the part of the union, thus the arbitrator held that the employer violated the contract and reinstated the grievant without back pay: 383

- The grievant had been a Driver’s License Examiner for 1 3 months. He was removed for falsification when he changed an applicant’s score from failing to passing on a Commercial Drivers’ License examination. The arbitrator found that the grievant knew he was violating the employer’s rules and rejected the union’s mitigating factors that the grievant had no prior discipline and did not benefit from his acts. Falsification of license examination scores was found serious enough to warrant removal for the first offense. The arbitrator also rejected arguments of disparate treatment. The grievance was denied: 4 03

- The grievant was an Investigator with the Department of Commerce who had been suspended for 5 days for failing to follow his itinerary for travel and filing incorrect expense vouchers. The grievant’s itinerary indicated that he would be in Toledo on a Friday, and he submitted expense vouchers for the trip, however it was discovered that he worked at home during the day in question. The arbitrator found that the employer violated Section 24 .04 by failing to provide witness lists and documents and not answering the grievants letters. Section 25 .08 was not found to be violated. The employer’s selection of the pre-disciplinary hearing officer was unwise because she had an interest in the outcome and that the investigation was incomplete and unfair. The arbitrator also found that the grievant’s itinerary was a contemplated itinerary and that he had informed his supervisor of schedule changes, however the grievant was AWOL as there was no provision for working at home. Disparate treatment was suspected by the arbitrator, who also noted that the grievant exhibited a contemptuous attitude towards management. The suspension was reduced to a 1 day suspension: 4 30**

– The grievant, accused of misusing a State vehicle, admitted to misconduct and waived his right to a pre-disciplinary hearing. He subsequently received a ten-day suspension. Management argued that this waiver prevented the Union from filing this grievance. The Arbitrator held that since the ultimate control of a grievance rests with the Union, and since it was protecting its procedural rights, this grievance was properly filed: 5 98

The issue of what constitutes a pre-disciplinary hearing/meeting arose in this arbitration. A hearing was held, but the hearing officer did not issue a report. She later testified that a report was not issued because no hearing occurred. Instead of the hearing officer issuing a report, management dropped two of the charges, changed one and set up another pre-disciplinary hearing. The arbitrator referred to Section 24 .04 of the Contract, which requires a pre-disciplinary conference but never refers to that conference as a hearing. It is called a meeting and the term is used five or more times in the section. One sentence states what is to occur at the meeting: “The Union and/or employee shall be given the opportunity to ask questions, comment, refute, or rebut.” The Union was able to prove that a pre-disciplinary “meeting” did indeed take place because the Union called witnesses and questioned them at the meeting. The arbitrator determined management’s tactic to be in violation of the contract. He concluded that the prejudicial process contaminated the charge for which the
arbitrator found the grievant guilty to the point that no discipline was warranted. 765

**Pre-Disciplinary Hearing Officer's Report**

- The arbitrator found that the union did receive witness lists and documents, but did not receive the Unit Administrator's report which contained witness statements and additional photographs. The employer is obligated to produce information relied upon to support discipline, with the pre-disciplinary hearing notice. Therefore, the employer did violate section 24.04. The grievant was prejudiced when the employer failed to disclose pre-disciplinary conference reports when the discipline imposed was decided by the employer. Further, the Unit Administrator's investigation was not complete. She never interviewed the grievant. She was not an assigned investigator but she acted as an investigator. The employer must follow contractual procedures and its own policies and that did not occur in this case.

  The employer violated the contract by improperly withholding information and failing to investigate the incident properly. However, the grievant has substantial prior discipline and has committed a serious offense. Therefore, there is just cause for discipline: 326

- The grievant was a Correction Officer, as was his wife. She had filed sexual harassment charges against a captain at the facility. The grievant and the grievant’s wife’s attorney contacted an inmate to obtain information about the captain. The employer removed the grievant for misuse of his position for personal gain, and giving preferential treatment to an inmate, 4 4 days after the pre-disciplinary hearing, and he received notice of his removal on the 4 6th day after the pre-disciplinary. The arbitrator held that the employer proved that the grievant offered the inmate personal and legal assistance in exchange for information. The investigation was proper as it was a full investigation and it was conducted by persons not reporting to anyone involved in the events. It was found that the investigation need not contain all information, only relevant information, thus the grievance was denied: 372

- The grievant had been on a disability separation and had been refused when he requested reinstatement. The arbitrator found the grievance arbitrable because section 4 3.02 incorporated Ohio Administrative Code section 1 23:1 -33.03 as it conferred a benefit upon state employees not found within the contract. The grievant thus had three years from his separation to request reinstatement, which he did. The grievance was also found to be timely filed because there was no clear point at which the employer finally denied the grievant’s request for reinstatement and the union was not notified of the events by the employer. Additionally, the employer was estopped from asserting timeliness arguments because the employer was found to have delayed processing the grievant’s request for reinstatement. The physician who performed a state-ordered examination released the grievant to work, thus the employer improperly refused the grievant’s reinstatement request. The grievant was reinstated with back pay less other income for the period, holiday pay, leave balances credited with amounts he had when separated, restoration of seniority and service credits, medical expenses which would have been covered by state insurance, PERS contributions, and he was to receive orientation and training upon reinstatement: 375

- The federal government created, established hiring criteria, and funded job training positions within the Ohio Bureau of Employment Services for Disabled Veterans’ Outreach Specialist (DVOPS), and Local Veterans’ Employment Representative (LVERS). The OBES and Department of Labor negotiated changes in the locations of these employees which resulted in layoffs which were not done pursuant to Article 1 8. Title 38 of the United States Code was found to conflict with contract Article 1 8. There is no federal statute analogous to Ohio Revised Code section 4 1 1 7 which allows conflicting contract sections to supersede the law, thus federal law was found to supersede the contract. As the arbitrator’s authority extends only to the contract and state law incorporated into it, the DVOPS’ and LVERS’ claim was held not arbitrable. Other resulting layoffs were found to be controlled by the contract and Ohio Revised Code sections incorporated into the contract (see Broadview layoff arbitration #34 0). The grievance was sustained in part. The non-federally created positions had not been properly abolished and the affected employees were awarded lost wages for the period of their improper abolishments: 390

**Predetermination of Discipline**
The Arbitrator was convinced that the Patrol had pre-determined that the grievant was to be removed and the Patrol merely went through the formality of a hearing. Because the Patrol violated Article 24.05 in its decision to terminate the grievant before the pre-disciplinary hearing, the grievant’s removal date was changed to the date on which written closings were received and the record of the hearing was closed. 792

**Preferential Treatment to an Inmate**

The grievant was accused of allowing/encouraging inmates to physically abuse other inmates who were sex offenders. The arbitrator found that the grievant’s testimony was not credible when weighed against the testimony of co-workers and inmates. The Union argued that the lack of an investigatory report tainted the investigation. The arbitrator concluded that despite the lack of the report, the investigation was fair fundamentally and direct testimony and circumstantial evidence proved that the grievant had knowledge of the allegations against. The arbitrator found that the grievant was removed for just cause. 779

The arbitrator found that the grievant failed to inform her employer of a past casual relationship with an inmate. The grievant had a duty to notify her employer of this information. In this instance, the grievant had ongoing contact with the inmate as a Word Processing Specialist 2 responsible for telephone and office contact with the inmate. The arbitrator also found that the grievant sent confidential official documents to the inmate without approval. He noted that the fact that the mail was intercepted does not negate the severity of the grievant’s actions. 803

The Grievant was a Corrections Officer who was terminated for violating a work rule that prohibits employees from giving preferential treatment to any individual under their supervision, Rule 4.5 (A) & (B). The Employer argued that the Grievant’s co-workers who were aware of the conduct and failed to report were not disciplined despite a duty to report because they trusted and believed the Grievant to be exchanging food for information that would lead to a drug bust. These employees reported the conduct when it was evident a drug bust was not making progress. The Arbitrator found that the Employer treated the Grievant disparately in disciplining him for his attempt to gain drug bust information since his coworkers were not disciplined for failing to report the conduct. He found their knowledge made them complicit in the violation and found that they only came forward after the disciplinary process commenced. Therefore, the Arbitrator found that DR&C failed to enforce its rule on an equal basis. 94

The grievant was a CO who was charged with allegedly giving preferential treatment to an inmate and having an unauthorized relationship with an inmate. The grievant admitted at arbitration that on occasion he provided an inmate cigars, scented oil and food from home and restaurants. He admitted that he accepted cigarettes from inmates who received contraband. The arbitrator found that the grievant was removed for just cause. His misconduct continued for an extended period of time; thus his actions were not a lapse in judgment. He attempted to conceal his misconduct by hiding food so the inmates could find it. Therefore, the grievant knew what he was doing was wrong. The grievant accepted “payment” for the contraband when he accepted cigarettes in exchange for the food and other items he provided to the inmates. The arbitrator found that grievant’s actions compromised the security and safety of inmates and all other employees at the facility. 95

**Pregnancy Accommodations**

The Arbitrator found that the Employer did not violate Section 11.1.1 because the Employer engaged in a good faith effort to provide alternative comparable work and equal pay to the two pregnant Grievants. On four of five scheduled work days the employees would work “relief” in “non-contact” posts. On the fifth day the Union requested that the two employees be assigned an “extra” or “ghost” post or be permitted to take the day off and use accrued leave for coverage purposes. However, the Warden placed the Union on notice that the institution could no longer have pregnant employees assigned to posts as extras. Certain posts were properly rejected based on the Grievants’ doctor recommendations. The Union’s proposals would have resulted in “ghost posts.” The Grievants would have worked in positions at the expense of other established posts. Also, unapproved “ghost posts” would violate the spirit of the local Pick-A-Post agreement. Proposed uses of accrued leave balances, personal leave, and sick leave failed. Nothing in the record
indicated the Grievants had sufficient leave balances available to cover one day off per week. In addition, if the Grievants were allowed to take vacation time on dates previously selected, the Employer would be violating a mutually agreed to number of vacation days made available for bid. Other correction officers’ seniority rights would be violated if vacations were preferentially granted to pregnant employees. Section 27.02 entitles an employee to four personal leave days each year; however those four days could not possibly cover the entire pregnancy period. Section 29.02 grants sick leave to employees “unable to work because of sickness or injury.” A pregnancy cannot be viewed as an “illness or injury.” 94

Pregnancy Hazards

The grievant was a visitation/utility officer on second shift at the facility. She became pregnant and present her employer with a physician’s statement stating so and indicating her due date. He also advised her not to lift more than ten to fifteen pounds for the duration of her pregnancy. She was told by her employer she would not be allowed to work due to her lifting restrictions. The Union could not agree to her displacing other officers in violation of the Pick-A-Post Agreement and the warden could not agree to splitting her job between the visiting hall and the entrance building because the possibility of having to use force against an inmate or visitor would not be incompliance with her weigh-lifting limitations. She was told to apply disability. The arbitrator found that the employer made a good faith effort to accommodate the grievant’s restrictions. A “good faith” effort is all that is required by the contract. The parties met and both rejected the proposals submitted. Arbitrator noted that he grievant also submitted her charges to the Ohio Civil Rights Commission and the U.S. EEOC. OCRC took jurisdiction and found that that employer’s actions were not due the grievant’s pregnancy, but to her restrictions. The arbitrator concurred, stating that the grievant received her answer to Title VII issue from OCRC. 871

The grievant notified her employer that she was pregnant and applied for accommodation to continue working. Subsequent statements from her physician stated that due to complications the grievant could not lift more than 20 pounds, was unable to run ¾ miles and could not break up fights. Her application for accommodation was denied. She applied for and received disability benefits. The Union presented evidence at arbitration that two other COs at Richland had been accommodated by the employer during pregnancy. The employer could not explain why they received accommodations and the grievant did not. The arbitrator stated, “If the employer can demonstrate it made the requisite ‘good faith effort to provide alternative, comparable work and equal pay to a pregnant employee upon a doctor’s recommendation’ (Sec. 1 1 .1 1 ) it will have satisfied its obligation under the Agreement. As the record does not demonstrate that occurred in this instance the grievance must be sustained.” 897

Preservation of Benefits

- Section 4 3.01 gives the Agreement precedence over conflicting laws: 297
- Section 4 3.02 of the Agreement preserves statutory benefits “in areas where the Agreement is silent.”: 297
- The language of the Administrative Code, ORC 4 1 1 7.1 0 Article 4 3 of the Agreement recognize the preeminence of Article 1 7 over any rights to demotion into the bargaining unit designated by the Administrative Code. The Agency does not have to violate the Agreement to follow the Administrative Code: 297
- Section 4 3.01 gives the Agreement precedence over conflicting laws: 297

-- Layoffs are to be made pursuant to the Ohio Revised Code, § 1 24 .321 -327 and the Administrative Rules 1 23:1 -4 1 -01 through 22. Other sections of the Revised Code and Administrative Rules are incorporated by Section 4 3.02 of the Agreement. In the situation where state statutes and regulations confer benefits upon employees in areas where the Agreement is silent, the benefits shall continue. It was a benefit to employees prior to the institution of collective bargaining that the State Personnel Board of Review hear appeals from layoffs. Under Section 25 01 the grievance procedure is the “exclusive method” of resolving grievances. Employees covered by the Agreement no longer have access to the State Personnel Review Board in order to contest layoffs. The employees must grieve under the plain language of the Agreement. The parties altered the forum of review. The grievance
procedure, including arbitration, now serves as the same avenue of appeal. When appeals were taken to the Board of Review they were made pursuant to rules that are not specifically set out in the Agreement. One rule placed the burden upon the employer to demonstrate by “a preponderance of the evidence that a job abolishment was undertaken due to the lack of the continuing need for the position, a reorganization, for the efficient operation of the appointing authority, for reasons of economy or for a lack of work expected to last more than twelve months.” ORC 124.701 (A)(1). This rule represents a benefit to employees and is continued under the language of Section 4 3.02 of the Agreement. The two major decisions in the area of layoffs are Bispeck and Esselburne. Bispeck emphasizes that the burden is on the employer and Esselburne sets out the standard of proof the employer must show to carry its burden. The arbitrator decided that the employer must compare current work levels for the employee to a period when a lack of work existed in either of the layoffs. The State’s reference to the money that could be saved by not paying the grievants does not prove that there existed a lack of funds. As Bispeck states, “Evidence of not having to pay the salaries on its own is not sufficient to prove increased efficiency and economy as required.” Not having to pay the grievants’ salaries is sufficient evidence of the employer’s increased economy and efficiency: 311

- Section 4 3.02 which deals with the preservation of employee benefits also points towards abolishment decisions being reviewable by an arbitrator. The benefits are not limited to economic gains. An appeal from an abolishment or layoff decision is a form of benefit and arbitral review is preserved: 340

- When the Agreement is silent on who has the burden of proof and the standard of proof, Section 4 3.02 prevails and the relevant regulations and statutory law apply. In this case that means that the employer has the burden of proving by a preponderance of the evidence that the job abolishments were properly implemented: 340

Presumption in Favor of Arbitration

On April 24, 2006 the Agency posted a position for an Environmental Specialist 1 (ES1). Later the Agency withdrew that posting and applicants were sent letters on or about May 26, 2006 that the position would not be filled. Then the agency posted for an Administrative Assistant 2, with a job description which was essentially the same as that of the ES1. That position was filled on June 26, 2006. On July 6, 2006 the Union filed a grievance arguing that assigning an exempt employee to that position violated Articles 1.05 and 1.7.05 of the CBA. The Agency raised a timeliness objection. The Union contended that the triggering event was the June 26 filling of the AA2 position with an exempt employee and not the announced withdrawal of the ES1 position. The Arbitrator held that the Agency effectively waived its right to raise the issue of procedural arbitrability by waiting until the arbitration hearing to assert that issue. Each Party has an obligation to scrutinize the substantive and procedural aspects of a grievance while processing it through the negotiated grievance procedure and to raise relevant procedural and/or substantive objections before going to arbitration. When procedural objections are not raised earlier in the grievance process, there is a risk of losing relevant information or losing opportunities to negotiate settlements. The Arbitrator was persuaded that Article 25.03 does not impose a duty on the Union to establish a prima facie case before arbitrating the merits of a dispute. The Agency’s argument rests on their own interpretation of that Article. However the Arbitrator held that reasonable minds may differ on their interpretations; consequently, reinforcing the need for a review of the issues in an arbitration. The Agency arguments also rest on several assertions that have not been established as facts in the dispute (e.g. “bargaining unit work does not exist in the ESS.”) These assertions are better left to an arbitration. The Arbitrator held that because of the special nature of collective bargaining relationships, there is a heavy presumption in favor of arbitration when disputes arise.

Pretext for Discipline

- Where the grievant had been removed, but had also been a beneficiary of a grievance settlement, the arbitrator found that nothing in the record indicated that the removal was a consequence of the settlement. First, the removal took place before the settlement. Second, there was no evidence suggesting animus motivated by the settlement: 268

Prima Facie Case

On April 24, 2006 the Agency posted a position for an Environmental Specialist 1 (ES1). Later the Agency withdrew that posting and applicants were sent letters
on or about May 26, 2006 that the position would not be filled. Then the agency posted for an Administrative Assistant 2, with a job description which was essentially the same as that of the ES1. That position was filled on June 26, 2006. On July 6, 2006 the Union filed a grievance arguing that assigning an exempt employee to that position violated Articles 1.05 and 1.7.05 of the CBA. The Agency raised a timeliness objection. The Union contended that the triggering event was the June 26 filling of the AA2 position with an exempt employee and not the announced withdrawal of the ES1 position. The Arbitrator held that the Agency effectively waived its right to raise the issue of procedural arbitrability by waiting until the arbitration hearing to assert that issue. Each Party has an obligation to scrutinize the substantive and procedural aspects of a grievance while processing it through the negotiated grievance procedure and to raise relevant procedural and/or substantive objections before going to arbitration. When procedural objections are not raised earlier in the grievance process, there is a risk of losing relevant information or losing opportunities to negotiate settlements. The Arbitrator was persuaded that Article 25.03 does not impose a duty on the Union to establish a prima facie case before arbitrating the merits of a dispute. The Agency’s argument rests on their own interpretation of that Article. However the Arbitrator held that reasonable minds may differ on their interpretations; consequently, reinforcing the need for a review of the issues in an arbitration. The Agency arguments also rest on several assertions that have not been established as facts in the dispute (e.g. “bargaining unit work does not exist in the ESS.”) These assertions are better left to an arbitration. The Arbitrator held that because of the special nature of collective bargaining relationships, there is a heavy presumption in favor of arbitration when disputes arise.

Prior Discipline

- Regardless of prior record, there must still be just cause for any further discipline: 16

- Where the employee had been laid off, and later given a position in the same classification but with a different agency, the arbitrator held that the employee carried his prior disciplinary record from the original position with him into the new position. The arbitrator stated that this was fair since, under Article 1.8, the employee is not required to undergo a new probationary period in the new position: 195

- Given the long history of discipline brought to this proceeding by the grievant, neither he nor the Union should expect a decision involving a make whole restoration to employment: 266

- The trooper investigating the escape and the Step 3 official both knew of a 1984 incident in which the grievant was disciplined. Citing this discipline was not proper under Section 24.06 of excising discipline from the employee’s record: 314

- It is not believable that a 27-year employee of a local business and 10 year employee of the institution would risk prison and his reputation for the future promise of money from inmates. The discipline 1984 for bringing something improper to an inmate does not impact on whether the grievant would abet an escape: 314

- While the arbitrator endorsed Arbitrator Dworkin's analysis of 24.06 which prevented the admission of evidence about discipline prior to the contract, he held that the analysis did not anticipate the circumstances surrounding the present case where the grievant had falsified tier employment application by omitting that she had previously been removed from employment with the state. The arbitrator held that evidence of that removal obtained by an investigation was admissible in such a situation. To preclude such an investigation would frustrate the employer's selection and appointment process. Without additional evidence of the intent of the parties regarding 24.06, the arbitrator was unwilling to find that the employer had violated 24.06: 268

- The grievant was employed as a Salvage Processor who was responsible for signing off on forms after dangerous goods had been destroyed. He was removed for falsification of documents after it was found that he had signed off on forms for which the goods had not been destroyed. The arbitrator found that despite minor differences, the signature on the forms was that of the grievant. The employer was found to have violated just cause by not investigating the grievant’s allegation that the signature was forged, and by failing to provide information to the union so that it could investigate the incidents. The employer was found not to have met its burden of proof despite the grievant’s prior discipline: 398

- The grievant had failed to complete several projects properly and on time and another
The grievant was a Psychiatric Attendant who had received prior discipline for refusing overtime and sleeping on duty. He refused mandatory overtime and a pre-disciplinary hearing was scheduled. Before the meeting occurred, the grievant was found sleeping on duty. A 6 day suspension was ordered based on both incidents. The arbitrator found that despite the fact that the grievant had valid family obligations, he had a duty to inform the employer rather than merely refuse mandated overtime and, thus was insubordinate. The employer failed to meet its burden of proof as to the sleeping incident, however due to the grievant’s prior discipline a 6 day suspension was warranted for insubordination. The grievance was denied: 404

The grievant was a LPN who had been assaulted by a patient at the Pauline Lewis Center and she had to be off work due to her injuries for approximately 1 month. When she returned she was assigned to the same work area. She informed her supervisor that she could not work in the same work area, and was told to go home if she could not work. The grievant offered to switch with another employee whom she identified, but the supervisor refused. She then told her supervisor she was going home but instead switched work assignments. The grievant had prior discipline including two 6 day suspensions for neglect of duty. The supervisor concluded that the grievant was given a direct order to work in her original work area. The grievant erroneously believed that switching assignments was permitted. Despite the grievant’s motivation for her actions, the grievant’s prior discipline warranted removal, thus the grievance was denied: 424

Discipline was imposed upon the grievant for just cause. The State provided eyewitness testimony that the grievant was observed standing beside the open salvage door when no loading was in progress. Given the grievant’s continued dishonesty in the face of credible eye witnesses and his extensive disciplinary record (which including numerous reprimands for dishonesty
and neglect of duty, failure to carry out work assignments, willful disobedience of direct order and violations of agency policies and procedures) and the removal was commensurate with the offense: 4 93

- Given the severity of the assault committed by the grievant and his prior disciplinary record, the arbitrator found just cause for his removal: 5 06**

- Although the Union provided believable testimony and documents exonerating the grievant, the length of grievant's prior disciplinary record and the grievant's dishonesty under oath weakened his credibility and strengthened the State's claim that it removed the grievant for just cause: 5 08

- The grievant was removed because he (1) took an inmate who needed emergency medical care to a hold and signed him in instead of taking the inmate to a waiting station as he was directed to do, (2) refused to immediately transport this inmate to the hospital, (3) refused to report to the lieutenant's office to explain his combative behavior, and (4) refused, in an obscene manner, to work mandatory overtime. Consequently, the arbitrator found that the grievant was discharged for just cause and in a manner consistent with progressive discipline. In fact, the arbitrator held that where an offense is extremely serious, a discharge may occur without progressive discipline, and noted that the instant case would have merited such a result. The grievant's activities were so outrageous that, when compounded with the grievant's prior record, the Employer was left with no alternative except to remove the grievant: 5 4 0

Privacy of Employees

- The subpoena for the grievant's telephone records is proper under ORC Section 5 1 20.30: 224

Privileges Against Testifying or Giving Evidence

- 4 3.01 gives precedence to the agreement over any statute other than ORC 4 1 1 7 where such statutes conflict with the agreement. Thus, the requirement in 25 .08 that the state produce evidence requested by the union supersedes the Ohio Highway Patrol's statutory privilege in ORC 1 4 9.4 3: 75

- The difference in discipline between two employees was described to be because the one employee, the grievant, did not cooperate with the Superintendent. The Superintendent admitted that the grievant was advised by her lawyer and union representative to refrain from discussion. The grievant’s “lack of cooperation” was a legitimate execution of her rights and must not be counted against her: 388

Probationary Employees

- The grievant had a thirty-day time limit on filing her grievance starting from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance. The event giving rise to the grievance occurred when the grievant continued to be carried as a probationary employee after sixty days from the date when she was wrongfully listed as a probationary employee. The Union’s argument that the grievant was not harmed until she was later removed was dismissed. The arbitrator found that as soon as the grievant was kept on probationary status and did not receive the full protection and rights of seniority status. The employer is also not liable for the training of the employee in her right to bring a grievance. The employee also had worked for the State previously and had adequate time to discover the issue of her probationary status and raise it in a timely fashion. The grievance was not arbitrable since it was untimely: 34 4

- It was decided that the grievant was not a new State employee but she was a new employee for the agency. According to the Civil Service rules, employees for the State maintain certain benefits when they move from job to job, but the Union did not represent specific language showing that an employee moving from one state agency to another must always at the same or greater wage rate. The new agency considered the grievant a new hire and it was generally accepted that she had a 1 20-day probationary period and presumably after successful completion, she would move a step per section 36.02 of the Agreement. The grievant’s claim that she merely transferred to the new agency was not supported. Article 1 7 of the Agreement defines promotions as moving to a higher pay range and a lateral transfer as a movement to a different position at
the same pay range. It does not specify that a lateral transfer from one agency to another within the State must be at the same step within the same pay range. The employer did not transfer the grievant she applied for a vacant position: 360

- The employer is obligated by Administrative Rule 5 1 20-703 to follow prescribed procedure for a probationary removal. The rule is incorporated into the contract by Section 4 3.02. The procedure includes a conference with the probationary employee to discuss the matter of probationary removal and the reasons therefore. If, after the conference, the decision is made to proceed with the removal, the employee (appointee) must be notified in writing and the reasons must be set forth. The rule empowers the appointing authority of an institution to remove an appointee: 207

- When viewed in its entirety, the contract gives management the right to assess the work performance of a probationary employee and make an objective determination regarding his/her continued employment on the basis of said work performance: 207

- Because the grievant made herself unavailable there was no alternative in this case but to effectuate the probationary removal in a timely manner without the conference referenced in Administrative rule 5 1 20-7-03. Management met its obligation by attempting to contact the grievant several times about the impending action: 207

- Where the warden of the correctional institution removed a probationary employee, the state did not violate 24 .05 : there is no contractual requirement that the agency head approve a probationary employee's removal prior to the end of the probationary period: 207

- While the arbitrator ruled that a probationary removal is not generally arbitrable. She found that the issue it sex discrimination is arbitrable under 2.01 and 25 .01 : 207

- The time at which the grievant was allegedly improperly classified as a probationary employee is the triggering event from which the timely filing of the grievance must be calculated: 4 5 5

**Probationary Period**

- The employer wrongfully revised the length of probationary periods for the positions of District Hearing Officer 1 and 2, from six months to one year: 5 5 3

- The Union argued that the other applicant was prohibited from applying of the posted position of Carpenter 2 since he was within the probationary period under Article Section 1 7.05 (A), which provides, “Employees serving either in an initial probationary period or promotional probationary period shall not be permitted to bid on job vacancies.” The Arbitrator held that the applicant was not within a probationary period, but had instead made a lateral transfer. Therefore, the applicant was not barred from posting for the available position: 61 7

The Grievant had accepted an inter-agency transfer, demotion, and headquarter county change. The Department sent her a letter that erroneously stated that she would “serve a probationary period of 60 days in this position.” A month later the Department issued a “Corrected Letter” informing her that she would serve a probationary period of 1 20 days, provided by Article 6.01 D. The Grievant’s Final Probationary Evaluation rated her performance as unsatisfactory and she was probationarily removed. The Arbitrator held that the Grievant was in an initial probationary period and not a trial period when she was removed. The Acknowledgment she signed explicitly referenced Article 6.01 D, used the term “initial probationary period”, and placed her on notice that she could be removed during that period without recourse. The Grievant neither consulted the Collective Bargaining Agreement or Union before signing the Acknowledgment; nor did she inquire about the change or file a grievance when she got the corrected letter. Trial periods differ from probationary periods in that they are one-half the regular probationary period and employees in trial periods are not prohibited from using the grievance procedure to protest discipline and discharge actions. The Arbitrator held that regardless of the mistake made by the Department (but later rectified) she had no authority to review the Department’s removal decision. Therefore, the matter of the Grievant’s removal was not arbitrable. 936

The Employer initially took a firm position that the Grievant was not qualified for the promotion of Electronic Design Coordinator position, but agreed to place the Grievant in the position following a grievance settlement/NTA award. A
considerable amount of assistance was given to the Grievant in performing his work; however, after the probationary period the Grievant was removed from the position. The Arbitrator found that the Union failed to prove that the Employer, following a reasonable and contractually adherent period of probationary observation, acted in an unreasonable, arbitrary, or capricious manner in determining the Grievant was not able to perform the job requirements of the position of Electronic Design Coordinator. The testimony of the Employer’s witnesses contained the important element of specificity that was not refuted by the Grievant in any specific or substantial manner. In contrast, the Grievant’s direct testimony was far more general, vague, and for the most part accusatory in nature. There was little evidence to demonstrate the Grievant knew enough and was sufficiently skilled to successfully perform the work of an Electronic Design Coordinator in accordance with acceptable standards. 939

Probationary Removal

- The grievant should have been on notice that he was incorrectly classified as a probationary employee. The grievant was required to resign from his job in order to transfer to another job within the agency, the grievant went down a pay range, the grievant signed an evaluation which was clearly marked as “A MID-PROBATIONARY EVALUATION”, and the grievant was told not to worry about being on probation. Once the grievant was put on notice of his probationary status and did not file a timely grievance, then the grievance is untimely: 4 5 5

Procedural Arbitrability

On April 24, 2006 the Agency posted a position for an Environmental Specialist 1 (ES1). Later the Agency withdrew that posting and applicants were sent letters on or about May 26, 2006 that the position would not be filled. Then the agency posted for an Administrative Assistant 2, with a job description which was essentially the same as that of the ES1. That position was filled on June 26, 2006. On July 6, 2006 the Union filed a grievance arguing that assigning an exempt employee to that position violated Articles 1.05 and 1 7.05 of the CBA. The Agency raised a timeliness objection. The Union contended that the triggering event was the June 26 filling of the AA2 position with an exempt employee and not the announced withdrawal of the ES1 position. The Arbitrator held that the Agency effectively waived its right to raise the issue of procedural arbitrability by waiting until the arbitration hearing to assert that issue. Each Party has an obligation to scrutinize the substantive and procedural aspects of a grievance while processing it through the negotiated grievance procedure and to raise relevant procedural and/or substantive objections before going to arbitration. When procedural objections are not raised earlier in the grievance process, there is a risk of losing relevant information or losing opportunities to negotiate settlements. The Arbitrator was persuaded that Article 25 .03 does not impose a duty on the Union to establish a prima facie case before arbitrating the merits of a dispute. The Agency’s argument rests on their own interpretation of that Article. However the Arbitrator held that reasonable minds may differ on their interpretations; consequently, reinforcing the need for a review of the issues in an arbitration. The Agency arguments also rest on several assertions that have not been established as facts in the dispute (e.g. “bargaining unit work does not exist in the ESS.”) These assertions are better left to an arbitration. The Arbitrator held that because of the special nature of collective bargaining relationships, there is a heavy presumption in favor of arbitration when disputes arise. 989

Procedural Violations

- Arbitrator found that the procedural defects did not vitiate the employer's action in its entirety because the grievant was also at fault: 7

- Where union cannot credibly argue that grievant’s defense was compromised by minor procedural error, the conclusion is compelled that the state did proceed correctly: 38

- Actual harm to individual grievant is not the central issue. To ignore this negotiated and explicit requirement (4 5 day time limit) would not merely waive the grievant's rights but the rights of all the employees: 4 4

- Since the arbitrator has no power of mandamus over future behavior of a party, the question of enforcement of guidelines and procedures must be handled within the context of a particular grievance. Once the substantive and n issue on the merit is resolved, the arbitrator may modify the remedy where appropriate to encourage the parties to abide by the rules: 83
- Procedural violations by employer can be of three sorts:

(1) Employer violates the explicit procedures of the contract,
(2) the Employer fails to follow its own rules set up under the contract, and
(3) Employer violates basic notions of essential fairness.

- In assessing a procedural violation of the third type, the Arbitrator must assess the degree of the prejudice to the grievant and simultaneously the need to persuade the parties to follow the rules. Compliance with the rules not only benefits the individual but all employees for whom the contract is negotiated. Where explicit contract procedures are violated, the arbitrator is often compelled to set aside what may have been a substantively correct decision. However, where Employer failures are of a lesser nature, a different remedy is appropriate. Finding that the grievant had not been substantially harmed by the procedural violation, the arbitrator did not overturn his Grievant's dismissal. However, the arbitrator did award back pay: 105

- The arbitrator is disturbed by the employer’s failure to recognize the importance of its own rules with regard to the prompt investigation of incidents forming the basis for disciplinary actions. The arbitrator awarded back pay as a consequence: 106

- Arbitrators have 3 approach procedural violations:

(1) nullify the discipline
(2) modify discipline only if they prejudiced the grievant, or
(3) modify the discipline since procedural require menu are important, but leave some disciplinary v measure so as not obviate the disciplinary effect.

The arbitrator endorsed the third method: 108, 118

- The parties mutually agreed to language in the agreement dealing with notice requirements. To minimize the importance of this language would in effect subtract from or modify the terms of this agreement: 108

- Factors that can determine how an arbitrator handles procedural violations include:

(1) was the grievant's case prejudiced?
(2) was the violation one which violated the contract explicitly?
(3) was the violation an implicit violation of due process notions of fairness?
(4) was the violation a failure to follow the employer's own rules?

The presence of factor #1 requires the grievance be sustained. The presence of #2 usually requires the grievance be sustained. The presence of #3 and 4 require balancing interests. Often, the interest in a substantively correct decision must be weighed against the interest in ensuring fair procedure in the future: 109

- A prominent interest inherent in a labor management contractual arrangement which utilizes arbitration is that fair procedures be followed regardless of the substantive outcome: 109

- The arbitrator decided not to modify the discipline due to procedural violations noting that no pattern of abuse had been shown and that the violation had not been shown to be deliberate. She did note that the balancing of interests night require that a remedy be fashioned in a future case if violations reoccur to ensure future good faith: 109

- The arbitrator held that an adjustment of the remedy was necessitated by the failure of the employer to observe the letter and the spirit of the parties agreement on discoverable matters: 116

- The just cause standard is not necessarily satisfied by a substantial level of proof that grievant is guilty of the charges. By blatantly refusing to provide the union with relevant information, the employer's action is tainted with a procedural defect which necessitates a modification of the removal penalty: 118

- Even though the agreement does not provide a specific penalty for the violation (failure to furnish documents) the arbitrator cannot in clear conscience disregard language mutually agreed to by the parties. To minimize the importance of this language would subtract front or modify the terms of this agreement which is clearly outside the scope of this arbitrator's authority: 118

- Grievance was denied despite employers failure to comply with step 3 of the grievance procedure as
- Arbitrator would have overturned the dismissal because of employer's failure to abide by the 45-day time limit in the contract, but did not because of mitigating circumstances:

1. Employer's good faith belief that the union had waived the time limit,

2. The issue was not fairly raised at arbitration since it had not been raised in earlier steps, and

3. The removal was justified on the basis of offenses with regard to which the 45-day rule had not been violated:

- Where the employer had violated 24.04 by not providing, documents and 24.05 when the "appointing authority did not meet the deadline for submitting his disciplinary recommendation, the arbitrator gave no effect to these violations stating that the grievant's rights had not been prejudiced thereby:

- The arbitrator determined that the grievant was not prejudiced by the procedural defects in the Use of Force Committee's investigation. Consequently, the arbitrator refused to disturb the discharge. He offered two reasons. First, "in many . . . [arbitration] cases compliance with the spirit of such procedural requirements was held to suffice where the employee had not been adversely affected by failure of management to accomplish total compliance with the requirements." Second, there is precedent for refusing to disturb a discharge where the procedural requirements were not complied with even in spirit, but where the grievant was clearly guilty of a serious offense and had not been prejudiced:

- Arbitration is merely a method for determining a pre-existing dispute which the parties have been unable to resolve at earlier steps in the grievance process. The arbitration hearing is not the place for the presentation of new claims, although obviously a more thorough investigation prior to arbitration often surfaces evidence not theretofore known and additional arguments not thereto fore conceived by the parties. The essential facts supporting the claims of either party, however, should be revealed in the earlier stages of the grievance procedure, if such facts are known to the parties. In this particular instance, the grievant was aware of these facts (although the union was not). Whether the grievant's unwillingness to reveal the information was a consequence of his naiveté or an intentional act of subversion is irrelevant in terms of the due process ramifications. Both alternatives subvert the grievance process. With respect to the present infraction this Arbitrator must limit the previous analysis to the specific charges levied against the grievant. He was not charged with dishonesty but that does not mean that this due process infringement will not be factored into the equation when the propriety of the penalty is considered:

- Many arbitrators take the view that a due process violation by the employer necessitates setting the discharge aside. However, this arbitrator adheres to the view that it depends upon the particular circumstances, on a case, be case basis, as to whether the due process short-comings warrants voiding the discipline imposed without ever reaching the merits of the employer's reasons for the discipline. The seriousness of the violations and the adequacy of a remedy, short of voidance of the Employer's discharge action, are the touchstones for the disposition of any due process violations:

- The arbitrator held that the employer's due process violations were not so serious as to warrant the voidance of a removal without ever reaching the merits even though he found several violations including:

1. Failure of the employer to give 48 hour notice of the pre-disciplinary conference as required by the employer's self imposed rules.

2. Failure to allow the employee to review the evidence utilized in his case no later than at the pre-disciplinary meeting as is required by the employer's self imposed rules

3. Failure of the employer to include in the list of witnesses furnished to the union one of the witnesses it relied upon, and

4. Failure to produce witness statements, incident reports, and investigative reports until the time of the arbitration hearing.
- The employer's due process failures must be remedied. Having found on the merits of the case that the grievant's removal should be modified to a 60 day suspension, the arbitrator further reduced the suspension to 45 days in order to remedy the employer's due process failures: 192

- Arbitrators have taken several positions in discipline cases where the employer has engaged in procedural violations:

  1) that unless there is strict compliance with the procedural requirements the whole action will be nullified;

  2) that the requirements are of significance only where the employee can show that he has been prejudiced by failure to comply therewith; or

  3) that the requirements are important, and that any failure to comply will be penalized, but that the action taken is not thereby rendered null and void.

  The third approach is most common and this arbitrator concurs with it. It has the virtue of penalizing failure to comply with the contract but does not obviate all that has been done: 197

- The state cannot claim that the grievance may not be heard on its merits due to a procedural defect committed by the union when it has committed a procedural error itself: 203

- The discipline must be modified (but not eliminated) because the employer failed to comply with several contractual procedures mutually agreed to by the parties. Such a disposition recognizes that the offense has indeed been committed, that procedures have been violated, but does not declare the entire action a nullity: 220

- Even where the error does not significantly affect the result, to ignore the employer's breaches of the contract would be to excise the relevant sections form the contract. Thus the discipline must be modified even though discipline was warranted: 230

- The finding that the grievant did not commit the violation makes the procedural errors moot. The arbitrator de- to rule on issues which are moot and for which there are no readily available remedies: 240

- The arbitrator stated his preference for dealing with procedural violations by modifying the discipline. An employer must be penalized for failure to comply with the contract. On the other hand, the infractions engaged in by the grievant should not be disregarded: 270

- Even in abuse cases the grievant continues to have rights. First, they are entitled to a strict construction of burden-of-proof clause. The employer was obligated to prove its charges, and the employer had a legitimate claim to favorable findings from evidentiary inconsistencies. Second, the grievant has a right to expect the employer’s full adherence to procedural due-process requirements, especially those contained in the Agreement: 302

- The arbitrator found that issuance of a disciplinary grid does not meet the requirements of Section 24.04. The Agreement mandates that the employee and their representative “shall” be informed in writing of the possible form of discipline. The violation was not sufficient to set aside the grievant’s removal for abuse. The Union knew the type of discipline contemplated. The State’s technical violation of the Agreement did not affect the grievant’s rights under the Agreement of the ability of the Union to defend them: 306

- In an abuse case the arbitrator first looked at whether the procedural violations by the State were enough to set aside the grievant’s removal. The arbitrator found that the procedural violations did not affect the grievant or the Union so he proceeded to make a decision on the merits. After deciding that the State proved its charge of abuse the arbitrator could not modify the discipline under Section 24.01 of the agreement: 306

- Section 25.05 requires a final decision on disciplinary action as soon as possible not to exceed 45 days. The exception to the 45 -day time limit is in cases where a criminal investigation may occur and the employer decides not to make a decision of the discipline until after disposition of the criminal charges. This specific exception was intended to suspend the otherwise applicable time constraints when the results of a criminal investigation are unknown. By its terms, the exception is future is future oriented; when the criminal investigation is complete, it no longer “may occur” and the exception no longer applies. Because the employer took longer than 45 days
after the end of the criminal action, it was in technical violation of the provision: 307

- The State did not capriciously or arbitrarily delay its disciplinary action. The State did not subject the grievant to the hardship of a threatened penalty for 18 months and intentionally prevent the Union from collecting evidence to defend the grievant. The State dropped the matter for lack of evidence in 1988, and took it up again when new evidence came to light from an entirely different source. The delay makes it difficult for anyone to remember what happened and makes it impossible for the Union to refute the charges by placing the grievant somewhere else. In the absence of overwhelming evidence of guilt this decay in the quality of the evidence would be enough to overturn the removal: 317

- Citation of the ORC section defining abuse is a technical violation and is insufficient for overturning the removal for allegedly abusing a youth: 326

- If not for the employer’s violations of the Agreement and its own procedure the grievant’s removal would have been sustained: 326

- The arbitrator did not consider the Ohio Revised Code section defining abuse in his determination of just cause for the grievant’s removal. The employer citing this section is therefore not prejudicial to the grievant’s case: 328

- The Step 3 hearing was not held until almost four months after the grievance was received by Labor Relations. This delay is not conductive to the smooth running of the grievance procedure but this procedural violation is minimal and did compromise the rights of the grievant: 332

- The Superintendent’s procedural errors; failing to disclose the source of the information that the grievant was a felon, using a personal unofficial source to find the grievant’s criminal record, failing to carry out a full and fair investigation, and failing to attend the pre-disciplinary hearing without excuse were not enough to overcome the grievant’s conduct of falsifying information on his job application. The dismissal was upheld. The grievant was deemed dismissed until the date of the arbitration hearing when he finally was afforded his due process rights under Section 24 .04 : 354

- The Pre-disciplinary Hearing required by the agreement was held barely w week after the fighting incident, the findings of the hearing officer were transmitted the same day of the hearing and the discharge notice was issued only one day later. The Union was told that the witnesses it wanted to call at the pre-disciplinary hearing were out on a job. Based on testimony the fellow crew worker witnesses were at the garage, waiting to be called to testify if needed. These are procedural violations but they do not necessarily modify the discipline of the grievant: 357

- The grievant began his pattern of absenteeism after the death of his grandmother and his divorce. The grievant entered an EAP and informed the employer. He had accumulated 104 hours of unexcused absence, 80 hours of which were incurred without notifying his supervisor, and 24 hours of which were incurred without available leave. Removal was recommended for job abandonment after he was absent for three consecutive days. The pre-disciplinary hearing officer recommended suspension, however the grievant was notified of his removal 52 days after the pre-disciplinary hearing. The arbitrator found that the employer violated the contract because the relevant notice dates are the hearing date and the date on which the grievant receives notice of discipline. Other arbitrators have looked to the hearing date and decision date as the relevant dates. Additionally, the employer was found to have given “negative notice” by overlooking prior offenses. The arbitrator reinstated the grievant without back pay and ordered him to enter into a last chance agreement based upon his participation in EAP: 371

- The grievant attended a pre-disciplinary hearing for absenteeism at which his removal was recommended, but deferred pending completion of his EAP. He failed to complete his EAP and was absent from December 28, 1990 to February 11, 1991. The grievant was then requested to attend a meeting with a union representative to discuss his absence and failure to complete his EAP. The grievant was removed for absenteeism. The arbitrator found the grievant guilty of excessive absenteeism and prior discipline made removal the appropriate penalty. The employer was found to have committed a procedural error. Deferral because of EAP participation was found proper, however the second meeting was not a contractually proper pre-disciplinary hearing. No
reasons: 1

The employer removed the grievant for two reasons: 1) The grievant committed theft because he had been named as the supplier of checks that had been returned to the Bureau of Workers’ Compensation, to another state employee in order to cash the checks (see arbitration decision #370);

- The grievant worked in a Medical Records office when a new supervisor was hired in January 1985. The supervisor changed the office location and began to strictly enforce the work rules. The office layout was also change twice due to new equipment purchases. The supervisor also instituted a physician’s verification policy which was stricter than the previous policy. The grievant went on work related disability in February 1987. She received Disability Leave benefits and Workers’ Compensation. When these benefits expired she began working for a private employer. She received an order to return to work in July 1987 because of her other employment. The grievant refused to return to work under her prior supervisor. The grievant appealed her denial of further Workers’ Compensation benefits and lost, after which she contacted the facility to come back to work. The arbitrator found that the grievant failed to prove supervisory harassment or constructive discharge. All the supervisor’s acts were within her scope of authority and related to efficiency. The removal was timely because the three year delay was caused by the grievant’s pursuit of her workers’ compensation claim in state court. The arbitrator held that the grievant abandoned her job and denied the grievance: 384

- The grievant was employed as a Salvage Processor who was responsible for signing off on forms after dangerous goods had been destroyed. He was removed for falsification of documents after it was found that he had signed off on forms for which the goods had not been destroyed. The arbitrator found that despite minor differences, the signature on the forms was that of the grievant. The employer was found to have violated just cause by not investigating the grievant’s allegation that the signature was forged, and by failing to provide information to the union so that it could investigate the incidents. The employer was found not to have met its burden of proof despite the grievant’s prior discipline: 398

- The employer removed the grievant for two reasons: 1) The grievant committed theft because he had been named as the supplier of checks that had been returned to the Bureau of Workers’ Compensation, to another state employee in order to cash the checks (see arbitration decision #370);

- While on disability leave in October 1990 the grievant, a Youth Leader, was arrested in Texas for possession of cocaine. After his return to work, he was sentenced to probation and he was fined. He was then arrested in Ohio for drug-related domestic violence for which he pleaded guilty in June 1991 and received treatment in lieu of a conviction. The grievant was removed for his off-duty conduct. The grievant’s guilty plea in Texas was taken as an admission against interest by the arbitrator and the arbitrator also considered the grievant’s guilty plea to drug related domestic violence. The arbitrator found that the grievant’s job as a Youth Leader was affected by his off-duty drug offences because of his co-workers’ knowledge of the incidents. The employer was found not to have violated the contract by delaying discipline until after the proceedings in Texas had concluded, as the contract permits delays pending criminal proceedings. No procedural errors were found despite the fact that the employer did not inform the grievant of its investigation of him, nor permit him to enter an EAP to avoid discipline. No disparate treatment was proven as the employees compared to the grievant were involved in alcohol related incidents which were found to be different than drug related offenses. Thus, the grievance was denied: 410

- The grievant was hired as a Tax Commissioner Agent and had received a written reprimand for
poor performance while still in his probationary period. He was assigned a new supervisor who developed a plan to improve his performance, however the grievant continued to receive discipline for poor performance and absenteeism, including a ten day suspension which was reduced pursuant to a last chance agreement. It was discovered after the last chance agreement had been made, that prior to the signing of the last chance agreement, the grievant had committed other acts of neglect of duty. The grievant was removed for neglect of duty. The arbitrator held that a valid last chance agreement would bar an arbitrator from applying the just cause standard to a disciplinary action and that the agreement made by the grievant was valid. It was also found that there existed hostility between the grievant and his supervisor, the employer stacked charges by basing discipline on events which occurred prior to the last chance agreement but the grievant was awarded 4 weeks back pay because of the employer’s failure to comply with the union’s discovery requests: 412

- The grievant was a Therapeutic Program Worker who was removed for abusing a client. The client was known to be violent and while upset and being restrained, he spat in the grievant’s face. The grievant either covered or struck the client in the mouth and some swelling and a small scratch were found in the client’s mouth. The grievant had served a 70 day suspension for similar behavior. The arbitrator found that the employer committed procedural violations by not disclosing the incident report and the client’s progress report despite the employer’s claim of confidentiality. The employer’s witnesses were found to be more credible than the grievant. The grievance was denied: 414

- The grievant was an Investigator with the Department of Commerce who had been suspended for 5 days for failing to follow his itinerary for travel and filing incorrect expense vouchers. The grievant’s itinerary indicated that he would be in Toledo on a Friday, and he submitted expense vouchers for the trip, however it was discovered that he worked at home during the day in question. The arbitrator found that the employer violated Section 24.04 by failing to provide witness lists and documents and not answering the grievant’s letters. Section 25.08 was not found to be violated. The employer’s selection of the pre-disciplinary hearing officer was unwise because she had an interest in the outcome and that the investigation was incomplete and unfair. The arbitrator also found that the grievant’s itinerary was a contemplated itinerary and that he had informed his supervisor of schedule changes, however the grievant was AWOL as there was no provision for working at home. Disparate treatment was suspected by the arbitrator, who also noted that the grievant exhibited a contemptuous attitude towards management. The suspension was reduced to a 1 day suspension: 430*

- The grievant was removed for unauthorized possession of state property when marking tape worth $96.00 was found in his trunk. The Columbus police discovered the tape, notified the employer and found that the tape was missing from storage. The arbitrator found that the late Step 3 response was insufficient to warrant a reduced penalty. The arbitrator also rejected the argument that the grievant obtained the property by “trash picking” with permission, and stated that the grievant was required to obtain consent to possess state property. It was also found that while the employer’s rules did not specifically address “trash picking” the grievant was on notice of the rule concerning possession of state property. The grievance was denied: 432

- The grievant was custodian for the Ohio School for the Blind who was removed for the theft of a track suit. The arbitrator looked to the Hurst decision for the standards applicable to cases of theft. It was found that while the grievant did carry the item out of the facility, no intent to steal was proven; removal of state property was proven, not theft. The arbitrator found no procedural error in that the same person recommended discipline and acted as the Step 3 designee. Because the employer failed to meet its burden of proof, the removal was reduced to a 30 day suspension with the arbitrator retaining jurisdiction to resolve differences over back pay and benefits: 439

- Ultimately, the arbitrator, while troubled by a seeming lack of urgency on the part of the State given the contract’s clear requirement of timely initiation, does not find it necessary to rule on the timeliness issue due to the resolution of the remaining issues: 481

- The procedural violation was harmless error and did not require that the grievant's removal be set aside. The grievant received actual notice of his termination 38 days after the agency head signed
the removal order. Therefore, even though the grievant did not receive timely notice of management's decision to discipline, the contract was not violated: 5 06**

- The Union introduced a procedural defect even though they had stipulated that there were no procedural defects. If there is evidence that such a defect has substantially prejudiced the grievant, the Arbitrator would not necessarily be bound by such a stipulation. In this case the grievant was not substantially prejudiced: 5 76

- The Union contended that the employer waived its right to argue arbitrability by accepting and processing a grievance that was untimely filed. However, the Arbitrator concluded that the Union's waiver argument was not valid, because the Department of Rehabilitation and Correction clearly raised its procedural objection at the third step meeting. Thereafter, the Department discussed the case on its merits and that does not constitute a waiver: 5 82

- The Arbitrator held that the grievance was not arbitrable based on the fact that it was not timely filed and was not in accordance with Article 25 of the contract: 5 97

- The grievant, accused of misusing a State vehicle, admitted the misconduct and waived his right to a pre-disciplinary hearing. He subsequently received a ten-day suspension. The Union contended that management committed a procedural violation by waiting nearly one year after the conclusion of the criminal investigation to initiate the discipline. The Arbitrator held that management complied with the contract by waiting until after the disposition of the criminal investigation: 5 98

- The Arbitrator found that neither the notice of disciplinary action nor the timing of the discipline presented a procedural violation. The disciplinary notice provided the grievant with both the work rule that was violated and the time frame in which the violation occurred. Furthermore, the Employer initiated discipline as soon as the victim raised concerns about the grievant’s behavior. In either case, the Employer’s actions did not violate the disciplinary procedures outlined in the contract: 6 18

- The Arbitrator found that the fifteen-day suspension violated the parameters of Article 24.05, as evidenced in the arbitral record. He noted that the grievant’s suspension did not begin until fifty-five days after the pre-disciplinary hearing, and the record contained no explanation or justification for the delay. The Arbitrator wished to make it clear that the fifteen-day suspension would have been sustained but for the procedural violation of the Employer. 7 12

- The Arbitrator found that though the Employer had just cause to discipline the grievant; the penalty imposed was excessive because the evidence did not support it. The Arbitrator cited notice, proof and procedural defects, as the basis for the modification of the grievant’s suspension from ten (10) days to four (4) days. 7 15

**Procedures**

- Discipline in presence of other employees

- 24.05 violated, technically at least, when captain delivered order of removal to employee in the presence of other employees: 1
- Where there was no effort to humiliate grievant, and no evidence that grievant was publicly humiliated, violation of 24.05 does not warrant setting aside a removal, or modification thereof: 1

- Disregard for procedure: 4.106

- Failure to notify of true charge: 1.05

- Failure to provide documents: 5.3, 81.83.1.09.1

- Failure to appear at hearing: 1.20, 1.6t;

- Failure to raise issue at lower step: 5.8

- Forty-five day time limit: 1.0, 31, 36.47

- Investigation, absence of proper: 1.67
- Preventing grievant from attending step 3: IN

- No effect where grievant not prejudiced: 1.8

- Objection should be raised at hearing: 1.8

- Report altered after signing: 1.09

- Where removal order cites rule that was fit effect at time of offense and also a rule that became effective after offense, arbitrator did not set aside discipline because he accepted the employer's
contention that it did not rely on the rule that was not in effect: 1

- Timeliness: 83, 1 26

- The requirement for timeliness will become stricter later in the contractual relationship than it is early to the relationship: 1

- Where there is an unenviable backlog in grievances, it is "fair to infer" that employees would have come to expect some delays in the imposition of discipline: 1

- In the absence of explicit timeliness rules provided for in 4 3.02, to the contrary, the issue is whether the lapse of time impaired grievant's ability to defend himself against the charge: 1

- Where grievant received early notice that he would be disciplined, failure of management to immediately initiate the disciplinary procedure, the early notice under tunics any contention that the grievant's opportunity to defend himself was eroded by the lapse of time: 1

**Profanity**

- 1 -day suspension is commensurate with the offense of uttering profanity to patient: 1 04
- An employee is responsible for the commonly accepted meaning of the words he elects to use provided there is no contradiction by the circumstances. Similarly, he is also subject to the proscribed consequences for such words. It may be that the familial insult rather than the racial aspect was the primary stimulus of Smith's reaction but that does not neutralize the statement as a racial slur: 1 5 4

- The grievant was our 1 1 -year employee with no prior discipline. While the arbitrator must hesitate to substitute her judgment for management's, the imposition of a ten day suspension in this incident is not commensurate with the offense nor progressive with regard to this grievant. On the other hand, horseplay is dangerous on the job and abusive language beyond shoptalk can provoke reactions which also cause unsafe conditions and potential injury: 1 82

- Where the grievant had said that "white shirts" are "pricks", not knowing that supervisors were present, the arbitrator concluded that this was a relatively minor violation of the rude against abusive and obscene statements since

(1) the parties had stipulated that coarse and profane language is ill normal use by the employees at the wash site.

(2) the word "prick" is relatively mild on the coarse/profane Richter scale,

(3) only one sentence was uttered, and

(4) only two persons were present and the grievant did not know they were present: 200

The employer is entitled to insist on some standards of civility in the comments made to its supervisors (and the Union as well for its members): 200

- Where the grievant was given a 5 day suspension for a second profanity offense, the minimum allowed by the disciplinary grid, but another employee had been given a written reprimand for a second profanity offense, the arbitrator found disparate treatment. The arbitrator did not accept the employer's attempt to distinguish the cases by saying that the grievant's offense was premeditated whereas the other offense was an emotional outburst. The grievant did not lie in wait for the supervisor but acted on an impulse of the moment: 200

- While the arbitrator does not condone the use of abusive language, the penalty of discharge was excessive and unduly harsh given the circumstances. The employee had reason to suspect discrimination, was asking for a reason for the departure from past procedure, but overreacted in his discussion with the supervisor: 202

- The grievant's supervisor had orders which he passed on to the grievant. The grievant had planned the work for the day such that the new order was inconsistent with his plan. One party had to yield. Given the grievant's position in the hierarchy it was his duty to yield and to do so respectfully. He violated that duty by uttering some swearwords together with the statement "you are afraid of your job." While shop talk is common in highway maintenance work, even between crewmen and supervisors, and is usually harmless, language directed specifically at another human being, if said in anger and contempt, crosses the line into abuse: 277
- Discipline was imposed upon the grievant for just cause. The State provided eyewitness testimony that the grievant was observed standing beside the open salvage door when no loading was in progress. Given the grievant’s continued dishonesty in the face of credible eye witnesses and his extensive disciplinary record (which including numerous reprimands for dishonesty and neglect of duty, failure to carry out work assignment, willful disobedience of direct order and violations of agency policies and procedures) the removal was commensurate with the offense: 4 93

**Progressive Discipline**

- Different rules violated: 1 36

- Sequence of disciplinary action

- 24 .02 does not require that forms of discipline be imposed in the same sequence they are listed in 24 .02: 1

- Generally speaking, arbitrators will require progressive discipline if it is mandated by tine contract: 7

- "Malum in se" offenses are generally excluded from progressive discipline. These are serious offenses such as "theft, striking a foreman, and malicious destruction of company property." Absenteeism caused by taking sick leave when employee's sick leave was used up and by failure to submit proper leave request forms is not a "malum in se" offense. Thus, the agreement's progressive discipline provision requires that grievant receive a suspension prior to being removed for such an offense: 7

- The Agreement's progressive discipline provision requires that a suspension precede a removal except for "malum in se" offenses: 7

- Where grievant had been given progressive discipline for absenteeism which would have justified a removal if grievant engaged in further absenteeism, grievant was not removed for just cause when removed for failure to follow correct procedures in supplying physicians statements. That earlier violations and last violation were disciplined under the general phrase 'neglect of duty" does not change this requirement: 24

- Where previous disciplinary actions were not appealable because not trader the contract, the arbitrator must take this into account: 24

- 4 counselings, 1 written reprimands, and a suspension all for absenteeism constitute sufficient progressive discipline to justify a removal for absenteeism: 24

- Not true that each and every different infraction of a minor rule must start at position # 1 in progressive discipline. Then employee could violate rules repeatedly as long as the employee carefully chose a different infraction each time: 26

- Employer may reasonably start with suspension or removal where severity of offense merits such discipline: 30

- Dismissal must be used only as a last resort except where offense is so serious that arbitrator cannot in good conscience return the employee to work-. 33

- Attempt to deposit public tax money in private account justifies dismissal even where no prior discipline: 33

- Arbitrator reduced two day and five day suspension, to single five day suspension since they had been imposed so close together that it was unclear that grievant had made aware of the full impact of his earlier conduct before being disciplined the second time: 34

- Well established concept: requires employer not to discharge errant employee until established that employee is not likely to respond to a lesser penalty: 36

- Where offense is extremely serious, the progressive discipline requirement is outweighed by management’s need to deter others from like conduct: 36

- Accepting payment for time absent is fraud against the state which, when committed on several occasions, is so serious that offender can be discharged for the first offense: 36

- Progressive discipline includes section 24 .05 requirement that penalty be commensurate with offense. That require- meat supports the notion that discharge call be used after first offense when offense is serious: 36
- The thought that progressive discipline must be triggered by the same type of event is erroneous. Progressive discipline is for the purpose of forewarning the employee that any substandard conduct violating facility rules will be subject to greater discipline. (Note: Union does not agree: case law to the contrary): 37

- Major offenses do not necessarily trigger progressive discipline: 37

- Some merit lies in the argument that the prior discipline was pre-contractual and decided under a lesser standard: 4 4

- The parties clearly intended a sequence of events [disciplinary actions] to occur. Verbal reprimand, Written reprimand, suspension, termination: 4 6

- Where a written reprimand has been given, the next stage of discipline (suspension) is appropriate even though no verbal reprimand was ever issued: 4 6

- The parties did not intend that previous disciplinary action would be ignored: 4 6

- Two instances of neglect of duty by absences without leave within less than six months constitute just cause for dismissal: 4 7

- Employer is not barred from presenting evidence that work records merited discipline when no discipline was imposed: 4 7

- Where grievant had received oral and written reprimands, and a 3 day suspension all for the same offense, progressive discipline is present when grievant given 5 day suspension for the same offense: 5 0

- It is well supported that some behaviors are so serious that they warrant discipline out of the steps of progressive discipline. Allowing residents of the department of youth services to engage in gratuitous violence is such an offence: 83

- While violation was the sort that justifies discharge on the first offence, since this grievant, from day one, admitted his fault and agreed to correct his behavior, if discipline is to be corrective rather than punitive, the application of progressive discipline would seem to have been ideal in this case: 83

- The parties have agreed that, for the purpose of applying progressive discipline, pre-contract disciplinary actions are to be considered under the same guidelines as post contract actions (24 .06): 91

- Arbitrator found dismissal for excessive use of force to be progressive where grievant had previously been suspended 5 days for sleeping on duty (serious offense in prison setting): 1 05

- 25 .08 specifically provides that not only documents but witnesses reasonably available from the employer be made available for arbitration: 1 06

- Progressive discipline is not violated where grievant has had numerous disciplines for absenteeism, but had been removed before his previous discipline, a suspension, had been served: 1 1 1

- Where grievant's only previous discipline had been a verbal reprimand, the arbitrator held that a three day suspension for unauthorized use of a state vehicle was more consistent with progressive discipline than a 5 day suspension: 1 1 3

- In a sexual harassment case where grievant had no disciplinary record whatsoever, the arbitrator held that the state should have leeway to decide whether progressive discipline in this situation should begin with a suspension rather than a reprimand: 1 1 7

- Progressive discipline does not require that previous disciplines must be for the same sort of violation to be taken into account. The aim of progressive discipline is to give grievant notice that any misconduct will give rise to greater discipline: 1 1 9

- 24 .02 first states that discipline shall be commensurate with the offense and then cites the progressive discipline schedule. The obligation of the employer is to determine if the usual steps of progressive discipline can be applied in this case by weighing the two elements of 24 .02 (seriousness of the offense vs. the requirement of progressive discipline). In this case, the seriousness of the offense (absence without leave and deliberate failure to call in despite knowing the procedure) takes precedence and, thus, the discipline did not violate 24 .02 even though it skipped steps of progressive discipline: 1 20
- The grievant had no prior discipline. Since offenses were minor, progressive discipline schedule must be followed, it follows that verbal reprimand is the appropriate penalty: 1 21

- Proof that the grievant is guilty as charged does not automatically justify the penalty. The arbitrator is required to weigh the discipline against 3 interrelated contractual standards:

1) Discipline must follow the principles of progressive discipline.

2) Discipline must be commensurate with the offense and not solely for punishment.

3) Discipline must be for just cause: 1 23

- Pre-contractual discipline is not to be counted within the contractual disciplinary progression. (It is manifestly unreasonable to assume that a pre-contractual discipline would have been sustained under contractual requirements). However, pre-contractual discipline is relevant to the question of whether the employer is required to follow discipline schedule of 24 .02. Implicit in the language of 24 .02 is the mutual recognition that some offenses are so severe as to permit bypassing disciplinary steps. (The contract calls for adherence to "the principles of progressive discipline" rather than directly to the schedule.) Pre-discipline is relevant in two ways to determining the seriousness of the offense.

(1) It shows that grievant had notice that he would be disciplined for the wrongful conduct.

(2) Long service will count as a mitigating factor only if it is long service with a good work record: 1 23

- Where the arbitrator had reduced a previous discipline since the present discipline was imposed, the arbitrator reduced the present discipline so that it was consistent with progressive discipline and the revised prior discipline: 1 36

- The arbitrator ruled that progressive discipline had been followed where grievant had missed 4 1/2 weeks per year due to related disciplines over the last three years. The current violation was a removal for tardiness: 1 38

- Progressive discipline for striking a supervisor cannot be based upon an earlier sexual harassment violation because they are not similar violations: 1 73

- It is a well established arbitral axiom that once an employee is given notice of an adverse entry in his record and the employee fails to file a grievance even if nothing precludes a filing, such entries are typically accepted on their face without a review of their merits: 1 76

- The short times between disciplines was not held against the employer on the grounds that the employee had nut had opportunity to change his behavior. The grievant had received notice of the possible disciplinary consequences of his conduct. It was not the employer's actions that engendered the disciplinary action but the grievant's activity which necessitated immediate action. Although corrective discipline is an admirable goal, the circumstances surrounding this case forced a procedural overlapping of the disciplinary process. The employer did not, however, overlap the offenses and the associated consequences 1 81

- The grievant was an 11-year employee with no prior discipline. While the arbitrator must hesitate to substitute her judgment for management's the imposition of a ten day suspension lift this incident is not commensurate with the offense nor progressive with regard to this grievant. On the other hand, horseplay is dangerous on the job and abusive language beyond shoptalk can provoke reactions which also cause unsafe conditions and potential injury: 1 82

- Prior warnings and suspensions are both important cornerstones in the progressive discipline process because they serve as formal reprimands and provide an employee with notice. Warnings have two closely related functions. A reprimand may become part of an employee's total disciplinary record which may eventually be used to justify more severe penalties for future offenses. They not only place an employee on notice that his conduct is unacceptable, it also places the employee on notice that he can no longer count on a clean disciplinary record if the employee commits another act of misconduct, and that more severe discipline is likely to follow. Suspensions serve as a critical aspect in the progressive discipline process because loss of wages is a more effective form of notice than a simple warning: 1 84
- Establishing the proof facet of just cause does not necessarily mean that a disciplinary action is totally proper and justified. Other considerations must also be evaluated in determining whether the administered discipline is proper. Typically, progressive discipline requires that at least one disciplinary suspension be imposed before removal is justified. This majority position on suspension is based upon notice and rehabilitation factors. Proper notice is important because it demonstrates or affords a tangible indication to the employee that the employer will follow through with its warning. Wild respect to the rehabilitation factor, Arbitrator Dworkin aptly characterized this principle when he stated, "Discharge is warranted only in such cases where corrective measures appear to be futile." Normally, futility can only be established when all other measures, including suspension, are logically applied in a progressive fashion: 1 85

- There are some exceptions to the majority view that a suspension must precede removal.

  (1) Where the employer has established a formal "warnings only" policy.

  (2) Where the employer has been patience personified and the employee has failed to respond to prior counseling and reprimands.

  (3) Where the employee has engaged in a "malum in se" offense: 1 85

- While the employer should be commended for the attempted counseling interventions, counseling does not serve as a substitute within the progressive discipline process for formal discipline. The formal discipline is necessary in order to put the employee on notice that continued misconduct would result in more severe corrective measures: 1 85

- Progressive discipline requirements were satisfied where the prior discipline, a suspension, had been imposed but had not been served. The events that gave rise to the current discipline had intervened. The grievant was provided ample notice that the state regarded tier attendance as unsatisfactory: 1 86

- The supervisor who initiated discipline admitted that he discounted the 14-month improvement in the grievant's record because he concluded "had he been Grievant's supervisor previously, he would have disciplined the grievant for absenteeism offenses during that period." This conclusion violates basic notions of fairness implicit in "just cause". A member of management is bound by the employer's records and actions. A manager cannot arbitrarily and capriciously impose what amounts to "ex post facto" punishment to remedy what in his mind were past management failures: 1 89

- Removal of an employee after 28 years of good service with no prior discipline is unreasonable, arbitrary and capricious 1 90

- It is true that at some point the extra chances end and one infraction serves as a final trigger to bring about removal. Similarly, progressive discipline contemplates the rehabilitation of poor performance and does not require indefinite withholding of discharge, where an employee proves incorrigible. But there must be a final trigger. An employee cannot be arbitrarily removed, without a trigger- Management cannot simply cite an employee's record as the basis for discharge: 1 91

- Theft of employer property ranks as one of the roost serious offenses and thus discharge for the first offense, absent extraordinary mitigating circumstances is generally upheld. A moderately long period of employment and a record unblemished by prior discipline are not the sort of extraordinary mitigating circumstances needed: 1 93

- The arbitrator rejected the employer’s contention that falsification of an employment application is an extreme infraction justifying removal on the first offense. The arbitrator noted that the employer's rule specified a penalty of between 5 days and removal. The rule did not indicate that certain types of falsification should automatically result in removal while lesser penalties are, deemed appropriate in other circumstances. If the employer viewed such a distinction as highly material if should have done the following: specify such a distinction in its rules; argue the distinction more vigorously and consistently at the hearing; apply the distinction consistently across similarly egregious circumstances: 1 97

- Where the state had not previously disciplined the employee for her absenteeism, and the state argued that the grievant never provided any
indicating that progressive discipline could be corrective, the arbitrator held that the state is unable to know that the grievant would not respond to positively to corrective discipline since it had never been applied: 198

- Progressive discipline does not entail a requirement that an employee repeat the same violation before the penalty can be made more severe. The unreasonable consequence not of such a requirement would be that an employee could not be severely disciplined after breaking many rules as long as the employee takes care never to violate the same rule twice: 205

- The 6-day suspension was not progressive given that the only previous discipline for the same offense was a verbal reprimand. The arbitrator resisted the employer's attempt to class other absenteeism related offenses together with the tardiness offense by calling them all neglect of duty. Nevertheless, the arbitrator only reduced the penalty to a 4-day suspension because of

1. the grievant's record of tardiness which the employer had attempted to deal with patiently through verbal warnings and counseling and
2. the grievant's repetition of dissimilar violation: 209

- When an employee disappears and makes certain that he cannot be contacted by management, he may be held to have quit his job voluntarily. The obligation to create open channels for two-way communication is that important. When an employee abandons his/her job, management has no need to apply corrective discipline: such action would be an excuse in futility. All it has to do is identify the voluntary quit, accept it as fact, and remove the employee from payroll: 213

- Theft of employer's property is one of those offenses for which discharge may be warranted on the first offense: 235

- The requirements in 24.02 and 24.05 that discipline be commensurate with the offense anticipates that discharge may be warranted on the first offense for certain offenses: 235

- Where the arbitrator found that the number of absentee violations in such a short period reflect a serious problem, she found that while a number of shorter suspensions were possible before imposition of the 15-day suspension, the 15-day suspension was not clearly unreasonable given the events: 236

- The initial discipline occurred 13 days before the last. The absence of warning or other discipline prior to removal contributed to the building of a record. This defect prevented the grievant from having an opportunity to correct his conduct prior to the imposition of removal penalty: 241

- The concept of progressive discipline entails a predictable weakening of the employer's endurance of repeated rule violations: 272

- Suspension is a very severe penalty used at the later stage of the progressive disciplinary process
to provide an employee with a narrowing opportunity for remediation: 272

- Where the grievant called in late, and was going to be tardy before he called in again saying he would not be in at all because of a fall (for which he never supplied a suitable physician's statement), the arbitrator determined that a ten day suspension was fair and progressive since the grievant's last punishment for tardiness was a 3 day suspension and the "watch period" had not passed: 274

- Given a history of treating sleeping on duty as an offense subject to the progressive disciplinary approach, the union reasonably expected the employer to grant the grievant a chance to learn from his mistake. The employer violated 24 .02 by failing to follow principles of progressive discipline. This grievant had no prior discipline. In the past the employer had suspended rather than removed employees with spotty disciplinary records: 276

- The contractual philosophy is to conserve jobs and require the employer to exercise every reasonable effort to correct misconduct: 287

- There is exception to the general rules of just cause. In the case of employees dismissed for proven patient/client abuse the arbitrator does not have the authority to modify the termination of the employee committing such abuse: 287

- The concept of just cause entails progressive discipline, that is, the inherent right of an employee to be specific informed of perceived deficiencies and to be afforded a reasonable opportunity to rectify the problem: 288

- The sequence form verbal to written reprimand, suspension and termination is indeed a progressive discipline approach and directly follows the chain contemplated by Article 24: 288

- Discipline, commensurate and progressive discipline, is designed to have a “corrective” educational effect, not just on the recipient but on all employees. If the discipline meted out to employees differs or varies arbitrarily or with discrimination among employees the corrective effect is lost. Moreover the “notice” elements of procedural fairness is also destroyed. An employee cannot be on “notice” of consequences, if the consequences vary unreasonably or arbitrarily: 296

- The arbitrator decided there was not just cause for termination of the grievant for abuse. The grievant did fail to report his own use of physical force and to report another employee’s abusive actions. Although these are serious violations removal would not follow the Agreement’s progressive and commensurate discipline criteria: 308**

- Although alteration of payroll records is a serious offense one which the grievant received a three-day suspension for in the past, removal is neither commensurate nor progressive. There were mitigating factors. The grievant was a nine-year employee who does quality work and is highly skilled. The grievant also trained others and received various citations for his work: 31 8**

- While progressive discipline is the general goal, the Union and the employer both know that certain offenses are so serious that progressive discipline is unwarranted. Drug related offenses in the prison setting fit this criteria. The claim that bringing drugs onto state property lacks the proper nexus between the job and the offense is dismissed. The drugs were readily available to the grievants from the parking lot and thus readily available to the inmates. Grievants had a clear opportunity to transport drugs inside the prison walls: 334

- The grievant had received up to a ten day suspension and had been enrolled in two EAP programs. She was late to work for the third time within a pay period. The arbitrator found that just cause did exist for the removal as the grievant had received four prior disciplinary actions for absenteeism and the employer had warned her of possible removal. The fact that the employer reduced the most recent discipline did not lead to the conclusion that the employer must start the progressive discipline process over: 376

- The grievant was a thirteen year employee who developed absenteeism problems. In just over one year he received discipline up to and including a fifteen day suspension. Between December 1 990 and March 1 991 the grievant had eighteen unexplained absence-related incidents for which he was removed. The arbitrator found that the employer proved that the grievant failed to account for his activities at work and that
progressive discipline was followed. The arbitrator noted that while the grievant has a great deal of freedom while working, he must follow the employer’s work rules. The grievance was denied: 381

- The grievant was upgraded through Class Modernization to a Systems Analyst 2 position. She received an adequate mid-probationary rating but received a verbal reprimand for poor performance afterwards. She alleged supervisory harassment and was transferred to another supervisor who also rated her below average in all six categories. Her performance failed to improve and she received further discipline up to and including the ten day suspension which is the subject of this grievance. She was charged with failure to follow a direct order, breach of security for failing to turn her computer terminal off at the end of the day, and various items relating to proper completion of work assignments. However, the employer failed to send a Step 3 response to the Union. The arbitrator found that the employer did violate section 24 .02 by not sending a Step 3 response to the union, however there was no harm to the grievant. The employer proved that the grievant was guilty of the acts alleged and that there was no supervisory harassment. Progressive discipline was followed (a 10 day suspension following a 1 day suspension) but the procedural violation warranted a reduction to a seven day suspension: 386

- The grievant was a Correction Officer who had an alcohol dependency problem of which the employer was aware. He had been charged twice for Driving Under the Influence, which caused him to miss work and he received a verbal reprimand. The grievant was absent from work from May 18th through the 21st and was removed for job abandonment. The arbitrator found that the grievant’s removal following a verbal reprimand was neither progressive nor commensurate and did not give notice to the grievant of seriousness of his situation. It was also noted that progressive discipline and the EAP provision operate together under the contract. The grievant was reinstated pursuant to a last chance agreement with no back pay hand the period he was off work is to be considered a suspension: 413

- The grievant was removed for failing to report off, or attend a paid, mandatory four-hour training session on a Saturday. The grievant had received 2 written reprimands and three suspensions within the 3 years prior to the incident. The arbitrator found that removal would be proper but for the mitigating factors present. The grievant had 23 years of service, and her supervisors testified that she was a competent employee. The arbitrator noted the surrounding circumstances of the grievance; the grievant was a mature black woman and the supervisor was a young white male and the absence was caused by an embarrassing medical condition. The removal was reduced to a 30 day suspension and the grievant was ordered to enroll into an EAP and the arbitrator retained jurisdiction regarding the last chance agreement: 422

- The grievant was a LPN who had been assaulted by a patient at the Pauline Lewis Center and she had to be off work due to her injuries for approximately 1 month. When she returned she was assigned to the same work area. She informed her supervisor that she could not work in the same work area, and was told to go home if she could not work. The grievant offered to switch with another employee whom she identified, but the supervisor refused. She then told her supervisor she was going home but instead switched work assignments. The grievant had prior discipline including two 6 day suspensions for neglect of duty. The supervisor concluded that the grievant was given a direct order to work in her original work area. The grievant erroneously believed that switching assignments was permitted. Despite the grievant’s motivation for her actions, the grievant’s prior discipline warranted removal, thus the grievance was denied: 424

- The grievant was removed after 13 years service from her position with the Bureau of Disability Services for unapproved absence, conviction of a drug charge, and failure to report the drug charge as required by the state’s Drug-Free Workplace Act of 1988. The grievant had a history of alcohol problems. She was also involved with a co-worker who, after the relationship ended, began to harass her at work. She filed charges with the EEOC and entered an EAP. The former boyfriend called the State Highway Patrol and informed them of the grievant’s drug use on state property. An investigation revealed drugs and paraphernalia in her car on state property and she pleaded guilty to Drug Abuse. She became depressed and took excessive amounts of her
prescription drugs and missed 2 days of work. She was admitted into the drug treatment unit of a hospital for 2 weeks. She was on approved leave for the hospital stay, but the previous 2 days were not approved and the agency sought removal. The arbitrator found that while the employer’s rules were reasonable, their application to this grievant was not. The Drug-Free Workplace policy does not call for removal for a first offense. The employer’s federal funding was not found to be threatened by the grievant’s behavior. The grievant was found to be not guilty of dishonesty for not reporting her drug conviction because she was following the advice of her attorney who told her that she had no criminal record. The arbitrator noted that the grievant must be responsible for her absenteeism, however the employer was found to have failed to consider mitigating circumstances present, possessed an unwillingness to investigate, and to have acted punitively by removing the grievant. The grievant’s removal was reduced to a 10 day suspension with back pay, benefits, and seniority, less normal deductions and interim earnings. The record of her two day absence was ordered changed to an excused unpaid leave. The grievant was ordered to complete an EAP and that another violation of the Drug-Free Workplace policy will be just cause for removal: 429

- The Employer did not initiate each disciplinary action as soon as reasonably possible, and failed to provide any justification for merging separate infractions. Progressive discipline could not be followed because the grievant was never promptly charged with any violation. The Arbitrator inferred that the Employer hoped to develop a critical mass resulting in discharge: 444

- The Employer failed to follow progressive discipline. The grievant received two written reprimands in the past for similar violations concerning neglect or negligence concerning patient care, and therefore, the removal was modified to a three-day suspension: 447

- The removal is set aside, and a 20-day suspension is imposed. The Employer had just cause to discipline the grievant, but removal following a one-day suspension is not progressive unless the offense was so serious as to warrant removal. In this case, the removal was not progressive, commensurate nor fairly applied: 477

- The Arbitrator rejected the Union’s argument that it was not progressive discipline to remove the grievant because his driver’s license was suspended, he failed to get a modification order allowing limited driving privileges, and he was unable to perform his job: 486

- The grievant, who did not properly attend to an inmate patient and falsified a report concerning the incident, committed serious violations and deserves to be disciplined, but there is not just cause for removal under the circumstances. This was a first offense and Section 24.02 of the contract clearly provides for progressive discipline. As such, the grievant may not be removed at this state of the disciplinary process: 501

- The grievant was removed from her position with the Department of Rehabilitation and Correction for dishonesty and failure to cooperate with an official investigation. The arbitrator felt that removal was inappropriate for a first offense. As a result, the grievant was reinstated with no loss of seniority, but without back pay: 504

- Article 29 authorized management to take corrective and progressive disciplinary action for the unauthorized use and abuse of sick leave. This discipline includes but is not limited to removal: 512

- The State upheld the principles of progressive discipline by giving oral and written reprimands and suspensions for violations of the call in policy. The State then executed an EAP agreement as a conditional discharge. The grievant was eventually discharge for failing to comply with the terms of the EAP agreement: 516

- In a case involving a grievant who was removed, the arbitrator ruled that although a discharge is the most severe penalty, it is warranted in this case because the grievant committed three serious offenses and had eleven reprimands on his record: 517

- The State unjustly removed the grievant for neglect of duty where the grievant was given a list of tasks to be completed for a major inspection without an explanation, an indication of priority, or a deadline. Because the problem resulted from a lack of communication between the grievant and
her supervisor and the grievant's prior disciplinary history was completely unrelated to the instant offense, the penalty was too severe: 5 1 9

- In light of the grievant's length of service, the arbitrator converted a removal for a 30 day suspension: 5 1 9A

- The grievant was essentially a very honest employee with 18 years of service and a minimal disciplinary record. Because she was actively seeking treatment for her drug dependency and because her drug dependency was primarily responsible for non-compliance with the initial EAP agreement, her removal was neither just nor progressive: 5 20

- In a case involving a grievant who was disciplined on December 21 for a violation which occurred on August 2, the arbitrator found that the State reasonably initiated and followed through with the disciplinary process. Management reasonably notified the grievant that a pre-disciplinary hearing would be held and met the time limitations in the contract. The main delay was caused by the fact that the grievant was suspended during part of the interim because of previous violations: 5 21

- In a case involving a grievant who had been progressively disciplined through twelve violations of work rules for absence and tardiness, the State had just cause to issue one five-day suspension followed by one ten-day suspension. The grievant had been put on notice prior to the five-day suspension that his problems needed to be corrected by the fact that he had received prior discipline. Thus, even though most of the infractions that led to the ten-day suspension occurred while the five-day suspension was being processed, the grievant was not denied an opportunity to correct his behavior between the two disciplinary actions in question: 5 22

- Management properly removed a grievant who (1) failed to sign in for a break which he took during the first hour after reporting to work in violation of agency policy and (2) was AWOL for more than three consecutive days. First, the grievant was aware of the policy, the Union never challenged it as being unreasonable and the grievant failed to provide a rational excuse for taking the unauthorized break. Second, the agency's awareness of the grievant's incarceration in no way curtailed its right to expect employees to work their scheduled hours and be regular in their attendance: 5 23

- The grievant was properly removed where he admitted that he unethically and intentionally used the Bureau's facilities and confidential client records for personal profit. Moreover, the grievant's offer to make restitution, which was motivated more by a desire to avoid criminal prosecution than by any real feelings of remorse, did not serve to mitigate the offense. Given the severity of the offense, the grievant's long length of service and discipline-free work record were insufficient to mitigate the misconduct in the instant case, and the State did not violate the principle of progressive discipline: 5 25

- In light of the grievant's disciplinary record, including four attendance-related infractions, the grievant received progressive discipline and his removal was for just cause. The grievant's prior discipline progressed from verbal reprimand, to written reprimand to suspension according to the WRPH's policy, and according to this policy, the next step was removal. Although it was undisputed that the grievant was given a copy of and training on the tardiness policy, the grievant continued to arrive at work late and refused to record the time he actually arrived at work: 5 26

- The grievant's actions were serious enough to constitute just cause. She admitted that she entered numerous false social security numbers into the computer each Saturday for three months. Such actions constitute falsification of records and deliberate sabotage of the new extended hours program. These actions caused substantial harm to customers who were unable to schedule appointments on Saturday: 5 27

- The arbitrator ruled that removal of the grievants was commensurate with the severity of their misconduct and did not violate the principles of progressive discipline due to the grievants' relatively short-term work histories, their failure to immediately confess, and the malicious intent underlying their actions: 5 33

- The grievant was removed because he (1) took an inmate who needed emergency medical care to a hold and signed him in instead of taking the inmate to a waiting stations as he was directed to do, (2) refused to immediately transport this inmate to the hospital, (3) refused to report to the
lieutenant's office to explain his combative behavior, and (4) refused, in an obscene manner, to work mandatory overtime. Consequently, the arbitrator found that the grievant was discharged for just cause and in a manner consistent with progressive discipline. In fact, the arbitrator held that where an offense is extremely serious, a discharge may occur without progressive discipline, and noted that the instant case would have merited such a result. The grievant's activities were so outrageous that, when compounded with the grievant's prior record, the Employer was left with no alternative except to remove the grievant: 5 4 0

- The arbitrator stated that, in evaluating an Employer's disciplinary action, he must look only to whether the Employer took into account all items necessary to render the discipline. The arbitrator may not alter the Employer's decision based on his own subjective opinion. The discipline in this case was found to be well within that provided for by the work rules and required by the standards of progressive discipline: 5 4 2

- Under Article 24 of the Contract “disciplinary action shall not be imposed upon by an employee except for just cause.” Furthermore, the discipline shall be progressive and it shall be commensurate with the offense.” However, if the offense is of a very serious nature, progressive discipline may not be appropriate. When the employer removes an employee, an Arbitrator cannot overrule this employer’s decision unless there is good and sufficient reason to do so. In this case there were such reasons: 5 7 1
The Arbitrator held that the employer has the burden of proof in these matters. A six-day suspension was meted out to the grievant and from the grievant’s history of discipline and the evidence presented, it appeared to the Arbitrator that the suspension was proper. The argument that progressive discipline must be followed at each step for every type of rules infraction is not accurate. The fact is that discipline for serious cases of insubordination and abuse directed toward patients and supervisors does not necessarily have to follow the progressive discipline rules as set out in the contract: 5 7 2

- Since the grievant's last discipline for a similar offense was a fifteen day suspension, the Arbitrator determined that the appropriate, progressive discipline for the unexcused absence in question was a twenty day suspension rather than a twenty-five day suspension: 5 8 8

- The grievant was discharged for making threatening, intimidating, coercive and abusive language toward a number of mentally ill inmates. The Arbitrator determined that any progressive discipline would be futile because the grievant lacked “actual” remorse as evidenced by his testimony and demeanor at the arbitration hearing. Therefore, a suspension component of discipline is not required and the removal was for just cause: 5 8 9

- Considering the fact that the investigation was complete when the indictment was returned, the Arbitrator concluded, pursuant to Contract Article 24, that the employer had the option to terminate the grievant’s Administrative Leave and, if circumstances warranted, the grievant could have been returned to work. In the instant case the grievant could not return to work. Therefore, it was appropriate for the employer to terminate the grievant’s Administrative Leave: 5 9 1

- The Arbitrator did not concur with the employer's view regarding the application of the abuse language contained in Article 24.01. It is inappropriate to infer a charge of abuse when the employer, regardless of the reasons, fails to include this charge in its own guidelines and/or removal order. If the employer was so inclined to clothe the present proceeding with an abuse allegation, it should have raised the issue at the pre-disciplinary stage. A stipulated issue containing a just cause phrase is totally inappropriate if one wishes to raise an abuse allegation: 5 9 5

- The Arbitrator held that the grievant’s repeated violations were so flagrant and appalling as to leave no room for corrective discipline. Even without the lascivious aspects of this case, the Arbitrator emphasized that by repeatedly placing not only herself but the other employees on her shift in dangerous situations, the grievant demonstrated that she could not perform the fundamental duties of her position. Progressive and corrective discipline, therefore, was not appropriate: 6 0 4

- The Arbitrator emphasized that progressive discipline was reserved for violations that are relatively minor in nature and that disciplinary measures are only required to be commensurate with the seriousness of the conduct in question.
Accordingly, the Arbitrator held that operating a state vehicle at excessive speeds while under the influence of alcohol was not a minor incident that would justify progressive discipline but was serious enough to provide just cause for the grievant’s removal: 605

- The Arbitrator concluded that the employer met its obligation of progressive discipline under the terms of the contract. The grievant received four letters of reprimand, two one-day suspensions, one three-day suspension, one five-day suspension, two ten-day suspensions, and one fifteen day suspension for absenteeism prior to her removal. However, the Arbitrator held that the spousal abuse suffered by the grievant warranted her reinstatement provided that she participates in an Employee Assistance Program: 609

- The Union argued that the grievant should have received at least one disciplinary suspension prior to removal. The Union further asserted that discharge without a prior suspension is only appropriate in limited circumstances: One, where the employer has a formal “warnings only” policy; two, where the employer has been “patience personified” and the employee fails to respond to reprimands; or three, where the employee is engaged in “malum in se” offense, a serious offense such as theft, striking a supervisor, or malicious destruction of company property: 613

- The Arbitrator agreed with the Union’s position that the State violated both the policy of the Gallipolis Developmental Center and Section 24.02 of the Agreement by depriving the grievant of progressive discipline. The Arbitrator stated that despite this violation, the grievant’s removal was justified due to the serious nature of the grievant’s misconduct on September 15, 1995: 615

- The Arbitrator held that the grievant was not entitled to progressive discipline because his conduct was frequent, humiliating and unwelcome. All of these factors have been recognized as being applicable in determining if sexual harassment is serious enough to constitute a “malum in se” offense—i.e. an act that is implicitly wrong—and warrant removal. The Arbitrator found that the grievant’s conduct was sufficiently serious and rejected the application of progressive discipline in this case: 618

- The Arbitrator found that the Department established the kind of aggravating circumstances through the offer of a favor to an inmate that warrants removal, even for a first offense, and no progressive discipline would be necessary. 702

The Arbitrator noted that the grievant had worked for a relatively short period of time and though he had a good work record, it did not outweigh the severity of the offensive. 702

During her brief employment with the State of Ohio, the grievant accumulated a number of disciplines: an oral reprimand, a written reprimand, a three-day suspension and a five-day suspension. Violations included misplaced files, incomplete claims and claims which were processed improperly. The employer had been aware of the grievant’s poor work performance for some time and the various disciplines were its attempts to correct the problem. The arbitrator found that the progressive disciplines which increased in severity did nothing to correct the grievant’s performance. The employer could not have reasonable confidence that the grievant’s work would reach an acceptable level. The discipline imposed was justified. 904

The Arbitrator found that the Employer exercised sound discretion given the fact that the Grievant had failed to respond in a meaningful way to prior progressive corrective action steps (particularly to a fifteen day suspension) in an effort to improve her dependability. The Grievant also failed to present any convincing mitigating factors that would excuse her late call in or her one hour and twenty-four minute absence from work. The Arbitrator did not agree that the Grievant was treated in a disparate manner, that a misstated year on a letter had any impact on the timing of the investigation, and that there was bias when the investigator was a witness to the Grievant’s calling in late. 928

The Arbitrator found that the Employer applied the principles of progressive discipline and no evidence existed that the Employer’s conduct was arbitrary, unreasonable or capricious. The Grievant was given a ten-day suspension for failure to notify the employer of an absence within the 30 minutes required. Grievant also was absent without pay on one day, assuming he had not exhausted his FMLA leave after an extended disability leave. The Union considered the ten-day suspension punitive and asked the Arbitrator
to consider medical reasons as extenuating circumstances warranting mitigation and to lessen the discipline. The grievant’s history of FMLA use, plus four prior disciplines involving the exact issue of this grievance, failed to convince the Arbitrator that the grievant’s conduct was an honest mistake. In considering mitigation for a long-term employee (24 years), quality of service must also be weighed. The grievant engaged in repeated violations of the work rules and seemingly made no effort to change his conduct, despite progressive discipline. Discipline imposed was reasonable and fair in an effort to correct his conduct. The discipline was issued for just cause. 95 4

When the Grievant organized, planned, and promoted a work stoppage she violated rule 30B. The Arbitrator believed she developed the plan and solicited the participation of other employees. When the grievant organized a work stoppage in the face of an approaching winter storm, she engaged in “action that could harm or potentially harm . . . a member of the general public” and violated Rule 26. Grievant violated Rule 4 by interfering with the investigation of the work stoppage. Testimony from other witnesses showed that the grievant was not truthful in her accounts of the events. The Arbitrator believed the state conducted a full and fair investigation. The Arbitrator did not believe the grievant was the object of disparate treatment. Leaders of work actions are identified and discharged, while employees playing a lesser role receive less severe penalties. The Arbitrator did not believe the state failed to use progressive discipline. In the case of very serious misconduct an employer is not required to follow the usual sequence of increasingly severe discipline. Mitigating factors of long service, good evaluations, and behaving in a professional manner in her work as a union steward did not offset the seriousness of the Grievant’s misconduct. The Arbitrator concluded that when the Grievant organized a work stoppage in the face of major winter storm she provided the state with just cause for her discharge. 95 6

Neither the Employer nor the Union were entirely right or wrong in the case. The Grievant’s discipline did not stand in isolation. She had 29+ years of service with the state with a satisfactory record until 2004. In addition, she had been diagnosed with sleep apnea and begun treatment. Under the circumstances her discharge could not stand. The Employer acted properly in administering progressive discipline to the Grievant; on the other hand, the Grievant was ill. Because she had called-off the two days prior to the day in question she had a reasonable belief, albeit erroneous, that the Employer knew she would not report. As a veteran of many years of service she should have known that she should call in. She had been subject to recent and increasingly serious discipline. Therefore a make-whole remedy could not be adopted. 964

The Grievant admitted that he failed to make all of the required 30-minute hallway checks and a 2:00 a.m. headcount and then made entries in the unit log indicating he had done so. The Arbitrator held that just cause existed for discipline. Since the Grievant committed a serious offense less than two years after being suspended for six days for the same offense, the Arbitrator held that the principles of progressive discipline had been followed. In addition, the Arbitrator held that long service cannot excuse serious and repeated misconduct. It could be argued that an employee with long service should have understood the importance of the hallway checks and headcount more than a less senior employee. The Union argued that since the Grievant was not put on administrative leave, it suggested that his offense was not regarded as serious. The employer, however, reserved the use of administrative leave for cases where an employee is accused of abuse. The Union also argued that the time it took to discipline the Grievant should mitigate against his termination. The Arbitrator held that the investigation and pre-disciplinary hearing contributed to the delay and the state made its final decision regarding the Grievant’s discipline within the 4 5 days allowed. 978

In the period leading up to his dismissal the Grievant was having issues with members of his household and his own health. The Grievant did not call in or show up for work for three consecutive days. The Arbitrator held that employers unquestionably have the right to expect employees to come to work ready to work when scheduled. However, just cause also demands consideration for the surrounding circumstances of a violation, both mitigating and aggravating. The Arbitrator found the circumstances in this case did not indicate a “troubled employee” such as one suffering from addiction or serious mental illness. Rather, the Grievant was an otherwise good employee temporarily in crisis (because of circumstances beyond his control) and unable to help himself. This case, in which professional intervention may eventually rehabilitate the employee, was ripe for corrective discipline rather than discharge. The Grievant received a thirty-day
The Arbitrator held that, management demonstrated by a preponderance of the evidence that the Grievant violated General Work Rules 4.1.2, 5.1.2, and 5.1.2, and therefore, some measure of discipline was indicated. Mitigating factors were the Grievant’s three years of tenure, satisfactory performance record, and no active discipline. In addition, the Agency established only one of the three major charges that it leveled against the Grievant. Also, nothing in the record suggested that the Grievant held ill will against the Youth. The Arbitrator held that removal was unreasonable, but only barely so, in light of the Grievant’s poor judgment and his less than credible performance on the witness stand. The primary reason for his reinstatement is that the Grievant never intended to harm the Youth. The Grievant was reinstated under very strict conditions: he was entitled to no back pay or other benefits during the period of his separation, and he was reinstated pursuant to a two-year probationary plan, under which he shall violate no rule or policy involving any youth. Failure to comply will be grounds to remove the Grievant. 995

The Arbitrator concluded that more likely than not the Grievant transported a cell phone into the institution within the period in question, violating Rule 30, by using it to photograph her fellow officers. The Arbitrator held that the Agency clearly had probable cause to subpoena and search 1 3 months of the Grievant’s prior cell phone records. The prospect of serious present consequences from prior, easily perpetrated violations supported the probable cause. The Arbitrator held that the Grievant violated Rule 38 by transporting the cell phone into the institution and by using it to telephone inmates’ relatives. The Arbitrator held that the Grievant did not violate Rule 4 6(A) since the Grievant did not have a “relationship” with the inmates, using the restricted definition in the language of the rule. The Arbitrator held that the Grievant did not violate Rule 24. The Agency’s interpretation of the rule infringed on the Grievant’s right to develop her defenses and to assert her constitutional rights. The mitigating factors included: the Agency established only two of the four charges against the Grievant; the Grievant’s almost thirteen years of experience; and her record of satisfactory job performance and the absence of active discipline. However, the balance of aggravative and mitigative factors indicated that the Grievant deserved a heavy dose of discipline. Just cause is not violated by removal for a first violation of Rules 30 and 38. 1 003

The Arbitrator held that there was ample evidence that the Grievant failed to take care of a resident of the Ohio Veteran’s Home. The Grievant left the resident, who was unable to take care of himself, unattended for five and one-half hours. In light of the Grievant’s prior discipline, the Arbitrator found the removal to be progressive. The Union made a procedural objection to the use of video evidence on a CD, because it was not advised of the CD’s existence until less than a week prior to the hearing. Since the employees and the Union are aware that video cameras are placed throughout the institution, the Arbitrator ruled that the CD could be used; however, he reserved the right to rule on its admissibility in relation to the evidence. The Union’s objection to the use of video evidence was sustained as to all events that occurred in a break room. The Arbitrator found little independent evidence of those events and did not consider any of that evidence on the video in reaching his decision. 1 007

The Grievant acted contrary to the Employer’s training and directives and admitted he acted inappropriately. The Youths made verbal comments that were tied in to their combative behavior. The Arbitrator found that there were grounds for discipline, but did not think removal was warranted. Considering the total evidence, the discipline was not progressive and
needed to be modified. The removal was changed to a forty-five day suspension. 1 01 5

While on a hunting trip and staying in Mt. Vernon, the Grievant was arrested for operating a vehicle while impaired. The Grievant became very belligerent and verbally abusive. A newspaper report regarding the incident was later published in Mt. Vernon. The Arbitrator held that the Employer had just cause to remove the Grievant. The Arbitrator was unwilling to give the Grievant a chance to establish that he was rehabilitated. Some actions or misconduct are so egregious that they amount to *malum in se* acts—acts which any reasonable person should know, if engaged in, will result in termination for a first offense. Progressive discipline principles do not apply in these situations and should not be expected. The Employer established a nexus for the off-duty misconduct. The Grievant’s behavior harmed the reputation of the Employer. It would be difficult or impossible to supervise inmates who may find out about the charges and their circumstances. This would potentially place other officers in jeopardy; an outcome the Arbitrator was unwilling to risk. 1 025

The Arbitrator held that the Employer had just cause to terminate the Grievant. The Grievant’s disciplinary record exhibited several progressive attempts to modify his behavior, with the hope that progressive penalties for the same offense might lead to positive performance outcomes. As such, the Grievant was placed on clear notice that continued identical misconduct would lead to removal. The Arbitrator also held that the record did not reflect any attempt to initiate having the Grievant enroll in an EAP program within five days of the pre-disciplinary meeting or prior to the imposition of discipline, whichever is later. This barred any attempts at mitigation. 1 030

The Arbitrator held that BWC had just cause for removing the Grievant, since the Grievant was either unwilling or unable to conform to her employer’s reasonable expectation that she be awake and alert while on duty. The agency and the Grievant had entered into a settlement agreement, wherein the Grievant agreed to participate in a 180-day EAP. However, the Arbitrator found that the sleeping while on duty was a chronic problem which neither discipline or the EAP had been able to correct. The Grievant raised the fact that she had a common aging problem with dry eyes and was taking a drug that made the condition worse. However, she never disclosed to the supervisor her need to medicate her eyes. The Arbitrator held that this defense amounted to post hoc rationalization and couldn’t be credited. The Arbitrator felt that a person on a last-chance agreement for sleeping at work and who had been interviewed for an alleged sleeping infraction would take the precaution of either letting her supervisor know in advance about this treatment, take the treatment while on break and away from her work area, or get a witness. 1 033

The Arbitrator held that despite the Grievant’s 19 ½ years of service, her extension of her break, and more importantly, her dishonesty in the subsequent investigation, following closely her ten-day suspension for insubordination, gave him no alternative, but to deny the grievance and uphold the removal. The Arbitrator rejected the argument that the removal was inconsistent with progressive discipline because dishonesty and insubordination are different offenses. The Arbitrator found this contention contrary to the accepted view of Arbitrators regarding progressive discipline. Also, the agency policy stated that “discipline does not have to be for like offenses to be progressive.” 1 04 0

Promotion

- **ORC section 1 24 .1 5 does not apply to promotions:** 1 4 7

- **Promotion is defined in the Administrative Code, section 1 23:1 -4 7-01 as ”the act of placing an employee in a position, the classification for which contains a higher salary range than that previously held:** 1 4 7

- **Where,**

  (1) as a matter of policy, a promotion is not deemed to be finally approved until the director signs the personnel action,

  (2) the promotions are not always approved, and

  (3) the computer log of the promotion did not indicate that the action was final until after the director had signed, but

  (4) the person promoted received retroactive pay to an earlier date,
the arbitrator ruled that the promotion occurred when the director signed the promotion: 1 4 7

- Section 1 7.03 is violated if the employer posts a notice for an opening but the posting does not list all of the qualifications which the employer actually requires when filling the position: 1 7 0 (vacated but under appeal)

- Where the employee's classification changed, his job title changed, his duties changed from those of one classification to another, the arbitrator held that the employee occupied a new position even though the position control number (PCN) did not change. The PCN is nothing more than a number assigned by the employer. It may designate a position but does not define one. A position is defined by the functions and duties which comprise it. The employer's argument that the position remained because the agency decided to assign the same PCN is circular and flies in the face of reason. The demotion placed the employee factually into a new position no matter what PCN was assigned to him: 2 4 2

- Among the rights of Management set forth in Article 5 of the Contract is the exclusive authority to determine the personnel by which governmental operations are to be conducted. This vested right, together with the authority to declare or not declare job openings under 1 7.02, accorded the agency the discretion to vacate the position and not fill it again: 2 4 2

- Where the employer filled a vacancy with a non-bargaining unit employee and without following contractual job- procedures, the arbitrator determined that the remedy should be that the employer pay, to the most senior person in category (A) of 1 7.05, the difference between that persons earnings and the earnings that person would have collected if the person had been promoted to the position for period that the position was wrongfully filled 2 4 2

- The grievant signed a letter accepting his current position which stated that he did not have the right to bid for a position in District 1 1: 2 9 0

- There are at least two plausible interpretations of Article 1 7.04. Appendix J was virtually undiscussed in negotiations. The majority of the exhibits support the State's position that the grievant was a Central Office member and not a member of the Northeast Office that would allow him to bid on a job posting or promotion there. Since the interpretation of “within” can be read several different ways the arbitrator fell back on the past practice of the Agency. In the past an employee given bidding rights in the Central Office, District 1 3 would not be allowed to bid for a position in District 6. The permanently placed in this District so the grievant was not “within” either District 1 1 or the Northeast region permanently. The grievance was also given notice that his position was no longer a District 1 1 position. On the original acceptance form he wrote in his own hand the condition “with bidding rights in District 1 1.” This condition was not approved and the grievant later signed an acceptance form that did not include this condition. There have been no changes since the grievant signed this form that would lead the grievant to believe he now has a right to bid in District 1 1: 2 9 0

- It was decided that the grievant was not a new State employee but she was a new employee for the agency. According to the Civil Service rules, employees for the State maintain certain benefits when they move from job to job, but the Union did not represent specific language showing that an employee moving from one state agency to another must always move at the same or greater wage rate. The new agency considered the grievant a new hire and it was generally accepted that she had a 1 20-day probationary period and presumably after successful completion, she would move a step per Section 36.02 of the Agreement. The grievant’s claim that she merely transferred to the new agency was not supported. Article 1 7 of the Agreement defines promotions as moving to a higher pay range and a lateral transfer as a movement to a different position at the same pay range. It does not specify that a lateral transfer from one agency to another agency within the State must be at the same step within the same pay range. The employer did not
transfer the grievant she applied for a vacant position: 360
- ODOT posted a vacant Equipment Operator 2 position. The grievant and others bid on the vacancy, however two applicants also had filed job audits which were awarded prior to the filling of the vacancy. The vacancy was canceled because of the job audits. The arbitrator found the union’s pre-positioning argument arbitrable because the grievant would otherwise have no standing to grieve. Managerial intent to pre-position was found to be possible even if committed by a lead worker. The arbitrator also found that job audits are a second avenue to promotions and not subordinate to Article 17 promotions. The grievance was, thus denied: 367

- The employer posted a Statistician 3 position which the grievants and other individuals bid for. The two grievants had eighteen and thirteen years seniority, while the successful applicant had only one year seniority. The employer contended that the grievants did not meet the minimum qualifications for the position and the successful applicant was demonstrably superior. The employer was found to have the burden of proving demonstrable superiority which was interpreted as a “substantial difference.” Demonstrable superiority was found only to apply after the applicants have been found to possess the minimum qualification. Also, the arbitrator stated that if no applicant brings “precisely the relevant qualification” to the position, the employer may promote the junior applicant if a greater potential for success was found. The arbitrator found that the employer proved that the junior employee was demonstrably superior and the grievance was denied: 382

- During the processing of several grievances concerning minimum qualifications, #393**, 397**, a core issue regarding the union’s right to grieve the employer’s established minimum qualifications was identified. The arbitrator interpreted section 36.05 of the contract as permitting the union to grieve the establishment of minimum qualifications. He explained that the minimum qualifications must be reasonably related to the position, and that the employer cannot set standards which bear no demonstrable relationship to the position: 392**

- The grievant applied for a posted Tax Commissioner Agent 2 position but was denied the promotion. She was told that she failed to meet the minimum qualifications, specifically 9 months experience preparing 10 column accounting work papers. The grievant was found to have experience in 12 column accounting work papers which were found to encompass 10 column papers. Additionally, the employer was found to have used Worker Characteristics, which are to be developed after employment, in the selection process. The grievant was found to possess the minimum qualifications and was awarded the position as well as any lost wages: 393** (see 392**)

- The grievant applied for a posted Word Processing Specialist 2 position and was denied the promotion. The employer claimed that she did not meet the minimum qualifications because she had not completed 2 courses in word processing. The grievant was found not to possess the minimum qualifications at the time she submitted her application. The fact that she was taking her second word processing class cannot count toward her application; she must have completed it at the time of her application. Additionally, business data processing course work cannot substitute for word processing as the position is a word processing position: 394** (see 392**)

- The grievant applied for a posted Programmer Analyst 2 position and was denied the promotion. The employer claimed that she did not possess the required algebra course work or the equivalent. The arbitrator found that because the grievant completed a FORTRAN computer programming course, she did possess the required knowledge of algebra. The minimum qualifications allow alternate ways of being met, either through course work, work experience, or training. The grievance was sustained and the grievant was awarded the position along with lost wages: 395** (see 392**)

- The grievant applied for a posted Microbiologist 3 position in the AIDS section position and was denied the promotion because she failed to meet the minimum qualifications. The successful applicant was a junior employee who was alleged to have met the minimum qualifications. The arbitrator found that the junior applicant should not have been considered because the application had not been notarized, and it was thus incomplete at the time of its submission. The arbitrator also found that the employer used worker characteristics which are to be developed after employment (marked with an asterisk) to
determine minimum qualifications of applicants. Lastly, neither the successful applicant nor the grievant possessed the minimum qualifications, however the employer was found to have held this against only the grievant. The arbitrator stated that the employer must treat all applicants equally. The grievant was awarded the position along with any lost wages: 396** (see 392**)

- The grievant applied for a posted Microbiologist 3 position in the Rabies section and was denied the promotion because the employer found that she failed to possess the minimum qualifications. Neither the successful applicant nor the grievant possessed the minimum qualifications for the position but this fact was held only against the grievant. The arbitrator stated that the employer must treat all applicants equally. The arbitrator found that the grievant did possess the minimum qualifications and that the requirement for rabies immunization and other abilities could be acquired after being awarded the position. The grievant was awarded the position along with any lost wages: 397** (see 392**)

- The resignation of an OBES Claims Examiner 2 created a vacancy which the employer did not post, but instead transferred in a Claims Examiner 2 from an office outside the district. The transferred employee received a new Position Control Number, but not the one vacated by the employee who resigned. A violation of the contract was conceded by the employer and the sole issue was the appropriate remedy. The arbitrator ordered the position in question to be vacated and posted for bids. The transferred employee was allowed to remain in the position until the status of her application was determined. If she fails to obtain the position she occupied, the employer was ordered to place her back into the office which she had left so as to prevent any lost wages due to the transfers. If a person other than the transferred employee receives the position, that employee must be made whole for any lost wages and benefits: 399

- The grievant had over 7 years seniority and applied for a posted vacancy. She did not receive the promotion which was given to a more senior employee from the agency despite the fact that she was in Section 1 7.04 applicant group A (1 7.05 of 1 989 contract) and the successful bidder was in group D. The employer stated that the grievant failed to meet the minimum qualifications and the successful bidder was demonstrably superior. The arbitrator held that Article 1 7 established groupings which must be viewed independently. Additionally, the contract applies the demonstrably superior exception only to junior employees. The employer violated the contract by considering, simultaneously, employees from different applicant groups and applying demonstrable superiority to a senior employee. The arbitrator found that the grievant met the minimum qualifications for the vacant position, but she had since left state service. The grievance was sustained and the remedy was the lost wages from the time the grievant would have been awarded the position until she left state service: 4 05

- A General Activity Therapist 2 position was posted for which the grievant bid. The posting listed a valid water safety instructor’s certificate as a minimum qualification. The grievant did not possess the certificate and an outside applicant was selected. The arbitrator found that the employer improperly posted the position by using a worker characteristic that doesn’t have to be acquired until after the employee receives the job. While the arbitrator cautioned that employees must act timely to become qualified, the employer can only hold bidders to minimum qualifications required by the contract. The grievance was sustained and the grievant was awarded the position with back pay: 4 18

- The Department of Natural Resources determined a need for more Geologist 4 employees and that all employees in the groundwater division would be classified as geologists. Geologist positions were posted in ODNR offices but in the grievant’s office the most senior Environmental Engineer was reassigned to a Geologist 4 position. The reassigned employee testified that her job responsibilities had changed since the reassignment. The arbitrator found that the employer used the reassignment as a disguised attempt to disrupt the seniority benefits of the bargaining unit. It was stated that the crucial factor is the job duties, not the name attached, and that supervision of others was a substantial and significant change. The grievant was awarded the position retroactively with the employer ordered not to recoup any additional wages earned while she was wrongly reassigned: 4 19

- The Department of Natural Resources posted a vacancy and accepted applications through June 28, 1 989. The applications were evaluated
through August, and a selection was made in September 1, 1989. The grievant would have no grievance rights if the 1986 agreement controlled the entire process, but would if the 1989 agreement controlled due to his section 17.05 (1989 agreement) applicant group status. The arbitrator found that critical elements of the selection process were performed under the 1989 agreement, thus it controlled the matter and the grievance was held arbitrable, (the right to grieve arose under the 1989 agreement upon notification of non-selection). The employer was ordered to select from applicants grouped pursuant to the 1989 agreement: 4 23

- The Bureau of Motor Vehicles posted a vacancy for a Reproduction Equipment Operator 1 position. The employer chose a junior employee over the grievant claiming that he failed to meet the minimum qualifications. The arbitrator found that the employer improperly used the semantic distinction between retrieval, the grievant’s present position, and reproduction, what the posting called for, rather than the actual job duties to determine whether the grievant met the minimum qualification. The arbitrator stated that both consist of making copies of microfilm images on paper. The grievant was found by the arbitrator to possess the minimum qualifications, however the employer was found to not have completed its selection process as the grievant had not been interviewed. The arbitrator ordered the selection process re-opened pursuant to Article 17: 4 27

- The grievant was an Auto Mechanic 2 who had been assigned on an interim basis as an Auto Mechanic 3 from June until September 1, 1989 when he was placed back into his former position due to poor performance. The employer posted the Auto Mechanic 3 position when it became vacant in January 1, 1990; the grievant bid but the promotion was awarded to a junior employee. The arbitrator found that the grievant possessed the minimum qualifications found on the class specification. Section 17.05 was interpreted to also require proficiency in the minimum qualifications found on the position description. Due to the grievant’s performance while assigned on an interim basis, the arbitrator found that the employer had not acted in bad faith, that no purpose would be served by allowing a probationary period to prove the grievant’s proficiency, thus the grievance was denied: 4 28

- The Bureau of Workers’ Compensation posted a vacancy for a Word Processing 1 position. The grievant, who had 3 years seniority, was not selected. A person who had worked as a student was chosen and in effect was a new hire. The arbitrator stated that applicants must possess and be proficient in the minimum qualifications for the position. The Position Description requires course work or experience in word processing equipment. The grievant’s application does not show that she met this requirement, thus she was found not to meet the minimum qualifications for the position posted. The grievance was denied: 4 37

- The State improperly commingled bidders categorized under both Article 17.05 (A) and (E) in the interview process for two System Analyst I positions. Those in (A) must be evaluated and determined unqualified before consideration of applicants under (E) takes place. Agency discretion in scheduling interviews only exists within each subsection’s group of bidders: 4 5 7

- Senior applicants do not have to be equally or better qualified than other applicants. They must merely be qualified. Therefore, if there are one or more qualified bidders within the subsection pool under consideration, the Employer has the obligation to select the most senior, even if he or she is not the best qualified, except where the Employer can show that a junior bidder from the same subsection is demonstrably superior: 4 5 7

- It is the Union’s burden to show that senior bidders are qualified: 4 5 7

- The State may not hold bidders to qualifications it desires, only to qualifications that are required. The State may not go beyond what it sets forth on the specific position description and generic classification specification as requirements for the position. The applicants should not have been measured against additional requirements stated in the posting: 4 5 7

- The parties negotiated that there is to be no step above Step 6 in Pay Range 7, and so, the grievant, even though he was promoted from the top step of Pay Range 27 to the top step of Pay Range 7, is not entitled to a four percent increase as specified in Article 36.04. Given the conflict between 36.04 which grants a four percent increase upon promotion, and the pay schedule,
the pay schedule rules. To create an additional step would be an act outside the authority of the Arbitrator: 4 62

- The grievant, a Utility Rate Analyst 2, lacked the necessary familiarity and proficiency with the computer software as required by the position description for the Utility Rate Analyst 3. Consequently, the grievant had no contractual right to the position: 4 87

- Even if the grievant met and was proficient in the minimum qualifications, the State could properly have used the “demonstrably superior” language in Article 1 7.06 to select the junior applicant over the more senior grievant: 4 87

- Because of the different training the members of each department received and the specialized duties and responsibilities of the Utility Rate Analyst 3, it was virtually impossible for a candidate working outside the Forecasting Department to complete with a candidate with inside knowledge and experience. Despite the unfair results, the State did not violate the contract: 4 87

- Applicants (and grievant) for vacant positions must demonstrate that they actually meet each requirement set forth in a job posting and/or position description to meet the minimum qualifications which will secure them an interview for a promotion: 5 1 1

- In a case involving a senior male employee who applied for a position alongside a junior female employee, the State's decision to promote the junior female employee because she was demonstrably superior due to affirmative action considerations was consistent with the language in Contract Article 1 7.06. The language in Article 1 7.06 is clear. Affirmative action is a criterion for demonstrably superior and, so long as the employee meets the minimum qualifications, considerations based on affirmative action, acting alone, can justify the promotion. At such point, the burden of proof shifts to the Union to demonstrate that the standard was improperly applied: 5 4 1

- The grievant was not awarded a position she applied for, because she did not meet the minimum qualifications contained in the classification specification and position description. The individual who was awarded the position had “demonstrably superior” qualifications: 5 4 5

- The Arbitrator denied a grievance in a case where the grievant, although she had seniority, did not possess the minimum qualifications. Therefore, a junior applicant with the required qualifications was promoted to the position of Insurance Contract Analyst 3: 5 67

- The Arbitrator determined that the grievant did meet the requirements as set forth in Part Two of the minimum class qualifications for the position of Claims Service Specialist, and therefore the grievant should be promoted to that position: 6 1 4

The grievant was employed for over 19 years in the Information and Technology Division of the Ohio Bureau of Worker’s Compensation as a Telecommunications Systems Analyst 3. He, along with five other employees, applied for a promotion to the position entitled Information Technology Consultant 2. Another applicant was awarded the position despite the fact that the grievant had more seniority and had a bachelor’s degree that was pertinent to the position. The successful applicant did not meet the minimum qualifications for the job and lied on his application when he stated that he possessed an undergraduate core curriculum in computer science and an undergraduate degree in math. The arbitrator recognized that management has wide discretion in managing its workforce and selecting employees for promotion. However, “the Employer is governed by the rule of reasonableness and the exercise of its management rights must be done in the absence of arbitrary, capricious, or unreasonable discretion.” The arbitrator found that the Employer’s decision to promote the successful applicant to a position for which he did not meet the minimum requirements was arbitrary. 863

The Arbitrator held that the Employer’s evaluation process was reasonable. It could not be determined that it was tainted with favoritism or discrimination. It was not administered with hostility to the Grievants. In all respects, its use was permitted by the Agreement. The selection procedure used by the Employer for these positions had been the subject of intense scrutiny and development. The element of subjectivity was reduced by the manner in which the Employer utilized the interview. By using the interview process the Employer did not violate the
agreement. The ranking of and scale assigned by the Employer to education and experience was not arbitrary. Applicants were required to take a test to determine the factors of “qualifications, experience, and education.” The test had been given previously and had been taken by some applicants in the past. The action of the Employer was exceptionally generous to applicants in that the applicants were awarded the higher of the two scores they had attained. The record shows that the selected candidates were superior to the Grievants in the assessment and testing process. A claim that the selected candidates had falsified their applications could not be shown. Both grievances were denied. 937

The Arbitrator held that the state properly assigned points to the applicants for the Computer Operator 4 position and selected the appropriate applicant for the job. The Grievant was not selected because her score was more than ten points below that of the top scorer. The Union argued the Grievant should have been selected because she was within ten points of the selected candidate and therefore, should have been chosen because she had more seniority credits than he did. The language could be clearer, but the intent is clear. If one applicant has a score of ten or more points higher than the other applicants, he or she is awarded the job. If one or more applicants have scores within ten points of the highest scoring applicant, the one with the most state seniority is selected for the position. The Arbitrator pointed out that the union’s position could result in the lowest scoring person being granted a job. If that person was awarded the job, someone within ten points of him or her could argue that he or she should have gotten the job. The Arbitrator commented on the union’s complaint that the state violated Article 25.09 when management refused to provide notes of the applicants’ interviews. The issue submitted to the Arbitrator was simply the violation of Article 1 7. The state provided the requested material at the arbitration hearing and the Union had the opportunity to address the notes at the hearing and in its written closing statement. 976

The Arbitrator held that the procedure used by the division was not a valid method for selecting the employee to be promoted to Customer Service Assistant 2. However, simply placing the Grievant in the position would be unfair to the selected applicant. Thus, a valid method must be used to choose between the Grievant and the selected applicant. While it might be desirable for the union to have input into developing the process, the test prepared and administered by DAS would provide a speedier resolution. The Arbitrator saw nothing that would justify denying the grievant back pay if he was wrongly denied a promotion because of the invalid selection method used by the employer. 1 004

Proper Restraint

The grievant was charged with using a hammerlock to restrain an aggressive and violent resident. During the struggle with the resident, both individuals fell and the resident was injured. The arbitrator did not view the grievant’s actions as improper. The arbitrator noted that the hold used by the grievant seemed no worse than any of the holds included in the facility’s training manual. He concluded that the injuries were not caused by the hold but by the fall to the floor and that the fall would have occurred regardless of the hold used to restrain the resident. The arbitrator rejected the notion that the use of a hold that was not facility-approved or included in the training of employees is abusive. He noted that there are situations in which the employees must react quickly to control an individual or situation, or to protect themselves. The arbitrator found no just cause for removal of the grievant. 804

Promotional Pay Raise

- When the grievant was promoted, he removed from the top step of Correction Officer Pay Range 27 to the top step of Correction Farm supervisor Pay Range 7. Although the two pay ranges were different, they were similar enough to prevent the grievant from achieving a four percent increase, as required by Article 36.04. This section provides that employees who are promoted “shall be placed in a step” to guarantee them at least an increase of four percent. Since there is no step in the grievant’s current pay range that could achieve the four percent raise, there is a conflict which must
be resolved by Appendix L, Pay Schedules. By the parties’ negotiations, they have determined that there is to be no step above Step 6 in Pay Range 7 and thus to create an additional step under these circumstances would expand the contract, an act which would be outside the authority granted by Article 25.03 of the Contract to the Arbitrator: 4 62

Providing False Information In an Investigation

The Arbitrator held that a statement by the Grievant in an email was a false, abusive, and inflammatory statement concerning his supervisor. The Grievant did provide false information in an investigation. The Arbitrator found that the Grievant was not permitted to complete closing inventory on the Operation in question; consequently, he did not breach his job duty to complete the inventory properly. The record supported the finding that the Grievant did not provide even a minimal level of support to the Operator in dealing with customer complaints about the operation of her facility. Therefore, the Arbitrator held that the Grievant did fail to carry out one of his assigned job duties and failed to follow administrative rules. Because some of the Grievant’s work was for his personal business and for his job at Columbus State Community College, the work was for his personal gain. The Arbitrator held he did fail to follow administrative regulations in the use of his computer equipment assigned to him. The Grievant did have 27 years service to the Commission and had no disciplinary record. However, his ease in involving his blind clients in the investigation of his own conduct as a Specialist demonstrates a lack of sensitivity to the vulnerability of his clients. His supervisor was visually impaired and he wrote a false statement about her in the course of an investigation. Both actions show that the Grievant exhibits little concern for the blind. The Arbitrator found that the grievant cannot be trusted to return to an organization devoted to the service of the blind. 1 005

Psychological Stress

- The arbitrator found the following circumstances to mitigate against a removal for absenteeism: The Doctor characterized the grievant's condition as a "frantic and desperate state of mind..." and said that in this state of mind it is likely that the grievant "either didn't remember, half heard or misinterpreted the procedures she needed to follow in order to take leave from her employment": 1 86

Public Employees Retirement System (PERS)

- See remedy

- The grievants that won job abolishment arbitration were reinstated at their former positions with back pay which was reduced by unemployment compensation and established interim earnings. The employer was also directed to pay benefits such as: holiday pay, all leave accruals, full seniority and service credits. The employer must also pay the lost employer contribution to the Public Employer Retirement System (PERS) for all dates from the date of the abandonment through the date of the reinstatement. A grievant that was subsequently employed by the State at another position will not receive back pay from the date of his acceptance of the new State position. The PERS money that the grievant withdrew does not have to be reimbursed by the employer but the employer is still obligated to reimburse the grievant for lost employer contributions to PERS: 34 0

- The grievant had been employed as a Veterinarian Specialist for the Department of Agriculture for about twenty-one years. After sustaining neck and back injuries in an automobile accident, the grievant received State disability benefits. However the grievant failed to fill out the proper leave paperwork after the State issued an AWOL notice and a written direct order. The grievant was eventually removed for failing to submit this paperwork. After this removal, but before the arbitration hearing, PERS notified the grievant that his disability retirement was approved. The Arbitrator held that the grievant was removed without just cause and adjusted the discipline to a suspension: 601

- Q –

- R –

Racial Slurs

- An employee is responsible for the commonly accepted meaning of the words he elects to use provided there is no contradiction by the circumstances. Similarly, he is also subject to the proscribed consequences for such words. It may be that the familial insult rather than the racial aspect was the primary stimulus of Smith's
reaction but that does not neutralize the statement as a racial slur: 1 5 4

- The Employer had just cause to remove the grievant. The grievant never apologized, nor did he testify as to his intention or state of mind when he made the racial slurs. His longevity, the harm caused, his prior discipline and any mitigating factors must be balanced. Such balancing is at the prerogative of the Employer unless it is not progressive or commensurate. The Arbitrator cannot substitute her judgment for that of the Employer without such a finding: 4 5 2

The grievant was involved in a verbal altercation with the Deputy Warden of Operations regarding failure to follow a direct order from the Warden. At the time of the incident the grievant was on a Last Chance Agreement (LCA), which included random drug tests within the year following entrance into the LCA. As a result of his behavior during the argument, the grievant was ordered to submit to a drug test. He refused and was removed. The arbitrator noted that the grievant’s discipline record demonstrated a pattern of poor conduct over a short period of time regarding his inability to follow orders or interact with management appropriately. Further misconduct would surely result in removal. The arbitrator found that the employer failed to establish reasonable suspicion to order a drug test. The grievant’s failure to obey the Warden’s direct order gave just cause to impose discipline, but flaws in procedure on the part of the employer were noted by the arbitrator for his decision to convert the removal to a suspension. The arbitrator determined that “the overall state of the evidence requires reinstatement, but no back pay or any economic benefit to the grievant is awarded.” 81 4

The grievant reported for work under the influence of alcohol. He signed a Last Chance Agreement (LCA) which held his removal in abeyance pending his participation in, and completion of, an EAP program. Random drug/alcohol testing was a component of the LCA. He was told to report for a random test. He failed to comply and was removed. The arbitrator found that the employer’s failure to notify the chapter president of a change in the LCA was a violation of good faith but did not negate the grievant’s obligation to adhere to the agreement. The grievant had ample opportunity to confer with his union representative prior to signing the agreement and without specific reason for the necessity to speak to his representative prior to the test, the grievant’s procedural arguments did not justify his refusal to submit to the test. 838

**Reasonable Accommodation**

- In a case involving a grievant who was progressively disciplined for twelve work violations but who was not allowed the chance to have his discipline placed on hold pending the completion of EAP, the State did not refuse the grievant reasonable accommodation for his problem with alcohol in violation of the Americans With Disabilities Act. The State was found to have reasonable accommodated the grievant by providing the grievant with leave without pay to pursue wellness activities: 5 22

The grievant was a visitation/utility officer on second shift at the facility. She became pregnant and present her employer with a physician’s statement stating so and indicating her due date. He also advised her not to lift more than ten to fifteen pounds for the duration of her pregnancy. She was told by her employer she would not be allowed to work due to her lifting restrictions. The Union could not agree to her displacing other officers in violation of the Pick-A-Post Agreement and the warden could not agree to splitting her job between the visiting hall and the entrance building because the possibility of having to use force against an inmate or visitor would not be in compliance with her weigh-lifting limitations. She was told to apply disability. The arbitrator found that the employer made a good faith effort to accommodate the grievant’s restrictions. A “good faith” effort is all that is required by the contract. The parties met and both rejected the proposals submitted. Arbitrator noted that he grievant also submitted her charges to the Ohio Civil Rights Commission and the U.S. EEOC. OCRC took jurisdiction and found that that employer’s actions were not due the grievant’s pregnancy, but to her restrictions. The arbitrator concurred, stating that the grievant received her answer to Title VII issue from OCRC. 871

The grievant notified her employer that she was pregnant and applied for accommodation to continue working. Subsequent statements from her physician stated that due to complications the grievant could not lift more than 20 pounds, was unable to run ¾ miles and could not break up fights. Her application for accommodation was
denied. She applied for and received disability benefits. The Union presented evidence at arbitration that two other COs at Richland had been accommodated by the employer during pregnancy. The employer could not explain why they received accommodations and the grievant did not. The arbitrator stated, “If the employer can demonstrate it made the requisite ‘good faith effort to provide alternative, comparable work and equal pay to a pregnant employee upon a doctor’s recommendation’ (Sec. 1111) it will have satisfied its obligation under the Agreement. As the record does not demonstrate that occurred in this instance the grievance must be sustained.”

**Reasonableness**

- Idiosyncratic administration does not entail that the policy is unreasonable. A policy can be reasonable and poorly carried out. Furthermore, the effectiveness of a work role is a question of managerial discretion. A management tool can be totally ineffective so long as it is reasonable: 134

- The question is whether there is a rational relationship between the rule and a legitimate employer objective. Accounting for employee time is a legitimate employer objective. Sign-in/sign-out sheets are one method of accounting for employee time: 134

- The arbitrator held that the employer had faded to fully and clearly articulate a reasonable mandatory overtime policy where employees were excused from mandatory overtime only if they had already worked 16 hours or they had been hurt. All other excuses were viewed as improper and disciplinary action would result. Such an iron clad policy could lead to consistent disciplinary actions mad minimize subjective assessments. One, however, cannot always, equate consistency with reasonableness standards when an entire litany of plausible exemptions are automatically rejected: 225

- The employer unreasonably refused the application of available leave balances. If employees have available leave balances, leaves are normally approved except where pattern abuse has occurred. The grievant had available leave balances and his record did not evidence pattern abuse. When an employer makes a decision under these circumstances it has an affirmative obligation to substantiate the reasonableness of its decision. In this particular instance, the decision seems arbitrary: 241

**Reasonable Suspicion of Alcohol Abuse**

The Arbitrator found that the real issue is whether a past practice of long standing has changed the “plain meaning” of the language in Appendix M to the Collective Bargaining Agreement. At Trumbull and other institutions the Ohio State Patrol conducts reasonable suspicion testing for alcohol abuse testing. The Union queried 27 institutions as to their methods of handling the testing. Of the 25 institutions that responded 14 said they did not use the Ohio State Patrol and 11 said they did. This creates a past practice that is not followed by a plurality of the institutions. The Arbitrator found that the requirements for management to make a past practice argument were not met. 988

**Reasons of Economy**

- The Ohio Supreme Court has held that savings the State may realize from not having to pay the wages and benefits to an employee whose position is abolished is not, in and of itself, sufficient to justify the abolishment for reasons of economy. In addition, in order for the State to prove a permanent lack of work, the lack of work must be real and cannot be created by transferring the grievant's duties to another employee: 518

**Reassignment**

- The Department of Natural Resources determined a need for more Geologist 4 employees and that all employees in the groundwater division would be classified as geologists. Geologist positions were posted in ODNR offices but in the grievant’s office the most senior Environmental Engineer was reassigned to a Geologist 4 position. The reassigned employee testified that her job responsibilities had changed since the reassignment. The arbitrator found that the employer used the reassignment as a disguised attempt to disrupt the seniority benefits of the bargaining unit. It was stated that the crucial factor is the job duties, not the name attached, and that supervision of others was a substantial and significant change. The grievant was awarded the position retroactively with the employer ordered not to recoup any additional wages earned while she was wrongly reassigned: 419
The Employer was ordered to compensate the grievant for the premium pay (overtime) lost as a result of the Employer’s unauthorized temporary work area reassignment decision.

Recall Rights

The Orient Correctional Institution was closed. Orient employees exercised their bumping rights per the Collective Bargaining Agreement (CBA). A letter was sent to those individuals who were bumped indicating that they had recall rights in the “same, similar or related classification series” with their facility or “within the recall jurisdiction.” The Union interpreted the letter to mean recall rights to the institution. The State did not agree. The arbitrator found that the language of Section 1 8.1 1 of the CBA supported the State’s position. Recall rights are within the recall jurisdiction and are not specific to the institution. The arbitrator determined that the letter was wrong and that “an erroneous letter from the head of an institution cannot alter the terms of the CBA.

Recommendations, Disciplinary

- Arbitrator considered but did not give much weight to this factor. "A recommendation at the lower tier may be approved, but an equally strong likelihood exists that it might be overturned." Also, grievant committed more violations after recommendation.

Refusal to Follow Orders
Refusing an Assignment

- There is no guarantee to any correction officer that he/she will be assigned to the post he/she desires or is normally assigned to. (This particular case involved a post the officer was normally assigned to and one which he desired because he was unable to perform functions of other posts because of medical reasons.) Without such a guarantee, the officer must report to duty prepared for assignment to any post in the facility. Failure to accept an assignment after reporting to work is insubordination.

Reinstatement

The Arbitrator rejected the Employer’s contention that the grievance was not arbitrable because it was untimely. It was unclear when the Grievant was removed. A notice of removal without an effective date has no force or effect. The allegation of misconduct arose from three incidents involving a coworker. In the first the Grievant was joking and it should have been obvious to the coworker. Given the questions about the coworker’s view of the first incident and her failure to report the alleged misconduct until the next day, the Arbitrator could not accept the coworker’s testimony on the second incident. Because he was out of line when he confronted the coworker in a rude and aggressive manner, the Grievant merited some disciplinary action for the third incident. The strict adherence to the schedule of penalties in the Standards of Employee Conduct sometimes results in a penalty that is not commensurate with the offense and the employee’s overall record. The Arbitrator denied the request for full back pay based on the Grievant’s failure to contact the employer or to authorize the union to contact the employer on his behalf.

The Arbitrator held that the removal lacked just cause and must be set aside. In a related case Arbitrator Murphy held that lax enforcement of the employee-resident personal relationship ban undermines enforcement of other provisions of the policy including the ban on accepting money from residents. This Arbitrator agreed. Management’s actions have to be consistent with the published policy and rules, and similar cases have to be treated in a like manner for them to have value in guiding employee conduct. Because of lax enforcement of far more serious infractions elsewhere in the agency, the Grievant could not have expected removal for borrowing money from a resident. The Grievant had previous counseling for receiving a bag of gratuities from a resident. She should have learned that accepting gratuities from residents makes her subject to discipline. Her case is aggravated by her contact and attempted contacts with witnesses against her pending the arbitration. For this reason she is reinstated, but without back pay and benefits.

The Grievant was removed after two violations—one involving taking an extended lunch break, the second involved her being away from her work area after punching in. Within the past year the Grievant had been counseled and reprimanded several times for tardiness and absenteeism, therefore, she should have know she was at risk of further discipline if she was caught. Discipline was justified. The second incident occurred a week later when the Grievant left to park her car after punching in. The video camera revealed two employees leaving after punching in. The other employee was not disciplined for it until after the
Grievant was removed. That the Reviewing manager took no action against another employee when the evidence was in front of him is per se disparate treatment. No discipline for the parking incident was warranted. Management argued that removal was appropriate since this was the fourth corrective action at the level of fine or suspension. The Grievant knew she was on a path to removal. But she also had an expectation of being exonerated at her Non-traditional Arbitration. Her 3-day suspension was vacated by an NTA decision. That fine was not to be counted in the progression. The Grievant was discharged without just cause. 992

The Arbitrator held that, management demonstrated by a preponderance of the evidence that the Grievant violated General Work Rules 4 .1 2, 5 .1 , and 5 .1 2, and therefore, some measure of discipline was indicated. Mitigating factors were the Grievant’s three years of tenure, satisfactory performance record, and no active discipline. In addition, the Agency established only one of the three major charges that it leveled against the Grievant. Also, nothing in the record suggested that the Grievant held ill will against the Youth. The Arbitrator held that removal was unreasonable, but only barely so, in light of the Grievant’s poor judgment and his less than credible performance on the witness stand. The primary reason for his reinstatement is that the Grievant never intended to harm the Youth. The Grievant was reinstated under very strict conditions: he was entitled to no back pay or other benefits during the period of his separation, and he was reinstated pursuant to a two-year probationary plan, under which he shall violate no rule or policy involving any youth. Failure to comply will be grounds to remove the Grievant. 995

Reliance

- Allegations of detrimental reliance based on the comments of management must be supported by the record. This support requires more than hearsay evidence and must provide adequate specificity as to the timing of the comments. The latter requirement permits the Arbitrator to assess the conduct of the grievant and management prior to and after the occurrence of the comments on which grievant relied: 5 84

Remedies

- Where the employer filled a vacancy with a non-bargaining unit employee and without following contractual job-bidding procedures, the arbitrator determined that the remedy should be that the employer pay, to the most senior person in category (A) of 1 7.05 , the difference between that persons earnings and the earnings that person would have collected if the person had been promoted to the position for the period that the position was wrongfully filled: 24 2

- Where the arbitrator reinstated the grievant because of lax enforcement, but the arbitrator believed the underlying cause of the grievant's absenteeism was substance abuse, she reinstated the grievant contingent upon his following the advice of his Employee Assistance program counselor: 24 9

- Where the arbitrator reinstated the grievant, but tell v would be better to give the grievant a comparable position with a different supervisor, but the employer said none was available, the arbitrator retained jurisdiction for 2 years to insure that the grievant was treated fairly: 24 2

Relationship with Patient Reasonably Interpreted as Exploitive or Sexual

- A feeling of love for a patient has sexual overtones and violates CMHC policy p-1 7 where grievant helped patient escape: 29

Relevant Documents

The Arbitrator held that to sustain a charge of threatening another employee an employer must have clear and convincing proof. Here the proof did not even rise to the preponderance standard, being based solely on the report of the co-worker allegedly threatened, who had a deteriorated relationship with the Grievant since the events of a prior discipline. The investigator did not consider that the co-worker may have exaggerated or over-reacted. Management’s handwritten notes were held to be discoverable under Article 25 .09. It had refused to produce them until after the grievance was filed and then had to be transcribed for clarity, which delayed the arbitration. The investigator breached the just cause due process requirement for a fair and objective investigation which requires that whoever conducts the investigation do so looking for exculpatory evidence as well as evidence of guilt. Then, to make matters worse, the same investigator served as the third step hearing officer, essentially reviewing his own pre-formed opinion. 985
- The arbitrator determined that the fact that the grievant had received ADC (welfare benefits) during the period she was off work due to the State’s improper removal should not be offset against the back pay due the employee. Welfare benefits are different than unemployment compensation. Unemployment compensation can be offset against back pay due because there is an employer contribution to unemployment compensation. Welfare benefits are not compensation, but rather is a minimal public benefit due to the grievant being a taxpayer: 25 2(A)

- This is a decision dealing with the initial arbitration of decision 25 2. The Union argued that the employer should pay interest on the grievant’s back pay. The grievant was first discharged on 1/2/589. At the conclusion of the initial arbitration hearing on 4/17/90, the arbitrator put the employer on notice that the grievant would be reinstated. The employer requested a delay to effectuate a face saving settlement. When such a settlement was not forthcoming the arbitrator awarded the grievant to be reinstated in a written opinion on 4/30/90. The employer did not reinstate the grievant until 5/20/90 and the grievant did not receive her back pay until 6/1/90. The arbitrator first found that she did have the authority to award interest on a back pay was not a type of punitive damages as argued by the employer, but only a part of a make whole remedy. As such, the arbitrator was entitled to decide the issue of interest payments. The employer’s delay from 4/30/90 to 6/1/90 (post judgment) does warrant an award of interest. A post judgment interest award is clearly part of a make whole remedy. The employer should not benefit from its bureaucratic inefficiency. The arbitrator decided to award an interest rate of the adjusted prime rate in effect on 4/30/90 compounded daily: 25 2(B)

- Holiday pay lost as a result of unjust removal is due the grievant, as are all other contractual benefits: 25 4

- In the absence of overtime required by the contract or evidence as to the grievant's attendance and overtime record as well as overtime worked by other employers in his classification and workplace during his absence determination of overtime pay is too speculative to be considered earnings lost: 25 4

- The employee initiated his own resignation and must bear a large part of the blame for all that followed. It would be grossly unreasonable to reward him and punish the employer by upholding his claim for lost wages: 278

- Since the grievant claims she could not return to work until a certain date she is estopped from any back pay before that time. The grievant also must produce a physician’s statement attesting to her ability to work: 295

- The determination of overtime pay was found to be too speculative to be considered “earnings lost.”: 300

- The grievant’s claim that he has remained disabled from the time of the removal precludes any award of back pay: 31 0

- The arbitrator, in an improper job abolishment, granted the grievants back pay, seniority, holidays, vacations, and leaves. The employer was also directed to pay any health expenditures that would have been paid by the health insurance provided by the State: 31 1 **

- The reinstated grievant was given holiday pay but not overtime pay: 31 7

- Grievant was awarded full back pay at his straight time rate but did not receive money for missed overtime opportunities: 327

- The grievants that won a job abolishment arbitration were reinstated at their former positions with back pay which was reduced by unemployment compensation and established interim earnings. The employer was also directed to pay benefits such as: holiday pay, all leave accruals, full seniority and service credits. The employer must also pay the lost employer contribution to the Public Employee Retirement System (PERS) for all dates from the date of the abolishment through the date of the reinstatement. A grievant that was subsequently employed by the State at another position will not receive back pay from the date of his acceptance of the new Stat position. The PERS money that the grievant withdrew does not have to be reimbursed by the employer by the employer is still obligated to reimburse the grievant for lost employer contributions to PERS: 34 0**

- Since the employees were not eligible for pay beyond their regular hours under Section 37.04 they are not eligible for overtime under Section 1 3.07 of the Agreement: 34 5
- Due to the grievant’s negligence in responding to the employer’s demand for evidence of his inability to work, the grievant will receive no back pay for the period of his absence: 356.

- The grievant had been on a disability separation and had been refused when he requested reinstatement. The arbitrator found the grievance arbitrable because section 4 3.02 incorporated Ohio Administrative Code section 1 23:1 -33.03 as it conferred a benefit upon state employees not found within the contract. The grievant thus had three years from his separation to request reinstatement, which he did. The grievance was also found to be timely filed because there was no clear point at which the employer finally denied the grievant’s request for reinstatement and the union was not notified of the events by the employer. Additionally, the employer was estopped from asserting timeliness arguments because the employer was found to have delayed processing the grievant’s request for reinstatement. The physician who performed a state-ordered examination released the grievant to work, thus the employer improperly refused the grievant’s reinstatement request. The grievant was reinstated with back pay less other income for the period, holiday pay, leave balances credited with amounts he had when separated, restoration of seniority and service credits, medical expenses which would have been covered by state insurance, PERS contributions, and he was to receive orientation and training upon reinstatement: 375.

- The grievant was upgraded through Class Modernization to a Systems Analyst 2 position. She received an adequate mid-probationary rating but received a verbal reprimand for poor performance afterwards. She alleged supervisory harassment and was transferred to another supervisor who also rated her below average in all six categories. Her performance failed to improve and she received further discipline up to and including the ten day suspension which is the subject of this grievance. She was charged with failure to follow a direct order, breach of security for failing to turn her computer terminal off at the end of the day, and various items relating to proper completion of work assignments. However, the employer failed to send a Step 3 response to the Union. The arbitrator found that the employer did violate section 24 .02 by not sending a Step 3 response to the union, however there was no harm to the grievant. The employer proved that the grievant was guilty of the acts alleged and that there was no supervisory harassment. Progressive discipline was followed (a 10 day suspension following a 1 day suspension) but the procedural violation warranted a reduction to a seven day suspension: 386.

- The federal government created, established hiring criteria, and funded job training positions within the Ohio Bureau of Employment Services for Disabled Veterans’ Outreach Specialist (DVOPS), and Local Veterans’ Employment Representative (LVERS). The OBES and Department of Labor negotiated changes in the locations of these employees which resulted in layoffs which were not done pursuant to Article 1 8. Title 38 of the United States Code was found to conflict with contract Article 1 8. There is no federal statute analogous to Ohio Revised Code section 4 117 which allows conflicting contract sections to supersede the law, thus federal law was found to supersede the contract. As the arbitrator’s authority extends only to the contract and state law incorporated into it, the DVOPS’ and LVERS’ claim was held not arbitrable. Other resulting layoffs were found to be controlled by the contract and Ohio Revised Code sections incorporated into the contract (see Broadview layoff arbitration #340). The grievance was sustained in part. The non-federally created positions had not been properly abolished and the affected employees were awarded lost wages for the period of their improper abolishments: 390.

- The grievant was a field employee who was required to sign in and out of the office. He began to experience absenteeism in 1990 and entered drug abuse treatment. He continued to be excessively absent and was removed for periods of absence from October 2nd through the 10th and October 26th to the 30th, during which he called in sporadically but never spoke to a supervisor. The grievant was found to have violated the employer’s absenteeism rule. Additionally, the employer was found not to be obligated to enter into a last chance agreement nor to delay discipline until the end of the grievant’s EAP. Mitigating circumstances existed, however, to warrant a reduced penalty. The arbitrator noted the grievant’s length of service from 1981 to 1990, and the fact that he sought help himself, therefore the arbitrator reinstated the grievant with no back pay pursuant to a last chance agreement.
after a physical examination which must show him to be free of drugs: 391

The grievant applied for a posted Tax Commissioner Agent 2 position but was denied the promotion. She was told that she failed to meet the minimum qualifications, specifically 9 months experience preparing 10 column accounting work papers. The grievant was found to have experience in 12 column accounting work papers which were found to encompass 10 column papers. Additionally, the employer was found to have used Worker Characteristics, which are to be developed after employment, in the selection process. The grievant was found to possess the minimum qualifications and was awarded the position as well as any lost wages: 393** (see 392**)

- The grievant applied for a posted Word Processing Specialist 2 position and was denied the promotion. The employer claimed that she did not meet the minimum qualifications because she had not completed 2 courses in word processing. The grievant was found not to possess the minimum qualifications at the time she submitted her application. The fact that she was taking her second word processing class cannot count toward her application; she must have completed it at the time of her application. Additionally, business data processing course work cannot substitute for word processing as the position is a word processing position: 394** (see 392**)

- The grievant applied for a posted Programmer Analyst 2 position and was denied the promotion. The employer claimed that she did not possess the required algebra course work or the equivalent. The arbitrator found that because the grievant completed a FORTRAN computer programming course, she did possess the required knowledge of algebra. The minimum qualifications allow alternate ways of being met, either through course work, work experience, or training. The grievance was sustained and the grievant was awarded the position along with lost wages: 395** (see 392**)

- The grievant applied for a posted Microbiologist 3 position in the AIDS section position and was denied the promotion because she failed to meet the minimum qualifications. The successful applicant was a junior employee who was alleged to have met the minimum qualifications. The arbitrator found that the junior applicant should not have been considered because the application had not been notarized, and it was thus incomplete at the time of its submission. The arbitrator also found that the employer used worker characteristics which are to be developed after employment (marked with an asterisk) to determine minimum qualifications of applicants. Lastly, neither the successful applicant nor the grievant possessed the minimum qualifications, however the employer was found to have held this against only the grievant. The arbitrator stated that the employer must treat all applicants equally. The grievant was awarded the position along with any lost wages: 396** (see 392**)

- The grievant applied for a posted Microbiologist 3 position in the Rabies section and was denied the promotion because the employer found that she failed to possess the minimum qualifications. Neither the successful applicant nor the grievant possessed the minimum qualifications for the position but this fact was held only against the grievant. The arbitrator stated that the employer must treat all applicants equally. The arbitrator found that the grievant did possess the minimum qualifications and that the requirement for rabies immunization and other abilities could be acquired after being awarded the position. The grievant was awarded the position along with any lost wages: 397** (see 392**)

- The resignation of an OBES Claims Examiner 2 created a vacancy which the employer did not post, but instead transferred in a Claims Examiner 2 from an office outside the district. The transferred employee received a new Position Control Number, but not the one vacated by the employee who resigned. A violation of the contract was conceded by the employer and the sole issue was the appropriate remedy. The arbitrator ordered the position in question to be vacated and posted for bids. The transferred employee was allowed to remain in the position until the status of her application was determined. If she fails to obtain the position she occupied, the employer was ordered to place her back into the office which she had left so as to prevent any lost wages due to the transfers. If a person other than the transferred employee receives the position, that employee must be made whole for any lost wages and benefits: 399

- The grievant had over 7 years seniority and applied for a posted vacancy. She did not receive the promotion which was given to a more senior
employee from the agency despite the fact that she was in Section 1 7.04 applicant group A (1 7.05 of 1 989 contract) and the successful bidder was in group D. The employer stated that the grievant failed to meet the minimum qualifications and the successful bidder was demonstrably superior. The arbitrator held that Article 1 7 established groupings which must be viewed independently. Additionally, the contract applies the demonstrably superior exception only to junior employees. The employer violated the contract by considering, simultaneously, employees from different applicant groups and applying demonstrable superiority to a senior employee. The arbitrator found that the grievant met the minimum qualifications for the vacant position, but she had since left state service. The grievance was sustained and the remedy was the lost wages from the time the grievant would have been awarded the position until she left state service: 4 05

- The Ohio Penal Industries operates shops in which inmates work and bargaining unit employees supervise them. Prior to June 1 989 three bargaining unit members and two management employees were assigned to the shop. One bargaining unit member then retired, but his vacancy was not posted but rather the duties were assumed by a management employee. The arbitrator rejected the employer’s argument that there had been no increase in bargaining unit work performed by management. It was found that despite general inmate supervision performed by management, the duties assumed after the bargaining unit member’s retirement were a material and substantial increase. This increase in the amount of bargaining unit work done by management was held to be a violation of Section 1 .03, the grievance was sustained and the employer was ordered to cease performing bargaining unit work and post the vacancy in the shop: 4 06**

- The grievant was hired as a Tax Commissioner Agent and had received a written reprimand for poor performance while still in his probationary period. He was assigned a new supervisor who developed a plan to improve his performance, however the grievant continued to receive discipline for poor performance and absenteeism, including a ten day suspension which was reduced pursuant to a last chance agreement. It was discovered after the last chance agreement had been made, that prior to the signing of the last chance agreement, the grievant had committed other acts of neglect of duty. The grievant was removed for neglect of duty. The arbitrator held that a valid last chance agreement would bar an arbitrator from applying the just cause standard to a disciplinary action and that the agreement made by the grievant was valid. It was also found that there existed hostility between the grievant and his supervisor, the employer stacked charges by basing discipline on events which occurred prior to the last chance agreement but the grievant was awarded 4 weeks back pay because of the employer’s failure to comply with the union’s discovery requests: 4 1 2

- The grievant was a Correction Officer who had an alcohol dependency problem of which the employer was aware. He had been charged twice for Driving Under the Influence, which caused him to miss work and he received a verbal reprimand. The grievant was absent from work from May 1 8th through the 21 st and was removed for job abandonment. The arbitrator found that the grievant’s removal following a verbal reprimand was neither progressive nor commensurate and did not give notice to the grievant of seriousness of his situation. It was also noted that progressive discipline and the EAP provision operate together under the contract. The grievant was reinstated pursuant to a last chance agreement with no back pay hand the period he was off work is to be considered a suspension: 4 1 3

- The grievant was a custodial worker at a psychiatric hospital. The grievant asked a patient to smoke outside rather than inside a cottage. The patient told the grievant that he would not, dropped to his knees and repeated his statement, as was the patient’s habit. The patient repeated this action later in the day and grabbed the grievant’s leg. The grievant yanked his leg free, the client accused the grievant of kicking him and the patient was found to have injuries later in the day. The grievant was removed for abuse of a patient, and criminal charges were brought. The criminal charges were dropped pursuant to a settlement with the Cuyahoga County court in which the grievant agreed not to contest his removal. When the grievance was pursued, the employer asked for criminal charges to be reinstated. The charges could not be reinstated, but the grievant agreed not to sue the employer. The grievance was held to be arbitrable despite the settlement between the grievant and the
county court. Had the settlement been a three party agreement including the employer, dovetailing into the grievance process, it would have precluded arbitration. Additionally, after filing a grievance it becomes the property of the union. The grievance was sustained because the employer failed to meet its burden of proof that the grievant abused a patient. The arbitrator awarded full back pay less interim earnings, back seniority, back benefits and that the incident be expunged from the grievant’s record: 4 1 6

- A General Activity Therapist 2 position was posted for which the grievant bid. The posting listed a valid water safety instructor’s certificate as a minimum qualification. The grievant did not possess the certificate and an outside applicant was selected. The arbitrator found that the employer improperly posted the position by using a worker characteristic that doesn’t have to be acquired until after the employee receives the job. While the arbitrator cautioned that employees must act timely to become qualified, the employer can only hold bidders to minimum qualifications required by the contract. The grievance was sustained and the grievant was awarded the position with back pay: 4 1 8

- The Department of Natural Resources determined a need for more Geologist 4 employees and that all employees in the groundwater division would be classified as geologists. Geologist positions were posted in ODNR offices but in the grievant’s office the most senior Environmental Engineer was reassigned to a Geologist 4 position. The reassigned employee testified that her job responsibilities had changed since the reassignment. The arbitrator found that the employer used the reassignment as a disguised attempt to disrupt the seniority benefits of the bargaining unit. It was stated that the crucial factor is the job duties, not the name attached, and that supervision of others was a substantial and significant change. The grievant was awarded the position retroactively with the employer ordered not to recoup any additional wages earned while she was wrongly reassigned: 4 1 9

- The grievant was conducting union business at the Warrensville Development Center when a client pushed her and injured her back. Her Occupational Injury Leave was denied because she was conducting union business. A settlement was reached concerning a grievance filed over the employer’s refusal to pay, in which the employer agreed to withdraw its objection to her OIL application based on the fact that she was performing union business. Her application was then denied because her injury was an aggravation of a pre-existing condition. The arbitrator found the grievance arbitrable because the settlement was mistakenly entered into. The grievant believed that her OIL would be approved while the employer believed that it was merely removing one basis for denial. The arbitrator interpreted Appendix K to vest discretion in DAS to make OIL application decisions. The employees’ attending physician, however, was found to have authority to release employees back to work. Additionally, Appendix K was found not to limit OIL to new injuries only. The grievant’s OIL claim was ordered to be paid: 4 2 0

- The grievant was removed for failing to report off, or attend a paid, mandatory four-hour training session on a Saturday. The grievant had received 2 written reprimands and three suspensions within the 3 years prior to the incident. The arbitrator found that removal would be proper but for the mitigating factors present. The grievant had 23 years of service, and her supervisors testified that she was a competent employee. The arbitrator noted the surrounding circumstances of the grievance; the grievant was a mature black woman and the supervisor was a young white male and the absence was caused by an embarrassing medical condition. The removal was reduced to a 30 day suspension and the grievant was ordered to enroll into an EAP and the arbitrator retained jurisdiction regarding the last chance agreement: 4 2 2

- Three Bureau of Employment Services employees grieved that their seniority dates were wrong. They had held positions with the employer until laid off in 1 9 8 2. They were called back to intermittent positions within 1 year but not appointed to full-time positions until more than 1 year had elapsed from their layoff. The employer determined that they had experienced a break in service as placement in intermittent positions was not considered to meet the definition of being recalled or re-employed. The arbitrator found that the term “re-employment” carries its ordinary meaning and not that meaning found in the Ohio Administrative Code when used an Article 1 6 and the 1 9 8 9 Memorandum of Understanding on Seniority, thus the grievants did not experience a break in service because they had been re-employed to intermittent positions. The grievants
were found to continue to accrue seniority while laid off. The employer was ordered to correct the seniority dates of the grievants to show no break in service and that any personnel moves made due to the seniority errors must be corrected and lost wages associated with the moves must be paid: 4 26

- The Bureau of Motor Vehicles posted a vacancy for a Reproduction Equipment Operator 1 position. The employer chose a junior employee over the grievant claiming that he failed to meet the minimum qualifications. The arbitrator found that the employer improperly used the semantic distinction between retrieval, the grievant’s present position, and reproduction, what the posting called for, rather than the actual job duties to determine whether the grievant met the minimum qualification. The arbitrator stated that both consist of making copies of microfilm images on paper. The grievant was found by the arbitrator to possess the minimum qualifications, however the employer was found to not have completed its selection process as the grievant had not been interviewed. The arbitrator ordered the selection process re-opened pursuant to Article 1 7: 4 27

- The grievant was removed after 1 3 years service from her position with the Bureau of Disability Services for unapproved absence, conviction of a drug charge, and failure to report the drug charge as required by the state’s Drug-Free Workplace Act of 1 988. The grievant had a history of alcohol problems. She was also involved with a co-worker who, after the relationship ended, began to harass her at work. She filed charges with the EEOC and entered an EAP. The former boyfriend called the State Highway Patrol and informed them of the grievant’s drug use on state property. An investigation revealed drugs and paraphernalia in her car on state property and she pleaded guilty to Drug Abuse. She became depressed and took excessive amounts of her prescription drugs and missed 2 days of work. She was admitted into the drug treatment unit of a hospital for 2 weeks. She was on approved leave for the hospital stay, but the previous 2 days were not approved and the agency sought removal. The arbitrator found that while the employer’s rules were reasonable, their application to this grievant was not. The Drug-Free Workplace policy does not call for removal for a first offense. The employer’s federal funding was not found to be threatened by the grievant’s behavior. The grievant was found to be not guilty of dishonesty for not reporting her drug conviction because she was following the advice of her attorney who told her that she had no criminal record. The arbitrator noted that the grievant must be responsible for her absenteeism, however the employer was found to have failed to consider mitigating circumstances present, possessed an unwillingness to investigate, and to have acted punitively by removing the grievant. The grievant’s removal was reduced to a 1 0 day suspension with back pay, benefits, and seniority, less normal deductions and interim earnings. The record of her two day absence was ordered changed to an excused unpaid leave. The grievant was ordered to complete an EAP and that another violation of the Drug-Free Workplace policy will be just cause for removal: 4 29

- Where a removal was modified to a 60-day suspension, the grievant was to be compensated for certain paid holidays; the Employer was required to canvas first shift and allow the grievant to bid on any position within her job classification and in line with her seniority; the Employer was required to compensate the grievant for all legitimate benefits and related expenses incurred between her removal and reinstatement dates; and the Employer was ordered to compensate the grievant for uniform hemming and sewing: 4 4 4 (A)

- The Employer was ordered to compensate the grievant for the premium pay (overtime) lost as a result of the Employer’s unauthorized temporary work area reassignment decision: 4 4 8

- The Arbitrator ruled that the grievant, who had been off work for five days because he was in jail, was to be reinstated without back pay or benefits but with full seniority conditioned upon his continued treatment for substance abuse and/or emotional problems and continued good attendance. The Arbitrator further stated that if the grievant should fail to meet these conditions and be removed, he is unlikely to be returned to work by an Arbitrator: 4 5 6

The Arbitrator ruled that, in the case of EPA On-Scene Coordinators, being on call was being on stand-by under Section 1 3.1 2 of the Contract, and ordered the grievant to be paid 25 percent of his base rate of pay for each hour he had been on stand-by status back to ten days prior to the filing of the grievance: 4 64

- In overturning the removal of the grievant, the arbitrator held that the grievants were entitled
to compensation for missed overtime opportunities and payment of outstanding medical bills. Furthermore, the second grievant’s current assignment was to remain the same for up to 30 calendar days to allow him an opportunity to obtain an Ohio Driver’s License and if he did not obtain the license, he would be allowed to bid for available openings which did not require a driver’s license. The grievants were not entitled to roll call pay: 4 81 (A)

Pay is a particularly appropriate remedy here for two reasons: 1) makeup overtime in future overtime purge periods would interfere with the seniority and rotation rights to overtime of others on the roster, some of whom were not even on the list during earlier purge period; 2) the makeup remedy is ineffective in a period when much overtime is being offered because grievant’s would have been able to work overtime in any event. However, the Arbitrator cannot estimate the number of hours each grievant would have worked, and remands this to the parties to agree on a figure for each grievant: 4 91

The Arbitrator ordered that management to cease and desist from having the bargaining unit work of a Chemical Laboratory Coordinator be performed by a supervisory employee: 4 98

A remedy is not available to a grievant who was not awarded a position despite the grievant’s greater seniority. The State did not violate the contract by awarding the position to an individual with less seniority than the grievant, because this individual had “demonstrably superior” qualifications: 5 4 5

The Arbitrator sustained the grievance and awarded the grievant the position of Claims Service Specialist. The Arbitrator stated that it was unjust to remove the applicant who had been selected for the position by the State, but that the removal was necessary because the Arbitrator had no authority to order the State to continue the extra position: 6 1 4

Removal

- Absenteeism: 1 37
- Insubordination: 1 37
- Reinstated: 1 , 25
- Tardiness: 1 38

Although the grievant received the order of termination on May 29, he worked on June 1. It may very well be that the substance rather than the form of termination took place on June 1. In light of the timeliness of the grievance filing issue raised by the state, I believe it would be highly inappropriate to utilize May 29 as the date of termination rather than June 1: 1 88

- Where the grievant had been discharged by the chairman, but there was a question of whether anyone but the board had the authority to discharge the grievant. The arbitrator avoided the question by asserting, "in effect the entire Board has adopted Shank's discharge action." Since the discharge was widely publicized, each of the board members was kept abreast of the grievant's status. Nevertheless, none of the board members stepped forward to disagree with Shank's discharge action. "They must therefore be deemed to have sanctioned it": 2 1 8

The grievant was involved, along with two other state employees, in a check-cashing scheme involving stolen state checks from another agency. His role was that of an intermediary between the person who stole, and the person who cashed the checks. He served 4 5 days of a criminal sentence. The grievant was found to be deeply involved with the scheme and received a substantial portion of the proceeds. The violations were found to be connected to the grievant’s job as theft of state property is harm to the employer. The grievant was found to be not subjected to disparate treatment when compared to other employees not removed for absenteeism while incarcerated. The other employees cited for disparate treatment purposes had not stolen state property: 3 7 0

The grievant began his pattern of absenteeism after the death of his grandmother and his divorce. The grievant entered an EAP and informed the employer. He had accumulated 1 04 hours of unexcused absence, 80 hours of which were incurred without notifying his supervisor, and 24 hours of which were incurred without available leave. Removal was recommended for job abandonment after he was absent for three consecutive days. The pre-disciplinary hearing officer recommended suspension, however the grievant was notified of his removal 5 2 days after the pre-disciplinary hearing. The arbitrator found that the employer violated the contract because
the relevant notice dates are the hearing date and the date on which the grievant receives notice of discipline. Other arbitrators have looked to the hearing date and decision date as the relevant dates. Additionally, the employer was found to have given “negative notice” by overlooking prior offenses. The arbitrator reinstated the grievant without back pay and ordered him to enter into a last chance agreement based upon his participation in EAP: 371

- The grievant was a Correction Officer, as was his wife. She had filed sexual harassment charges against a captain at the facility. The grievant and the grievant’s wife’s attorney contacted an inmate to obtain information about the captain. The employer removed the grievant for misuse of his position for personal gain, and giving preferential treatment to an inmate, 44 days after the pre-disciplinary hearing, and he received notice of his removal on the 46th day after the pre-disciplinary. The arbitrator held that the employer proved that the grievant offered the inmate personal and legal assistance in exchange for information. The investigation was proper as it was a full investigation and it was conducted by persons not reporting to anyone involved in the events. It was found that the investigation need not contain all information, only relevant information, thus the grievance was denied: 372

- The grievant injured his back in a car accident and was off work for six months while receiving disability benefits. His doctor released him to work if no lifting was allowed. Because the position required lifting, he either left or was asked to leave work. He failed to call in for three consecutive days and was removed for job abandonment. The union requested arbitration more than 30 days after the date of the Step 3 response. No evidence was offered on the interpretation of 25.02 and as to when the union received the Step 3 response. The employer failed to overcome the presumption that a grievance is arbitrable. The arbitrator found just cause because: the grievant served a 5 day suspension for failing to follow call-in procedure while on disability, his doctor’s statement that he should avoid lifting was ambiguous, and he failed to respond to the employer’s attempts to contact him. Filing for Workers’ Compensation was not found not to substitute for contact with the employer: 373

- The grievant was a Correction Officer and had received and signed for a copy of the agency’s work rules which prohibit relationships with inmates. The grievant told the warden that she had been in a relationship with an inmate prior to her hiring as a CO. Telephone records showed that the grievant had received 197 calls from the inmate which lasted over 134 hours. Although the grievant extended no favoritism toward the inmate, just cause was found for the removal: 374

- The grievant had received up to a ten day suspension and had been enrolled in two EAP programs. She was late to work for the third time within a pay period. The arbitrator found that just cause did exist for the removal as the grievant had received four prior disciplinary actions for absenteeism and the employer had warned her of possible removal. The fact that the employer reduced the most recent discipline did not lead to the conclusion that the employer must start the progressive discipline process over: 376

- The grievant was a Correction Officer who was removed for watching inmates play cards while they were outside their housing unit. The grievant admitted this act to his sergeant. The pre-disciplinary hearing had been rescheduled due to the grievant’s absence and was held without the grievant or the employer representative present. The arbitrator found that because the union representative did not object to the absence of the employer’s representative that requirement had been waived. There was also no error by the employer in failing to produce inmates’ statements as they had not been used to support discipline. The removal order was timely as the 45 day limit does not start until a pre-disciplinary hearing is held, not merely scheduled: 377

- The grievant ran out of gasoline as he entered the parking area of his facility. He was unable to buy gasoline on his way to work because the station would not take his fifty-dollar bill. He was seen siphoning gasoline from a state vehicle to use in his truck until he could go to buy more at lunch and replace the gasoline siphoned. He did not speak to management about his situation because his regular supervisor was not present. The arbitrator found that just cause existed for some discipline because the grievant showed poor judgment in not obtaining gasoline before work and not speaking to management personnel. The grievant was found to lack the intent to steal. He
was merely borrowing the gasoline; thus, the grievant was reinstated without back pay: 378

- The grievant was a Correction Officer who had been accused of requesting sexual favors from inmates and accused of having sex with one inmate three times. The inmates were placed in security control pending the investigation. During this time statements were taken and later introduced at arbitration. The arbitrator found that the employer failed to prove by clear and convincing evidence that the grievant committed the acts alleged and management had stacked the charges against the grievant by citing to a general rule when a specific rule applied. The primary evidence against the grievant, the inmates’ statements, were not subject to cross examination and the inmate who testified was not credible. The grievant was reinstated with full back pay, benefits, and seniority. The arbitrator recommended that the grievant be transferred to a male institution: 379

- The grievant was an investigator who was discovered to have used his state telephone credit card for personal calls, which he afterward offered to repay. He also gave an inter-office memo containing confidential information to his union representative. He was removed for these violations. The arbitrator found that the grievant’s explanation for his use of the telephone card was not credible, however the employer had notice of other employees who had misused their cards but issued no discipline to the others. The document containing the confidential information was not a typical document generated in an investigation and the employer’s rules on disclosure were found to be unclear. The arbitrator distinguished between confidential documents and confidential information, and reinstated the grievant without back pay: 380

- The grievant was a thirteen year employee who developed absenteeism problems. In just over one year he received discipline up to and including a fifteen day suspension. Between December 1 990 and March 1 991 the grievant had eighteen unexplained absence-related incidents for which he was removed. The arbitrator found that the employer proved that the grievant failed to account for his activities at work and that progressive discipline was followed. The arbitrator noted that while the grievant has a great deal of freedom while working, he must follow the employer’s work rules. The grievance was denied: 381

- The grievant attended a pre-disciplinary hearing for absenteeism at which his removal was recommended, but deferred pending completion of his EAP. He failed to complete his EAP and was absent from December 28, 1 990 to February 1 1 , 1 991 . The grievant was then requested to attend a meeting with a union representative to discuss his absence and failure to complete his EAP. The grievant was removed for absenteeism. The arbitrator found the grievant guilty of excessive absenteeism and prior discipline made removal the appropriate penalty. The employer was found to have committed a procedural error. Deferral because of EAP participation was found proper, however the second meeting was not a contractually proper pre-disciplinary hearing. No waiver was found on the part of the union, thus the arbitrator held that the employer violated the contract and reinstated the grievant without back pay: 383

- The grievant worked in a Medical Records office when a new supervisor was hired in January 1 985 . The supervisor changed the office location and began to strictly enforce the work rules. The office layout was also changed twice due to new equipment purchases. The supervisor also instituted a physician’s verification policy which was stricter than the previous policy. The grievant went on work related disability in February 1 987. She received Disability Leave benefits and Workers’ Compensation. When these benefits expired she began working for a private employer. She received an order to return to work in July 1 987 because of her other employment. The grievant refused to return to work under her prior supervisor. The grievant appealed her denial of further Workers’ Compensation benefits and lost, after which she contacted the facility to come back to work. The arbitrator found that the grievant failed to prove supervisory harassment or constructive discharge. All the supervisor’s acts were within her scope of authority and related to efficiency. The removal was timely because the three year delay was caused by the grievant’s pursuit of her workers’ compensation claim in state court. The arbitrator held that the grievant abandoned her job and denied the grievance: 384

- The grievant was a Youth Leader 2 who had forgotten that his son’s BB gun was put into his
work bag to be taken to be repaired. While at work a youth entered the grievant’s office, took the BB gun and hid it in the facility. Management was informed by another youth and the grievant was informed the next day. He was removed for failure of good behavior, bringing contraband into an institution, and possessing a weapon or a facsimile on state property. It was proven that the grievant committed the acts alleged but removal was found to be too severe. The grievant had no intent to violate work rules, the BB gun was not operational, and the employer withdrew the act of leaving the office door open as a basis of discipline. The grievant’s work record also warranted a reduction to a thirty day suspension: 388

- The grievant was a field employee who was required to sign in and out of the office. He began to experience absenteeism in 1990 and entered drug abuse treatment. He continued to be excessively absent and was removed for periods of absence from October 2nd through the 10th and October 26th to the 30th, during which he called in sporadically but never spoke to a supervisor. The grievant was found to have violated the employer’s absenteeism rule. Additionally, the employer was found not to be obligated to enter into a last chance agreement nor to delay discipline until the end of the grievant’s EAP. Mitigating circumstances existed, however, to warrant a reduced penalty. The arbitrator noted the grievant’s length of service from 1981 to 1990, and the fact that he sought help himself, therefore the arbitrator reinstated the grievant with no back pay pursuant to a last chance agreement after a physical examination which must show him to be free of drugs: 391

- The grievant was employed as a Salvage Processor who was responsible for signing off on forms after dangerous goods had been destroyed. He was removed for falsification of documents after it was found that he had signed off on forms for which the goods had not been destroyed. The arbitrator found that despite minor differences, the signature on the forms was that of the grievant. The employer was found to have violated just cause by not investigating the grievant’s allegation that the signature was forged, and by failing to provide information to the union so that it could investigate the incidents. The employer was found not to have met its burden of proof despite the grievant’s prior discipline: 398

- The employer removed the grievant for two reasons: 1) The grievant committed theft because he had been named as the supplier of checks that had been returned to the Bureau of Workers’ Compensation, to another state employee in order to cash the checks (see arbitration decision #370); and 2) falsification of his job application because he admitted during the investigation that he had prior felony convictions which he failed to report on his employment application. The arbitrator held that the employer could not use the falsification charge as a basis for removal because the grievant had sought assistance when he completed his application and lacked intent to falsify the application. The employer was also estopped from using the falsification because the grievant had been employed for 8 years, and had been removed once before, thus the employer was found to have had ample time to have discovered the falsification prior to this point. The employer was not permitted to introduce the Bureau of Criminal Investigation’s report into evidence at arbitration because the employer failed to disclose it upon request by the union. The fact that the investigation was ongoing was irrelevant. Just cause was proven through the investigator’s testimony and testimony of others involved in the scheme. The grievance was denied: 401

- The grievant had failed to complete several projects properly and on time and another employee had to complete them. She had also been instructed to set projects aside and focus on one but she continued to work on several projects. The grievant had prior discipline for poor performance including a 7 day suspension. The arbitrator found that the employer had proven just cause for the removal. The grievant was proven unable to perform her job over a period of years despite prior discipline. The fact that another employee completed the projects was found to be irrelevant. Removal was found to be commensurate with the offense because of the prior discipline and the work was found to have been within the grievant’s job description and she had been offered training. Thus, the grievance was denied: 402

- The grievant had been a Driver’s License Examiner for 13 months. He was removed for falsification when he changed an applicant’s score from failing to passing on a Commercial Drivers’ License examination. The arbitrator found that the grievant knew he was violating the employer’s rules and rejected the union’s mitigating factors
that the grievant had no prior discipline and did not benefit from his acts. Falsification of license examination scores was found serious enough to warrant removal for the first offense. The arbitrator also rejected arguments of disparate treatment. The grievance was denied: 4 03

- The grievant was a Psychiatric Attendant who had received prior discipline for refusing overtime and sleeping on duty. He refused mandatory overtime and a pre-disciplinary hearing was scheduled. Before the meeting occurred, the grievant was found sleeping on duty. A 6 day suspension was ordered based on both incidents. The arbitrator found that despite the fact that the grievant had valid family obligations, he had a duty to inform the employer rather than merely refuse mandated overtime and, thus, was insubordinate. The employer failed to meet its burden of proof as to the sleeping incident, however due to the grievant’s prior discipline a 6 day suspension was warranted for insubordination. The grievance was denied: 4 04

- The grievant was a Youth Leader who had been removed for abusing a youth. He was accused of pushing and choking the youth. The grievant testified that he had other youths present leave the room so that he could talk to the complaining youth. The employer’s witness testified that the grievant told the youths to leave so he could kick the complaining youth’s ass. The arbitrator held that the employer failed to prove that the grievant abused a youth because that he did not intentionally cause excessive physical harm. The grievant was found to have used excessive force in restraining the youth and the removal was reduced to a one month suspension with back pay, less outside earnings: 4 07

- The grievant was removed for misuse of his position for personal gain after his supervisor noticed that the grievant, an investigator for the Bureau of Employment Services, had received an excessive number of personal telephone calls from a private investigator. The Ohio Highway Patrol conducted an investigation in which the supervisor turned over 1 30-1 5 0 notes from the grievant’s work area and it was discovered that the grievant had disclosed information to three private individuals, one of whom admitted paying the grievant. The arbitrator found that the employer proved that the grievant violated Ohio Revised Code section 4 1 4 1 .21 by disclosing confidential information for personal gain. The agency policy for this violation calls for removal. The employer’s evidence was uncontroverted and consisted of the investigating patrolman’s testimony, transcribed interviews of those who received the information, and the grievant’s supervisor’s testimony. The grievant’s 13 years seniority was an insufficient mitigating circumstance and the grievance was denied: 4 08

- The grievant was a Therapeutic Program Worker who was removed for abusing a patient by restraining him in a manner not provided for in the client’s restraint program. The client was acting out while eating and the grievant either choked or placed the client in a bear hug. The arbitrator found that the employer proved that the grievant abused the client. The grievant was shown to have engaged in acts inconsistent with the client’s human rights by restraining the client in a way not permitted by the client’s program or the agency’s policies. The testimony of the employer’s witnesses was found to be more credible than that of the grievant, and there was no evidence of coercion by the employer or collusion among the witnesses. The arbitrator recognized that if abuse was proven, then no authority exists to reduce the penalty of removal, thus the grievance was denied: 4 09

- While on disability leave in October 1 990 the grievant, a Youth Leader, was arrested in Texas for possession of cocaine. After his return to work, he was sentenced to probation and he was fined. He was then arrested in Ohio for drug-related domestic violence for which he pleaded guilty in June 1 991 and received treatment in lieu of a conviction. The grievant was removed for his off-duty conduct. The grievant’s guilty plea in Texas was taken as an admission against interest by the arbitrator and the arbitrator also considered the grievant’s guilty plea to drug related domestic violence. The arbitrator found that the grievant’s job as a Youth Leader was affected by his off-duty drug offenses because of his co-workers knowledge of the incidents. The employer was found not to have violated the contract by delaying discipline until after the proceedings in Texas had concluded, as the contract permits delays pending criminal proceedings. No procedural errors were found despite the fact that the employer did not inform the grievant of its investigation of him, nor permit him to enter an EAP to avoid discipline. No disparate treatment was proven as the employees compared to the grievant were involved in alcohol related incidents which were found to be different
The grievant was a Correction Officer who had an alcohol dependency problem of which the employer was aware. He had been charged twice for Driving Under the Influence, which caused him to miss work and he received a verbal reprimand. The grievant was absent from work from May 1st through the 21st and was removed for job abandonment. The arbitrator found that the grievant’s removal following a verbal reprimand was neither progressive nor commensurate and did not give notice to the grievant of the seriousness of his situation. It was also noted that progressive discipline and the EAP provision operate together under the contract. The grievant was reinstated pursuant to a last chance agreement with no back pay and the period he was off work is to be considered a suspension: 413

The grievant was a Therapeutic Program Worker who was removed for abusing a client. The client was known to be violent and while upset and being restrained, he spat in the grievant’s face. The grievant either covered or struck the client in the mouth and some swelling and a small scratch were found in the client’s mouth. The grievant had served a 70 day suspension for similar behavior. The arbitrator found that the employer committed procedural violations by not disclosing the incident report and the client’s progress report despite the employer’s claim of confidentiality. The employer’s witness were found to be more credible than the grievant. The grievance was denied: 414

The grievant was a Psychiatric Attendant who had been mandated to work overtime. The grievant notified the employer that he would be unable to work over because he had to meet his children’s school bus and was unable to find a substitute, and he signed out at his normal time. The grievant had two prior suspensions for failure to work mandatory overtime. Ordinarily, the “work now, grieve later” doctrine applies to such situations, however the arbitrator noted that certain situations alter that policy. The grievant gave a legitimate reason for refusing the overtime and the employer was found to have abused its discretion in not finding a substitute. The grievant was found to have a history of insubordination and inability to arrange alternate child care. Upon a balancing of the parties’ actions, the arbitrator held that there was no just cause for removal, but reduced the penalty to a 60 day suspension: 415

The grievant was a Tax Commissioner Agent and had received a written reprimand for poor performance while still in his probationary period. He was assigned a new supervisor who developed a plan to improve his performance, however the grievant continued to receive discipline for poor performance and absenteeism, including a ten day suspension which was reduced pursuant to a Last Chance Agreement. It was discovered after the Last Chance Agreement had been made, that prior to the signing of the Last Chance Agreement, the grievant had committed other acts of neglect of duty. The grievant was removed for neglect of duty. The arbitrator held that a valid Last Chance Agreement would bar an arbitrator from applying the just cause standard to a disciplinary action and that the agreement made by the grievant was valid. It was also found that there existed hostility between the grievant and his supervisor, the employer stacked charges by basing discipline on events which occurred prior to the Last Chance Agreement but the grievant was awarded 4 weeks back pay because of the employer’s failure to comply with the union’s discovery requests: 412

- The grievant had held several less than permanent positions with the state since March 1 989. In December 1 990 the grievant bid on and received a Delivery Worker position from which he was removed as a probationary employee after 117 days. The grievant grieved the probationary removal, arguing that his previous less than permanent service should have counted towards the probationary period. The arbitrator found the grievance not arbitrable because it was untimely. The triggering event was found to have been the end of the shortened probationary period, not the removal. The union or the grievant were held obligated to discover when an employee’s probationary period may be abbreviated due to prior service. The employer was found to have no duty to notify a probationary employee of the grievant’s eligibility for a shortened probationary period when it is disputed. There was no intentional misrepresentation made by the employer, thus the employee waived his right to grieve the end of his probationary period and the employer was not estopped from removing the grievant. The grievance was not arbitrable: 410

- The grievant was a Correction Officer who had an alcohol dependency problem of which the employer was aware. He had been charged twice for Driving Under the Influence, which caused him to miss work and he received a verbal reprimand. The grievant was absent from work from May 1st through the 21st and was removed for job abandonment. The arbitrator found that the grievant’s removal following a verbal reprimand was neither progressive nor commensurate and did not give notice to the grievant of the seriousness of his situation. It was also noted that progressive discipline and the EAP provision operate together under the contract. The grievant was reinstated pursuant to a last chance agreement with no back pay and the period he was off work is to be considered a suspension: 413

- The grievant was a Therapeutic Program Worker who was removed for abusing a client. The client was known to be violent and while upset and being restrained, he spat in the grievant’s face. The grievant either covered or struck the client in the mouth and some swelling and a small scratch were found in the client’s mouth. The grievant had served a 70 day suspension for similar behavior. The arbitrator found that the employer committed procedural violations by not disclosing the incident report and the client’s progress report despite the employer’s claim of confidentiality. The employer’s witness were found to be more credible than the grievant. The grievance was denied: 414

- The grievant was a Psychiatric Attendant who had been mandated to work overtime. The grievant notified the employer that he would be unable to work over because he had to meet his children’s school bus and was unable to find a substitute, and he signed out at his normal time. The grievant had two prior suspensions for failure to work mandatory overtime. Ordinarily, the “work now, grieve later” doctrine applies to such situations, however the arbitrator noted that certain situations alter that policy. The grievant gave a legitimate reason for refusing the overtime and the employer was found to have abused its discretion in not finding a substitute. The grievant was found to have a history of insubordination and inability to arrange alternate child care. Upon a balancing of the parties’ actions, the arbitrator held that there was no just cause for removal, but reduced the penalty to a 60 day suspension: 415

- The grievant was a Tax Commissioner Agent and had received a written reprimand for poor performance while still in his probationary period. He was assigned a new supervisor who developed a plan to improve his performance, however the grievant continued to receive discipline for poor performance and absenteeism, including a ten day suspension which was reduced pursuant to a Last Chance Agreement. It was discovered after the Last Chance Agreement had been made, that prior to the signing of the Last Chance Agreement, the grievant had committed other acts of neglect of duty. The grievant was removed for neglect of duty. The arbitrator held that a valid Last Chance Agreement would bar an arbitrator from applying the just cause standard to a disciplinary action and that the agreement made by the grievant was valid. It was also found that there existed hostility between the grievant and his supervisor, the employer stacked charges by basing discipline on events which occurred prior to the Last Chance Agreement but the grievant was awarded 4 weeks back pay because of the employer’s failure to comply with the union’s discovery requests: 412

- The grievant had held several less than permanent positions with the state since March 1 989. In December 1 990 the grievant bid on and received a Delivery Worker position from which he was removed as a probationary employee after 117 days. The grievant grieved the probationary removal, arguing that his previous less than permanent service should have counted towards the probationary period. The arbitrator found the grievance not arbitrable because it was untimely. The triggering event was found to have been the end of the shortened probationary period, not the removal. The union or the grievant were held obligated to discover when an employee’s probationary period may be abbreviated due to prior service. The employer was found to have no duty to notify a probationary employee of the grievant’s eligibility for a shortened probationary period when it is disputed. There was no intentional misrepresentation made by the employer, thus the employee waived his right to grieve the end of his probationary period and the employer was not estopped from removing the grievant. The grievance was not arbitrable: 410

- The grievant was a Correction Officer who had an alcohol dependency problem of which the employer was aware. He had been charged twice for Driving Under the Influence, which caused him to miss work and he received a verbal reprimand. The grievant was absent from work from May 1st through the 21st and was removed for job abandonment. The arbitrator found that the grievant’s removal following a verbal reprimand was neither progressive nor commensurate and did not give notice to the grievant of the seriousness of his situation. It was also noted that progressive discipline and the EAP provision operate together under the contract. The grievant was reinstated pursuant to a last chance agreement with no back pay and the period he was off work is to be considered a suspension: 413

- The grievant was a Therapeutic Program Worker who was removed for abusing a client. The client was known to be violent and while upset and being restrained, he spat in the grievant’s face. The grievant either covered or struck the client in the mouth and some swelling and a small scratch were found in the client’s mouth. The grievant had served a 70 day suspension for similar behavior. The arbitrator found that the employer committed procedural violations by not disclosing the incident report and the client’s progress report despite the employer’s claim of confidentiality. The employer’s witness were found to be more credible than the grievant. The grievance was denied: 414

- The grievant was a Psychiatric Attendant who had been mandated to work overtime. The grievant notified the employer that he would be unable to work over because he had to meet his childrens’ school bus and was unable to find a substitute, and he signed out at his normal time. The grievant had two prior suspensions for failure to work mandatory overtime. Ordinarily, the “work now, grieve later” doctrine applies to such situations, however the arbitrator noted that certain situations alter that policy. The grievant gave a legitimate reason for refusing the overtime and the employer was found to have abused its discretion in not finding a substitute. The grievant was found to have a history of insubordination and inability to arrange alternate child care. Upon a balancing of the parties’ actions, the arbitrator held that there was no just cause for removal, but reduced the penalty to a 60 day suspension: 415
The grievant was a custodial worker at a psychiatric hospital. The grievant asked a patient to smoke outside rather than inside a cottage. The patient told the grievant that he would not, dropped to his knees and repeated his statement, as was the patient’s habit. The patient repeated this action later in the day and grabbed the grievant’s leg. The grievant yanked his leg free, the client accused the grievant of kicking him and the patient was found to have injuries later in the day. The grievant was removed for abuse of a patient, and criminal charges were brought. The criminal charges were dropped pursuant to a settlement with the Cuyahoga County court in which the grievant agreed not to contest his removal. When the grievance was pursued, the employer asked for criminal charges to be reinstated. The charges could not be reinstated, but the grievant agreed not to sue the employer. The grievance was held to be arbitrable despite the settlement between the grievant and the county court. Had the settlement been a three party agreement including the employer, dovetailing into the grievance process, it would have precluded arbitration. Additionally, after filing a grievance it becomes the property of the union. The grievance was sustained because the employer failed to meet its burden of proof that the grievant abused a patient. The arbitrator awarded full back pay less interim earnings, back seniority, back benefits and that the incident be expunged from the grievant’s record: 4 1 6

An inmate was involved in an incident on January 4, 1991, in which a Correction Officer was injured. The inmate was found to have bruises on his face later in the day and an investigation ensued which was concluded on January 28th. A Use of Force Committee investigated and reported to the warden on March 4th that the grievant had struck the inmate in retaliation for the inmate’s previous incident with the other CO on January 4th. The pre-disciplinary hearing was held on April 15, and 16, and the grievant’s removal was effective on May 29, 1991. The length of time between the incident and the grievant’s removal was found not to be a violation of the contract. The delay was caused by the investigation and was not prejudicial to the grievant. The arbitrator found that the employer met its burden of proof that the grievant abused the inmate. The employer’s witness was more credible than the grievant and the grievant was found to have motive to retaliate against the inmate. The grievance was denied: 4 21

The grievant was removed for failing to report off, or attend a paid, mandatory four-hour training session on a Saturday. The grievant had received 2 written reprimands and three suspensions within the 3 years prior to the incident. The arbitrator found that removal would be proper but for the mitigating factors present. The grievant had 23 years of service, and her supervisors testified that she was a competent employee. The arbitrator noted the surrounding circumstances of the grievance; the grievant was a mature black woman and the supervisor was a young white male and the absence was caused by an embarrassing medical condition. The removal was reduced to a 30 day suspension and the grievant was ordered to enroll into an EAP and the arbitrator retained jurisdiction regarding the last chance agreement: 4 22

The grievant was a LPN who had been assaulted by a patient at the Pauline Lewis Center and she had to be off work due to her injuries for approximately 1 month. When she returned she was assigned to the same work area. She informed her supervisor that she could not work in the same work area, and was told to go home if she could not work. The grievant offered to switch with another employee whom she identified, but the supervisor refused. She then told her supervisor she was going home but instead switched work assignments. The grievant had prior discipline including two 6 day suspensions for neglect of duty. The supervisor concluded that the grievant was given a direct order to work in her original work area. The grievant erroneously believed that switching assignments was permitted. Despite the grievant’s motivation for her actions, the grievant’s prior discipline warranted removal, thus the grievance was denied: 4 24

The grievant was an employee of the Lottery Commission who was removed for theft. The agency’s rules prohibit commission employees from receiving lottery prizes, however the grievant admitted redeeming lottery tickets, but not to receiving notice of the rule. The arbitrator noted that while the employer may have suspected the grievant of stealing the tickets, there was no evidence supporting that suspicion and it cannot be a basis for discipline. The arbitrator found that the grievant did redeem lottery coupons in violation of the employer’s rules and Ohio Revised Code section 3770.07(A) but that he had
The grievant was reinstated without back pay but with no loss of seniority: 4 25

- The grievant was removed after 13 years service from her position with the Bureau of Disability Services for unapproved absence, conviction of a drug charge, and failure to report the drug charge as required by the state’s Drug-Free Workplace Act of 1988. The grievant had a history of alcohol problems. She was also involved with a co-worker who, after the relationship ended, began to harass her at work. She filed charges with the EEOC and entered an EAP. The former boyfriend called the State Highway Patrol and informed them of the grievant’s drug use on state property. An investigation revealed drugs and paraphernalia in her car on state property and she pleaded guilty to Drug Abuse. She became depressed and took excessive amounts of her prescription drugs and missed 2 days of work. She was admitted into the drug treatment unit of a hospital for 2 weeks. She was on approved leave for the hospital stay, but the previous 2 days were not approved and the agency sought removal. The arbitrator found that while the employer’s rules were reasonable, their application to this grievant was not. The Drug-Free Workplace policy does not call for removal for a first offense. The employer’s federal funding was not found to be threatened by the grievant’s behavior. The grievant was found to be not guilty of dishonesty for not reporting her drug conviction because she was following the advice of her attorney who told her that she had no criminal record. The arbitrator noted that the grievant must be responsible for her absenteeism, however the employer was found to have failed to consider mitigating circumstances present, possessed an unwillingness to investigate, and to have acted punitively by removing the grievant. The grievant’s removal was reduced to a 10 day suspension with back pay, benefits, and seniority, less normal deductions and interim earnings. The record of her two day absence was ordered changed to an excused unpaid leave. The grievant was ordered to complete an EAP and that another violation of the Drug-Free Workplace policy will be just cause for removal: 4 31

- The grievant was removed for unauthorized possession of state property when marking tape worth $96.00 was found in his trunk. The Columbus police discovered the tape, notified the employer and found that the tape was missing from storage. The arbitrator found that the late Step 3 response was insufficient to warrant a reduced penalty. The arbitrator also rejected the argument that the grievant obtained the property by “trash picking” with permission, and stated that the grievant was required to obtain consent to possess state property. It was also found that while the employer’s rules did not specifically address “trash picking” the grievant was on notice of the rule concerning possession of state property. The grievance was denied: 4 32

- The grievant, a Therapeutic Program Worker, took $150 of client money for a field trip with the clients. The grievant was arrested en route and used the money for bail in order to return to work for his next shift. The grievant was questioned about the money before he could repay it, he offered to repay it when he was paid on Friday, but failed to offer payment until the next Monday. He was removed for Failure of Good Behavior. While the employer was found to have poorly communicated its rules concerning use of client funds, the grievant was found to have notice of its provisions. The arbitrator found that the grievant lacked the intent to steal the money, however the grievant’s failure to repay was not excused, thus just cause was found for discipline. Because of the grievant’s prior disciplinary
record, removal was held commensurate with the offense and the grievance was denied: 4 33
- The grievant was a Mail Clerk messenger whose responsibilities included making deliveries outside the office. The grievant had bought a bottle of vodka, was involved in a traffic accident, failed to complete a breathalyzer test and was charged with Driving Under the Influence of Alcohol. The grievant’s guilt was uncontested and the arbitrator found that no valid mitigating circumstances existed to warrant a reduction of the penalty. The grievant’s denial of responsibility for her drinking problem and failure to enroll into an EAP were noted by the arbitrator. The arbitrator stated that the grievant’s improved behavior after her removal cannot be considered in the just cause analysis. Only the facts known to the person imposing discipline may be considered at arbitration. The arbitrator found no disparate treatment as the employees compared with the grievant had different prior discipline than the grievant, thus, there was just cause for her removal: 4 34

- The grievant was employed by the Bureau of Workers’ Compensation as a Data Technician 2. He had been disciplined repeatedly for sleeping at work and he brought in medication he was taking for a sleeping disorder to show management. The grievant was removed for sleeping at work. The grievant had valid medical excuses for his sleeping, which the employer was aware of. The arbitrator stated that the grievant was ill and should have been placed on disability leave rather than being disciplined. No just cause for removal was found, however the grievant was ordered to go on a disability leave if it is available, otherwise he must resign: 4 36

- The grievant was a Cosmetologist who was removed for neglect of duty, dishonesty and failure of good behavior. She was seen away from her shop at the facility, off of state property, without having permission to conduct personal business. The arbitrator found the grievant’s explanation not credible due to the fact that the grievant did not produce the person who she claimed was mistaken for her. There were also discrepancies in the grievant’s story of what happened and the analysis of travel time. The arbitrator found no mitigating circumstances, thus the grievance was denied: 4 38

- The grievant was custodian for the Ohio School for the Blind who was removed for the theft of a track suit. The arbitrator looked to the Hurst decision for the standards applicable to cases of theft. It was found that while the grievant did carry the item out of the facility, no intent to steal was proven; removal of state property was proven, not theft. The arbitrator found no procedural error in that the same person recommended discipline and acted as the Step 3 designee because the employer failed to meet its burden of proof, the removal was reduced to a 30 day suspension with the arbitrator retaining jurisdiction to resolve differences over back pay and benefits: 4 39

- The Employer had just cause to remove the grievant where, in spite of an acquittal by a court, it is plausible to believe that the grievant, a Correction’s Officer, engaged in purchasing drugs for the purpose of selling them to inmates: 4 4 0

- Removal was too severe a penalty where the grievant had adequate work evaluations and had shown a desire to be rehabilitated. The grievant’s license was suspended due to a charge of driving while intoxicated. This made it impossible for him to perform his job, which required him to drive state vehicles. The grievant was permitted to seek a modification order of the suspension, allowing him to perform his job duties: 4 4 1

- The Employer had just cause to remove the grievant because the grievant failed to abide by the previous arbitration award requirements. The grievant was permitted to seek a modification order of his driver’s license suspension, but let his driver’s license expire, preventing him from obtaining a modification. Allowing his license to expire showed disregard for his employer’s needs and for the arbitration award: 4 4 1 (A)

- The Employer had just cause to remove the grievant because she violated Rule 4 5, prohibiting giving preferential treatment to inmates, and Rule 4 6(e), prohibiting personal relationships with inmates: 4 4 2

- The Employer did not have just cause to remove the grievant. There is insufficient evidence as to whether the grievant did in fact physically abuse a patient. However, there is evidence that the grievant failed to exercise good judgment, and so the removal was modified to a 90-day suspension: 4 4 3

- The Employer had just cause to discipline the grievant, but not to remove her. The Employer was not timely in initiating discipline; it merged
separate infractions to apparently build a case against the grievant, preventing progressive discipline, and charged the grievant with a general work rule rather than a more specific charge, which led to ambiguity. The Employer also failed to have a clear doctor’s verification policy. The grievant did not abandon her job. She did, however, fail to follow the call-off and sick leave policies, and so some measure of discipline is warranted. The removal was modified to a 60-day suspension: 4 4 4

- Where a removal was modified to a 60-day suspension, the grievant was to be compensated for certain paid holidays; the Employer was required to canvas first shift and allow the grievant to bid on any position within her job classification and in accordance with her seniority; the Employer was required to compensate the grievant for all legitimate benefits and related expenses incurred between her removal and reinstatement dates; and the Employer was ordered to compensate the grievant for uniform hemming and sewing: 4 4 4 (A)

- Where a grievant was removed for being AWOL for three consecutive days due to an illness, the removal was overturned because the grievant complied with the requirements of Article 31 .01 by providing periodic, written verification from a psychologist. Given the fact that the agency provided information to the doctor, the agency cannot complain of the doctor’s recommendation and substitute its opinion for that of the doctor: 4 4 6

- The Employer had just cause to discipline the grievant because, in addition to not informing her supervisors that her Unit was critically understaffed, she had two previous reprimands. However, the Employer failed to show just cause for removing the grievant: 4 4 7

- The Employer failed to timely take disciplinary action against the grievant, and therefore, the removal was set aside and the grievant was reinstated: 4 4 9

- The Employer had just cause to remove the grievant, a Correction officer, for violating Rule 4 6(e) of the Standards of Employee Conduct. She engaged in an unauthorized relationship with a parolee. The grievant engaged in a long-term relationship with a parolee prior to and following her appointment, and she failed to disclose the matter after orientation and training involving the specific work rule: 4 5 1

- The Employer had just cause to remove the grievant. The grievant never apologized, nor did he testify as to his intention or state of mind when he made these racial slurs. His longevity, the harm cause, his prior discipline and any mitigating factors must be balanced. Such balancing is at the prerogative of the Employer unless it is not progressive or commensurate. The Arbitrator cannot substitute her judgment for that of the Employer without such a finding: 4 5 2

- The Employer had just cause to remove the grievant because he falsified his applications for both temporary and permanent employment, as well as resumes and a recommendation letter. He lied about his education and prior employment, and manufactured the letter of recommendation: 4 5 3

- The Employer did not have just cause to remove the grievant, in spite of the fact that the grievant was off work five days while in jail, he had no leave balances to cover the time, and that the State does not excuse employees who are in jail. The generally accepted approach in dealing with employees with drug or alcohol problems is to attempt to rehabilitate them rather than to terminate them: 4 5 6

- Several factors led the Arbitrator to decide to reinstate the grievant: the grievant had his father call off for him because he could not, he was a satisfactory employee with five years seniority, the State was not substantially harmed by the grievant’s absences, and the grievant entered into EAP before being informed of disciplinary action: 4 5 6

- The Employer had just cause to remove the grievant for sexual harassment and failure of good behavior, especially considering his disciplinary record. The grievant was provided with proper notice concerning the sexual harassment policy articulated in the Work Rules and procedures. The Employer’s training efforts were sufficient in providing proper notice concerning the sexual harassment policy. Witness testimony demonstrated that the grievant’s lewd, harassing behavior created an oppressive working environment: 4 6 1
- The employer’s finding of patient abuse is well founded, and as such, there was just cause for her removal. The grievant admitted hitting the patient, but failed in her assertion that it was in self defense: 463

- The Employer and grievant signed a last-chance agreement, which included EAP completion, after the Employer ordered the removal of the grievant based on a charge of patient abuse, a charge which was not grieved. The grievant failed to meet the conditions of the last-chance agreement, and so the Employer had just cause to activate the discipline held in abeyance, regardless of any mitigating circumstances: 465

- The grievant failed to inform a supervisor that he had lost his driving privileges and of continuing to drive state vehicles. Because he lost his license, he was unable to perform his job duties, and it was additionally unlikely in light of his suspension that he would obtain the newly required commercial driver’s license by the deadline. Therefore, the Employer had just cause to remove the grievant: 466

- Although the grievant’s commission of inmate abuse constitutes a first offense, Management had just cause to remove him as a threat to the institution’s security: 470

- The grievant was improperly designated a fiduciary, and therefore, maintained her bargaining unit status. The Employer, therefore, violated Section 24 .01 of the Contract when it terminated the grievant without just cause: 472

- The removal is set aside, and a 20-day suspension is imposed. The Employer had just cause to discipline the grievant, but removal following a one day suspension is not progressive unless the offense was so serious as to warrant removal. In this case, removal was not progressive, commensurate nor fairly applied: 477

- Unless the individual situation is examined, removal after three days’ unauthorized leave without more is simply an unreasonable, arbitrary cut-off time without evidence of the employee’s intention: 477

- In choosing removal, the Employer failed to consider that the employee was competent and that she was an employee for 1 4 years: 477

- The Employer had just cause to remove the grievant who had admitted charges of gross sexual imposition of an inmate and was subsequently convicted. The Employer did not abuse its discretion considering the seriousness of the misconduct and its direct relation to the grievant’s responsibilities and job performance as a Correction Officer: 479

- The Employer had just cause to remove the grievant for sleeping on duty, in light of his disciplinary record. The denial by the grievant that he was sleeping in the face of the record he has compiled is viewed skeptically. The account provided by the State’s principal witness is more credible than that by the grievant: 480

- The State did not sustain its Section 24 .01 burden of proof to establish just cause for discipline. The allegations of inmate abuse were not supported. The testimony of the State’s witnesses, many of whom have criminal records, was inconsistent, and in some cases, not credible. No reports were filed on the incident nor were medical exams conducted until days later. Material evidence was not secured, and a detailed investigation was apparently not conducted by the Employer after the incident: 481

- In overturning the removal of the grievant, the arbitrator held that the grievant was entitled to compensation for missed overtime opportunities and payment of outstanding medical bills. Furthermore, the second grievant’s current assignment was to remain the same for up to thirty calendar days to allow him an opportunity to obtain an Ohio Driver’s license and if he did not obtain the license, he would be allowed to bid for available openings which did not require a driver’s license. The grievant were not entitled to roll call pay: 481 (A)

- Giving the “role model” requirement its most narrow reading, the prison employer can show a rational relationship between the correction officer’s off-duty criminal behavior, whether a felony or misdemeanor, and his ability to function as a Correction Officer. A direct conflict exists if a Correction Officer, whose job essentially consists of confining criminals, is himself a criminal. Such a conflict of interest can seriously undermine his ability to do the job. While the grievant had only minor discipline up to this point, the nature of the crime was serious. The State had just cause to remove the grievant: 482
- ODOT policy prohibits any ODOT employee from operating or driving any department equipment unless or until their modification of driver’s license suspension is documented on the employee’s driving record at the BMV. The grievant failed to comply with the requirements of the modifying order, and so was not able to obtain limited driving privileges. Because 70 percent of the grievant’s job duties requires him to drive ODOT vehicles off-season, and 100 percent in snow season, he was unable to perform his job. Therefore, the Employer had just cause to remove the grievant: 4 86

- The Employer had just cause to remove the grievant for being absent without leave (AWOL). Her two previous attendance infractions, coupled with other unrelated infractions during her short employment with the Northwest Ohio Development Center justified sustaining the State’s decision to discharge the grievant: 4 88

- Disciplined was imposed upon the grievant for just cause. The State provided eyewitness testimony that the grievant was observed standing beside the open salvage door when no loading was in progress. Given the grievant’s continued dishonesty in the face of credible eye witnesses and his extensive disciplinary record (which included numerous reprimands for dishonesty and neglect of duty, Failure to carry out work assignment, willful disobedience of direct order and violations of agency policies and procedures) and the removal was commensurate with the offense: 4 93

- Unauthorized relationships, involving a close personal relationship, consistent telephone contact, and a scheme to avoid detection, between a Correction Officer and an inmate is a serious offense. These activities create problems for the Correction facility, and therefore there is just cause for appropriate discipline. In these situations, appropriate discipline can be removal of the employee: 4 95

- Credible and unbiased testimony implicating a hospital aid’s involvement in patient abuse is sufficient to warrant discipline of the hospital aid. Appropriate discipline may be dismissal. Unauthorized breaks, although indicative of an employee’s lack of responsibility, have no bearing on the severity of discipline imposed for patient abuse: 4 96

- The grievant was removed for just cause. ODOT established a nexus between the shoplifting offense and the grievant’s position as ODOT employee and Union shop steward. The grievant was actually on duty when the incident occurred and there was notable media coverage of it. The removal was commensurate with the offense, because the grievant had been previously convicted of theft, but not removed. The mitigating circumstances (i.e., kleptomania diagnosis, length of service, involvement in a rehabilitative program) did not overcome the circumstances and the severity of the offense: 5 00

- The grievant, who did not properly attend to an inmate patient and falsified a report concerning the incident, committed serious violations and deserved to be disciplined, but there was not just cause for removal under the circumstances. This was a first offense and Section 24.02 of the contract clearly provides for progressive discipline. As such, the grievant may not be removed at this stage of the disciplinary process: 5 01

- The grievant was denied reinstatement of her position as a Correction Officer because she violated work rules designed to protect prison guards by limiting personal contact between the guards and the inmates. The grievant had a physical relationship with an inmate, was involved in an extortion scheme with the same inmate and gave her unlisted phone number to another inmate. The arbitrator found that the grievant was terminated for just cause: 5 02

- The Employer has to establish just cause for removal by clear and convincing evidence when the charge is for serious misconduct such as sexual harassment and sexual imposition. The charging party’s claim was not more credible than the grievant’s denials. Therefore, the removal was improper: 5 03

- The grievant was removed from her position with the Department of Rehabilitation and Correction for dishonesty and failure to cooperate with an official investigation. The arbitrator felt that removal was inappropriate for a first offense. Therefore, the grievant was reinstated with no loss of seniority, but without back pay: 5 04

- Given the severity of the assault committed by the grievant and his prior disciplinary record, the
- In a case where the grievant was accused of trafficking prescription drugs to a fellow prison employee, his reinstatement with back pay was awarded because the State was unable to convince the grievant did the deed with which he was charged and thus there was not just cause for his removal: 5 07

- Although the Union provided believable testimony and documents exonerating the grievant, the length of grievant's prior disciplinary record and the grievant's dishonesty under oath weakened his credibility and strengthened the State's claim that it removed the grievant for just cause: 5 08

- In a case involving a grievant who was removed for his disruptive behavior during a management meeting, the arbitrator held that there was no just cause to remove the grievant because the parties were equally at fault for the confrontation. The grievant was at fault by interrupting the meeting, by refusing to be quiet, by arguing with the Regional Director and by impeding the Regional Director's leaving. However, the Regional Director exhibited poor management skills in not asking the grievant to leave the meeting, by allowing the conversation to become increasingly heated, and by shoving the grievant. The fact that the grievant did not retaliate physically is a significant fact that mitigates against upholding his removal: 5 09

- Under Article 24 .01 , 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. If the arbitrator finds that there has been an abuse of a patient, the arbitrator does not have authority to modify the termination of an employee committing such abuse: 5 10

- In this case, the Employer did not establish just cause as to why the grievant should be removed. The Employer could not demonstrate a casual connection between the grievant's blow and the patient's injuries. The grievant was improperly removed and therefore was reinstated with back pay and no loss of benefits: 5 10

- The State upheld the principles of progressive discipline by giving oral and written reprimands and suspensions for violations of the call in policy. The State then executed an EAP agreement as a conditional discharge. The grievant was eventually discharged for failing to comply with the terms of th4 EAP agreement: 5 17

- In a case involving a grievant who had friendly discussions with an ex-inmate on the premises of the correctional institution, the arbitrator found that there was sufficient evidence of an unauthorized relationship with an inmate for which the grievant could be disciplined: 5 17

- In a case involving a grievant who refused to identify his roommate during an internal investigation, the arbitrator held that it is not up to the grievant to decide what questions are relevant to the investigation. The grievant failed to cooperate in the investigation in violation of work rules and, in combination with other violations, could be removed: 5 17

- In a case involving a grievant who violated work rules by threatening a co-worker with bodily injury, the arbitrator found that there was just cause for removal: 5 17

- The State unjustly removed the grievant for neglect of duty where the grievant was given a list of tasks to be completed for a major inspection without an explanation, an indication of priority, or a deadline. Because the problem resulted from a lack of communication between the grievant and her supervisor and the grievant's prior disciplinary history was completely unrelated to the instant offense, the penalty was too severe: 5 19

- Just cause requires that the Employer establish that the penalty which it imposed was appropriate when taking into consideration both the employee's past record and the offense he was charged with committing: 5 21

- In a case involving a grievant who signed an EAP agreement to correct his persistent tardiness due to drinking, the State had just cause to remove the grievant when his problems continued and when he failed to enroll in a detoxification program. Although the EAP agreement was to last for ninety days, the arbitrator found that the State did not act prematurely in removing the employee: 5 21

- Management properly removed a grievant who (1 ) failed to sign in for a break which he took during
the first hour after reporting to work in violation of agency policy and (2) was AWOL for more than three consecutive days. First, the grievant was aware of the policy, the Union never challenged it as being unreasonable and the grievant failed to provide a rational excuse for taking the unauthorized break. Second, the agency's awareness of the grievant's incarceration in no way curtailed its right to expect employees to work their scheduled hours and be regular in their attendance: 5 23

- The grievant was properly removed where he admitted that he unethically and intentionally used the Bureau's facilities and confidential client records for personal profit. Moreover, the grievant's offer to make restitution, which was motivated more by a desire to avoid criminal prosecution than by any real feelings of remorse, did not serve to mitigate the offense. Given the severity of the offense, the grievant's long history of service and discipline-free work record was insufficient to mitigate the misconduct in the instant case. Therefore, the State did not violate the principle of progressive discipline: 5 25

- In light of the grievant's disciplinary record, including four attendance-related infractions, the grievant received progressive discipline and his removal was for just cause. The grievant's prior discipline progressed from verbal reprimand, to written reprimand to suspension according to the WRPH's policy, and according to this policy, the next step was removal. Although it was undisputed that the grievant was given a copy of and training on the tardiness policy, the grievant continued to arrive at work late and refused to record the time he actually arrived at work: 5 26

- The grievant's actions were serious enough to constitute just cause. She admitted that she entered numerous false social security numbers into the computer each Saturday for three months. Such actions constitute falsification of records and deliberate sabotage of the next extended hours program. These actions caused substantial harm to customers who were unable to schedule appointments on Saturday: 5 27

- Removal was too harsh a penalty where the State was unable to prove its entire case against the grievant. The State failed to prove that the grievant falsified his military leave form. However, because the grievant should have known that, without accompanying orders, a military leave form was insufficient to place him on active duty, the arbitrator concluded that the grievant was absent from work without proper leave. Nevertheless, the arbitrator reduced the penalty from removal to a suspension because the State had not proved its entire case: 5 28

- The arbitrator found just cause for the removal of the grievant due to the grievants' relatively short-term work histories, their failure to immediately confess, and the malicious intent underlying their actions: 5 33

- The grievant was removed for patient abuse. The arbitrator weighed evidence from the grievant that he was simply taking an aggressive client's shoe away from him and that the client showed no signs of injury or abuse. The grievant's supervisor claimed to have seen the grievant strike the client with a shoe "with all possible force". The supervisor then pointed to the client's acne-like skin condition which was supposed to have hidden the bruise. The arbitrator, finding the grievant to be more credible, reinstated the grievant: 5 35

- The grievant's removal was not just, and the penalty was far too severe in comparison with the offense. A Driver's License Examiner performs a variety of duties which are not only associated with administering driving tests. The grievant could have been assigned to perform any number of other duties during the 90-day suspension of her driver's license. In fact, at least two of the grievant's colleagues volunteered to trade non-driving duties with the grievant, and such accommodations have been extended to other employees in the past. The State even admitted that it probably could have accommodated the grievant during her period of license suspension, but instead chose to remove her: 5 36

- The grievant was removed because he (1 ) took an inmate who needed emergency medical care to a holding and signed him in instead of taking the inmate to a waiting station as he was directed to do, (2) refused to immediately transport this inmate to the hospital, (3) refused to report to the lieutenant's office to explain his combative behavior, and (4 ) refused, in an obscene manner, to work mandatory overtime. Consequently, the arbitrator found that the grievant was discharged for just cause and in a manner consistent with progressive discipline. In fact, the arbitrator held that where an offense is extremely serious, a
discharge may occur without progressive discipline, and noted that the instant case would have merited such a result. The grievant's activities were so outrageous that, when compounded with the grievant's prior record, the Employer was left with no alternative except to remove the grievant: 5 4 0

- Because the grievant had little seniority and the transaction between the grievant and the inmate was such a serious offense, the removal of the grievant was reasonable: 5 4 3

- The Arbitrator found that the grievant was terminated for just cause. Because the grievant did not fulfill the terms of his EAP agreement, did not attempt to make use of EAP’s service appropriately, and did not report to the EAP on the date she indicated she would: 5 4 4

- In reaching a decision to terminate the grievant, the Arbitrator considered the grievant’s past disciplinary record which included several reprimands for Neglect of Duty due to her attendance-related problems. The Arbitrator found the grievant to be a less credible witness because of her past disciplinary record: 5 4 4

- The grievants id not violate Article 24 .01 of the Contract because the State failed to meet its burden of presenting sufficient credible evidence and testimony to prove that the grievants abused the patient. Therefore, their termination was not for just cause: 5 4 7

- The patient’s testimony was not credible. Therefore, his testimony did not warrant the removal of the grievants: 5 4 7

- The making of a bomb threat by an employee which constitutes a criminal violation, is just cause for the employee’s termination: 5 4 9

- The grievant’s failure to maintain a commercial driver’s license was a prerequisite for the position and the grievant’s failure to maintain a CDL gave the employer just cause to terminate him: 5 5 0

- In a case where an employee was excessively absent and maintained a zero balance in her sick leave account, the Arbitrator held that removal was appropriate: 5 5 5

- The Arbitrator found that the penalty of discharge was not too severe for the infraction alleged because of the limited amount of supervision that the grievant was under. The amount of trust in the truthfulness of the employee’s report is of great importance in the grievant’s situation. When it is proven that such trust has been deliberately betrayed, discharge is not too severe a penalty: 5 5 6

- The burden of proof in cases such as this, in which there are allegations of serious misconduct, should be higher than proof by preponderance of the evidence. The correct standard was clear and convincing evidence. When the circumstantial evidence was considered with the testimony of the State’s witness, relating the admission of the grievant, there was no reasonable conclusion other than to find in favor of the employer and against the grievant: 5 5 7

- The grievant was wrongfully discharged due to a no contest plea to an alleged drug possession arrest. The Arbitrator found that a written reprimand for failure of good behavior was commensurate with the offense and the grievant was returned to his position with full back pay, seniority, and benefits: 5 5 8

- The employer had just cause to remove the grievant due to her violation of the terms of a Last Chance Agreement whereby any violation of the employer’s attendance policies would result in her discharge: 5 5 9

- The employer had just cause to remove an employee who was convicted for patient abuse/neglect and violated the terms of last chance agreement, which called for removal if any of its policies were violated after a 4 5 day suspension: 5 6 0

- The grievant’s behavior was premeditated, unnecessary and cruel. Such cruelty directed to the very animals that the grievant was to care for, has no excuse. The grievant was supposed to train inmates and be a role model of behavior for inmates. In a prison setting, such a propensity for violence cannot be tolerated in a person hired to train and supervise inmates. The termination was for just cause: 5 6 1

- Some offenses are so serious as to justify removal as the first and final discipline. Theft of public monies by a public servant falls within that scope. While the grievant was a long-term
employee without prior discipline, the seriousness of the offense outweighed those factors. Therefore, just cause was present for the grievant’s removal: 5 63

- The Arbitrator held that the grievant was not rightfully removed from his position for allegedly misappropriating funds where there was insufficient evidence and the grievant was later acquitted of the charges in a criminal proceeding: 5 66

- The Arbitrator held that there was insufficient evidence to remove a grievant for patient abuse in a case where the patient had a history of physical aggression and destruction of property and based on the fact that a witness’ testimony was not corroborated: 5 68

- The Arbitrator held that there was no just cause for the removal in a case where the grievant requested leave and provided documentation pertaining to a medical problem suffered by the grievant’s wife: 5 69

- The Arbitrator held that management showed just cause in the removal of the grievant for insubordination stemming from failure to attend a pre-disciplinary hearing and failing to follow an order to submit to a physical examination. Although the grievant claimed that he never received the correspondence informing him of the hearing and the physical examination, the Arbitrator held that reasonable efforts were made on the part of management to contact the grievant and that the fact that the grievant had received prior discipline was also important: 5 70

- There is no hard and fast rule about the quantum of proof Arbitrators should expect in discharge cases. The Agreement between the parties place the burden of proof for discharge cases on the State, but is silent as to what quantum of proof is needed. Since there is no standard included in the contract, the Arbitrator would not impose one. The Arbitrator held that since there was no standard included in the contract between the parties for removal, the standard of “clear and convincing” evidence was to be imposed upon by the State. Rather, what is required is “a heavy burden to present sufficient evidence that discharge is warranted”: 5 73

- The Arbitrator held that the employer had just cause to remove the grievant. Two elements must be present when an insubordination charge is imposed: a direct order and proof that the employee was given clear prior warning of the consequences. He failed to comply with a clear and unambiguous direct order to report to work. The order of instruction was clear and specific enough to let the grievant know exactly what was expected: 5 75

- This case turns on the credibility of the grievant and his supervisor. The most important issue in determining if there was just cause for the grievant’s removal was whether or not the grievant threatened his supervisor. If there was clear and convincing evidence that the grievant did threaten his supervisor, then the removal would be justified. The Arbitrator concluded that there was not clear and convincing evidence in this case that the grievant genuinely threatened his supervisor: 5 76

- The employer did not have just cause for removing the grievant for three alcohol induced off-duty incidents. The grievant’s termination was reduced to a disciplinary suspension, and the grievant was reinstated to his former position on a conditional last-chance basis: 5 77

- The grievant violated hospital policy against resident abuse when he grabbed a patient by the neck and slammed his head against a concrete block wall. The evidence allowed the Arbitrator to conclude that the patient engaged in patient abuse. Therefore, management properly removed the grievant from his position: 5 79

- The Arbitrator held that the employer did not have just cause to remove the grievant based on the fact that the charges were ambiguous. The exact charges used to support the removal changed a number of times throughout the investigation and grievance handling process. This condition results in a clear violation of Article 24.04. This Article places a clear notice obligation on the employer to articulate "the reasons for the contemplated discipline and the possible form of discipline." A legitimate defense can never be established if the charges continually shift: 5 80

- The Arbitrator held that the grievant was properly removed for physical abuse because there was reliable corroborating evidence and testimony regarding the abuse charge and a causally linked injury. In addition, the Arbitrator concluded that the Unit Director’s testimony was more credible
than the grievant's testimony due to the consistency of the Unit Director's testimony with other corroborating testimony: 5 81

– The grievant was employed as a Correction Officer at Warren Correctional Institution and was removed for hitting another officer for allegedly complaining about an incident report. Although the grievant had no prior discipline, the Arbitrator believed that based on the seriousness of the incident, removal was proper, and therefore, the Agency had just cause to do so. The Arbitrator held that removal would have been appropriate but for mitigating circumstances. In particular, the grievant was told on his performance reviews that he was meeting all expectations of his position, when, in fact, the expectations were very low. The Arbitrator believed that if the grievant had been rated low all along, it was probable that his conduct would have improved to the point that the incident with the other officer would not have happened: 5 86

– The grievant, an Activities Therapist 1 at a youth facility, was removed for the unauthorized use of an employer credit card. Where a grievant is in the position of being a role model for the youth and where there is no evidence the other employees charged with theft have received lesser penalties, removal is justified, even though the grievant has a considerable number of years of distinguished service: 5 87

– Considering the grievant's past record it is obvious that progressive discipline has not been successful. Furthermore, the employer has presented sufficient evidence to support its claim that the grievant's removal was for just cause: 5 88

– The Arbitrator concluded that there was proper and just cause to remove the grievant based on the general principle that the employer usually prevails when it discharges an incarcerated employee on the basis of absenteeism caused by an employee's incarceration: 5 90

– The Arbitrator found that there was clear and convincing evidence that the grievant was involved in the theft of the two snow blowers because the State’s witnesses were more credible than the grievant. The value of the snow blowers involved in this case clearly made the theft a dischargeable offense. Therefore, the State properly removed the grievant: 5 92

– The grievant was removed for lying on his time sheets. The State dismissed the grievant for just cause. The Arbitrator stated that just cause rarely sanctions a mechanical removal based solely on a single offense. However, the grievant failed to demonstrate that he would behave appropriately and give acceptable service. Thus, the dismissal was justified: 5 94

– The Union argued that the grievant was not afforded progressive discipline as required by the Contract since the grievant contended that he was not aware of several of the prior oral and written reprimands and related charges. The Arbitrator held that progressive discipline was adhered to by the employer and the penalty imposed reflected the severity of the proven charges and the grievant's past disciplinary record. Even if the Union's position is accepted, the penalty imposed was justified based on the two substantial suspensions imposed on the grievant: 5 95

– The grievant was removed for patient abuse. The Arbitrator held that the grievance was not arbitrable pursuant to Article 25.02 of the contract because it was not timely filed and there were fundamental errors made on the grievance form that rendered the form inadequate: 5 97

– The grievant, a Correction Officer, was accused of striking an inmate in an altercation and was subsequently removed. The Union argued that the removal was not proper because the grievant had been acquitted in a criminal trial. The Arbitrator stated that a criminal trial holding is not controlling in an arbitration. Because three other Correction Officers testified against the grievant, the Arbitrator determined that management had just cause to remove the grievant: 600

– The grievant was removed after failing to fill out the proper paperwork for a medical absence. The Arbitrator held that the removal was unnecessarily severe for a 21-year employee with a good service record. The Arbitrator adjusted the discipline to a thirty-day suspension: 601

– The grievant was informed that she was being removed from her position for good management reasons based on several letters of complaint from visitors to the facility. As result, a grievance was filed charging management with a violation of Article 24.01 and the pick-a-post agreement. The Arbitrator concluded that the proper standard to be applied in this case was “good management”
- The Arbitrator concluded that the employer violated the Agreement when it removed the grievant for client abuse. The employer failed to provide the Arbitrator with sufficient evidence and testimony to sustain the grievant's removal. Specifically, the employer failed to prove that the grievant punched the client in the stomach. Further, the Arbitrator was inclined to believe the grievant's version over the surveyor's version based on the fact that the surveyor only observed the tail-end of an appropriate intervention (physical restraint of a patient) and she failed to see the entire episode due to her obstructed view: 603

- The Arbitrator found that the grievant violated work rules and was removed as a result, because the violation of the work rules constituted a violation of his last chance agreement with management: 612

- The Arbitrator stated that even without considering past misconduct on the part of the grievant, the grievant’s removal was justified due to the serious nature of the grievant’s misconduct on September 15, 1995: 615

- The Arbitrator’s finding that the grievants abused the residents was based primarily upon the inconsistent statements of the grievants and the
fact that the grievants were uncooperative during the investigation of the alleged incidents. Opportunities existed for the grievants to clarify the record, yet they basically denied any personal knowledge of and/or direct involvement in the incidents of abuse alluded to by the witness. As a result, the Arbitrator held the removal of the grievant: 61

- The Arbitrator found that just cause existed for the grievant’s removal because his conduct created a hostile work environment. Although the grievant had no active disciplines on his record, the Arbitrator held that the serious nature of sexual harassment warranted removal without the application of progressive discipline: 61

- The Union contended that the grievant’s removal was without just cause. The Arbitrator affirmed this contention and held that since the Employer’s rules provide for flexibility in discipline, the removal was without just cause. Especially since the grievant had a good record, showed no signs of drug use, abuse or trafficking, and the State could not demonstrate that the grievant even had knowledge of the drugs found in his car, removal was unreasonable: 62

- The Arbitrator could find no source in the record to warrant the charge of neglect of duty, which is the only offense, per Department guidelines, which can result in removal on a first offense. The arbitrator held that removal was inappropriate: 70

- Though the Arbitrator found the grievant’s absenteeism record insufficient as just cause for removal, it was found that the grievant’s off-duty drug abuse was subject to discipline: 704

- The Arbitrator found that it was reasonable to conclude that the two correction officers purposely placed themselves in the inmate’s cell and instigated the incident which occurred, violating the rules of the Standards of Employee Conduct and removal was warranted: 705

- The Arbitrator found that the role played by the grievant in this incident warranted a “stiff corrective action,” but it did not warrant removal. The grievant was reinstated to his position without back pay and benefits. His seniority was bridged, and the time the grievant served when removed was converted into a suspension. The grievant was returned to work within thirty (30) days from the date of the award: 706

- The Arbitrator found the grievant’s testimony most convincing, and she based that decision on several facts. First, the grievant admitted the possibility that he might have touched the client. Second, before he was aware that he was suspected of hitting the client, he mentioned the client’s self-injurious behavior. Third, he volunteered that the client was groaning, and that could have explained the noises the witness heard. Fourth, he stated that nothing unusual happened on the shopping trip. The Arbitrator noted that the witness could have misinterpreted the situation due to her lack of knowledge of the client’s mental retardation, nonverbal communication, and self-injurious behavior. The Arbitrator found that the State had no just cause to remove the grievant from his position: 708

- The Arbitrator suggested that employees needed an explicit policy stating that taking fill dirt was a dischargeable offense because the dirt is a “free good.” She found that the grievant did not feel he did anything wrong because the value of the dirt was so inconsequential. Consequently, the Arbitrator found that the grievant was not guilty of theft because he did not intend to deprive the State of value, and the State violated the CBA in removing the grievant from his position: 71

- The Arbitrator noted that while it came down to one person’s word against another’s, she concluded that the grievant’s story did not account for the injuries sustained. She also found that there was a probability that the client fabricated or was taught the second false story. The Arbitrator then concluded that the probability was not great enough to establish the required doubt. The Arbitrator felt compelled to find the grievant guilty of the charge, and therefore, she denied the grievance: 713

- The Arbitrator found that the grievant exercised poor judgment in dropping visual contact of the resident on two occasions in a short span of time. He also found this offense to be minor under the Center’s disciplinary policy. The grievant had no prior disciplinary history and it was determined that this was the grievant’s first offense which required an oral or written reprimand with a
notation placed in the grievant’s personnel file indicating a first offense. The grievant’s removal was converted to an oral or written reprimand with “appropriate notation in the grievant’s employee file for the first offense. It was also ordered that the grievant be made whole less interim earnings. Lost wages were not to include overtime. 71

- The Arbitrator found that though most of the grievant’s disciplinary history consists of attendance violations, the last suspension occurred because the grievant was arrested, used his car trouble as an excuse for his absence from work and did not report the arrest. The Arbitrator noted that if the grievant had been honest when he reported for duty, there was a possibility that he would have been disciplined for being AWOL but not for the other charges. The Arbitrator stated that evidence that the grievant transported the marijuana seed into the institution was circumstantial and weak. However, the fact that the grievant was arrested for marijuana created suspicion that the grievant may have had knowledge regarding how the seed got into his briefcase. The Arbitrator was convinced that the grievant received a haircut from an inmate. She could find no reasonable explanation why the grievant woke up the inmate and took him up into the restroom to stack cleaning supplies at 2:00 or 2:30 in the morning. The Arbitrator found the grievant guilty of the charge of “dealing with an inmate,” as well as, the contraband charges. She stated the two violations taken separately would justify a major suspension and that the two violations committed on two separate occasions do not constitute “stacking the charges.” The Arbitrator found the removal justified. 71

- The Arbitrator found that the charge of giving cocaine to an inmate was unproven. She stated that the only evidence presented by the State was circumstantial or hearsay. She found that the evidence did not convincingly prove that the grievant carried drugs into the institution; therefore, the removal was without just cause. 72

- Prior incidents involving similar violations were considered by the Employer in weighing the importance of the verbal abuse violation. The verbal comment made by the grievant to his co-worker marked the sixth time the grievant had violated Rule 12 – “making abusive statements to another employee.” While the statement alone may warrant suspension or written reprimand, the Arbitrator determined that this violation, coupled with the striking of a supervising officer, which is in violation of Rule 19, should and did result in removal. 72

The Arbitrator noted that the grievant ceased his advances towards Ms. Martin after she rejected him. The Arbitrator also noted that if this were an isolated incident distinguished by inappropriate playfulness that the grievant recognized was improper and for which he sincerely apologized, this situation would have been seen in a different light. However, the evidence presented did not indicate that this was an isolated incident. The Employer presented evidence to support its position that the grievant had a long-term problem of improper encounters with female co-workers. 73

The Arbitrator found that no discipline was warranted because the grievant should not have been placed in an AWOL status; therefore, his termination was without just cause. 72

The Arbitrator found that OPI was also at fault in this matter by turning a deaf ear to reports of insecure practices in pursuit of profit. Thus, she found that OPI shared responsibility in this matter. She found that the grievant’s removal was unwarranted and converted it to a 60-day suspension. It was her determination that it was necessary to impress upon the grievant that he has to be individually responsible and that his job is at stake should he consider about ignoring such a situation again. 73

- The Arbitrator found that the charge of giving cocaine to an inmate was unproven. She stated that the only evidence presented by the State was circumstantial or hearsay. She found that the evidence did not convincingly prove that the grievant carried drugs into the institution; therefore, the removal was without just cause. 72

The Arbitrator found that no discipline was warranted because the grievant should not have been placed in an AWOL status; therefore, his termination was without just cause. 72

The Arbitrator found that OPI was also at fault in this matter by turning a deaf ear to reports of insecure practices in pursuit of profit. Thus, she found that OPI shared responsibility in this matter. She found that the grievant’s removal was unwarranted and converted it to a 60-day suspension. It was her determination that it was necessary to impress upon the grievant that he has to be individually responsible and that his job is at stake should he consider about ignoring such a situation again. 73
- While the Arbitrator found that the Union successfully defended most of the allegations against the grievants, he found that the incident would never have occurred if the grievants had not used poor judgment in moving the inmate, particularly when he initially resisted. Their terminations were converted to ten (10) day suspensions for violating Rule 7. 735

- The Arbitrator found that the investigating officer concluded that the incident did not warrant the CO’s restriction from OSU. However, the warden, after consulting with the facility, came to the conclusion that the CO’s behavior was disruptive to patient care, and therefore, did not act arbitrarily in the actions against the CO. The warden deferred to the facility despite the conclusion of the investigator. The Arbitrator found that the warden’s actions were sufficient to establish “good management reason.” 737

- The Arbitrator found that the injury to the youth was totally unrelated to his touching the youth; therefore, one of the factors that led to the grievant’s removal was not present when the grievant’s removal was based only the touching and turning of the youth. The grievant’s action warranted discipline, but not removal. The removal was converted to suspension without pay. 74 8

The Arbitrator determined that while the grievant was not guilty of physical abuse, handcuffing the inmate did constitute an inappropriate use of force in this case. She found that the grievant’s conduct warranted discipline, but removal was too severe. The removal was converted to a five-day suspension. 74 9

It was determined that the grievant violated Rule 4 6(a), however, the Arbitrator found that the grievant’s misconduct was limited to exchanging personal information with the inmate and failing to report the correspondence she received from him. The Arbitrator found that the proper remedy in this instance was reinstatement without back pay which resulted in a suspension for approximately one year. The Arbitrator pointed out that the significant loss of pay indicated the seriousness of any violation of Rule 4 6 and was further warranted by the grievant’s dishonesty which prolonged the ultimate remedy. 75 0

The Arbitrator determined that the circumstantial evidence presented by the Employer lacked sufficient probative value to meet a “just cause” burden. He noted that there were no witnesses who could testify that the grievant was upset. He also noted that the resident was self-abusive and had a history of displaying the abuse in specific patterns. The Arbitrator pointed out that the grievant’s performance evaluations demonstrated that he met or exceeded performance requirements. The Arbitrator stated that although the grievant was loud, the conclusion that he was abusive could not be reached. The Arbitrator agreed with the Union’s position that the resident’s injuries were covered by his shirt, which the parties stated in agreement was never removed. The injuries suggested the resident had been in a scuffle, but the grievant’s physical appearance did not indicate that he had been in the kind of altercation that would cause the injuries present on the resident’s body. 75 1

The arbitrator found that the grievant was wrong to think he could take off work the rest of the day following a two-hour examination. The employer presented credible evidence that on the day preceding the examination the grievant was told he was to return to work following his examination. The arbitrator found that the grievant was insubordinate when he refused to tender a leave form after receiving a direct order from his supervisor to do so. The grievant should have obeyed the directive and grieved it afterwards. The arbitrator noted the grievant’s prior disciplines regarding violations of attendance rules, stating that the grievant seemed unaffected by the prior disciplines. However, the arbitrator concluded that termination was excessive in this case. 75 2

The grievant was charged with failing to tag and immediately slaughter a suspect/downed animal. He failed to note that a chicken processing plant did not properly perform fecal checks; thus it was not in compliance. He also failed to conduct an adequate inspection and neglect to note unsanitary conditions at a processing plant. The arbitrator concluded that the factual transactions amounted to neglect by the grievant of his duties as a meat inspector, endangering the public (Rule 30) and potentially harming the public (Rule 25 ). 75 3

The arbitrator found that there was a formal program in place to handle the resident’s aggressive behavior. The arbitrator noted that even if management had been less responsive to
the problem, it is a part of the duties of the caregivers to handle difficult residents without abusing them. The arbitrator concluded that on the date in question the grievant was unable to do that; therefore, she was removed for just cause. 75

The employer did not meet its burden of proof that what occurred in this instance could be characterized as physical abuse. The arbitrator found that there were elements of the evidence presented which supported the grievant’s testimony of what transpired. Therefore, the grievant was removed without just cause. 75

The employer erroneously interpreted Section 1 24 .27 of the Ohio Revised Code which states that “employees in the classified service shall be or become forthwith a resident of the State.” The employer added restrictions to the term “resident” – primary and permanent. Those restrictions made the term resident synonymous with domicile. The arbitrator noted that while a person could have only a single domicile, he/she could have many residences. The arbitrator found that the number and types of contacts with Ohio that the grievants had (family living in Ohio, established residency in Ohio) satisfied the term of residency under 1 24 .27. The grievants were discharged without just cause. 75

The grievant was accused of client abuse. The arbitrator found that the lack of evidence, including numerous blank pages in a transcript of an interview of the State’s witness by a police officer, did not support the employer’s position in this instance. 75

The grievant was charged with having an unauthorized relationship with an inmate. Handwritten notes to the inmate were analyzed and determined to be from the grievant. The arbitrator found that the employer met its burden of proof and based its findings on both direct and circumstantial evidence. 75

The arbitrator determined that the grievant physically abused an inmate in a mental health residential unit. He was accused of using abusive and intimidating language towards the inmate in addition to stomping the inmate. The evidence presented and the testimonies of the witnesses supported management’s position and removal was warranted. 75

The charges of sexual harassment and offensive touching of co-workers were not proven by the employer. The arbitrator determined that the investigation of the charges by the employer was neither fair nor complete. It was clear that there was one witness to the two incidents, which resulted in the charges was available, however, management did not interview this witness. Therefore, the statements and evidence presented were unsubstantiated. The arbitrator determined that the offensive touching occurred before the grievant was notified that the touching was unwelcome and that the touching that occurred was consistent with the usual behavior between the grievant and the complaining co-worker. 76

The grievant was removed for allegedly allowing meat to enter the food chain without inspection and for allowing product to be shipped without inspection of its label. The arbitrator noted that the grievant’s problems coincided with transition to a new program. Records indicate that the grievant did not effectively adapt to the new system. The arbitrator noted that discipline is used to correct a problem and must be progressive. The record indicated that this instance was the grievant’s third performance-related violation and according to the discipline grid, called for a suspension. The arbitrator stated that a long term employee like the grievant deserved another chance. However, returning the grievant to her job without training would be futile. 76

The arbitrator determined that the charges of failing to notify a supervisor of an absence or follow call-in procedure and misuse of sick leave were without merit. He found that the charge of AWOL did have merit.

Management attempted to assert that a Pre-disciplinary meeting did not occur. The arbitrator determined that the meeting did take place and that management’s tactic was in violation of the contract. He concluded that the prejudicial process contaminated the charge for which the arbitrator found the grievant guilty to the point that no discipline was warranted. 76

The grievant was charged with using his mace against a member of the public during a “road rage” incident and leaving the victim, temporarily blind, on the side of the highway. The arbitrator found that the grievant’s alibi was offered to late to be credible and his witnesses were not credible. The arbitrator determined that although the
incident occurred while the grievant was off duty, the discipline issued by the employer was justified because of the use of state-issued weapon and the fact that the act was committed while the grievant was in uniform. 768

The grievant made threatening comments to her supervisor in a DOH office. The arbitrator determined that comments made to members of the center’s police department and the Highway Patrol Trooper, in addition to the grievant’s insubordination supported the state’s decision to remove the grievant. 772

The grievant was accused of having an unauthorized relationship with an inmate and of writing checks to the inmate. The arbitrator stated that the grievant’s testimony and statements were inconsistent and did not match the facts. While he accepted the premise that some of the witnesses had motivation to lie, the arbitrator noted that neither the order of events which occurred nor the documents nor the testimonies supported the grievant’s conspiracy theory. The arbitrator found that the evidence and testimonies presented made a convincing case that the grievant was involved with the inmate which threatened security at the institution. 773

The arbitrator’s award was issued as a one-page decision. There was no rationale stated for the conversion of the grievant’s removal.

The grievant was returned to work as a Custodian with no back pay and her record reflected no break in seniority and service credit. The grievant’s removal was converted to a 2-day suspension and she was indefinitely returned to a position that was not in direct contact with residents. The grievant retained bidding rights to non-direct care positions. Her pay was redlined at the TPW rate until her Custodian pay rate caught up to the redlined rate. Vacation and personal time would accrue only for those hours during the time the grievant was removed. 774

Though the arbitrator found that the grievant had made inappropriate comments to both co-workers and customers who visited the center, he could not sustain the removal. The grievant was no aware that his conduct was not welcome. The female co-workers who filed the charges never told the grievant that his behavior upset them. The employer failed to provide the proper sexual harassment training pursuant to a settlement agreement following a one-day suspension he received for previous misconduct. The arbitrator could not award back pay because the grievant’s record indicated that he had previously been disciplined three times for inappropriate comments to female customers. The arbitrator noted that after completion of sexual harassment training, the grievant would be fully responsible for the consequences incurred as a result of any further sexually harassing comments made to co-workers or customers. 776

The grievant was removed for allegedly striking an inmate while he was handcuffed and in custody of another CO. The arbitrator found that the testimony of the inmate coupled with the testimony of a fellow CO to be credible. He concluded that the grievant’s testimony was not supported and implausible. 778

The grievant was accused of allowing/encouraging inmates to physically abuse other inmates who were sex offenders. The arbitrator found that the grievant’s testimony was not credible when weighed against the testimony of co-workers and inmates. The Union argued that the lack of an investigatory report tainted the investigation. The arbitrator concluded that despite the lack of the report, the investigation was fair fundamentally and direct testimony and circumstantial evidence proved that the grievant had knowledge of the allegations against. The arbitrator found that the grievant was removed for just cause. 779

The grievant was accused of striking his supervisor, causing injury to his eye. The arbitrator found the supervisor’s version of what happened to be credible over the grievant’s testimony. The arbitrator noted that the grievant
showed no remorse, did not admit to what he did not commit to changing his behavior. The arbitrator stated that without the commitment to amend his behavior, the grievant could not be returned to the workplace. 780

The grievant was charged with entering the room of a mental patient and striking him in the eye. The grievant stated that any injury the patient suffered was not the result of an intentional act by him. It was determined that the employer provided the only plausible explanation of what occurred. The arbitrator based this determination of the facts that the grievant failed to report the incident until the next day and that the patient’s testimony was consistent with the statement he made during the investigation seven months earlier. The arbitrator found the grievant’s intervention in the incident suspicious considering the fact that the grievant’s duties were custodial in nature and did not include patient care responsibilities. 788

The Arbitrator found that the grievant did not exercise poor judgment in informing the grievant of her findings, or that the department changed those findings. The Arbitrator, however, stated that the grievant’s act of telling the complainant to “not let it go” crossed the line from information to encouragement. This act constituted poor judgment. Although the Arbitrator found that the grievant engaged in misconduct and some form of discipline was warranted, removal was not appropriate in this case. He stated that removal was unreasonable, but only slightly so. 790

The grievant was removed for excessive absenteeism. The arbitrator stated that the grievant’s absenteeism was extraordinary, as was management’s failure to discipline the grievant concerning her repetitive absenteeism. The arbitrator found that the fact that the grievant used all of her paid leave and failed to apply for leave without pay, shielded management form the consequences of its laxness. It was determined that through Article 5, management has clear authority to remove the grievant for just cause even though her absenteeism was not due to misconduct if it was excessive. The arbitrator found that the grievant’s numerous absences coupled with the fact that she did not file for workers’ compensation until after termination, and never applied for unpaid leave, supported management’s decision to remove her. 791

The Arbitrator found that the evidence presented clearly proved that the grievant had abused his position and that removal was justified. However, because the Patrol violated Article 24 .05 in its decision to terminate the grievant before the pre-disciplinary hearing, the grievant’s removal date was changed to the date on which written closings were received and the record of the hearing was closed. 792

The grievant was charged with inappropriate contact with a co-worker. The arbitrator found no evidence to suggest that the grievant’s removal was arbitrary or inconsistent. The grievant admitted that he was previously warned not to touch his co-worker but he did it anyway. The arbitrator upheld the removal based upon that violation alone and did not address any other charges. 793

The arbitrator found that there were no Division rules – written or oral – instructing the grievant in her selection of documents to share with the SEC, under the access agreement the Division had with the SEC. The record failed to prove that the communication from the AG’s office was a communication between attorney and client. It was noted that the telephone calls between the prosecutor’s office and the grievant were initiated by the prosecutor’s office as a result of a complaint by a citizen. The grievant had a duty to cooperate with an official investigation. The arbitrator found that the grievant did fail to prepare subpoenas in a timely manner and the grievant offered several reasons for the neglect. The arbitrator noted that the employer had a disciplinary grid which established sanctions for the first four offenses. Therefore, the arbitrator converted the removal to a written warning to be placed in the grievant’s personnel records. 797

The grievant was removed for physical abuse of an inmate. The arbitrator concluded that the grievant committed the act based on testimony and injuries suffered by the inmate. The nurse who examined the inmate noted the several injuries which included superficial cuts, minor swelling and minimal bleeding. The arbitrator viewed most of these injuries as a direct result of the grievant’s misconduct. Evidence included a telephone conversation with another CO in which the grievant discussed damage he done to an inmate. Based on the totality of circumstantial evidence, the arbitrator found that the grievant physically abused the inmate. 800
**Bench Decision** – The grievant was returned to his former position. His termination was to be removed from his personnel record. The time since his removal was to be converted to Administrative Leave without pay. The grievant was ordered into a Last Chance Agreement for two years for violations of Rule 40 – *Any act that could bring discredit to the employer.* 801

The arbitrator found that the grievant failed to inform her employer of a past casual relationship with an inmate. The grievant had a duty to notify her employer of this information. In this instance, the grievant had ongoing contact with the inmate as a Word Processing Specialist 2 responsible for telephone and office contact with the inmate. The arbitrator also found that the grievant sent confidential official documents to the inmate without approval. He noted that the fact that the mail was intercepted does not negate the severity of the grievant’s actions. Her actions potentially placed the parole officer in charge of the inmate’s case at risk for retaliation by the inmate. 803

The arbitrator noted that the hold used by the grievant seemed no worse than any of the holds included in the facility’s training manual. He concluded that the injuries were not caused by the hold but by the fall to the floor and that the fall would have occurred regardless of the hold used to restrain the resident. The arbitrator rejected the notion that the use of a hold that was not facility-approved or included in the training of employees is abusive. He noted that there are situations in which the employees must react quickly to control an individual or situation, or to protect themselves. The arbitrator found no just cause for removal of the grievant. 804

The arbitrator found that the grievance was not filed properly – it was not filed on the proper form nor filed within 14 days of notification pursuant to the Collective Bargaining Agreement. The arbitrator stated that if the grievance had been properly filed, it would have been denied on its merits. The grievant was charged with using derogatory and obscene language towards a security guard. Two witnesses, both of who were Ohio State Patrol Troopers, corroborated the guard’s testimony. Though the incident did not occur when the grievant was on duty, it did occur in the public area of the State building where the grievant’s office was located and where State employees, as well as the public were present. The employer did not consider the grievant’s 22 years of service and the arbitrator noted that there was no obligation to do so because the grievant had signed a Last Chance Agreement from a previous disciplinary action which had been negotiated and agreed to by both parties. 805

The arbitrator found that the grievant lied about having a handgun in his truck on State property. The State did not prove that the grievant threatened a fellow employee. The arbitrator stated that it was reasonable to assume that the grievant was either prescribed too many medications or abusing his prescriptions. The arbitrator determined that the grievant’s use of prescription medications played a major role in his abnormal behavior. The grievant’s seniority and good work record were mitigating factors in this case and his removal was converted to a time-served suspension. 808

The grievant was charged with failing to initiate payments, which resulted in negative cash flows in projects, and making an inappropriate payment. She was also charged with failing to reconcile documents and failing to file documents in a timely manner. She received a fifteen-day suspension. The arbitrator stated that a lack of specificity makes it virtually impossible for the Union to establish a defense strategy. He concluded that the circumstances surrounding the charges against the grievant clouded the State’s proof of misconduct. The alleged errors occurred when the existing system was being automated. The employer also relied on the grievant’s prior disciplinary history. The arbitrator determined that the Union proved its unequal treatment claim and that a proper and impartial investigation that should have been conducted did not take place. 810

The grievant was charged with violating institution policy by opening the cell door of the segregation unit prior to the inmates being restrained in handcuffs. Another CO struggled with, and was accused of injury, one of the inmates. The grievant was evasive in the interview with the investigator regarding what actually occurred during the incident. The arbitrator determined that the grievant was a relief officer who rotated among several posts. There was no evidence that the grievant received training regarding specific procedures for the segregation unit. The arbitrator found the grievant’s testimony credible. He concurred with
the Union that not all of the evidence was considered in this matter. Although the grievant had only twenty months of service, the fact that she had no prior disciplines was also a mitigating factor. 81

The grievant was involved in a verbal altercation with the Deputy Warden of Operations regarding failure to follow a direct order from the Warden. At the time of the incident the grievant was on a Last Chance Agreement (LCA), which included 6 random drug tests within the year following entrance into the LCA. As a result of his behavior during the argument, the grievant was ordered to submit to a drug test. He refused and was removed. The arbitrator noted that the grievant’s discipline record demonstrated a pattern of poor conduct over a short period of time regarding his inability to follow orders or interact with management appropriately. Further misconduct would surely result in removal. The arbitrator found that the employer failed to establish reasonable suspicion to order a drug test. The grievant’s failure to obey the Warden’s direct order gave just cause to impose discipline, but flaws in procedure on the part of the employer were noted by the arbitrator for his decision to convert the removal to a suspension. The arbitrator determined that “the overall state of the evidence requires reinstatement, but no back pay or any economic benefit to the grievant is awarded.” 81

The grievant was on a Last Chance Agreement (LCA) when she called off sick. She was advised to present a physician’s verification. The grievant continuously stated she would obtain one, but failed to do so. She was charged with insubordination and an attendance violation and subsequently removed. The arbitrator found that the grievant failed to present the verification within a 3-day limit per the LCA and that the note she eventually produced gave no evidence of a legitimate use of sick leave. The arbitrator noted that the grievant demonstrated through the interview that she understood the consequence of not producing verification and if she had a problem with the directive she should have applied the “obey now, grieve later” principle. 81

Grievant Johnson was a Penal Workshop Supervisor and Grievant Paige was a Penal Workshop Specialist, both at the Trumbull Correctional Institute. Both supervised the Ohio Penal Industries (OPI) division where inmates dismantled donated personal computers, upgraded and fixed them before sending them to schools and other locations. Johnson served as the “group leader” which involved supervising Paige’s activities. A finding of pornographic material in an inmate’s cell that was determined to have come from OPI led to a search of the OPI area on December 19, 2000. Numerous security violations were found in OPI as the result of the search including telephone splitters, cellular phones and 3.5 floppy disks in unauthorized areas, keys lying in unsecured areas, hidden laptop computers with charged battery packs, inmates legal papers and personal letters, unauthorized tools, among many others including a finding that several personal phone calls were made daily on the phone without authorization. The arbitrator found that while the Employer failed to substantiate all of the proposed rule violations, the cumulative effect of the security breaches allowed by Grievant Johnson was so egregious to the safety, health, and security of the institution that her removal was justified. The arbitrator found Rule 5(b), which is the purposeful or careless act resulting in damage, loss or misuse of property of the state was violated due to the illegal computer, fax, and printer use and allowing of such activity, even if only negligent was a dischargeable offense. The arbitrator found many other rule violations including Rule #7 for failure to properly inventory equipment and tools, and Rule #28 for the grievant’s failure to control the keys thereby jeopardizing the security of others. The arbitrator further found that Grievant Paige’s removal was not justified in that she was not similarly situated as Grievant Johnson. Grievant Paige was on probationary status at the time of the search and had spent a limited time in the area since she had been on sick leave. Grievant Paige was trained and under the direct supervision of Grievant Johnson, and therefore the arbitrator found that any shortcoming in Grievant Paige’s performance was directly attributable to Grievant Johnson’s interventions. 81

The arbitrator found that, while on his watch, the grievant witnessed an inmate being assaulted by another Correction officer. The grievant cooperated in a conspiracy with other officers to cover up the incident. By doing so, the grievant failed to follow appropriate post orders and policies, falsified his report of the incident, interfered with the assault investigation, and failed
to report of the work rule regarding the appropriate and humane treatment of an inmate. The arbitrator found that all of this conduct by the grievant violated Work Rules 7, 22, 24, and 25. The arbitrator further found that the grievant violated the work rule on responsiveness in that the grievant failed to remain fully alert and attentive at all times while on duty and to properly respond to any incident. The arbitrator concluded that all of these work rule violations, when taken together, along with the aggravated circumstances of the brutal assault of an inmate on the grievants watch justify the termination of the grievant. 820

The grievant was terminated as a Correction Officer at the Lima Correctional Institution. Under Article 25.02 of the Contract, a grievance involving a layoff or discipline shall be initiated at Step three (3) of the grievance procedure within fourteen days of notification of such action. The grievance was filed twenty-four days after the Union was notified of the removal. The arbitrator found that the Contract language was clear and that discharge grievances must be filed with the Agency Head or designee within fourteen days of notification. While OCB had a new address and there were new players for both the Union and institution involved with this grievance, these factors do not make the enforcement of the fourteen-day time limit unreasonable. The arbitrator found that even though the Department overlooked procedural flaws in other grievances, enforcing such standards on this grievant is not unjust. The arbitrator stated that the parties themselves have the power to settle or not settle and to waive or not waive timeliness as they see fit. In this instance, the Department is enforcing the timeliness requirement. Since the grievance is not arbitrable, the merits cannot be addressed. 821

The arbitrator found that while 15 of 16 employees the grievant conducted TB tests on became ill, the employer did not meet its burden in establishing that the grievant’s actions were the proximate cause of the employees resulting sickness. The employer did not prove that the grievant injected the employees with a substance other than TB/PPD serum or that the serum was out of date or the incorrect dosage was used. Furthermore, while evidence tends to show the grievant injected the employees too deeply, it is unknown what effect on the employees such an error would have. The arbitrator also stated that other medical professionals have made medication injection errors that entailed injecting inmates with the wrong solution in the past and they were not terminated for such a mistake. Ultimately, the grievant’s discipline-free record and nine years of service as well as there being no established TB testing protocol at the facility prior to the incident convinced the arbitrator to return the grievant to his position with stipulations. 822

The grievant discussed the facility’s new alarm system with two inmates. His comments were a threat to the security of the facility, staff and inmates. The arbitrator found that this type of offense does not require the application of progressive discipline and it was the most egregious type of security breach going far beyond exercising poor judgment. The arbitrator noted that the grievant’s short service time was an aggravating factor in support of removal. 823

The grievant was a Health Information Tech. 1 (HIT1) at the time he received a direct order to box, label and log loose items in the admitting area. He did not follow the direct order. Two days later he was reclassified to a Correction Officer. The action which resulted in the grievant’s removal took place during the time the grievant was an HIT1. He received the order via email and when confronted by his superiors, stated that he had performed the task when in fact, he hadn’t. He was then verbally ordered to complete the task. Five days later, the task was performed by a co-worker who replaced the grievant when he was reclassified. The arbitrator determined that the grievant understood the orders he received and refused to obey them. Evidence showed that he understood the directives but disobeyed them anyway. The arbitrator found that the grievant’s conduct warranted discipline but not removal. The grievant’s twenty-one years of service were mitigating factors in the arbitrator’s decision to conditionally return the grievant to work. Although the grievant’s work history was tarnished by a prior discipline, after reviewing the grievant’s record in its entirety, the evidence supported reinstatement under certain conditions. 824

The grievant was charged with, and admitted to, playing cards with inmates and leaving his area unsupervised for a period of time. A surveillance camera was unplugged during his shift and an inmate received a tattoo while the camera was off. The grievant did not report the tattooing incident. The arbitrator gave the grievant the benefit of the doubt in considering his explanation for while the
camera was off. He was unaware that there was a camera and pulled the plug so the inmate could use the outlet for a power source for the tattoo gun. The arbitrator found that the grievant was guilty of helping inmates engage in prohibited behavior but was not guilty of interfering with an investigation. The State argued that it had no choice but to remove the grievant because his actions made him untrustworthy and an unfit CO; however, it left him on the job for two months following the discovery of his actions. He also had not received a performance evaluation since 1999. The arbitrator determined that the grievant was guilty of actions warranting discipline, but those actions did not fatally compromise his ability to perform his duties as a CO. In light of his service record, years of service and remorse, he was entitled to learn from his mistakes. 825

On February 27, 2002, the grievant was working second shift at the Toledo Correctional Institution in the segregation unit control center due to the ensuing events, she was removed from her position as Correction Officer. The institution has a policy prohibiting two unsecured inmates being placed together in the same recreation cage. Despite this policy, that evening two officers placed two unsecured segregation inmates together in a recreation cage for the purpose of allowing them to settle their differences. Officer Cole Tipton entered the cage as the second inmate was being uncuffed, but he turned to walk away in order not to see what happened. As he exited he claimed that he saw Officers Mong and McCoy (the grievant) overlooking the cage at the control booth. None of the officers reported the incident, but management became aware of it the following morning and an investigation ensued. In his interview and written statement, Officer Mong stated that both he and the grievant were in the control booth at the time of the incident. During the arbitration, his testimony was consistent with this statement, and on cross he stated that he was “fairly sure” the grievant saw the incident but he didn’t see her eyes because she was wearing dark prescription glasses. Officer Tipton also gave a statement during the investigation. He claimed that as he exited the cage he looked up and saw the grievant and Officer Mong in the control booth. However, his testimony during arbitration was contrary to this statement. He stated that he saw only Officer Mong in the control booth and the grievant was in the lighted stairwell. On cross-examination he again stated that he saw both officers in the control booth, and on redirect, he claimed that Mong was standing there alone. The arbitrator ruled that this case turns on the credibility of the witnesses. She was convinced by Mong’s testimony because it was consistent with what he had stated before, and she found that he had nothing to gain by placing the grievant where she was not. On the other hand, she found that Tipton’s testimony was worthless. As evidenced from his first interview, he is willing to lie to protect himself and others. With respect to the dark glasses, the arbitrator stated that if the Union is arguing that they prove Mong could not see where the grievant was looking, it is admitted that the grievant was there to see the incident. But, the grievant did not claim that she was there, but did not see what had happened. For the foregoing reasons, the arbitrator found that the grievant was guilty, and since there were no mitigating circumstances, the penalty was upheld. 826

On February 27, 2002, the grievant was working second shift at the Toledo Correctional Institution in the segregation unit control center due to the ensuing events, he was removed from his position as Correction Officer. The institution has a policy prohibiting two unsecured inmates being placed together in the same recreation cage. Despite this policy, that evening two officers placed two unsecured segregation inmates together in a recreation cage for the purpose of allowing them to settle their differences. The grievant entered the cage as the second inmate was being uncuffed, but he turned to walk away in order not to see what happened. As he exited he claimed that he saw Officers Mong and McCoy (the grievant) overlooking the cage at the control booth. None of the officers reported the incident, but management became aware of it the following morning and an investigation ensued. When he was first interviewed later that day, the grievant denied having any knowledge of what had transpired. However, ten days later, he gave a written statement and interview admitting to what he had observed. The grievant was later terminated from his position. The Union argued that the punishment was not appropriate for the offense. Officer Mong committed the same offense but he received only five days suspension thought he saw the fight and the grievant did not. In addition, the grievant fully cooperated in the investigation after his first interview. The arbitrator ruled, however, that the grievant cannot be compared to Office Mong because he was not in the position to
intervene. Additionally, the fact that the grievant eventually did tell the truth is not enough by itself to mitigate the penalty. She concluded that both offenses, failing to intervene while knowing officers were putting inmates and staff in harm’s way and then lying about it, are individually and collectively terminable acts. Despite the fact that the grievant did not have an active role in the incident, his inaction threatened security and the safety of the inmates as well. 827

The grievant lost his keys at the institution and did not report the loss for five hours. The arbitrator determined that he used poor judgment and was inattentive when he left his keys unattended. The keys could have been used as a weapon against personnel or other inmates. A violation of the alleged charge as a second offense permitted removal as a discipline. The grievant had disciplines from reprimands to fines prior to this violation. The arbitrator found that management did not abuse its discretion in removing the grievant from his position. 830

The grievant and a former girlfriend were both employed at ToCI. The relationship did not end amicably. During and following roll call the two co-workers had a verbal confrontation. The grievant allegedly struck the former girlfriend in the presence of witnesses. The arbitrator found that the conduct of both individuals was deplorable and neither had convinced him that either was the victim in this situation. He determined that the “…the discipline conduct was demonstrated by the grievant not Pedro. The quid pro quo being, that is Pedro had engaged in similar conduct the result would have been similar in my viewpoint”. The arbitrator found no mitigation to lessen the discipline. 832

The grievant was an Elevator Inspector who was subsequently promoted to Elevator Inspector as a result of a settlement even though management had reservations regarding the grievant’s ability to perform his duties. He had two active disciplines – a written reprimand for carelessness after leaving a state credit card as a gas station which he did not promptly report, and a second written reprimand for carelessness when his state vehicle was destroyed by flooding. The arbitrator found that this was not a discipline case. It was a competency case in which the correction for inadequate performance is reassignment, training or separation. The grievant was a short-term employee who never met the employer’s expectations in the performance of his duties. The only classification lower than the one he was in was Elevator Inspector Trainee. The arbitrator stated that the employer could not be expected to keep an employee in perpetual training when that employee “shows little or no evidence of ever achieving at least a minimum level of competency”. The employer produced substantial evidence that the grievant was unable to perform his job safely and made reasonable efforts to help the grievant reach that a satisfactory level of competency. The arbitrator determined that the employer’s assessment was reasonable. Removal was not excessive because there were no reasonable alternatives. 833

The grievant was charged with the use of a State gasoline card for a personal vehicle, misuse of a parking pass, personal telephone calls, being insubordinate and AWOL. Once removed, the Union sought to schedule this matter for arbitration citing Article 25 .02 of the Contract regarding the timeline for arbitration of discharge grievances. The employer refused to schedule an arbitration in this matter because a criminal investigation was pending. The Union filed an action in state court and it was agreed by both parties that an arbitrator would hear the dispute. Arbitrator John Murphy found that there must be a formal criminal action pending against the employee in order to defer the sixty (60) day deadline for discharge grievances to be heard. A criminal investigation was not sufficient reason for delaying arbitration.

The grievance was scheduled for arbitration. The arbitrator found that due to the employer’s misinterpretation of the Contract language, the employer violated Article 25 .02. The grievance was granted due to procedural defect and not on substantive charges. The arbitrator stated that an “unfortunate consequence, is this award will be viewed as a win by the Grievant and it should not. The overall conduct of the Grievant is not addressed, herein, but serious concerns were evident in the evidence presented by the employer and if continued unabated the end result will include future disciplinary action(s) by the employer.” 834

The grievant was charged with an unauthorized relationship with an inmate. She denied having a relationship with the inmate and continued up to and throughout the relationship Telephone records (home and cell), transcripts of a control call between the grievant and an inmate, the
The employer raised the issue of timeliness at arbitration. The arbitrator found that management’s acceptance of the grievance form at Step 2 did not relieve the grievant from timely filing his grievance at Step 3 in accordance with specific language of the Collective Bargaining Agreement. “It is reasonable to assume that the Grievant and the current Local Union President (then steward) were well aware of the filing procedures for discipline and were even reminded of the procedures by the language of the grievance form. 840

The grievant was removed from her position for unauthorized viewing of emails of co-workers and superiors. The arbitrator found that there are various types of conduct which warrant removal on the first offense; the fatal element in this case is that the grievant could no longer be trusted by her employer. The arbitrator stated that the misconduct and the subsequent dishonesty regarding her actions destroyed the employer-employee relationship. The arbitrator noted he lacked the authority to order the employer to transfer the grievant to a less sensitive position, particularly in light of layoffs, bumping and transfers. 841

The grievant sustained two injuries at work both in an attempt to restrain youths who refused to follow directives. The grievant followed the application process. No evidence was submitted to establish that the grievant submitted false data. 842

The grievant was charged with corresponding with an inmate and being dishonest about the relationship when interviewed. The arbitrator found that inconsistencies in the grievant’s two interviews raised questions about his trustworthiness. Although the arbitrator noted that the grievant appeared to be a compassionate person, his judgment and suitability as a Correction Officer was very doubtful. 843

The grievant, a Maintenance Repair Worker 3, was charged with job abandonment (three or more consecutive work days without proper notice). The arbitrator stated that this case was about system failure caused by failed communications, complicated by the nature of the grievant’s illness (depression), lack of a telephone and a lack of information about the procedure for mental health claims. Though management had a right to expect the grievant to either return to work or provide
documentation to support his request for additional leave, the arbitrator questioned the employer’s failure to make a greater effort to contact the grievant upon receipt of information regarding the nature of the grievant’s illness and the fact that he did not have a telephone. The grievant should have monitored his leave status more closely and should have sought assistance from personnel or the Union; however, the arbitrator found that, “An employee who suffers from an addiction or mental illness that impairs his ability to conduct his behavior acts involuntarily and is thus not responsible for his misconduct that, but for the impairment, would not have occurred.” The arbitrator determined that the Union met its burden to establish the grievant’s condition, its relevance to his behavior, and the likelihood of rehabilitation. 84

The grievant was responsible for making corrections to employees’ payroll records. The employer had a verbal work rule, which stated that employees were not permitted to make changes in their own accounts. The grievant was charged with deleting sixteen hours of leave usage from her balance. Computer records showed that the grievant’s user ID was used to make the deletions. At the time, the grievant was at her computer and logged on under her own ID and password. The arbitrator found the circumstantial evidence to be very strong against the grievant. The computer records, inconsistent statements, in addition to the grievant’s suspicious inquiry regarding whether a co-worker’s ID would be the last to update the grievant’s account, discredit the grievant. The arbitrator concluded that the grievant more likely than not deleted the leave usages from her balance.

The arbitrator stated, “When an employee who occupies such a position of trust engages in misconduct that is so strongly linked to the core of her duties, the bond of trust and confidence is permanently ruptured.” He opined that no measure of progressive discipline would likely renew the employer’s trust in the grievant. 84

The grievant was charged with violating several rules/regulations, mainly acts of insubordination. Instead of removal, the employer, the Union and the grievant to hold the discipline in abeyance pending completion of an EAP. The grievant was also moved to a new area with a new supervisor. The evidence showed that the grievant failed to comply with the agreement by not maintaining contact with EAP. The arbitrator found the grievant’s “flat refusal to follow reasonable and proper directives and her blatant defiance of her supervisor’s authority…inexcusable.” The arbitrator noted that the minor violations alone were not serious but in totality with the continued pattern of insubordination they took on greater significance. He did not find sufficient evidence that the grievant clocked-in” for another employee. 84

The grievant was a Training Officer with seventeen years of service with the State of Ohio, with an impeccable work record, no disciplines and several letters of commendation. He received information that a Parole Officer (PO) was driving on a suspended driver’s license from the PO’s partner (and friend of the grievant). This information originated via telephone to the PO’s partner from a Municipal Court Clerk/Police Officer. The PO’s partner did not wish to become involved and asked the grievant to relay the information to the proper people. When he took this information to the PO’s supervisor, he was advised to obtain and present proof of this allegation. The grievant contacted the Municipal Court Clerk/Police Officer who provided a LEADS printout to him. The grievant erased the key number from the printout in an attempt to protect the identity of the Officer. The employer contended that the grievant’s conduct involved unauthorized use, release or misuse of information, that he interfered with an official investigation and that his actions could prohibit a public employee from performing his/her duties. The Union argued that the PO’s supervisor’s advice to obtain proof of the allegation was an implicit authorization to do just that. The arbitrator determined that the employer did not establish proof of all of the alleged violations leveled against the grievant. The one violation established by the employer – erasing the key number – was de minimis. The grievant is a seventeen-year employee with no active disciplines and an exemplary work record. The arbitrator noted that the grievant’s conduct complied with Rule 25 of the “Performance-based Standards Track” and the provisions of the Whistleblower Statute, “thereby advancing the explicit and desirable goals of the Adult Parole Authority and the State of Ohio.” The Whistleblower Statue specifically prohibits the removal or suspension of an employee who complies with the requirements of the statute. The arbitrator also found that the grievant was a victim of disparate treatment when comparing the
serious violation of the Parole Officer and the minimal measure of discipline imposed upon him. The arbitrator concluded that the grievant’s removal “was unreasonable, arbitrary, and capricious and not for just cause.” 84 9

The grievant was removed from his position for making sexual comments and other types of nonverbal sexual conduct towards a Deputy Registrar who worked in the same building, thus, creating a hostile work environment. The arbitrator found that the evidence and testimony presented by the employer was clear and convincing that the grievant’s conduct was unwelcome, offensive and adversely effected the victim’s job performance, ultimately becoming a major factor in “constructively discharging her”. The two aggravating factors which weighed the most against the grievant were the serious nature of his misconduct and his resistance to rehabilitation despite that fact that he had received sexual harassment training as the result of an earlier violation. 85 0

Grievant was removed for violating agency policy against physically or verbally abusing a resident. Although there was not enough proof of physical abuse, there was sufficient evidence of verbal abuse to sustain the charge and the subsequent removal. If there is a solid “web of evidence” that eliminates all other plausible explanations, a circumstantial case can be sufficient to meet a “clear and convincing” evidentiary standard required in physical and verbal abuse cases, but to also exercise extreme caution in such cases. The arbitrator found that given the combination of strong circumstantial evidence and witness credibility (a crucial factor in this case), these supported the employer’s position to sustain the charge of verbal abuse against the grievant. There was insufficient evidence of physical abuse; eyewitness testimony could only depict grievant’s demeanor as aggravated, that he made abusive remarks, and directed intimidating behavior at the resident--enough evidence to amount to verbal abuse as defined by the center’s policy. Grievant’s inconsistent, varied and generally unconvincing testimony undermined his credibility. The arbitrator found that at a minimum, the grievant struck something, possibly with a paddle, at least three times causing loud noise, sufficiently intimidating the resident who was known by grievant to be intimidated by these acts, that grievant lost his temper with the resident and verbally abused him in accordance with the definition of verbal abuse contained in the Department’s policy. 85 1

The grievant was charged with failing to utilize the proper techniques to diffuse a physical attack against her by a patient. The patient was a much larger person than the grievant and was known to be aggressive. She allegedly punched the patient several times in an attempt to get him to release her hair. The arbitrator determined that while it was clear the grievant placed herself in a position to be a target of the patient and her judgment was very suspect, a lapse in common sense, the failure to flee and the improper use of hair release did not equal abuse of a patient. The arbitrator noted that there was no evidence that the patient sustained any physical injuries. The arbitrator found that “…it is not reasonable to fire an employee for employing immediate and reasonable defensive measures that come to the fore to avoid serious injury”. 85 2

The burden of proof for the employer where a correction officer is charged with misconduct of a criminal nature is clear and convincing of which the arbitrator must be pretty certain the grievant is guilty. The use of polygraph testing will be given weight to their results when they corroborate direct evidence of innocence. The grievant’s guilty plea in court and the use of the polygraph test results were not persuasive enough to deny the grievance, but other evidence did support the charge that grievant physically abused an inmate. The arbitrator sites to the following evidence of grievant’s guilt: (1) the grievant’s disappearance with the inmate for a length of time, although the parties disputed the approximate length, while enroute to the captain’s office, did provide enough time for the abuse to take place; (2) the grievant could not explain the procedure he took in transporting the inmate with two other correction officers and his description of what happened between himself and the inmate was unreliable; (3) the grievant was untruthful in his testimony about what happened at the polygraph examination because evidence did not support his contention that the questions were too personal, that the examiner was not professional and that he was not told he could quit without admitting guilt. 85 6

The grievant was employed as a Therapeutic Program Worker and she periodically escorted clients on shopping field trips. Each client had a
The grievant was employed as a meat inspector with the Ohio Department of Agriculture. ODA is responsible for monitoring the various meat-processing plants in Ohio and has a zero-tolerance policy for fecal matter on any inspected carcasses due to the possibility of e-coli contaminations. On February 1, 2003, the grievant was the inspector in charge at Plant #18 (Wilson's), and his supervisor observed fecal slurry on the front shank of a beef carcass. The grievant’s stamp of approval also appeared on the front of the shank. It was called to his attention, and he admitted that he inspected the beef as it came off the line, observed it being washed, re-inspected after the wash and stamped the beef prior to it being placed in the cooler. The grievant stated that he had inspected the beef with no fecal matter being present. Subsequently, he was charged with violating ODA disciplinary grid 30(A)- Neglect of Duty. The arbitrator recognized that the burden of proving wrongdoing rests with the employer who must prove that the grievant neglected his duty to inspect the meat after it was removed from the floor or after being placed in the cooler. The arbitrator found that the employer failed to meet its burden. He concluded that the fecal matter could have come from an employee’s contaminated apron while being transferred to the cooler, from an apron while in the cooler, or from the grievant’s negligent inspection. The evidence is inconclusive and it fails to demonstrate that the grievant neglected his duty. 859

The grievant was employed as a meat inspector with the Ohio Department of Agriculture. ODA is responsible for monitoring the various meat-processing plants in Ohio and has a zero-tolerance policy for fecal matter on any inspected carcasses due to the possibility of e-coli contaminations. On February 1, 2003, a manager at Target alerted the center about the grievant’s possible fraudulent behavior and an investigation was undertaken. It found that the grievant had returned previously purchased items, received cash disbursements, but never returned the funds to the center nor re-shopped for replacement items. There were seven shopping trips in question with unaccounted for resident funds totaling $797.96. As a result, the center removed the grievant from her position for Misappropriation/Exploitation and Failure to Follow Policy. The Union argued that the employer did not have just cause for this removal, but the arbitrator ruled to the contrary. He found that the Target manager offered credible testimony about the grievant’s unusual shopping habits. She had a pattern of returning the most expensive items bought on the shopping trips, receiving a cash refund, and after a short period of time, returning and re-shopping. On the other hand, the grievant’s testimony was inconsistent and unbelievable. Receipts for the repurchased items were not submitted to the facility and the grievant offered conflicting statements concerning her management of the receipts. In addition, there was no conclusive evidence of any clearly identifiable re-shopped for clothing purchases nor was there evidence of any receipts. As a result, the arbitrator stated that no other reasonable conclusion was possible; the grievant had stolen the funds for her own personal use. 858

The grievant was terminated from his position as Cook 1 at the Department of Youth Services for reporting to work 22 minutes late on June 15, 2003 and one minute late on June 16, 2003. In addition, the grievant was arrested at the facility for failing to pay a fine for a traffic offense. The arbitrator found that since the grievant was late on two consecutive days and admitted to his prior problems of tardiness, the department was justified in its discipline despite the severity. The Union argued that the grievant was treated differently than other employees, however, the arbitrator ruled that there was no disparate treatment because the grievant had been warned that he needed to have his warrant cancelled, while the other employees had not had a similar
forewarning. Furthermore, the arbitrator found that despite the fact that the grievant was ordered to clock out before he was arrested, it is still possible for him to be absent without leave. In this case, the superintendent was simply trying to eliminate the disruption that might result from an employee being arrested at the facility. In addition, the arbitrator denied the Union’s contention that the grievant’s arrest could not be considered because it was not addressed in his removal letter. The grievant was not terminated for his unpaid traffic ticket but for his unauthorized leave that resulted from his arrest. The arbitrator also found that the state was not required to offer a last chance agreement to an employee because nothing in the collective bargaining agreement required it. Finally, the arbitrator did consider seniority as a mitigating factor, but found that the grievant had only three years of seniority during which time his service with the department was poor. 862

The grievant was notified that she would be removed from her position as a Therapeutic Program Worker as a result of her threatening comments to the charge nurse on duty as well as several instances of tardiness and attendance violations. However, prior to the imposition of the removal, the grievant and NBH entered into an agreement that would hold the removal in abeyance for 180 days if she successfully completed the EAP program and remained free from other policy violations during that period. On January 3, 2003, the grievant called off sick without sufficient sick leave balance. She successfully completed the EAP program on May 2, 2003 but was later notified that as a result of the January 3rd AWOL violation, she had failed to remain free from policy violations. Therefore, her removal held in abeyance was reactivated. The arbitrator ruled that to support a claim for violation of the Workplace Violence Prevention Policy, the employer must demonstrate that a specific threat occurred and the grievant had the power to carry it out. Also, the victim must have feared or had reason to fear for her safety. Here, the arbitrator found that the evidence was insufficient to support a finding or inference that a specific threat occurred. In addition, there was no evidence to suggest that the grievant had the power to direct clients and/or others to physically harm or cause property damage to the victim. Finally, after reviewing the victim’s own written statement and testimony, the arbitrator concluded that the victim did not perceive the grievant’s conduct as a threat. Therefore, the arbitrator ruled that the employer failed to meet its burden of proof with respect to this incident. With regard to the EAP violation on January 3rd, the arbitrator found that there were several mitigating circumstances that did not justify removal of the grievant - the fact that the grievant was employed for 24 years with NBH coupled with the fact that NBH originally sought to decrease the punishment for the confrontational incident and the attendance violations to a five day fine subject to successful completion of the EAP program. The arbitrator concluded that since the employer failed to meet its burden of proof regarding the workplace violence incident, reinstatement of the grievant is appropriate. However, he found that since the grievant received a written reprimand on a prior occasion for similar violent behavior, NBH’s zero tolerance policy for workplace violence, and the grievant’s violent conduct in the present action, the grievant will not receive back pay and the five day fine shall remain as part of the grievant’s discipline record. 865

The grievant had 16 years of service as a Correction Officer at Chillicothe Correctional Institution. A confidential informant revealed that; the grievant had supplied narcotics, particularly heroin and cocaine, to a few of the inmates; he had supplied tubes of Superglue as well as food and candy to several of the inmates; and he had remained in contact with one of the inmates (Plowman) after the latter’s release from the institution. The employer conducted an investigation into the matter and found that the grievant and Plowman had been friends during Plowman’s stay at the institution, they had several telephone conversations with each other after Plowman release, and in an interview the grievant admitted to having contact with Plowman and other ex-inmates. Consequently, the employer discharged the grievant. The Union argued that the employer did not satisfy Arbitrator Daughtery’s seven tests of just cause and therefore the discharge should be overturned. The arbitrator rejected this argument and refused to apply Daughtery’s seven tests. In reference to the tests he stated, “Their mechanical application demeans the arbitration process.” He also rejected the grievant’s contention that he did not know that the institution’s policies prohibited telephone contact with inmates after their release. He reasoned that the grievant had 16 years of experience and had many hours of training. Therefore, he could not have been ignorant to the institution’s policies. Finally, the arbitrator
acknowledged that the offenses committed by the grievant were serious breaches of the code of conduct prescribed for Correction Officers, however; he found that the penalty was too harsh. He took into account the grievant’s 16 years of service with only one prior written reprimand, and his selection as Officer of the Year on a prior occasion. The arbitrator concluded that the grievant’s offense was serious, but a lesser punishment is appropriate in this case. 866

The grievant involved in a verbal and physical confrontation with a co-worker. The testimony presented by the employer’s witnesses was found credible by the arbitrator. The arbitrator noted that no evidence or facts were presented to indicate that the co-worker made any physical gestures towards the grievant. The arbitrator stated that the grievant’s confrontational behavior during the incident and her continued aggressive behavior towards co-workers convinced him that the employer met its burden of proof. He also noted that the employer had shown a previous measure of restraint in its unsuccessful attempt to correct the grievant’s behavior. The arbitrator stated that a long-term employee could not seek protection if he/she was continually abusive towards co-workers or management. 867

The grievant was charged with an unauthorized relationship with an inmate. The employer presented evidence that the grievant refused to cooperate in the official investigation when she refused to come to a pre-disciplinary meeting stating that her doctor advised her not to go to the institution. The arbitrator found that the grievant’s refusal was under the guise of medical protection. The grievant’s disability application failed to provide the mitigating factor to overturn her removal. The arbitrator determined that because of the grievant’s reluctance to participate at any stage of the investigation, based on the evidence presented; the employer met its burden of proof. 868

The grievant was a Therapeutic Program Worker who worked part-time for MRDD and part-time for a county-level supported-living provider. The grievant was criminally charged with resident abuse at the county facility and terminated without an administrative hearing. The investigator reported the allegations to the state facility which, in turn, placed the grievant on administrative leave and subsequently removed him. The county’s investigator did not speak to the grievant about the violations, nor did the grievant have the opportunity to face his accusers or present his position until his trial. Neither a jury nor the hearing officer who heard the grievant’s unemployment compensation appeal found sufficient evidence to warrant termination. The Union presented testimony at arbitration that the definition for “substantiated” in regards to evidence did not exist in the Ohio Revised Code, or in the Medicaid regulations. It was the Union’s position that the arbitrator must use the ordinary definition of “substantiated”, as well definitions included in other jurisdictions to determine the meaning of the word. It further noted that in the absence of a definitive substantial evidence, the State relied on one investigator’s declaration that the grievant was guilty of the allegations. The arbitrator found that the allegations of physical abuse were not substantiated that the grievant was removed without just cause. 870

The arbitrator found that the grievant displayed contempt rather than compassion for a co-worker, had an insubordinate attitude towards management, used foul language and apparently resented being corrected and reprimanded. However, the arbitrator found no evidence of this behavior being a plan to intentionally harm; it was rather a private bad joke. The arbitrator agreed that the employer could prohibit expressions of hostility in the workplace, even when they are merely bad jokes and take corrective action. The arbitrator also agreed that the grievant cannot be allowed to continue as he is. For this reason, the charge of Menacing/threatening/harassing behavior was removed from his record and replaced with the charge noted in the award. 872

The arbitrator found that the grievant went on approved disability leave. She exhausted her available leave balances and was placed on Physician’s Verification. The grievant was sent a set of disability forms, but failed to submit the documents or contact the personnel office. The arbitrator found that the grievant’s actions, or inactions, aggravated rather than mitigated the situation. It is reasonable to expect an employee experiencing an extended absence to know that he/she must call his/her supervisor. The grievant made no attempt to contact her employer. The employer made several efforts to contact the grievant regarding her absence and the necessity to contact personnel. Nothing in the record indicates the employer did not have the grievant’s telephone number or correct address; nor was there any
indication that the grievant had moved or changed her number. The arbitrator stated he had to assume the grievant blatantly disregarded the employer’s efforts. He found it ironic that had the grievant notified her employer, she could have filed her disability application in a timely manner. 873

The grievant was a visiting room shakedown officer responsible for checking for drugs and contraband. While off-duty, he was arrested and charged with the possession cocaine and tampering with evidence. In lieu of a conviction, the grievant was sentenced to three (3) years probation. Other CO’s, as well as inmates testified that they were aware of the grievant’s arrest and subsequent removal and the circumstances surrounding them. The arbitrator determined there was a substantial relationship between his off-duty misconduct and his job as a CO. The arbitrator noted that the “grievant had a duty to enforce the law and the very subject matter of his off-duty misconduct was identical to his job duties.” 874

The grievant admitted to giving his cell phone number to an inmate; engaged in a phone conversation with the inmate; and failed to report contact with a parolee. The grievant admitted he was aware of DR&C policies and work rules regarding unauthorized relationships with inmates and parolees. The arbitrator noted that the DR&C mandates a safe and efficient rehabilitation/corrections system for inmates, requiring even-handed treatment, and insists on the absence of any preferential treatment of inmates by COs. Without expressed permission, unauthorized relationships between a CO and an inmate cannot exist. 875

The grievant was charged with striking a youth with an open hand in the presence of other youths. The arbitrator stated that the grievant did not present himself well in arbitration and displayed no regret for his actions. The arbitrator did not find the grievant’s testimony credible. Evidence presented indicated that the grievant initiated the confrontation with the youth when he grabbed the youth’s shirt. After intervention by two co-workers, the grievant struck the youth in the face. Although the grievant had recent favorable performance evaluations, the employer pointed out that the grievant had been suspended for various reasons eleven times in twenty-six years. The arbitrator found no mitigating factors to overrule the actions taken by employer in this case. 879

The grievant, a TPW with 1 2½ years of service, no active disciplines and satisfactory evaluations was removed from his position for leaving a client alone in a restroom. The client was under an “arms length”, “one-on-one supervision” order. The client was discovered on the restroom floor by the grievant who did not report the incident. The arbitrator stated that the employer’s definition of client neglect was two-fold. First, there must be a failure to act. Second, the failure to act must result in, or cause “potential or actual harm.” The arbitrator found that the grievant failed to act when he allowed the client to enter the restroom with an unauthorized absence and misuse of FMLA leave. The arbitrator noted that the grievant’s prior disciplines and stated that a fourth violation may occur to justify removal, but the facts in this instance did not convince the arbitrator that the employer met its burden of proof of just cause. After receiving her assignment, the grievant informed her supervisor that she was sick, that her sickness was due to a medical condition recognized under FMLA and she wanted to go home. Her supervisor granted her request, but ordered her to provide a physician’s verification when she came back to work. The employer over-stepped its bounds when the grievant’s supervisor demanded a physician’s verification upon the grievant’s return to work. The arbitrator determined that “if an employee is FMLA certified and calls off stating FMLA, then no physician statement for that absence can be required.” He found do difference between an employee using a telephone outside the institution and calling off while at the institution. 878

The grievant had been disciplined on three (3) prior occasions for absenteeism. She was charged with an unauthorized absence and misuse of FMLA leave. The arbitrator noted that the grievant’s prior disciplines and stated that a fourth violation may occur to justify removal, but the facts in this instance did not convince the arbitrator that the employer met its burden of proof of just cause. After receiving her assignment, the grievant informed her supervisor that she was sick, that her sickness was due to a medical condition recognized under FMLA and she wanted to go home. Her supervisor granted her request, but ordered her to provide a physician’s verification when she came back to work. The employer over-stepped its bounds when the grievant’s supervisor demanded a physician’s verification upon the grievant’s return to work. The arbitrator determined that “if an employee is FMLA certified and calls off stating FMLA, then no physician statement for that absence can be required.” He found do difference between an employee using a telephone outside the institution and calling off while at the institution. 878
alone; however, there was no evidence to establish “causal link” to the client’s injuries. The arbitrator determined that the grievant’s neglect exposed the client to potential harm and that his act of neglect was more than simply poor judgment. The arbitrator found that the mitigating and aggravating circumstances did not outweigh the severity of the violations allegedly committed by the grievant. 880

The grievant had four active disciplines in her records – a two-day suspension (falsifying reports), a five-day suspension (inefficiency and making false statements, a written reprimand (AWOL) and an oral reprimand (failure to follow policy). The grievant accumulated four disciplines, including two suspensions, during approximately five years of service. The disciplines did not change her behavior. She was removed from her position for the use of vulgar and abusive language in two separate incidents occurring one week apart. The arbitrator found that “the state did not have to continue to employ a person who repeatedly violates the standards of employee conduct.” 881

The grievant was charged with failing to act as required by the resident’s “full code” status. She did not administered CPR; she also did not intervene when the RN present failed to do so. The arbitrator stated that a licensed practical nurse accepting and maintaining employment in the profession has to be presumed to be informed on the duties and responsibilities of her profession. The grievant’s 2½ years of service was no excuse for failing to clarify with the RN that the resident was full code and then take the necessary steps if the RN was non-responsive. The arbitrator noted that aside from the facts of the case, since her termination, the grievant had held other employment as an LPN and the Ohio Board of Nursing had not – by the time of arbitration – pulled her license. Removal was not unreasonable. 882

The grievant was removed from his position for being absent without proper authorization and job abandonment. The grievant had two active disciplines at the time of his removal – a one-day fine and a two-day fine. Both fines were for absence without proper authorization. At the time of removal, the grievant had no sick, vacation or personal time available. After exhausting his FMLA leave, the grievant was advised to return to work, which he failed to do. The arbitrator concluded that the grievant at least implied that he was abandoning his job by not giving proper notification. The arbitrator noted, “…one could reasonably conclude that the Grievant made either a conscious or an unconscious decision to focus on health related problems and to place his job on the “back burner”.” The arbitrator found that the grievant was in almost continual AWOL status without providing proper notification and the employer provided testimony that it encountered undue hardship due to the grievant’s absences. The arbitrator was sympathetic to the grievant’s situation with a sick parent, however, it was noted that he showed little concern for his job. The employer’s decision to remove the grievant was neither arbitrary nor capricious. 883

The grievant was charged with an unauthorized relationship with an inmate. The former inmate, who was not under the supervision of the State at the time of the arbitration, did not attend the hearing and could not be located. The arbitrator listened to six selected taped telephone calls and determined that the voice she heard was that of the grievant; and, that she did in deed have a personal relationship with the former inmate. The arbitrator found that the affidavits presented by the grievant did not place the grievant somewhere else at the time of the calls. The grievant only presented denials and testimony of her family members. The arbitrator determined that in light of what she heard herself, there was insufficient evidence to overturn the removal. 885

The grievant accused by her employer of deleting records from the database in an effort to outperform a co-worker. The employer never presented testimony or evidence to prove this theory. The grievant testified that customer feedback regarding her performance was important. There was a problem in system in obtaining that feedback. The arbitrator stated in his decision that the grievant credibly explained her situation and what she did to explore the problem. Nothing in the record discredited the feedback problem experienced by the grievant. The arbitrator concluded that the grievant’s attempt to clarify the matter appeared plausible, although somewhat unusual. 886

The grievant was a ten-year employee with DR&C and had no active disciplines on his record. An inmate informed the agency that the grievant had a sexual relationship with an inmate while working overtime on a unit to which he was
not regularly assigned. Following an investigation, which included review of video tape of the grievant entering and exiting a laundry room with an inmate during a formal head count, management determined that the grievant failed to obtain authorization before he released an inmate from her cell during a formal count. He placed himself in a compromising position by being in a dark room with an inmate for ten minutes. He was removed from his position. The grievant argued that he was unaware of the requirement for authorization to release inmates to wash their soiled sheets after an accident; the video was not a true indicator of what happened and exaggerated the darkness of the room; and, his presence in the laundry room with the inmate did not compromise his ability to perform his duties.

The arbitrator determined that based on the evidence the grievant violated agency rules of conduct, however, aggravating and mitigating factors in this instance do not warrant removal. The arbitrator found the removal to be “unreasonable, arbitrary, and capricious”. The arbitrator based his decision on the grievant’s ten years of service, his spotless disciplinary record and presumed satisfactory evaluations. Additionally, he maintained a respectable status in his community. More importantly, the arbitrator found that the agency failed to give the grievant adequate notice and access to policy regarding inmate movement during counts. The arbitrator stated, “Even though the grievant must have understood the broad, commonsensical guidelines about inmate movement during counts, it is unfair to hold him fully accountable for specific provisions in rules where the Agency has not shown that he either knew of the rules or had reasonable access to them.”

It is the Arbitrator’s opinion based on the evidence presented that the Grievant abused the Inmate, and thus, the removal decision was properly imposed. The arbitrator found that the Grievant abused “a patient or another in the care of custody of the State of Ohio,” and, therefore, in accordance with Article 24 .01 , the Arbitrator “does not have the authority to modify the termination of an employee committing such abuse.” Once an abuse finding is declared, all other related charges, whether well-founded or justified, are rendered moot for consideration purposes.

It is the Arbitrator’s opinion based on the evidence presented that the State cannot prove that the Grievant acted as the Employer claimed. It could not be concluded with any degree of confidence that the abuse reference in Section 24 .01 of the Agreement occurred. There was no rational basis for preferring the testimony of the sole witness over the Grievance testimony. The arbitrator concluded that in such situations the case of the Employer must fail.

It is the Arbitrator’s opinion that the employer had just cause to remove the Grievant for violating Standards of Employee Conduct Rule 4 6 (B). The Grievant was engaged in an unauthorized personal relationship with Parolee Young who was at the time under the custody or supervision of the Department. The Arbitrator also noted that evidence discovered post-discharge is admissible as long as it does not deal with subsequently discovered grounds for removal. Furthermore, the Arbitrator concluded that Article 25 .08 was not violated in this circumstance because the Union's information request did not meet the specificity requirement contained in the provision. Finally, the Union failed to plead and prove its disparate treatment claim since it did not raise the issue at Third Stage or Mediation Stage.

The Agency failed to produce even a preponderance of evidence (more likely than not) that the Grievant abused the Client. The Agency produced virtually no circumstantial evidence to support its charge in this dispute, so its case rested entirely on witness testimony and investigatory statements. The outcome of this case, therefore, rested entirely on two witnesses. Neither of the witnesses ultimately proved to be credible.

The employer failed to support the Grievant’s removal for abuse. Nothing in the record provides significant proof that the Grievant was guilty as charged. Improperly supported allegations, regardless of the employer’s well-intentioned purpose, require a ruling in the Grievant’s favor. Mere innuendo, without proper support in the form of consistent and valid evidence and testimony, will lead to similar findings in the future. This finding was fashioned primarily by the overwhelmingly consistent testimony provided by the Grievant and her co-workers.

The grievant was escorting a resident to the dining room at her facility. The resident was known to grab individuals by the shirt and throat, falling to the floor with the individual in tow. The grievant was suddenly grabbed by the patient who pulled
the grievant to the floor and began choking her. There was no one in the area to assist her. The grievant used a training maneuver (knuckle pressure) to loosen the patient’s grip. The action failed. The grievant who was loosing her ability to breathe tapped the resident on the side of his face to get him to release her. As the episode was ending and the resident was releasing his grip on the grievant, an M.R. Professional came upon the situation. The grievant was accused of abusing the resident. Management contended that the grievant abused the resident and there is never justification for “slapping” a resident in the face. The agency representative went so far as to state at arbitration that staff are expected to die or suffer serious injury rather than use unauthorized force against residents. The arbitrator noted that “neither regulation, nor contractual provision requires the Grievant to suffer death or serious bodily injury rather than to use unauthorized force, as a last resort, to repel the Customer’s life threatening attack.”.

The arbitrator found that the grievant faced a life-threatening situation and only after the unsuccessful attempt to use an authorized technique to free herself, was forced to strike the resident. 896

The grievant had several disciplines in his personnel record related to attendance. The grievant’s removal was the result of a confrontation with a resident. The confrontation ended with the grievant swinging a frame from a shirt hamper and damaging a ceiling tile. The arbitrator stated such behavior violated the employer’s work rules and that the grievant had been trained in those rules. However, the Union presented evidence that another employee at the facility had compiled a record of several incidents of workplace violence. He remained employed at the facility. The arbitrator noted an element of disparate treatment and overturned the removal. 898

The employer bears the burden of proof to demonstrate that Collins’ removal from his position for violation of ODJFS Rule F2 was for just cause in compliance with CBA Article 24. Rule F2 prohibits false, abusive, inflammatory, or obscene statements or gestures by any employee of ODJFS. Additionally, the discipline must be commensurate with the offense and not solely for punishment; it must be for “just cause”; it must follow the principles of progressive discipline; and it must not be disparate in nature.

Here, the Union cited McDaniel v. Princeton City Schools Board of Education (45 Fed. Appx. 35 4 : 2002 U.S. App. LEXIS 1 671 3), but the Arbitrator found that the Union’s reliance on McDaniel was misplaced. In contrast to McDaniel, the reasons for Collins’ removal remains the same, and no new additional charges were added stating that Collins did not have an opportunity to present full evidence surrounding the event. Only the charge classification was altered. Also unlike McDaniel, Collins had an opportunity to respond to all of the conduct that brought him to the pre-disciplinary hearing. Furthermore, the arbitrator held that the Union’s procedural argument still does not successfully show a violation of Collins’ procedural rights based on Cleveland Brd. Of Educ. v. Loudermill, 470 U.S. 5 32, 5 4 7-4 8 (1 985 ).

The Arbitrator found that the employer did not act arbitrarily or capriciously because the Grievant’s one email was inflammatory and borderline abusive, and his other “aggressive” emails occurred on the employer’s nickel as well. The language in Article 24 .02 does not require nor is it intended for absolute adherence. The principles of aggressive discipline allow for leeway.

Finally, under proper circumstances Collins would be entitled to mitigation; however, the facts of this case warrant no mitigation. Collins engaged in repeated offenses and made no effort to modify his behavior in response to progressive discipline, with understanding that his ‘active’ discipline would have a grave impact on future violations. The Union could not argue that Collins as a long-term employee had a good work record without any active discipline. Furthermore, as a long-term employee, Collins was clearly aware that his position required public trust and confidence. 899

The grievant was charged with submitting a false expense report. The arbitrator found the evidence overwhelming convincing that he was removed for just cause. The grievant was unable to present any evidence to support his position. Hr admitted that he did not attend a scheduled meeting as he had indicated on his expense report. The arbitrator stated that the grievant’s account of what occurred on his alleged trip included premises his could not support with any evidence. The arbitrator found that the grievant submitted false expense reports. The disciplinary grid for the agency included removal as a penalty for this violation for a first offense. Although the grievant
was a decorated veteran of the USAF and a good employee, the arbitrator noted that he made a series of mistakes which justify his removal. 901

The grievant was charged with allegedly submitting false documents about his work history to an outside certification institute, forging an ODOT employee’s initials on the paperwork. These actions resulted in an award of certification by the outside institute to the grievant which he used in an effort to obtain a promotion. The arbitrator found that the grievant was less than honest with co-workers who were assisting him in obtaining certification. It was problematic for the arbitrator that the grievant rejected responsibility for his actions which led to the removal. The arbitrator noted that the record contained a series of events that were not minor and covered an extensive period of time. Those actions outweighed length of service as a mitigating factor. The arbitrator also noted that the grievant had a fiduciary position as a PS II and his conduct demonstrated dishonesty and a manipulative approach for personal gain that warrants removal. 902

The arbitrator found insufficient evidence to overturn the removal. The weight of the evidence established that the grievant used excessive force when he grabbed and pushed an inmate, absent any credible evidence that the inmate touched or physically threatened him. The grievant went beyond grabbing and subduing the inmate when he began to repeatedly strike the inmate in the head. His seemingly boastful attitude following the incident further supported the employer’s decision to remove the grievant from his position. 908

The grievance was sustained in part and denied in part. The grievant was reinstated without back pay. The grievant’s seniority was not to be diminished by the award. From the date of the grievant’s effective removal to the date of his reinstatement, the grievant was not entitled to any seniority related benefits such as overtime to which he otherwise would have been entitled, but for his removal. The grievant was charged with allegedly using profanity, being disrespectful to a superior and using excessive force in his attempt to break up a fight between two youths. The arbitrator held that the agency established that the grievant used the “F” word in referring to how he would handle any further improper physical contact by a youth. It was determined that the grievant was disrespectful towards his superior. The arbitrator found that the employer did not provide sufficient evidence to support the excessive force charge. Because the employer proved that the grievant had committed two of the charges leveled against him, the arbitrator found that some measure of discipline was warranted. The aggravating factors in this case were the grievant’s decision to use threatening, abusive language instead of allowing his Youth Behavior Incident Report to go through the process and his decision to insult his superior. He also continued to deny that he used profanity. The arbitrator noted that his decision were unfortunate because as a JCO, he had the responsibility to be a role model for the Youth at the facility. The mitigating factors included the grievant’s thirteen years of satisfactory state service and the fact that there were no active disciplines on his record. 907

The grievant was charged with failing to provide a nexus form to his employer regarding the incarceration of his brother. He was also charged with threatening an inmate with bodily harm. The arbitrator found that the employer did not inform it of his relationship with an individual under the supervision of the State of Ohio. However, the employer provided substantial proof that the grievant threatened an inmate. The grievant had been a contract employee and then an interim employee. The grievant had only been a fulltime correction officer for seven months prior to the incident. There were no mitigating factors to warrant reducing the removal to a lesser discipline. 922
An inmate was dead in his cell of an apparent suicide. The grievant was charged with failing to perform cell checks. The arbitrator found that the condition of the body and the filthy condition of the cell indicate that if the grievant had made the two rounds per hour as required, the inmate’s suicide attempt would have been discovered much earlier. The grievant was a “short-term” employee with a prior discipline for inattention to duty. The arbitrator found no mitigating factors to warrant reducing the removal to a lesser discipline. 923

The grievant was charged with accessing employee email accounts without authorization. He was removed for failure of good behavior; unauthorized use of state time/property/resources for personal use. The Union argued that a procedural flaw occurred in this matter in that the disciplinary action was untimely. In its implementation of discipline, management relied upon a report that took 1 ¾ years to complete. It was not reasonable to expect the grievant to remember events over such a long period of time. The Union noted that there was a distinction between accessing an email account and actually viewing the emails. Accessing the accounts did not violate the grievant’s network privileges. The employer could not prove that the grievant did indeed view the contents of the accounts. The grievant had a good work record prior to the discipline. The employer did not implement progressive discipline in this instance.

The arbitrator rejected the Union’s timeliness objection, stating that the employer moved in a timely manner once it was satisfied that the grievant had violated policy. The arbitrator noted that the employer allowed ample time for the Union to conduct a proper investigation.

The arbitrator found that management could prove that the grievant logged on to several accounts, but could not prove that he actually read the contents. Management could not prove that the grievant used state resources for personal use or gain. The arbitrator noted that a co-worker had also accessed email accounts that were not his, but he had not been disciplined. The arbitrator stated, “If it is a serious offense to log on to accounts other than one’s own the question arises as to why one employee was discharged and the other was neither discharged nor disciplined.”

The grievance was sustained. The grievant was reinstated. He received back pay minus any earnings he received in the interim from other employment due to his removal. The grievant received all seniority and pension credit and was to be compensated for all expenditures for health incurred that would have been covered by state-provided insurance. All leave balances were restored and any reference to this incident was ordered stricken from the grievant’s personnel record. 924

The grievant was allegedly injured by an unknown assailant who was attempting to enter the building where the grievant worked. There were no witnesses to the incident. Due to inconsistencies in the grievant’s statements, the arbitrator found that the record did not indicate that the grievant was injured at work. The arbitrator found that the grievant was well aware that he did not have leave balances accrued and that the medical choices made by the grievant were his own doing. Given the arbitrator’s finding regarding the assault, the arbitrator determined that the grievant was absent without leave for more than four days and that he misused/abused approved leave. The arbitrator stated that those violations warranted removal. The arbitrator concluded that the facts did not support a work-related injury. He stated that critical to his conclusion was the grievant’s credibility. The grievant provided no evidence to conclude that an unknown assailant injured him. The arbitrator stated that the grievant’s overall testimony was not believable and his refusal to acknowledge wrongdoing negated any mitigating factors. 925

The grievant was charged with excessive force in subduing a youth during an incident in the gym at a youth facility. The arbitrator noted a disparity in the discipline decision to remove the grievant, but not to discipline a General Activities Therapist whose actions included dragging a youth to the floor by his shirt. The arbitrator found that the grievant’s actions warranted progressive discipline, but not removal. The grievant failed to take the most appropriate action during the incident and was unable to timely anticipate the need to call for assistance from other officers. The arbitrator determined that the charge of dishonesty lacked sufficient evidence. There was no evidence in the grievant’s employment record to indicate that he could not correct his actions through additional training. The employer’s decision to allow the grievant to continue to work for an extended period of time following the date
of the incident indicated that the employer did not foresee any additional problems. 926

The grievance was granted in part, and denied in part. The removal was vacated and converted to a 1 5-day suspension without pay. The grievant received back pay, less 1 5 days and any interim earnings. The arbitrator noted that the grievant needed to understand that taking a youth to the floor without provocation was a misjudgment that should never happen again. The grievant was charged with excessive use of force on a youth at his facility. The evidence presented included a video recording of the incident. The video did not have sound which precluded hearing the level of the disturbance in the gym where the incident took place. The tape did not reveal provocations by the youth indicating that the grievant’s actions were warranted. The arbitrator noted a disparity in the discipline decisions to remove the two officers involved, but to issue no discipline to a General Activities Therapist whose actions included dragging a youth to the floor by his shirt. The arbitrator reversed the removal stating, “Based particularly on the disparity regarding the levels of discipline imposed, the significance of the Grievant’s inappropriate response to the Youth’s activity in the gym incident, and the Grievant’s previous work record with DYS, the arbitrator finds that the Grievant’s summary discharge in response to this one performance offense is excessive, does not fit the ‘crime,’ and does not fundamentally comport with either progressive discipline or ‘just cause.’” 927

The Arbitrator found that the Employer exercised sound discretion given the fact that the Grievant had failed to respond in a meaningful way to prior progressive corrective action steps (particularly to a fifteen day suspension) in an effort to improve her dependability. The Grievant also failed to present any convincing mitigating factors that would excuse her late call or her one hour and twenty-four minute absence from work. The Arbitrator did not agree that the Grievant was treated in a disparate manner, that a misstated year on a letter had any impact on the timing of the investigation, and that there was bias when the investigator was a witness to the Grievant’s calling in late. 928

The grievant was observed arriving late for work on two separate dates and upon arrival did not clock in. The grievant stated that he did not clock in because he was on an LCA and did not want to get into additional trouble. During his pre-disciplinary meeting the grievant stated he was forced to sign the agreement, his representative misled him regarding the agreement and its effects, and he had been wrongly placed on an LCA because his disciplinary record was incorrect. A ten-day suspension had been reduced to a five-day suspension through NTA. The arbitrator found that the grievant and the Union should have sought to correct the grievant’s record prior to the LCA and based upon the untimely manner in which the issue was raised there was no longer appropriate relief. The agency’s conduct complied with the intent of the LCA and no mitigating factors were presented to warrant reversing the removal. 931

The grievance was upheld in part and denied in part. The employer was directed to send the Grievant to a psychologist or psychiatrist to determine his fitness to return to work. If the Grievant was determined to be fit to return to work, he was to be promptly reinstated to his former position on a last chance basis with no loss of seniority. The Grievant was to be given back pay and benefits from the date of the third step grievance meeting until he was returned to work. Any interim earnings were to be deducted from his back pay.

The Arbitrator rejected the Employer’s contention that the grievance was not arbitrable because it was untimely. It was unclear when the Grievant was removed. A notice of removal without an effective date has no force or effect.

The Arbitrator denied the request for full back pay based on the Grievant’s failure to contact the employer or to authorize the union to contact the employer on his behalf. 932
The grievance was upheld. The Grievant was reinstated with full seniority, benefits, and back pay less five days for the Rule 25 violation. The Rule 4 2 violation was removed from his record. A heavy master lock left the Grievant’s hand and struck an inmate in the groin area. This occurred in the context of an argument that resulted in the Grievant firing the inmate. There were no reliable witnesses to the incident. The accusing inmate waited to report the incident for over 24 hours, thus giving time to conspire with other inmates present at the time. The nature of the injuries suggests a different source for the injuries. The Arbitrator could not tell if the incident occurred as the inmate said or as the Grievant said; therefore, the State’s case lacked the required quantum of proof on the physical abuse charge. The Grievant struck an inmate while engaged in horseplay and should have reported it and did not. Since the abuse charge was unproven and the Grievant’s record only had a 2-day fine on it, he received a 5-day penalty for the Rule 25 violation. The Arbitrator found that the Grievant was removed without just cause. 933

The grievant was charged with striking a co-worker during a verbal altercation at work. The arbitrator found that the security video tape demonstrated the grievant was the aggressor during the incident. A review of the tape recording and testimony supported the employer’s position that termination was warranted. The arbitrator noted that the supervisor could have been more effective in diffusing the situation before it escalated. Although the co-worker may have been a “problem employee”, the workplace violence displayed by the grievant should not be tolerated and removal was for just cause. 935

Insubordination is a serious offense. The Grievant’s misconduct took place in a correctional facility where following orders is particularly important. The very next day the Grievant violated policies and procedures when she left a youth unattended. The Grievant’s disciplinary history was a major factor supporting termination—she had received a 12-day suspension on January 19, 2005. The Arbitrator rejected the claims that the Grievant was the victim of disparate treatment; that the imposition of discipline was delayed; and that the employer was “stacking” charges against the Grievant in order to justify her termination. The Union was unable to show how the delay prejudiced the Grievant’s case or violated the contract. The decision to combine two incidents appeared to be reasonable. The disciplinary record of another JCO involved in leaving the youth unattended justified the different treatment. The Arbitrator concluded that the Grievant’s discharge was for just cause and was in compliance with the collective bargaining agreement. 94 2

The Arbitrator held that the burden of proof needed in this case to support the removal was absent. DYS removed the Grievant for two distinct reasons: use of excessive force with a youth and lying to an investigator regarding an incident in the laundry room. The evidence, even if viewed in light most favorable to DYS failed to establish that the Grievant’s inability to recall the laundry room matter was designed purposely to deceive. Both parties agreed that nothing occurred in the laundry room that would warrant discipline. The record failed to support a violation of Rule 3.1 for deliberately withholding or giving false information to an investigator, or for Rule 3.8-interfering with the investigation. The Grievant’s misstatement of fact was nothing more than an oversight, caused by normal memory lapses. He handles movement of multiple juveniles each day, and the investigatory interview occurred eight days after the incident in question. No evidence existed to infer that the Grievant exhibited dishonest conduct in the past or had a propensity for untruthfulness. The evidence did not support that the Grievant violated Rules 4.1 4 and 5.1. The use of force by the Grievant was in accord with JCO policy aimed at preventing the youthful offender from causing imminent harm to himself or others. The grievance was granted. 94 3

The Grievant was a Highway Worker 3 who reported 1 2 minutes late for work, went to the lunchroom, sat down and then suddenly fell out of his chair and passed out on the floor. An emergency squad was called, and he was taken to the nearest medical clinic. At the clinic, medical personnel were unable to determine a medical cause for the Grievant’s passing out or other behavior. The Grievant resisted taking a test and orchestrated a number of delays. After approximately one hour, the Grievant finally complied with the order and provided a urine sample. The Employer did not arrange for a union steward to be present prior to the testing. The sample was negative for alcohol but positive for cocaine. The Grievant had active discipline in his file in the form of counseling, a written
reprimand, a one-day fine and a three-day suspension. He was offered a Last Chance / E.A.P. agreement several times over the course of four days, but he refused the offer. The Employer then terminated his employment for violations of the directives regarding drug testing and unauthorized absence.

Evidence undeniably established that the Grievant had reported to work under the influence of an illicit substance. The Arbitrator followed the “plain meaning rule” in determining that the contract language made a clear distinction between employees subject to federal law and all other employees, and found that the Union did not prove that federal law requires union representation as a pre-condition to testing. The Arbitrator further stated that, under the circumstances, the presence of a Union representative would have had no impact on the eventual outcome, especially in view of the fact that there was no claim or any evidence of procedural defects either in the testing procedure itself or of any actual rights violations to the Grievant. The Grievant’s refusal to use available rehabilitation opportunities precluded any opportunity for continued employment with ODOT.

The grievant was involved in a verbal altercation with an inmate at the facility. At arbitration the employer attempted to introduce an enhanced recording of a taped conversation which also contained the argument between the grievant and the inmate. The arbitrator found that the enhanced tape did not exist during the investigation and could not be presented. He determined that all other evidence – the original tape, interviews of both the grievant and the inmate and the grievant’s lack of remorse or acknowledgment of what occurred during the confrontation - supported management’s position that the grievant was removed for just cause. The grievant threatened the security and safety of the inmate by challenging the inmate to engage in a physical confrontation. The arbitrator stated, “…the evidence of the egregious conduct by the Grievant under the three rules—24, 38, and 44—stands alone as a basis for the justification for the removal in this case.” The Union’s allegation that the grievant’s removal was in retaliation for a sexual harassment suit filed against the institution was unfounded. The arbitrator noted there was no evidence connecting this grievance to the suit. The warden was not charged with any liability in the suit and the investigating superior in this grievance was not connected to the suit.

The Grievant deliberately used excessive force on a youth who was totally complying with the Grievant’s directives. The Arbitrator held that the Agency failed to prove that the Grievant interfered with or hampered its investigation of events because one cannot reasonably expect an employee to disobey a direct order from his supervisor not to report events of abuse he witnessed. The Grievant’s six years of tenure, above average job performance, discipline-free work record, and winning an award for “JCO of the Month” for June 2004 were factors in his favor. However, the Arbitrator held that the nature of the Grievant’s misconduct and abuse of his position as JCO warranted his removal, even though the Agency’s disciplinary grid did not absolutely demand that measure of discipline. The Grievant’s continued employment with the Agency would be inconsistent with its policy and fundamental mission. The grievance was denied in its entirety.

The Arbitrator held that the Employer did not meet its quantum of proof that the Grievant was guilty as charged. None of the charges were properly supported by the record. Other investigation-related factors, those within the Employer’s control, raised sufficient doubts regarding the credibility of the Employer’s decision. The Youth Offender had never filed one formal complaint regarding general allegations about the Grievant’s actions. The allegations only came to the Employer’s attention when the Youth Offender’s cell mate raised concerns. However, the cell mate was never interviewed nor was she brought forth to testify at the arbitration hearing. The Youth Offender suffered an untimely death prior to the arbitration hearing. Her sole link to the dispute, her cell mate, should have been made available for direct and cross-examination. Specific incidents of sexually related misconduct were raised by the Youth Offender and the Employer. One incident allegedly took place on a medical trip. The transport log never surfaced at the hearing. The other incident allegedly took place outside a cottage. The allegations were not supported by something or someone other than the deceased Youth Offender. A security camera existed in the exact location; however, the Employer never attempted to determine whether an archival copy existed. An impartial investigation requires such an effort; anything less
jeopardizes any just cause determination. The Employer did not have just cause to terminate the Grievant. The grievance was sustained. 94 7

A patient escaped and was subsequently hurt. The grievant did not notice the patient’s absence and reported the patient was present when making her rounds. The Grievant’s actions did not rise to the level of recklessness because she was not indifferent to the consequences, nor did she intend that there be harmful outcomes. The facts were not enough to establish “abuse.” However, the Grievant was negligent. She allowed herself to be fooled by a pile of blankets, a cold room, and by not taking greater care during her rounds to see what was under the blankets. This was not abuse, but it was neglect of duty and warranted corrective discipline. Language in the written policies was not specific and there was room for a range of interpretations about what the grievant knew was required or what she should have known. The burden management places on an employee to speak up if they don’t understand the written policy, overlooks the possibility that an employee may be confident he or she understands what to do and yet, in reality, be wrong about their understanding. Management did not prove that patient abuse occurred and, therefore, did not have just cause to remove the Grievant. But Management did have just cause for discipline. The Grievant was reinstated to her former position with full back pay, seniority, and benefits, less two days pay. Her discipline record reflects a 2-day suspension for a first offense of Neglect of Duty. 95 1

The grievant was involved in a response to a “Signal 1 4 ” call for assistance at the institution. The State charged the grievant with dishonesty in regards to the incident. Neither the grievant nor the Union was informed of the “abuse” charge prior to the imposition of discipline. The Agency also refused to allow the Union to review the video tape of the incident prior to arbitration. Both of these procedural issues were presented at arbitration. Following the State’s presentation of its case at arbitration, the Union Representative requested a directed verdict. The arbitrator found that the grievance was sustained in part and denied in part. The grievant’s removal was reduced to a one (1) day suspension. The grievant received all straight time pay he would have incurred if he had not been removed. Deductions for any interim earnings are to be made, except for any earnings received from a pre-existing part-time job. All leave balances and seniority are to be restored. The grievant is to be given the opportunity to repurchase leave balances. The grievant is to be reimbursed for all health-related expenses incurred that would have been paid through health insurance. The grievant is to be restored to his shift and post and his personnel record is to be changed to reflect the suspension. 95 2

The grievant was a CO who was charged with allegedly giving preferential treatment to an inmate and having an unauthorized relationship with an inmate. The grievant admitted at arbitration that on occasion he provided an inmate cigars, scented oil and food from home and restaurants. He admitted that he accepted cigarettes from inmates who received contraband. The arbitrator found that the grievant was removed for just cause. His misconduct continued for an extended period of time; thus his actions were not a lapse in judgment. He attempted to conceal his misconduct by hiding food so the inmates could find it. Therefore, the grievant knew what he was doing was wrong. The grievant accepted “payment” for the contraband when he accepted cigarettes in exchange for the food and other items he provided to the inmates. The arbitrator found that grievant’s actions compromised the security and safety of inmates and all other employees at the facility. 95 3

The Arbitrator concluded that the decision to remove the Grievant was not unreasonable, arbitrary, or capricious and denied the grievance. The Arbitrator concluded that the Grievant did everything wrong. He used an unauthorized “physical action” in the form of kicks; he made no effort to modulate the force of the kicks in compliance with Policy No. 301 .05 ; he used the unauthorized form of “physical action” to punish or retaliate against the Youth rather than to control him; and, he failed to report that he kicked the Youth three times, but readily reported that the Youth had assaulted him. An aggravating factor was that a JCO cannot afford to lose his temper and lash out at youth. The Agency need not or should not tolerate such conduct. The strongest mitigative factors were that the Grievant had not been trained and had little experience with cell extractions. In addition, the Grievant had a record of satisfactory performance and an unblemished disciplinary record. These mitigating factors did not diminish the Grievant’s misconduct. The Arbitrator opined that one must afford JCOs some...
“field discretion.” JCOs are not perfect and one cannot reasonably expect perfect implementation of applicable rules and regulations without fail in the “heat of battle.” As a practical matter, slight deviations from the strict application of rules governing interactions with youth must be tolerated—consistent with prohibitions against abuse and use of excessive force. 95

When the Grievant organized, planned, and promoted a work stoppage she violated rule 30B. The Arbitrator believed she developed the plan and solicited the participation of other employees. When the grievant organized a work stoppage in the face of an approaching winter storm, she engaged in “action that could harm or potentially harm . . . a member of the general public” and violated Rule 26. Grievant violated Rule 4 by interfering with the investigation of the work stoppage. Testimony from other witnesses showed that the grievant was not truthful in her accounts of the events. The Arbitrator believed the state conducted a full and fair investigation. The Arbitrator did not believe the grievant was the object of disparate treatment. Leaders of work actions are identified and discharged, while employees playing a lesser role receive less severe penalties. The Arbitrator did not believe the state failed to use progressive discipline. In the case of very serious misconduct an employer is not required to follow the usual sequence of increasingly severe discipline. Mitigating factors of long service, good evaluations, and behaving in a professional manner in her work as a union steward did not offset the seriousness of the Grievant’s misconduct. The Arbitrator concluded that when the Grievant organized a work stoppage in the face of major winter storm she provided the state with just cause for her discharge. 95

The grievant was a Correction Officer charged with threatening an inmate and using abusive language towards the inmate. The arbitrator found that the grievant’s conduct warranted discipline; however, the Union demonstrated that a co-worker who previously committed a similar offense was treated differently. The employer offered no explanation for the disparate treatment. The removal was ruled excessive and the grievant was reinstated. 95

The central question was whether the Grievant lost control of security keys to an inmate through no fault of his own. The Arbitrator felt that the Grievant used poor judgment in holding the keys in front of an inmate and letting him take them without protest. The Grievant’s actions afterward suggested he knew he had made a mistake and was trying to cover it up. These were not actions in-and-of-themselves warranting termination; however, a proven act of misconduct must be viewed in context. This was the Grievant’s sixth performance related misconduct in his less than two years service and he was on a Last Chance Agreement strictly limiting an arbitrator’s authority to that of reviewing whether he violated the Last Chance Agreement and/or the rule. When he violated the rule he broke the Last Chance Agreement and the Employer had the right to terminate his employment. The grievance was denied in its entirety. 96

Neither the Employer nor the Union were entirely right or wrong in the case. The Grievant’s discipline did not stand in isolation. She had 29+ years of service with the state with a satisfactory record until 2004. In addition, she had been diagnosed with sleep apnea and begun treatment. Under the circumstances her discharge could not stand. The Employer acted properly in administering progressive discipline to the Grievant; on the other hand, the Grievant was ill. Because she had called-off the two days prior to the day in question she had a reasonable belief, albeit erroneous, that the Employer knew she would not report. As a veteran of many years of service she should have known that she should call in. She had been subject to recent and increasingly serious discipline. Therefore a make-whole remedy could not be adopted. 96

The Arbitrator held that the discipline was for just cause and was not excessive. TPW’s are required to report any incident of known or suspected abuse they observe or become aware of, to ensure that a proper and timely response occurs, while considering the unique circumstances of each client. The Grievant had a duty to report and did not comply. Three incidents were not timely reported on a UIR, but were disclosed by the Grievant during an official investigation by CDC’s Police Department into alleged abuse. The Grievant admitted a UIR was incomplete, but attempted to justify his actions by alleging that: a.) he had been employed only seven months; b.) he did not want to be viewed as a “snitch” among his peers; c.) he has a passive personality; d.) he was concerned other TPWs might retaliate against him; and e.) an unwritten “code of silence” was used by his co-workers which encouraged TPWs
not to report unusual conduct. The Arbitrator determined that the Grievant’s overall testimony was not credible and believable. This was buttressed by the Grievant’s failure to provide any specific facts or verifiable supportive evidence to support claims that alleged abuse, unknown to CDC, occurred during his employment. An affirmative defense of disparate treatment could not be supported. Evidence offered was insufficient for a finding that one employee’s and the Grievant’s behavior were closely aligned or that another employee was similarly situated. 965

The grievant was accused of failing to follow post orders and interfering with an official investigation. He allegedly improperly stored a large package brought in by a visitor to the institution and he left his post to go to a unit where he was seen having an unauthorized conversation with an inmate. Prior to the grievant’s removal he received a two-day fine for a rule violation that the employer then included in its basis for the removal. The Union argued that the employer subjected the grievant to double jeopardy because the charges resulting in the fine were also included in the charges for which the grievant was removed. The arbitrator found that “the conduct of the Grievant in violation of Rules 3(G) and 24, became intertwined in the investigation and was never separated during the disciplinary process to establish the division required in maintaining the disciplinary grids regarding attendance and performance offenses argued by the Employer.” The arbitrator found the investigatory interview flawed in that there was no difference in the questions for each specific violation. The arbitrator found that the grievant did violate the work rule regarding visiting an inmate in the segregation area without authorization. 966

In accordance with Section 24 .01 the Arbitrator found the Grievant abused another in the care and custody of the State of Ohio. The force used by the Grievant was excessive and unjustified under the circumstances. The inmate’s documented injuries were a direct result of the Grievant’s actions. The Grievant admitted the entire situation could have been avoided if he had walked toward the crash gate and asked for assistance. Since abuse was found, the Arbitrator did not have the authority to modify the termination. This provision precluded the Arbitrator from reviewing the reasonableness of the imposed penalty by applying mitigating factors. 967

The Grievant was indicted on criminal charges, but entered an Alford plea to the lesser charges of criminal Assault and Falsification. As part of the Alford plea the Grievant agreed not to work in an environment with juveniles, which precluded his being reinstated at Scioto. The Union subsequently modified the Grievance to exclude the demand for the Grievant’s reinstatement and that he only sought monetary relief and a clean record. The Arbitrator was not persuaded that there was clear and convincing evidence that the Grievant used excessive force against the Youth. The Arbitrator held that for constitutional purposes an Alford Plea was equivalent to a guilty plea; however, for the purposes of arbitration the Grievant’s Alford Plea did not establish that the Grievant used excessive force. In addition, the Arbitrator held that the Grievant did not violate any duty to report the use of force. The Grievant did have a clear and present duty to submit statements from youth when requested and violated Rule 3.8 and 5 .1 when refusing to do so. The Arbitrator found that the termination of the Grievant was unreasonable. Under ordinary circumstances he would have reinstated the Grievant without back pay, but reinstatement could not occur due to the Alford plea. However, because of the number of violations and the defiant nature of his misconduct, the Grievant was not entitled to any monetary or non-monetary employment benefits. The grievance was denied. 968

The grievance was granted in part. The Grievant was reinstated, but was not entitled to back pay or any other economic benefit. The Grievant must enter into a Last Chance Agreement with DPS for two years and must successfully complete an appropriate program under the Ohio EAP guidelines. If the Grievant failed to comply with any of the conditions he would be subject to immediate removal. The Employer waited 55 days to notify the Grievant that a problem existed with two assignments. The Arbitrator agreed that this delay was unreasonable under Article 24 .02 and was not considered grounds to support removal. Given that his direct supervisors considered the Grievant a good worker, any conduct which could accelerate his removal should have been investigated in a timely manner. The Arbitrator found that sufficient evidence existed to infer that the Grievant’s conduct
surrounding one incident—in which proper approval was not secured nor was the proper leave form submitted—was directly related to a severe medical condition. Twenty one years of apparent good service was an additional mitigating factor against his removal. DPS met its burden of proof that the Grievant violated DPS’ Work Rule 5 01 .01 (C) (1) (b) on two dates and that discipline was appropriate, but not removal. However, as a long-term employee the Grievant was knowledgeable about DPS’ rules relating to leave and any future violation would act as an aggravating factor warranting his removal. 969

The Employer did not have just cause to terminate the Grievant, but did have just cause to suspend her for a lengthy suspension for accepting money from a resident. There was sufficient basis to convince the arbitrator that the Grievant did accept money from a resident. The lax enforcement of Policy No. 4 lulled the employees into a sense of toleration by the Employer of acts that would otherwise be a violation of policy. This lax enforcement negates the expectation by the Grievant that termination would have occurred as a result of the acceptance of money from a resident. The age of the resident and the amount of money involved called for a lengthy suspension. The Arbitrator held that there was no evidence to support the claim that the Grievant had received a defective removal order and that the requirement that the Grievant be made aware of the reasons for the contemplated discipline was met. 970

The Arbitrator held that the Agency failed to establish by preponderant evidence that the Grievant engaged in either sexual activity or sexual contact with a Youth. In addition, preponderant evidence in the record did not establish that the Grievant violated Rule 6.1, Rule 3.1, Rule 3.9, and 4.10. The Arbitrator concluded that the Youth was less credible than the Grievant. The Grievant’s refusal to submit to a polygraph test did not establish his guilt. The slight probative value of polygraphic examinations disqualifies them as independent evidence and relegated them to mere corroborative roles. Because the Agency established the Grievant’s failure to cooperate under Rule 3.8, some discipline was indicated. The strongest mitigative factor was the Grievant’s satisfactory and discipline-free work record. The major aggravative factor was the Grievant’s dismissive attitude toward the Agency’s administrative investigation. 972

The Grievant admitted that he failed to make all of the required 30-minute hallway checks and a 2:00 a.m. headcount and then made entries in the unit log indicating he had done so. The Arbitrator held that just cause existed for discipline. Since the Grievant committed a serious offense less than two years after being suspended for six days for the same offense, the Arbitrator held that the principles of progressive discipline had been followed. In addition, the Arbitrator held that long service cannot excuse serious and repeated misconduct. It could be argued that an employee with long service should have understood the importance of the hallway checks and headcount more than a less senior employee. The Union argued that since the Grievant was not put on administrative leave, it suggested that his offense was not regarded as serious. The employer, however, reserved the use of administrative leave for cases where an employee is accused of abuse. The Union also argued that the time it took to discipline the Grievant should mitigate against his termination. The Arbitrator held that the investigation and pre-disciplinary hearing contributed to the delay and the state made its final decision regarding the Grievant’s discipline within the 45 days allowed. 978

The Arbitrator held that the Grievant was neither eligible for, nor entitled to, reinstatement. Based on the degrees of fault the Grievant was entitled to twenty-five (25) percent of the back pay from the date of his removal to the date of the Arbitrator’s opinion. In addition, the Agency shall compensate the Grievant for twenty-five (25) percent of all medical costs he incurred and paid for out-of-pocket, as a direct result of his removal. The triggering event for the removal was the failure to extend the Grievant’s visa. The following factors contributed to the untimely effort to extend the visa: (1) the Agency’s failure to monitor the visa’s expiration, leading to a belated attempt to extend the visa; (2) the Agency’s failure to monitor the Grievant’s job movements; (3) the Grievant’s decision to transfer to the Network Services Technician position, which stripped him of proper status under his visa; and (4) the Grievant’s decision not to notify his attorney about the transfer to the NST position. The Grievant’s violation of a statutory duty, together with his silence, looms larger in the lapse of the visa than the Agency’s violation of its implicit duties. The Arbitrator held that the Agency failed to establish that the Grievant violated Rule 28. Because the Grievant was out of status with an expired visa, the Arbitrator held that he was not entitled to reinstatement. As to comparative
fault, the Agency and the Grievant displayed poor judgment in this dispute and neither Party’s fault absolves the other. 980

Three grievances with a factual connection were combined. The Arbitrator held that the events of August 23, 2006 clearly indicated an intention on the part of the Grievant to resign. The Grievant and her supervisor met in the supervisor’s office. At some point in time the Grievant threw the lanyard that held her ID card and her key card onto the supervisor’s desk and said “I’m out of here.” She left to go home. The Union argued that the comment “I’m out of here.” was the result of a panic attack and the Grievant was suffering from safety concerns arising out of the performance of her work The Arbitrator found that the Grievant’s panic or anxiety arose in part from her decision to challenge her supervisor “to burn in hell.” She then learned that this challenge had been reported by the supervisor. The Arbitrator held that there was no retaliatory discipline against the Grievant for expressing safety concerns about where she was assigned to work; nor was she denied emergency personal leave. 981

The Arbitrator held that the Employer had just cause to remove the Grievant for falsification. When an employee is found to have falsified a series of request forms to receive compensation for which he is not entitled, this misconduct is equivalent to “theft.” The Grievant used education leave for periods of time when no classes were scheduled and falsified a request for sick leave on a date he was not sick. The Arbitrator found no notice defects. The Grievant’s credibility was hurt based on the differing justifications for his misconduct. 982

The Arbitrator held that to sustain a charge of threatening another employee an employer must have clear and convincing proof. Here the proof did not even rise to the preponderance standard, being based solely on the report of the co-worker allegedly threatened, who had a deteriorated relationship with the Grievant since the events of a prior discipline. The investigator did not consider that the co-worker may have exaggerated or over-reacted. Management’s handwritten notes were held to be discoverable under Article 25.09. It had refused to produce them until after the grievance was filed and then had to be transcribed for clarity, which delayed the arbitration. The investigator breached the just cause due process requirement for a fair and objective investigation which requires that whoever conducts the investigation do so looking for exculpatory evidence as well as evidence of guilt. Then, to make matters worse, the same investigator served as the third step hearing officer, essentially reviewing his own pre-formed opinion. 985

Verbal exchanges between two corrections officers resulted in a physical struggle between the two officers. The Arbitrator held that the Agency failed to prove that the Grievant violated either Rule No. 19 or Rule No. 37. The Arbitrator held that more likely than not, the other officer was the aggressor in the events leading up to the struggle. The Grievant acted in self defense and believed that any reasonable person would have acted similarly. Rule 19 was not intended to deprive the Grievant or other corrections officers of the right to defend themselves against a physical attack from a fellow staff member. The Arbitrator held that it strained credibility to argue that the purpose or spirit of Rule No. 37 was to deprive correctional officers of the right to protect themselves against attacks from coworkers. The Grievant’s behavior was the kind of misconduct that undermines the Grievant’s position as a role model for the inmates. However, the altercation took place where only a handful of inmates were present. The Grievant’s fault or misconduct in this dispute was her voluntary participation in verbal exchanges with the other corrections officer that led to a physical struggle between the Grievant and that Officer. That misconduct warranted some measure of discipline. The Arbitrator held that the Grievant was not removed for just cause. The Agency should not terminate a fourteen-year employee for self-defense conduct or for engaging in juvenile verbal exchanges with a coworker, even though the behavior is clearly unacceptable. Some measure of discipline is clearly warranted to notify the Grievant and the other corrections officer that verbal barbs have no place in the Agency and will not be tolerated. A three-month suspension without pay should sufficiently deter the Grievant and others from embracing such conduct. The agency was ordered to reinstate the Grievant. 987

The Arbitrator held that the removal lacked just cause and must be set aside. In a related case Arbitrator Murphy held that lax enforcement of the employee-resident personal relationship ban undermines enforcement of other provisions of the policy including the ban on accepting money from
The Grievant had a prescheduled medical appointment on the afternoon of July 24. Then the Grievant called off for her entire shift early in the morning of July 24. An Employee is under a duty to provide a statement from a physician who has examined the employee and who has signed the statement. The statement must be provided within three days after returning to work. The Grievant should have submitted a physician’s statement on the new request—the second request for an eight (8) hour leave. The Grievant, instead, submitted the physician’s statement that comported entirely with her initial request for a leave on July 13 for three (3) hours. The record does not show that the reason for the prescheduled appointment was for the same condition that led her to call off her shift. The letter from the doctor made it clear that they could not provide an excuse for the entire shift absence requested by the Grievant. There was no testimony from the Grievant about why she called off her entire shift. The record does not support the finding that the Employer “demanded” a second physician’s verification. The physician’s verification submitted by the Grievant supported only a leave for three (3) hours, and the record is sufficient to show that the Employer did note this inadequacy to the Grievant on August 7. Based on the record, the Arbitrator found that the Grievant failed to provide physician’s verification when required—an offense under Rule 3F of the Absenteeism Track set forth in the disciplinary grid. This constituted a breach by the Grievant of her Last Chance Agreement. Proof of this violation required that “termination be imposed.” Furthermore, the Arbitrator did not have any authority to modify this discipline. 993

The Arbitrator held that, management demonstrated by a preponderance of the evidence that the Grievant violated General Work Rules 4.1, 2, 5.1, and 5.1, and therefore, some measure of discipline was indicated. Mitigating factors were the Grievant’s three years of tenure, satisfactory performance record, and no active discipline. In addition, the Agency established only one of the three major charges that it leveled against the Grievant. Also, nothing in the record suggested that the Grievant held ill will against the Youth. The Arbitrator held that removal was unreasonable, but only barely so, in light of the Grievant’s poor judgment and his less than credible performance on the witness stand. The primary reason for his reinstatement is that the Grievant never intended to harm the Youth. The Grievant was reinstated under very strict conditions: he was entitled to no back pay or other benefits during the period of his separation, and he was reinstated pursuant to a two-year probationary plan, under which he shall violate no rule or policy involving any youth. Failure to comply will be grounds to remove the Grievant. 995

The Arbitrator relied on the video evidence. The video indicated that the youth was not engaged in any conduct that required imminent intervention by the Grievant. The Arbitrator held that, given the seriousness of the use of unwarranted force by the Grievant and his failure to follow proper procedures when judgment indicated that a planned use of force was required, just cause for discipline existed. However, removal was inappropriate. The Grievant’s record of fourteen years of good service as well as his reputation of being a valued employee in helping diffuse potential problem situations mitigated against his removal. The incident was hopefully an isolated, one-time event in the Grievant’s career. 996

The Arbitrator found that the Grievant should have been aware of Rule 26. He held that there was no disparate treatment. The choice of the charge of the Grievant was reasonable and quite distinguishable from the facts concerning another corrections officer. The record contained evidence of evasion by the Grievant as to the reason why he did not report his arrest immediately. Any violation of Rule 26 would have been the first offense by this Grievant of Rule 26 and, as such, the maximum sanction for the first offense is a 2-day fine, suspension, or working suspension. However, there was a last chance agreement
signed by the Grievant, the warden, and by a union representative. The Arbitrator was limited by the rules which the Grievant accepted in the last chance agreement; therefore, the Arbitrator has no authority to modify the discipline in this case. Rule 26, an SOEC Rule on the performance track of the disciplinary grid, was violated by the Grievant. Once such a finding is made, the Grievant himself agreed in the last chance agreement “that the appropriate discipline shall be termination from (his) position.” 998

The Arbitrator found that the evidence showed the Grievant had violated Work Rule Neglect of Duty (d) and Failure of Good Behavior (e). The evidence failed to demonstrate any words or conduct that rose to the level of a threat or menacing. The Arbitrator held that the removal was excessive due to the Grievant’s medical condition; the Grievant’s acute personal issues; a relatively minor discipline record at time of removal; eleven years of satisfactory service; and the absence of threatening conduct. The Arbitrator reinstated the Grievant with conditions: she will successfully complete an EAP program for anger management and stress—failure to do so would be grounds for immediate removal; discipline of a 15 day suspension without pay for violating the work rules; she shall receive no back pay, seniority and/or any other economic benefit she may have been entitled to; she shall enter into a Last Chance Agreement, providing that any subsequent violation of the work rules for a year following her reinstatement will result in immediate removal. 999

Central to the issue was the credibility of the Grievant. There was evidence to contradict the Grievant’s statement that the youth threatened to harm himself. Reliable evidence existed to conclude that the youth was not suicidal and did not state that he was going to harm himself. Even though the Grievant claimed the youth was going to harm himself, he did not implement a planned use of physical response per DYS policy 301.05. The physical response utilized by the Grievant was unwarranted under the facts, and it constituted a violation of Rule 4.1.2. The Grievant escalated the situation by removing items from the youth’s room—an action that was not required. The Grievant could have utilized other options, but did not. After physically restraining the youth, the Grievant contacted two operations managers. If he was able to contact his supervisors after the restraint, what was the imminent intervention that precluded his contacting them prior to the altercation? The Arbitrator held that DYS had just cause to discipline the Grievant and given his prior discipline of record, their actions were not arbitrary, unreasonable, or capricious. 1002

The Arbitrator concluded that more likely than not the Grievant transported a cell phone into the institution within the period in question, violating Rule 30, by using it to photograph her fellow officers. The Arbitrator held that the Agency clearly had probable cause to subpoena and search 13 months of the Grievant’s prior cell phone records. The prospect of serious present consequences from prior, easily perpetrated violations supported the probable cause. The Arbitrator held that the Grievant violated Rule 38 by transporting the cell phone into the institution and by using it to telephone inmates’ relatives. The Arbitrator held that the Grievant did not violate Rule 4.6(A) since the Grievant did not have a “relationship” with the inmates, using the restricted definition in the language of the rule. The Arbitrator held that the Grievant did not violate Rule 24. The Agency’s interpretation of the rule infringed on the Grievant’s right to develop her defenses and to assert her constitutional rights. The mitigating factors included: the Agency established only two of the four charges against the Grievant; the Grievant’s almost thirteen years of experience; and her record of satisfactory job performance and the absence of active discipline. However, the balance of aggravative and mitigative factors indicated that the Grievant deserved a heavy dose of discipline. Just cause is not violated by removal for a first violation of Rules 30 and 38. 1003

The Arbitrator held that a statement by the Grievant in an email was a false, abusive, and inflammatory statement concerning his supervisor. The Grievant did provide false information in an investigation. The Arbitrator found that the Grievant was not permitted to complete closing inventory on the Operation in question; consequently, he did not breach his job duty to complete the inventory properly. The record supported the finding that the Grievant did not provide even a minimal level of support to the Operator in dealing with customer complaints about the operation of her facility. Therefore, the Arbitrator held that the Grievant did fail to carry out one of his assigned job duties and failed to
follow administrative rules. Because some of the Grievant’s work was for his personal business and for his job at Columbus State Community College, the work was for his personal gain. The Arbitrator held he did fail to follow administrative regulations in the use of his computer equipment assigned to him. The Grievant did have 27 years service to the Commission and had no disciplinary record. However, his ease in involving his blind clients in the investigation of his own conduct as a Specialist demonstrates a lack of sensitivity to the vulnerability of his clients. His supervisor was visually impaired and he wrote a false statement about her in the course of an investigation. Both actions show that the Grievant exhibits little concern for the blind. The Arbitrator found that the grievant cannot be trusted to return to an organization devoted to the service of the blind. 1

The Arbitrator found nothing in the record to support the falsification charge. The administration and interpretation of the Hours of Work/Time Accounting Policy were inconsistent. The policy in no way restricts an employee’s ability to supplement an approved leave and lunch with an afternoon break. The Employer admitted violating Article 24 .04 by failing to inform the Union about the purpose of the interview. It viewed the violation as de minimus. The Arbitrator found that this cannot be viewed as a mere procedural defect. “Without prior specification of the nature of the matter being investigated, the right of ‘representation’ becomes a hollow shell.” Without a purpose specification, interviews become an unfocused information gathering forum and can often lead to ambiguous results. The Employer attempted to raise certain credibility concerns because the Grievant provided differing justifications for her action at the investigatory interview versus the pre-disciplinary hearing. This difference in justification was plausible since the purpose requirement of Section 24 .04 was violated. A contractual violation of this sort represents a severe due process abridgment, which the Ohio Revised Code, state and federal courts view as a critical element of representation rights. Investigation defect allegations dealing with unequal treatment were supported by the record. Other similarly situated bargaining unit members who had not been disciplined for similar offenses were identified for the Employer. The Employer did nothing to investigate this unequal treatment. 1

The Arbitrator held that there was ample evidence that the Grievant failed to take care of a resident of the Ohio Veteran’s Home. The Grievant left the resident, who was unable to take care of himself, unattended for five and one-half hours. In light of the Grievant’s prior discipline, the Arbitrator found the removal to be progressive. The Union made a procedural objection to the use of video evidence on a CD, because it was not advised of the CD’s existence until less than a week prior to the hearing. Since the employees and the Union are aware that video cameras are placed throughout the institution, the Arbitrator ruled that the CD could be used; however, he reserved the right to rule on its admissibility in relation to the evidence. The Union’s objection to the use of video evidence was sustained as to all events that occurred in a break room. The Arbitrator found little independent evidence of those events and did not consider any of that evidence on the video in reaching his decision. 1

An inmate committed suicide while the Grievant was working. Post Orders required rounds to be made on a staggered basis every thirty minutes. On the night the inmate committed suicide, the Grievant did not check on the inmate for two hours. In addition, the Grievant admitted to making false entries in the log book and admitted to not making rounds properly for ten years. The Union’s claim that complacency by Management was the cause was not supported by persuasive evidence. There was evidence that “employees could be written up every day.” But there was also evidence that Management took steps to correct this and employees were given plenty of notice. The Arbitrator reviewed the Seven Steps of Just Cause and found the discipline commensurate. 1

The Arbitrator found that the Grievant told her co-worker that she was taking a bathroom break at 6:30 a.m., left her assigned work area, and did not return until 7:30 a.m. This length of time was outside the right to take bathroom breaks, and therefore, the Grievant had a duty to notify her supervisor. Failing to notify the supervisor would have given rise to a duty to notify the grounds office supervisor who is available 24 hours a day, 7 days a week. The Grievant’s prior discipline
The evidence does support a finding that just cause exists for discipline under Rule #6 because it was the clear intent of the Grievant to threaten the co-worker. A picture posted in the break room by the Grievant was offensive and was intended to threaten and intimidate the co-worker. However, just cause does not exist for removal. The evidence fails to indicate that during the confrontation in the break room the Grievant engaged in any menacing or threatening behavior toward the co-worker. The co-worker’s initial response to the posting of the picture failed to demonstrate any fear or apprehension on his part. In fact, his reaction in directly confronting the Grievant in the break room underscores his combative nature, and was inconsistent with someone allegedly in fear or apprehension. The Arbitrator took into consideration several mitigating factors. None of the Grievant’s allegations against the co-worker were investigated. The facts are unrefuted that the Employer failed to provide any documents or witness list before the pre-disciplinary hearing, in violation of Article 24 .05 . The Grievant’s immediate supervisor was directed by his supervisors to alter his evaluation of the Grievant. The revised evaluation contained four “does not meet” areas, whereas his original evaluation had none. Witnesses from both sides, including management, were aware of the animus between the co-workers. The Employer was complicit in not addressing the conduct or performance issue of the Grievant and the co-worker, which escalated over time and culminated in the break room incident. 101 2

Despite the Grievant’s 13 years of state service, the Arbitrator held that the state had the right to remove her. The Grievant’s extensive violations of the computer use policy combined with the other less serious offenses support the state’s actions. Her prior five-day suspension for computer misuse suggests that the Grievant was familiar with the computer use policy and knew that further discipline would result from continued computer misuse. It also indicates that she failed to take advantage of the opportunity to correct her behavior.

The Arbitrator overruled the timeliness issue raised by the union. Article 24 .06 gives the employer the option to delay the decision to discipline and halt the running of the forty-five days until after any criminal investigation. The evidence was clear that there was a fight and that the Grievant and several other JCO’s were
injured. However, the evidence was clear from witnesses that the Grievant hit and kicked the Youth once the Youth was on the ground. Considering the severity of the assault, the Arbitrator found the removal to be correct. 1 020 The Arbitrator held that the Bureau had just cause to discipline the Grievant for a willful failure to carry out a direct order and for her failure to produce a Physician’s Verification for an absence. This also constituted an unexcused absence for the same date. The Bureau also had just cause to discipline the Grievant for the improper call-off on a later day. The Grievant’s refusal to answer any questions in both investigatory interviews constituted separate violations of the fourth form of insubordination, in that the Grievant failed to cooperate with an official investigation. The Arbitrator held that the record did not support the mitigating factor that the Grievant’s work was placed under “microscopic” review. Nor did the record provide substantial information that the supervisors were universally committed to finding any violations of work rules by the Grievant. 1 021  

The employer removed the Grievant contending that he failed to protect a Youth; that he placed the Youth on restriction for seven to ten days without a Supervisor’s approval in order to conceal the Youth’s injuries; and that he failed to report Child Abuse. The Arbitrator held that the discipline imposed was without just cause. The Arbitrator found no evidence that the Grievant used inappropriate and unnecessary force on the Youth or any allegations against another JCO. The Arbitrator found that it was clear the Grievant used inappropriate and unnecessary force on the Youth. The Grievant knew the difference between Active and Combative Resistance. The Youth’s hands were underneath him and the other witnesses support the testimony of the JCO who said he saw the Grievant hit the Youth six (6) to eight (8) times. The Arbitrator held that the discipline was commensurate with the offense and the Grievant was discharged for just cause. 1 023 While on a hunting trip and staying in Mt. Vernon, the Grievant was arrested for operating a vehicle while impaired. The Grievant became very belligerent and verbally abusive. A newspaper report regarding the incident was later published in Mt. Vernon. The Arbitrator held that the Employer had just cause to remove the Grievant. The Arbitrator was unwilling to give the Grievant a chance to establish that he was rehabilitated. Some actions or misconduct are so egregious that they amount to malum in se acts—acts which any reasonable person should know, if engaged in, will result in termination for a first offense. Progressive discipline principles do not apply in these situations and should not be expected. The Employer established a nexus for the off-duty misconduct. The Grievant’s behavior harmed the reputation of the Employer. It would be difficult or impossible to supervise inmates who may find out about the charges and their circumstances. This would potentially place other officers in jeopardy; an outcome the Arbitrator was unwilling to risk. 1 025  

The grievance involved two separate incidents. The Arbitrator found that the evidence was overwhelming that the Grievant used inappropriate and unwarranted force in both incidents. The Grievant was interviewed twice. The second time he changed his story and said it was the correct version. The Grievant also failed to file correct reports for one of the incidents. The Arbitrator held that the discipline was commensurate with the offense and consistent with ODYS’s work rules and past practice. 1 026 The Arbitrator held that the Employer properly terminated the Grievant for abuse. Section 24 .01 limits the scope of an arbitrator’s authority when dealing with abuse cases. The threshold issue becomes a factual determination of whether abuse can be supported by the record. The record here supported three abuse incidents. Any one of these events in isolation could have led to proper termination; therefore the Employer was able to establish sufficient proof that abuse took place.
The Grievant’s inconsistent observations of the incidents led to a lack of credibility. The Arbitrator held that the self-inflicted injuries defense was not adequately supported. The Arbitrator found that the Grievant did not initiate a time out by removing the resident to “a separate non-reinforcing room” because no evidence helped to distinguish or equate the resident’s bedroom from a “non-reinforcing room.”

To establish theft, the evidence must show that the Grievant intended to deprive the agency of funds provided to employees to attend conferences. The funds were operated as a short-term loan. No written policy or consistent pattern was present regarding repayment by users. The arbitrator held that it was irrelevant how many days it took the Grievant to repay the fund since the Employer essentially allowed each user to determine the date of repayment. The Arbitrator found that several factors mitigated against removal: lax/inconsistent enforcement of rules/policies governing the fund undermines any contention that the Grievant was put on notice regarding the possible consequences of her actions; the Grievant’s treatment of the fund were explicitly or implicitly condoned by her supervisor; and other similarly-situated users of the fund were treated differently from the Grievant. No theft of public funds was proven; when put on notice by Management that immediate payment was required, the Grievant complied. The Arbitrator held there was no just cause for the discipline issued.

The Arbitrator held that the Employer had just cause to terminate the Grievant. The Grievant’s disciplinary record exhibited several progressive attempts to modify his behavior, with the hope that progressive penalties for the same offense might lead to positive performance outcomes. As such, the Grievant was placed on clear notice that continued identical misconduct would lead to removal. The Arbitrator also held that the record did not reflect any attempt to initiate having the Grievant enroll in an EAP program within five days of the pre-disciplinary meeting or prior to the imposition of discipline, whichever is later. This barred any attempts at mitigation.

The Grievant had entered into a Last Chance Agreement with the agency. She then violated the Corrective Action Standard, AWOL—No approved request for leave. The Arbitrator held that the Last Chance Agreement was fair, just, and reasonable. The Grievant was knowledgeable of the corrective action standard and there was no evidence showing that those corrective action standards were not published or selectively used rather than even-handedly applied. The Arbitrator found that the Grievant’s excuse for the absence lacked corroboration in any manner or respect. The Arbitrator reminded the parties that if a termination is based upon a Last Chance Agreement the just cause provisions may not apply, but rather the application is under the Last Chance Agreement.

The Arbitrator found that the Grievant was removed without just cause. Management did not satisfy its burden of proving that he acted outside the Response to Resistance Continuum and engaged in the conduct for which he was removed. The Youth’s level of resistance was identified as combative resistance. The Grievant’s response was an emergency defense, which he had utilized one week earlier with the same Youth and without disciplinary action by Management. A fundamental element of just cause is notice. Management cannot discharge for a technique where no discipline was issued earlier. In addition there was no self-defense tactic taught for the situation the Grievant found himself in.

The Arbitrator held that BWC had just cause for removing the Grievant, since the Grievant was either unwilling or unable to conform to her employer’s reasonable expectation that she be awake and alert while on duty. The agency and the Grievant had entered into a settlement agreement, wherein the Grievant agreed to participate in a 80-day EAP. However, the Arbitrator found that the sleeping while on duty was a chronic problem which neither discipline or the EAP had been able to correct. The Grievant raised the fact that she had a common aging
problem with dry eyes and was taking a drug that made the condition worse. However, she never disclosed to the supervisor her need to medicate her eyes. The Arbitrator held that this defense amounted to post hoc rationalization and couldn’t be credited. The Arbitrator felt that a person on a last-chance agreement for sleeping at work and who had been interviewed for an alleged sleeping infraction would take the precaution of either letting her supervisor know in advance about this treatment, take the treatment while on break and away from her work area, or get a witness. 1 033

The grievance was sustained in part and denied in part. The removal was reduced to a 10-day suspension. The Arbitrator found that the Grievant committed the alleged misconduct; therefore, the Employer had just cause to discipline her. However, there was not just cause to remove her. Considering all the circumstances, the Grievant had an isolated and momentary lapse in judgment. There was no physical harm or dire consequences from the momentary lapse. Recent arbitration awards between the Parties, uniformly reinstated--without back pay--employees involved in physical altercations more substantial that the Grievant’s. (See Arbitration Decisions: 971, 995, 996.) The Grievant was reinstated without back pay, but with seniority restored. 1 034

The grievance was sustained in part and denied in part. The removal was modified to a five-day suspension. The Grievant was granted full back pay and benefits less the five-day suspension. The Arbitrator found that Management satisfied its burden of proving that the Grievant failed to maintain the close supervision for one patient and one-on-one supervision for another patient. The Grievant chose to work without adequate sleep, rather than to seek leave, and her choice placed the residents in her supervision, and the Center at risk. However, Management had created an arbitrary distinction in supervision cases arising from sleeping on duty. The Union established that other similarly situated employees received suspensions and/or other disciplinary action far short of removal for similar conduct. Therefore, the Arbitrator held that discipline was warranted, but the removal was without just cause. 1 037

The Grievant was involved in an incident in which a Youth was injured during a restraint. The Employer asserted that the report written by the Grievant was worthless and inaccurate. The entire thrust of the Employer’s argument was based upon proximity and the “culture” at the Facility. The mere fact of proximity does not mean you saw or heard something. This is particularly true if you are engaged in trying to restrain someone. The Employer has no direct evidence that the Grievant saw anything. The Employer contended that the Grievant should have protected the Youth; however, the Arbitrator found that the Employer had no evidence as to how this should have been done. In most arbitrations, the Employer offers evidence as to what the Grievant should have done.

The Grievant was not placed on Administrative Leave, nor was he placed in a “No Youth Contact” status. It is a direct contradiction to claim the Grievant was guilty of such severe rule infractions that he should be removed and then to have ignored him for ninety (90) days. The Arbitrator also found no evidence to support the Employer’s contention that there is a “culture” at the Facility that causes cover up. 1 039

The Arbitrator held that despite the Grievant’s 19½ years of service, her extension of her break, and more importantly, her dishonesty in the subsequent investigation, following closely her ten-day suspension for insubordination, gave him no alternative, but to deny the grievance and uphold the removal. The Arbitrator rejected the argument that the removal was inconsistent with progressive discipline because dishonesty and insubordination are different offenses. The Arbitrator found this contention contrary to the accepted view of Arbitrators regarding progressive discipline. Also, the agency policy stated that “discipline does not have to be for like offenses to be progressive.” 1 040

**Removal from Bargaining Unit**

- The grievant was improperly designated a fiduciary, and therefore, she maintained her bargaining unit status. The Employer, therefore, violated Section 24 .01 of the Contract when it terminated the grievant without just cause: 4 72

**Removal Notice Defective**

- Whether grievant was guilty of "resident neglect" depends on whether events occurred as the "particulars" stated on the removal notice dated August 18, 1986 and if so, whether they constituted just cause for removal: 9

- Application of institutions policy was held to be not germane to the case because the policy was
- Consideration of other alleged violations discussed at the hearing, but excluded from the removal order would violate the grievant's due process rights: 108

- The arbitrator found the removal order defective because it cited ORC 1 24 .34 rather than pertinent sections of the Agreement. 'Me employer failed to introduce any evidence or testimony equating this standard with the standards specified in either Article 31 or Article 24. Reliance on this section also conflicts with an Ohio Supreme Court decision which found that the Code cannot be used to supplement or indirectly usurp provisions negotiated by the parties: 220

- The arbitrator found the removal order defective where it contained different particular violations that the pre-disciplinary hearing notice. The latter document referred to one insubordinate event but the removal order referred to several. This circumstance failed to provide the grievant with proper and timely notice as required by 24 .01 and 24 .04. This may have prevented a full and exact defense for the entire episode: 220

- That the removal order was dated the day after the pre-disciplinary hearing is strongly suggestive of prejudice: 227

- A mistake in the removal notice of one day as to the date of the incident was held to be insignificant: 260

- Reference to the Ohio Revised Code in the removal letter was not held to be a violation of the contract since it was clear that the grievant was disciplined for violation of a reasonable, published work rule and that the just-cause standard and other disciplinary provisions of the contract prevailed: 260

- Reference to the Ohio Revised Code in the removal order does not prejudice the grievant because the arbitrator is deciding the case based on just cause rather than the Revised Code: 261

- Defects in the removal notice such as citing standards other than contractual standards were minimal and did not prejudice the grievant's position: 272

The Arbitrator rejected the Employer’s contention that the grievance was not arbitrable because it was untimely. It was unclear when the Grievant was removed. A notice of removal without an effective date has no force or effect.

The allegation of misconduct arose from three incidents involving a coworker. In the first the Grievant was joking and it should have been obvious to the coworker. Given the questions about the coworker's view of the first incident and her failure to report the alleged misconduct until the next day, the Arbitrator could not accept the coworker's testimony on the second incident. Because he was out of line when he confronted the coworker in a rude and aggressive manner, the Grievant merited some disciplinary action for the third incident. The strict adherence to the schedule of penalties in the Standards of Employee Conduct sometimes results in a penalty that is not commensurate with the offense and the employee’s overall record. The Arbitrator denied the request for full back pay based on the Grievant’s failure to contact the employer or to authorize the union to contact the employer on his behalf. 932

**Report In Location**

- Under 1 3.06, an employee is a field employee only when assigned field work; the 3rd sentence of the third paragraph only covers employees who are on 1 000 hour assignments: thus, employees who are neither currently under 1 000 hour assignments nor currently assigned to field work are covered by the 4th paragraph: 84

- Management has the power under article 5 to determine where the report in location is. The employer must look at the nature of the work and must use a non-discrimination 1 3.06, which states "employees who work from their homes, shall have their homes as a report in location."
Presumably, if an employee works at or in her house, that would be her report in location. However, that supplies and records are kept at home, that correspondence is received at home, or that the employee has no designated office and does "field" type at several locations, is not a sufficient basis to conclude that the employee works from home. If a substantial amount of the work fit a person's job description is done at home, the home may be designated as the report tit location. The common and logical concept of a report in location is a place where the employee goes in order to report in, ready to commence to perform his job: 1 60

- Travel reimbursement is an entirely different issue than travel time and appears to be covered by 32.02: 1 60

Representation, Denial of Union

The arbitrator found that management violated §24 .04 when it denied the grievant representation at a meeting regarding his timesheet. Management had already spoken to the Union regarding this matter, but at a subsequent meeting the next day denied representation. The employer prevented the grievant from choosing wisely when he was given a direct order to correct his timesheet within 5 5 minutes. The insubordination charge was dismissed. 770

Representation, Right to Union

- Failure to provide notice of right to union representation at police investigatory interview is a minor violation and does not justify overturning discharge where union cannot credibly argue that grievant’s defense was compromised by the violation: 38

- Since the grievant did not request the presence of a union steward during the interview, the State did not violate Section 24 .04 : 1 68

- Prior to the pre-discipline, management had recommended a 5 -day suspension. The grievant ultimately received a 1 5 -day suspension. The arbitrator held that the increase in the suspension is not in violation of 24 .04 . The section provides, in relevant part that prior to the meeting, the grievant is to be informed in writing of the possible form of discipline. The word “possible” means something that may or may not be true or actual: 1 68

- The employer was found to have violated 24 .04 by denying the grievant of his right to union representation by issuing a notice of investigation at a time when there was no union representation on the site stating that the grievant would be disciplined if he did not complete a written statement. However, the arbitrator did not modify the grievant’s discipline because there was no indication that the employer’s violation was deliberate and no prejudice to the grievant resulted: 260

- The right to representation at appeals to performance evaluations was relinquished as a bargaining table concession in the 1 989 negotiations: 269

- The employer’s right to Union representation under Section 24 .04 of the agreement will arise only if the employee requests representation and if the employee has reasonable grounds to believe that the interview may be used to support the disciplinary action against him/her. The arbitrator found that in defining the words “investigatory interview” the phrase refers solely to an investigatory interview conducted by the employer which might lead to discipline; the phrase is not intended to cover a State Police investigation which might lead to conviction for a criminal offense: 325

- The terms of the Agreement are not binding on parties external to the Agreement. Section 24 .04 of the agreement does not contemplate a criminal investigation and the right to Union representation applies solely to the employer-employee relationship. The term “investigatory interview” applies solely to the parties of the agreement and to the bargaining unit members of represented by the Union: 325

- The grievant was a Correction Officer removed for using vulgar language, conducting union business on work time, and fondling an inmate. The arbitrator rejected the claim that the Union had a right to question witnesses at the pre-disciplinary hearing. Nor did the employer violate Article 25 .08 because the union made excessive document requests. The employer did violate Article 25 .02 by not issuing a Step 3 response for six (6) months, however the grievant was not prejudiced. Therefore, the arbitrator found, because the inmate was more credible than the grievant, that just cause did exist for the removal: 366
- The grievant was a Correction Officer who was removed for watching inmates play cards while they were outside their housing unit. The grievant admitted this act to his sergeant. The pre-disciplinary hearing had been rescheduled due to the grievant’s absence and was held without the grievant or the employer representative present. The arbitrator found that because the union representative did not object to the absence of the employer’s representative that requirement had been waived. There was also no error by the employer in failing to produce inmates’ statements as they had not been used to support discipline. The removal order was timely as the 45 day limit does not start until a pre-disciplinary hearing is held, not merely scheduled: 377

- In a case involving a grievant who never requested Union representation, the arbitrator held that the grievant cannot later charge that he was denied Union access. The employee bears the burden of proving that he was denied Union access. The arbitrator ruled that the grievant failed to do so here: 542

- The Union argued that the grievant was denied union representation at a pre-disciplinary meeting. Without being informed that discipline might result from the meeting, the grievant never considered requesting union representation: 613

The Arbitrator found nothing in the record to support the falsification charge. The administration and interpretation of the Hours of Work/Time Accounting Policy were inconsistent. The policy in no way restricts an employee’s ability to supplement an approved leave and lunch with an afternoon break. The Employer admitted violating Article 24.04 by failing to inform the Union about the purpose of the interview. It viewed the violation as de minimus. The Arbitrator found that this cannot be viewed as a mere procedural defect. “Without prior specification of the nature of the matter being investigated, the right of ‘representation’ becomes a hollow shell.” Without a purpose specification, interviews become an unfocused information gathering forum and can often lead to ambiguous results. The Employer attempted to raise certain credibility concerns because the Grievant provided differing justifications for her action at the investigatory interview versus the pre-disciplinary hearing. This difference in justification was plausible since the purpose requirement of Section 24.04 was violated. A contractual violation of this sort represents a severe due process abridgment, which the Ohio Revised Code, state and federal courts view as a critical element of representation rights. Investigation defect allegations dealing with unequal treatment were supported by the record. Other similarly situated bargaining unit members who had not been disciplined for similar offenses were identified for the Employer. The Employer did nothing to investigate this unequal treatment. 1006

**Required versus Authorized**

Under 37.03 it is mandated that the employer pay overtime or reimburse travel expenses. The word “required” in Section 37.03 was defined by the arbitrator as required by the employer. If the employer requires the employee to attend then the employer is required to pay. The employer’s choice to require or not to require attendance to a meeting is entirely within the article 5 management rights: 345

**Residency Requirement**

The employer erroneously interpreted Section 124.27 of the Ohio Revised Code which states that “employees in the classified service shall be or become forthwith a resident of the State.” The employer added restrictions to the term “resident” – primary and permanent. Those restrictions made the term resident synonymous with domicile. The arbitrator noted that while a person could have only a single domicile, he/she could have many residences. The arbitrator found that the number and types of contacts with Ohio that the grievants had (family living in Ohio, established residency in Ohio) satisfied the term of residency under 124.27. The grievants were discharged without just cause. 756

**Resignation**

The Grievant orally and by e-mail communicated to her direct supervisor her intent to end the employment relationship, which was accompanied by packing her belongings. The Grievant was in a state of anxiety and emotional distress at the time she voiced her intention to resign and acted upon it. The evidence did not show that the Grievant was in such a deteriorated mental condition that she was rendered incapable of understanding what she was doing, or the consequences of what she was doing. Her workplace situation could not be found to be so intolerable that a resignation would be compelled. The Arbitrator held that the resignation was voluntary and not coerced. The Arbitrator held that the resignation was effective.
since the Employer had accepted the resignation before the Grievant made any efforts to rescind the resignation. The Arbitrator held that the Department of Agriculture did not have a legal duty under Administrative Code 1 23:1-25-02 to reinstate the Grievant. This provision only creates a privilege on the part of the appointing authority to request a reinstatement. The administrative code provides that the employee “may be reinstated.” There is no right to be reinstated. The grievance was denied. 94 8

**Resignation** (See Job Abandonment)

- In determining that the grievant did not have the choice to rescind his resignation, the arbitrator was of the view that “Anxiety is a common disease in our society, and its presence does not, in and of itself, excuse sufferers from responsibility for their voluntary acts: 1 86

- The employer should not show due consideration if an employee tries to rescind their resignation in a timely manner. The grievant quit in a state of anxiety and depression then an hour later tried to rescind his resignation: 278

- Even a thoughtless outburst can be considered a voluntary quit. The employee needs to be psychologically impaired to the extent that he/she could not be held responsible for their act for the quit not to be voluntary: 278

- When employee initiates their voluntary resignation they should not be awarded with back pay award: 278

Where a grievant has submitted a hand written statement of resignation, establishing the requirements of finality of employment and intent to terminate employment, the grievant has voluntarily quit and has not been constructively discharged: 4 4 5

- The Employer accepted the grievant's resignation, effective August 30, 1 993. The settlement between the Employer and the Union included giving aid to the grievant in filing for unemployment compensation, filing for SSD or SSI, linking the grievant with a community mental health worker and seeking a sheltered workshop for the grievant. The grievant had been employed with the State since 1 975: 5 1 3

- The grievant’s detrimental reliance argument was not sufficiently supported by the record to constitute an "unusual circumstance" and was insufficient to overcome the clear language of the Contract. Therefore, the grievance was not filed in a timely manner and was not arbitrable: 5 84

- The State contended that the grievant voluntarily resigned and therefore was not discharged in violation of Article 24 of the Contract. However, the Arbitrator held that since the grievant did not sign a written resignation, she had no intention of quitting her job. Further, the State did not present evidence to demonstrate that the grievant voluntarily surrendered her badge and identification: 620

**Resignation and Re-Hire**

- The grievant should have been on notice that he was incorrectly classified as a probationary employee. The grievant was required to resign from his job in order to transfer to another job within the agency, the grievant went down a pay range, the grievant signed an evaluation which was clearly marked as “A MID-PROBATIONARY EVALUATION”, and the grievant was told not to worry about being on probation. Once the grievant was put on notice of his probationary status and did not file a timely grievance, then the grievance is untimely: 4 5 5

**Respirators**

- The Union’s medical defense was rejected. The employer required the grievant to be clean-shaven to properly wear a respirator. The grievant’s skin condition of psuedo folliculitis barbae can, as shown by medical testimony, be managed by shaving with barber clippers instead of a razor. This manner of shaving would have been acceptable to the State. The fact that the grievant passed respirator fit test does not have a great deal of bearing on this case. The test is conducted in the most ideal conditions. The manufacturer of the respirator and OSHA advised against bearded employees using a respirator. The requirement by the State that the grievant be clean-shaven is a reasonable one: 31 9

**Rest Periods**

- Between double shifts: 1 35
- Section 1 3.07 applies to breaks during overtime periods while section 1 3.04 applies to breaks during the regular work hours: 1 35

**Retained Jurisdiction**

- The arbitrator retained jurisdiction "for thirty days to resolve the issue of back pay that the parties are unable to settle." This procedure is a well-settled practice that recognizes the inadvisability of arbitral computation of back pay, where the parties have not presented relevant supporting data. In the absence of this retention of jurisdiction the arbitrator's jurisdiction would expire under the doctrine of functus officio. Thus, the scope of the arbitrator's jurisdiction is defined by the award itself. Some awards carve out a fairly broad area of retained jurisdiction ("to dispose of any problems that might arise Safety: 1 23 in the administration of the award). In this case, the arbitrator retained a narrower jurisdiction to resolve any issue of back pay. It would therefore be inappropriate to consider the grievant's subsequent discharge: 1 91 A

- Where the arbitrator retained jurisdiction to resolve any issues of back pay that might arise, that jurisdiction includes: 1 whether holiday pay should be included in the computation of back pay and (2) whether the grievant made sufficient efforts to mitigate back pay: 1 91 A

**Retaliation**

- See discrimination because of union activity

- For filing grievances: 80, 1 27

- Changing grievant's work assignment to work that has a closer deadline does not, by itself, amount to retaliation. However, the employer cannot assign duties that exceed reasonable bounds. If discipline for failure to finish work were imposed, that would throw a different light on the situation: 1 27

Three grievances with a factual connection were combined. The Arbitrator held that the events of August 23, 2006 clearly indicated an intention on the part of the Grievant to resign. The Grievant and her supervisor met in the supervisor’s office. At some point in time the Grievant threw the lanyard that held her ID card and her key card onto the supervisor's desk and said “I’m out of here.” She left to go home. The Union argued that the comment “I’m out of here.” was the result of a panic attack and the Grievant was suffering from safety concerns arising out of the performance of her work. The Arbitrator found that the Grievant’s panic or anxiety arose in part from her decision to challenge her supervisor "to burn in hell." She then learned that this challenge had been reported by the supervisor. The Arbitrator held that there was no retaliatory discipline against the Grievant for expressing safety concerns about where she was assigned to work; nor was she denied emergency personal leave. 981

**Retirement**

- The grievant was only one year away from acquiring thirty years service and retirement. The State and the Union agreed to a settlement. The grievant will be reinstated, but at the end of the year when he is eligible for retirement, he will be put on voluntary pay quit status: 289

- The grievant retired from the State Highway Patrol and was hired by the Department of Health four days later. His new employer determined that the Ohio Revised Code section 1 24 .1 81 did not provided for longevity pay supplements based on prior state service for rehired retirees. The arbitrator found the grievance arbitrable despite the employer's argument that because of the grievant’s retiree status that longevity was a retirement benefit, and under Ohio Revised Code section 4 1 1 7.1 0(A) longevity for a retired employee was not a bargainable subject. Section 1 24 .1 81 was found to be applicable and section 36.07 of the contract confers longevity pay based solely on length of service. That the grievant experienced a change in classification was found to be irrelevant for the purpose of calculating longevity and the grievance was sustained: 389

**Right to Union Representation**

- See Representation, Right to

**Rights**

- Whenever rights are deemed not absolute then a balancing process is contemplated: 75

**Roll Call**

- Section 36.05 preserves and carries forward the practices of individual correctional facilities on
discipline for roll call attendance deficiencies: 1 5 2

- Section 36.05 states "current practice on reporting time shall be continued unless mutually agreed otherwise." It must be presumed that the language was not thrown into the Agreement for its appearances - that the negotiators used it for the substantive purpose of preserving roll call practices. In other words, Section 36.05 is an exception to the abolishment of practices brought about by Article 4. Section 4 3.03: 1 5 2

**Roll Call Pay**

- In 36.05, which provides for roll call pay to Correction officers, "Correction officers" means all Correction officers, no specific group is excluded, i.e., special duty C.O.'s: 1 0 7

**Roll Call Pay**

The arbitrator determined that it was not reasonable to deny an employee roll call pay when the employee’s removal has been found to be without just cause. Roll call pay is for attending a mandatory meeting and is identical to other work which requires a meeting with management. 769

**Routine Procedures**

- Common experience teaches that we are creatures of habit and adhere to established routines, especially ones as long established and mechanistic as the routines involved here: 1 8 7

**Rule Not in Effect at Time of Violation**

- The institution's policy was held to be not germane to the case since the policy was not approved until after the alleged violation, and it was not retroactive: 9

- No exculpatory effect if conduct would have violated rules that were in effect: 1 8

- The grievant was removed for insubordination for failing to shave his beard to wear a respirator. The OSHA recommendation that the grievant be reinstated is entitled to little weight. The grievance procedure is the exclusive method for resolving this dispute. OSHA did not conduct the sort of evidentiary hearing required by the elementary considerations of due process. The conclusion of the Director of the Industrial
Relations is not controlling and does not serve to bind the arbitrator: 319

- There was the requisite just cause for the grievant’s removal. The grievant would not shave his beard. The rule that employees who wear respirators in asbestos filled areas must be clean-shaven is reasonable. The employer progressively disciplined the grievant for insubordination finally resulting in discharge: 319

With respect to Article 11.02, the grievance was denied. With respect to Article 33.01, the grievance was granted. However, the make whole remedy was limited to five months and was awarded only to Todd Braden. Throughout 2007 there was confusion about what was required to be purchased and what was optional for fire-resistant (FR) clothing. The Traffic Engineer, the Grievants’ supervisor, relied on information from the ODOT Central Office and required the Grievants to wear the FR shirt and pants beginning in October, 2007. The supervisor rescinded the order in February, 2008 when she received the following email: “All FR Safety Apparel which has already been purchased can be distributed to employees if they wish to wear it. Since the apparel is only recommended, it will be the employer’s responsibility to wash and maintain the safety apparel.” The supervisor instructed the Grievants to wear the pants and suit if they wished, but cleaning and maintenance was their responsibility. The contract between the parties states that the arbitrator cannot impose an obligation that is “not specifically required by the expressed language of this Agreement.” OSHA does not require FR clothing as personal protective equipment for the Grievants in the text of Section 191 0.335. The Arbitrator held that the Employer was not obligated under Article 11.02 to provide FR shirts and pants to the Grievants and, consequently, did not have any obligation to clean and maintain same. Because the traffic engineer ordered the five Grievants to wear the FR shirt and pants from October, 2007 to February, 2008, the Employer was contractually responsible for the cost of cleaning and maintaining the FR clothing during these five months. Evidence was submitted showing that Todd Braden had a per week expense for care and maintenance of this clothing. The make whole remedy was requested for this Grievant only. 1018

**Scope of Arbitral Award**

- See arbitral authority, class grievance v. individual grievance

- The scope of the award is limited to the parties to the grievance. Under 25.01, the Union can process grievances for an employee, for a group of employees or itself. How the grievance is brought is determinative of the parties. Where the union made no attempt to expand the class, the arbitrator determined that the award was limited to the class which made up the parties to the grievance as it was brought: 84

**Scope of Grievance** (See Arbitrator’s Authority, Class Grievance vs. Individual Grievance)

- In determining whether a grievance is a class grievance (as opposed to merely an individual grievance) and a “continuing grievance” (covers violations occurring after the original filing of the grievance), the arbitrator should ask whether the employer had notice of the wide scope of the grievance. It is the lack of notice, and the deprivation of discussion in the pre-arbitral stages, which is the foundation of any restrictive analysis as to the scope of the grievance. Evidence that the state had notice includes the following:

1. the nature of the subject matter (in this case, since the subject matter is bargaining unit erosion, it warrants the conclusion that the grievance is a class grievance); and
2. union was allowed to allege violations after the grievance filing at the 3rd step, and the State responded thereto: 142

- Where the grievance form indicated only one discipline that was being grieved, but the grievant had informed the employer at step three of his understanding that all of the discipline imposed against him during his extended absence, the arbitrator ruled that all of the disciplines imposed
during the grievant’s absence were included in the scope of the grievance: 21

Searches (See Drug Testing)

- Visitor and Employee search security policy" (a Correction policy) allows employee to refuse to submit to search. Discipline can only be imposed if employee has been informed that refusal in that instance will result in disciplinary action: 5

- 5 day suspension for failure to submit to search would not be inappropriate for employee with good record, if the search policy were properly applied: 5

- The fact that grievant drove to work with another employee and the employer had a tip from an inmate that the other employee was selling digs, serves as a reasonable basis for a correctional institution to strip search the grievant: 21

- The U.S. Supreme Court in O'Connor v. Ortega set forth principles concerning the constitutionality of searches of government employees by government employer's. The Fourth Amendment restrains government employer searches of government employees' private property and that a case by case analysis is required to determine whether an employee has a reasonable expectation of privacy in his office. The reasonableness of the search is dependent on the context of the search and requires a balancing of the nature and quality of the intrusion on Fourth Amendment interests with the importance of the government interests justifying the intrusion: 21

- The doctrine of inevitable discovery, in effect, suspends the Fourth Amendment's protection against searches if the sought to be suppressed evidence would inevitably have been discovered anyway: 21

In January 1 990, the OCSEA and the DRC entered into a Settlement Agreement containing several conditions intended to regulate future strip searches. This was a result of the Union suing DRC in federal court, challenging the constitutionality of the DRC’s strip search procedures. The instant case arose from DRC’s decision to strip search five black female correction officers after receiving an anonymous tip that described a correction officer who allegedly intended to bring drugs into the Allen Correctional Facility. The Arbitrator held that the Settlement Agreement was intended to be part of the Collective-Bargaining Agreement. Section 7(f) explicitly removes only “cause for search” from arbitration and grievances. “Cause for search” does not include the terms “suspicion” or “reasonable” and is not necessarily synonymous with the phrases “reasonable suspicion”, “cause for suspicion supporting the search”, or “cause for suspicion”. These are separate issues. In addition, Section 7(b) affords employees targeted for strip searches the right to review much of the information that went into the decision to strip search them. Affording employees access without the right to subject it to independent review does not protect them from arbitrary, discriminatory, or unreasonable searches or decisions. The Arbitrator held that issues involving how strip searches are conducted and the element of reasonable suspicion supporting decisions to strip search employees are substantively arbitrable under the Collective-Bargaining Agreement, which is referenced under Section 7(f) of the Settlement Agreement. The case was then settled with the grievants receiving back wages and back leave accruals. 94

Security of Correction Institutions

- All employees working in a correction environment are responsible for security: 23

Selection

The Arbitrator held that the state properly assigned points to the applicants for the Computer Operator 4 position and selected the appropriate applicant for the job. The Grievant was not selected because her score was more than ten points below that of the top scorer. The Union argued the Grievant should have been selected because she was within ten points of the selected candidate and therefore, should have been chosen because she had more seniority credits than he did. The language could be clearer, but the intent is clear. If one applicant has a score of ten or more points higher than the other applicants, he or she is awarded the job. If one or more applicants have scores within ten points of the highest scoring applicant, the one with the most state seniority is selected for the position. The Arbitrator pointed out that the union’s position could result in the lowest scoring person being granted a job. If that person was awarded the job, someone within ten points of him or her could argue that he or she should have gotten the job. The Arbitrator commented on the union’s complaint that the state violated Article 25 .09 when management refused to provide notes of the
applicants’ interviews. The issue submitted to the Arbitrator was simply the violation of Article 17. The state provided the requested material at the arbitration hearing and the Union had the opportunity to address the notes at the hearing and in its written closing statement. 976

The Arbitrator held that the procedure used by the division was not a valid method for selecting the employee to be promoted to Customer Service Assistant 2. However, simply placing the Grievant in the position would be unfair to the selected applicant. Thus, a valid method must be used to choose between the Grievant and the selected applicant. While it might be desirable for the union to have input into developing the process, the test prepared and administered by DAS would provide a speedier resolution. The Arbitrator saw nothing that would justify denying the grievant back pay if he was wrongly denied a promotion because of the invalid selection method used by the employer. 1004

Self-Defense

- See fighting

- In the circumstances facing the grievant, the type of discipline that was administered in this situation is inappropriate. The grievant was in a desperate situation and took the action that was available to her. Her reactions were instantaneous and instinctive. They occurred at a time she was in pain, fearful of damage to her hand, and during a physical straggle that evidenced the patient's strength. It is impossible to find 12 hours of training covering diverse topics, occurring over one year prior to the incident sufficient to overcome the grievant's instinctive reaction. The grievant was engaged in self-defense rather than patient abuse. Consequently the removal must be overturned: 216

- The grievant was a Correction Officer who was enrolled in an EAP and taking psychotropic drugs. He got into an argument with an inmate who had used a racial slur and struck the inmate. The grievant was removed for abuse of an inmate and use of excessive force. The arbitrator found that the grievant struck the inmate with no justifying circumstances such as self defense, or preventing a crime. The employer, however, failed to prove that the grievant knowingly caused physical harm as required by Ohio Revised Code section 2903.33(B)(2), because the grievant was taking prescription drugs. The grievant’s removal was reduced to a thirty day suspension because the employer failed to consider the grievant’s medication. The grievant was not faulted for not notifying the employer that he was taking the psychotropic drugs because he had no knowledge of their possible side effects. Thus, the use of excessive force was proven, but excessive use of force is not abuse per se: 368

- The grievant admitted hitting the patient, but failed in her assertion to prove that it was self-defense. The Employer’s finding of patient abuse is well founded, and as such, there was just cause for her removal: 463

Self-Inflicted Injury Defense

The Arbitrator held that the Employer properly terminated the Grievant for abuse. Section 24.01 limits the scope of an arbitrator’s authority when dealing with abuse cases. The threshold issue becomes a factual determination of whether abuse can be supported by the record. The record here supported three abuse incidents. Any one of these events in isolation could have led to proper termination; therefore the Employer was able to establish sufficient proof that abuse took place. The Grievant’s inconsistent observations of the incidents led to a lack of credibility. The Arbitrator held that the self-inflicted injuries defense was not adequately supported. The Arbitrator found that the Grievant did not initiate a time out by removing the resident to “a separate non-reinforcing room” because no evidence helped to distinguish or equate the resident’s bedroom from a “non-reinforcing room.” 1027

Seniority

- Definition of break-in-service for old ODOT contract (pre-OCSEA): 25

- Section 16.02 defines seniority and continuous service. Service is continuous unless certain enumerated events have occurred. A layoff is not one of the events. Thus, the grievant’s seniority and continuous service must include the period of the layoff and of the employment prior to the layoff. Contract language signifies that seniority can be adjusted retroactively for periods prior to the contract. The arbitrator ordered that the grievant's longevity pay and vacation accrual be calculated on the basis of the grievant's seniority which includes the layoff and the time prior to the layoff: 215
- If the employer undertakes to limit seniority rights other than as mutually agreed upon in Article 1 6.02, such action constitutes a violation of the collective bargaining agreement: 21

- Three of the most prominent factors when it comes to fights between employees are non-aggression, provocation, and self-defense. The generally accepted principles involving fights are quoted from Arbitrator Raymond R. Roberts, Alvey, Inc., 74 LA 835, 838 (1 980).
  1) An employee may be innocent and uninjured victim of an unprovoked assault and not, himself, engage in aggression or hostility. In such a case, the victimized employee has engaged in no wrongful conduct and must be regarded as innocent.
  2) Self-defense. When an employee engages in only as much hostile conduct as reasonably necessary to defend himself from aggression and uses no more force than is reasonably necessary for that purpose, he will generally be found not guilty of fighting or assault. This is a defense of justification which is a complete defense.
  3) Provocation. When an employee is the victim of provocation which foreseeable to provoke an ordinarily reasonable person to a heat of rage and aggression, the conduct of that employee may be excused (as opposed to justified) either partially so as to mitigate against the full degree of penalty whatsoever: 35

- Even though the foreman and not the grievant was the aggressor, the grievant was not acting in self-defense. The grievant’s actions of picking up a shovel and striking the foreman three times were found by the arbitrator not to be in the heat of the moment but deliberate. The assault was not self-defense – at least not after it proceeded beyond the first strike. One of the blows by the grievant was from behind and another while the foreman was helpless. There is a point where even the most forgiving concept of self-defense ends, when the victim becomes the aggressor. The arbitrator found that while the first clout with the shovel might have been “free” the other two were not: 35

- Three Bureau of Employment Services employees grieved that their seniority dates were wrong. They had held positions with the employer until laid off in 1 982. They were called back to intermittent positions within 1 year but not appointed to full-time positions until more than 1 year had elapsed from their layoff. The employer determined that they had experienced a break in service as placement in intermittent positions was not considered to meet the definition of being recalled or re-employed. The arbitrator found that the term “re-employment” carries its ordinary meaning and not that meaning found in the Ohio Administrative Code when used an Article 1 6 and the 1 989 Memorandum of Understanding on Seniority, thus the grievants did not experience a break in service because they had been re-employed to intermittent positions. The grievants were found to continue to accrue seniority while laid off. The employer was ordered to correct the seniority dates of the grievants to show no break in service and that any personnel moves made due to the seniority errors must be corrected and lost wages associated with the moves must be paid: 4

- Even if the grievant met and was proficient in the minimum qualifications, the State could properly have used the “demonstrably superior” language in Article 1 7.06 to select the junior applicant over the more senior grievant: 4

- In a case involving a senior male employee who applied for a position alongside a junior female employee, the State's decision to promote the junior female employee because she was demonstrably superior due to affirmative action considerations was consistent with the language in Contract Article 1 7.06. The language in Article 1 7.06 is clear. Affirmative action is a criterion for demonstrably superior and, so long as the employee meets the minimum qualifications, considerations based on affirmative action, by themselves, can justify the promotion. At such point, the burden of proof shifts to the Union to demonstrate that the standard was improperly applied: 5

- Where the grievant filed a timely application for a job posting and the position was filled based on seniority, the employer violated the contract by appointing a person with less seniority than the grievant: 5

- The Arbitrator denied a grievance in a case where the grievant, although she had seniority, did not possess the minimum qualifications. Therefore, a junior applicant with the required qualifications was promoted to the position of Insurance Contract Analyst 3: 5

- Seniority is an extremely important right because the right of seniority can have a
significant effect on not only the length of employment of a bargaining unit employee, but also on the proper job assignments of such employees. 5 74

The Arbitrator determined that the grievant was senior to the chosen applicants for two Project Inspector 2 positions. Because the grievant failed to demonstrate that he met the minimum qualifications, management was justified in not selecting the grievant: 5 93

The Union argued that Management violated Article 1 7.06 which provides, “the job shall be awarded to the qualified employee with the most State seniority unless the Agency can show that a junior employee is demonstrably superior to the senior employee.” However, the Arbitrator held that the grievant did not meet the qualifications of the Carpenter 2 position and that the State proved that the junior employee was demonstrably superior to the grievant: 61 7

The Arbitrator found that there was no evidence to show that the successful applicant was superior to the grievant in regards to the standards of qualifications, experience and education. 707

This case concerns the removal of two correction officers from posts at OSU obtained through the Correction Medical Center Pick-A-Post Agreements between ODRC and OCSEA. These agreements allow employees to bid on jobs based on seniority. In both cases, the Correction officers were reassigned to other duties and replaced by officers with less seniority. The warden, in consultation with OSU, conducted the removal in both of these cases with sufficient due process, and the warden’s deference to OSU on issue does not invalidate his decision. The warden exercised “good management reason” in his judgment. 737

The arbitrator determined that the Union could challenge the seniority of the successful applicant. He found that the Contract does not prohibit the challenge of seniority dates. He further stated that the employer cannot assume the position that an error should be preserved in the personnel records of employees if the error can be proved and that such a position would be “irrational and replete with potential for ratifying errors, to the possible detriment of employees.”

The arbitrator found this matter to be full of errors, particularly the poor record keeping of the State. He envisioned serious consequences affecting the lives of employees and their families through the State’s inability to keep accurate records. The arbitrator stated that DAS believed the successful applicant had resigned, and that this was demonstrated by the fact that DAS sent the applicant a check for his leave balances along with a letter and form confirming his resignation. However, the arbitrator noted that the burden of proof rested on the shoulders of the Union and that the burden was not met. The arbitrator based his decision on the facts that (1) when the successful applicant received the leave balance check, he returned it, (2) when he was asked if he resigned from his DAS position, he stated that he didn’t, and (3) his leave balances were transferred to OIC. The arbitrator found that the successful applicant did not resign and that his seniority credits should continue without reduction or break upon his transfer from DAS to OIC. 789

The grievant was removed from MANCI as a CO and transferred to OSP. A settlement agreement was entered into by the parties on December 4, 2001 granting the transfer to OSP but also allowing for the grievant to carry his institutional seniority with him to OSP under paragraph 5 of the settlement agreement. The OCSEA then intervened declaring the settlement agreement violated Art. §1 6.01 (B)- Institutional Seniority of the CBA. Subsequently, OCSEA with OCB’s consent amended the settlement agreement to remove paragraph 5 (the transferring of institutional seniority). The arbitrator found that the failure to transfer the institutional seniority as proscribed in the settlement agreement did not violate the rights of the grievant since settlement agreements can only work within the confines of the CBA, in which this particular agreement did not. No other provisions in the CBA allowed such a settlement agreement by the parties to work outside of the provisions provided by the CBA. The arbitrator further found that the settlement agreement did not need to be executed by the grievant unless a waiver of individual right’s was at issue, which was not at issue in this case. Therefore, the amending of the settlement agreement without the grievant consenting was valid. 81 8

The Arbitrator found that the Employer did not violate Section 1 1 .1 because the Employer engaged in a good faith effort to provide alternative comparable work and equal pay to the two pregnant Grievants. On four of five scheduled work days the employees would work “relief” in “non-contact” posts. On the fifth day
the Union requested that the two employees be assigned an “extra” or “ghost” post or be permitted to take the day off and use accrued leave for coverage purposes. However, the Warden placed the Union on notice that the institution could no longer have pregnant employees assigned to posts as extras. Certain posts were properly rejected based on the Grievants’ doctor recommendations. The Union’s proposals would have resulted in “ghost posts.” The Grievants would have worked in positions at the expense of other established posts. Too, unapproved “ghost posts” would violate the spirit of the local Pick-A-Post agreement. Proposed uses of accrued leave balances, personal leave, and sick leave failed. Nothing in the record indicated the Grievants had sufficient leave balances available to cover one day off per week. In addition, if the Grievants were allowed to take vacation time on dates previously selected, the Employer would be violating a mutually agreed to number of vacation days made available for bid. Other correction officers’ seniority rights would be violated if vacations were preferentially granted to pregnant employees. Section 27.02 entitles an employee to four personal leave days each year; however those four days could not possibly cover the entire pregnancy period. Section 29.02 grants sick leave to employees “unable to work because of sickness or injury.” A pregnancy cannot be viewed as an “illness or injury.”

Service Credit

Prior to her employment with the Industrial Commission (IC) in 1986, the grievant was employed at FCPDO. She requested service credit for her tenure at FCPDO. The IC denied the request because the FCPDO did not make contributions to PERS for its employees. The arbitrator found that the FCPDO was established as a result of the Public Defender’s Act of 1976. The majority decision in Mallory v. Public Employees Retirement Bd., 82 St. 3d 235 (1998) noted that the FCPDO was created pursuant to the Public Defender Act and that its public duties were performed under the auspices of the sovereign rights of Franklin County. The arbitrator’s determination was based on the court’s analysis Mallory. The grievant, however, did not file a grievance in this matter until 2001; therefore, service credit awarded as of ten days prior to the grievance filing date, pursuant to the Contract. 784

Settlement

- Settlement set forth as arbitral award: 64, 68
- Settlement agreements cannot be used to prove disparate treatment since the parties have many motives when settling a grievance and their use to prove disparate treatment would discourage the use of settlements: 250
- The arbitrator found that the settlement of the grievant’s claims served as a settlement for all similarly situated employees: 351
- The arbitrator indicated at the end of the arbitration that she would find just cause for the grievant’s dismissal but asked both the employer and the Union to consider a settlement. With mediation efforts of the arbitrator both parties agreed to the reinstatement of the grievant under a Last Chance Agreement. Since the grievant refused to sign the Last Chance Agreement the arbitrator upheld the removal of the grievant: 352

Citing that the normal workflow of the position was centered in Washington County and sending work to Athens was an obvious waste of time and resources is sufficient to meet the State’s burden to prove economy and efficiency. In limited circumstances (i.e., substantial violation of the settlement), agreements can be introduced into evidence if the facts of the grievance substantially concern the substance of the settlement: 499

- The Employer and the Union agreed upon a settlement of the issue of whether or not the grievant was disciplined for just cause. The grievant tendered his resignation, and the Employer accepted it. The settlement package was designed to aid the grievant after his duties with the State were finished: 513

The grievant was removed from MANCI as a CO and transferred to OSP. A settlement agreement was entered into by the parties on December 4, 2001 granting the transfer to OSP but also allowing for the grievant to carry his institutional seniority with him to OSP under paragraph 5 of the settlement agreement. The OCSEA then intervened declaring the settlement agreement violated Art. §1 6.01 (B)- Institutional Seniority of the CBA. Subsequently, OCSEA with OCB’s consent amended the settlement agreement to
The arbitrator found that the failure to transfer the institutional seniority as proscribed in the settlement agreement did not violate the rights of the grievant since settlement agreements can only work within the confines of the CBA, in which this particular agreement did not. No other provisions in the CBA allowed such a settlement agreement by the parties to work outside of the provisions provided by the CBA. The arbitrator further found that the settlement agreement did not need to be executed by the grievant unless a waiver of individual right’s was at issue, which was not at issue in this case. Therefore, the amending of the settlement agreement without the grievant consenting was valid.

The grievant was removed from his CO position in May 2003. The grievant filed a grievance. The grievant was reinstated as a result of a Settlement Agreement. While this grievance was pending, the Grievant filed an unemployment claim, and a determination was issued that the removal was not for just cause. The Employer appealed this decision. Another hearing was conducted, and when the hearing officer inquired as to the status of the grievant’s discharge grievance, the Employer submitted the Settlement Agreement. The hearing officer reversed the redetermination, finding the grievant was on a disciplinary layoff for misconduct in connection with his work. No appeal was filed to request a review, so ODJFS sought repayment from the grievant. It was not until after the deadline had passed for appeal and ODJFS sought repayment, that the grievant appealed the determination of overpayment of benefits. A hearing was held regarding the order of repayment, where a discussion ensued regarding whether the grievant had appealed the determination that he was ineligible for benefits, since a final determination of ineligibility was necessary for a determination of amounts overpaid. The grievant’s attorney requested a copy of the redetermination decision. This was followed by a fax of the grievant’s appeal of the redetermination, which was undated. The appeal disputes that the grievant was on disciplinary layoff while receiving benefits, asserts that his Employer’s references to the Settlement Agreement were improper, and asks that the determination that he received overpayment of unemployment benefits be overturned. The Arbitrator denied the grievance. The Arbitrator framed this grievance as three separate issues.

Settlement, Criminal Case

- The grievant was a custodial worker at a psychiatric hospital. The grievant asked a patient to smoke outside rather than inside a cottage. The patient told the grievant that he would not, dropped to his knees and repeated his statement, as was the patient’s habit. The patient repeated this action later in the day and grabbed the grievant’s leg. The grievant yanked his leg free, the client accused the grievant of kicking him and the patient was found to have injuries later in the day. The grievant was removed for abuse of a patient, and criminal charges were brought. The criminal charges were dropped pursuant to a settlement with the Cuyahoga County court in which the grievant agreed not to contest his removal. When the grievance was pursued, the employer asked for criminal charges to be reinstated. The charges could not be reinstated, but the grievant agreed not to sue the employer. The grievance was held to be arbitrable despite
the settlement between the grievant and the county court. Had the settlement been a three party agreement including the employer, dovetailing into the grievance process, it would have precluded arbitration. Additionally, after filing a grievance it becomes the property of the union. The grievance was sustained because the employer failed to meet its burden of proof that the grievant abused a patient. The arbitrator awarded full back pay less interim earnings, back seniority, back benefits and that the incident be expunged from the grievant’s record: 4 1 6

Settlement, Effect of Mistake

- The grievant was conducting union business at the Warrensville Development Center when a client pushed her and injured her back. Her Occupational Injury Leave was denied because she was conducting union business. A settlement was reached concerning a grievance filed over the employer’s refusal to pay, in which the employer agreed to withdraw its objection to her OIL application based on the fact that she was performing union business. Her application was then denied because her injury was an aggravation of a pre-existing condition. The arbitrator found the grievance arbitrable because the settlement was mistakenly entered into. The grievant believed that her OIL would be approved while the employer believed that it was merely removing one basis for denial. The arbitrator interpreted Appendix K to vest discretion in DAS to make OIL application decisions. The employees’ attending physician, however, was found to have authority to release employees back to work. Additionally, Appendix K was found not to limit OIL to new injuries only. The grievant’s OIL claim was ordered to be paid: 4 2 0

Sexual Harassment

- Where grievant argued that the other party had encouraged him by talking "sweet" and being friendly, the arbitrator found that construing the other party's friendliness in the light most favorable to the grievant, the friendliness was ambiguous. Possibly she was encouraging greater intimacy but maybe she was being friendly and nothing more: 7 9

- To engage in on the job efforts at intimacy was already a violation. If his efforts proved unwelcome, he was guilty of a worse offense: sexual harassment. Making his "moves" put him at risk: 7 9

- When the victim of sexual harassment reports the harassment, it is an additional act of sexual harassment to say, "Honey, I don't blame him.": 7 9

- Using a stick to touch another's body in a private area is an "intentional...insult on the basis of...sex" and therefore violates Rule 5, A-301 (ODOT disciplinary guidelines). Also, "goosing" is just as much a violation of rule 5 as touching a person in the crotch area from the front. Furthermore, it does not matter if the people are of the same sex Rule 5 is not violated by gender specific obscene language intended as an insult unless the insults are shown to be based on sex: 1 1 7

- In a sexual harassment case where grievant had no disciplinary record whatsoever, the arbitrator held that the state should have leeway to decide whether progressive discipline in this situation should begin with a suspension rather than a reprimand: 1 1 7

- Factors the arbitrator noted in determining how serious a sexual harassment offense had been included

1 ) Grievant was not a supervisor

2) Victim did not complain to spouse until the final episode which was deemed to the horseplay

3) Victim did not complain to the union or to supervision until the same episode even though she knew how to press her rights: 1 1 7

- The warning of a supervisor to an employee of “be careful with the girls’ does not qualify as an
adequate warning of what behavior will be deemed sexual harassment: 286

- Even though the grievant was not on notice of what constituted sexual harassment pinching a woman’s midriff, just below her brassiere was deemed a failure of good behavior and the grievant’s removal was modified to a fifteen day suspension without pay or benefits: 286

- Evidence in a sexual harassment case on how the two alleged victims dressed, talked, and daily mannerisms was not admitted into the arbitration hearing. The arbitrator found the dress and mannerisms of the women has no relevant relationship to the charge of unwanted sexual touching or unwanted sexual exposure: 324

- The grievant was a Correction Officer removed for using vulgar language, conducting union business on work time, and fondling an inmate. The arbitrator rejected the claim that the Union had a right to question witnesses at the pre-disciplinary hearing. Nor did the employer violate Article 25 .08 because the union made excessive document requests. The employer did violate Article 25 .02 by not issuing a Step 3 response for six (6) months, however the grievant was not prejudiced. Therefore, the arbitrator found, because the inmate was more credible than the grievant, that just cause did exist for the removal: 366

- The Employer had just cause to remove the grievant for sexual harassment and failure of good behavior. The grievant was provided with proper notice concerning the sexual harassment policy articulated in the Work Rules and Procedures. The Employer’s training efforts were sufficient in providing proper notice concerning the sexual harassment policy. Witness testimony demonstrated that the grievant’s lewd, harassing behavior created an oppressive working environment: 461

- A plea of no contest in a criminal proceeding may not be used against the grievant in a subsequent civil or disciplinary proceeding. Criminal charges of sexual harassment and sexual imposition may not be used by the Employer against the grievant to establish just cause for removal: 503

- The Arbitrator ruled that the grievant’s conduct constituted sexual harassment and created a hostile work environment. In reaching this decision, the Arbitrator employed a two-part test. First, the victim’s subjective perception would have to be that the work place was hostile and abusive; and, second, a reasonable person would have to find that the work pace was hostile and abusive. The Arbitrator found the evidence presented by Management to be sufficient in meeting both parts of this test: 618

The charges of sexual harassment and offensive touching of co-workers were not proven by the employer. The arbitrator determined that the investigation of the charges by the employer was neither fair nor complete. It was clear that there was one witness to the two incidents available, however, management did not interview this witness. Therefore, the statements and evidence presented were unsubstantiated. The arbitrator determined that the offensive touching occurred before the grievant was notified that the touching was unwelcome and that the touching that occurred was consistent with the usual behavior between the grievant and the complaining co-worker: 761

The grievant was charged with inappropriate contact with a co-worker. The arbitrator found no evidence to suggest that the grievant’s removal was arbitrary or inconsistent. The grievant admitted that he was previously warned not to touch his co-worker but he did it anyway. The arbitrator upheld the removal based upon that violation alone and did not address any other charges: 793

The grievant was charged with sexual harassment of a co-worker. The record indicated that no action taken during investigation was sufficient to modify or vacate the suspension, however some of the statements the investigator collected could not be relied upon because they were hearsay or rebutted by the witness. The arbitrator noted that the matter came down to the testimony of one person against another and there was no substantial evidence to sustain the charge. The arbitrator determined that the matter was properly before her because it was appealed within ninety days of the Step 3 response. The arbitrator noted that the fact that it was appealed before the mediation meeting did not invalidate the appeal: 807

The grievant was removed from his position for making sexual comments and other types of nonverbal sexual conduct towards a Deputy Registrar who worked in the same building, thus,
creating a hostile work environment. The arbitrator found that the evidence and testimony presented by the employer was clear and convincing that the grievant’s conduct was unwelcome, offensive and adversely affected the victim’s job performance, ultimately becoming a major factor in “constructively discharging her”. The two aggravating factors which weighed the most against the grievant were the serious nature of his misconduct and his resistance to rehabilitation despite that fact that he had received sexual harassment training as the result of an earlier violation. 850

- The Employer presented evidence to support its position that the grievant had a long-term problem of improper encounters with female co-workers. The Arbitrator applied the “reasonable woman” standard (Ellison v. Brady, 924 F.2d 872, 54 FEP Cases 1 34 6 (9th Cir. 1991)) in his discussion of this matter. A male employee who makes a comment or approaches a female co-worker must conclude how the female would reasonably accept his comment or approach.

Sexual Misconduct

The grievant was charged with sexual misconduct with inmates and lying during the investigation of the charge. The arbitrator found that the employer substantiated the charges and the removal should stand. The arbitrator cited the grievant’s “gross abuse of his position as a Correction Officer and the sexual nature of his exploitative conduct” as “nothing short of unprincipled, heinous, and wholly intolerable”. 913

The grievant was charged with failure to make a physical head count of inmates at the facility after three previous counts had resulted in different figures. Following that incident, the grievant found two metal shanks, which he documented and secured. Prior to finding the shanks, the grievant found 16 pieces of metal hidden in a ceiling. He disposed of them in a secured receptacle which was not accessible to inmates. He did not report finding the metal. The Union argued that a procedural flaw occurred in this matter in that a second pre-disciplinary hearing was held and a second charge was leveled against the grievant, leading to his removal. The arbitrator found no procedural error. He found that when the Employer reconvened the pre-disciplinary hearing and that it was not prohibited by the contract. He stated that if that were a procedural error, it was minimal at best and a decision could be reached on the merits of the case alone. The grievant was an experienced Correction Officer and well-versed in the detection of contraband which was evidenced by his numerous commendations. The arbitrator found that he grievant made a judgment when he found the metal blanks and placed them in a secured receptacle. Although the grievant’s decision may have been erroneous, the arbitrator noted that there are no precise definitions for “hot trash” versus contraband. In his decision, the arbitrator stated, “As ambiguity exists concerning the treatment of contraband found by Officers, discharge for disposing of the metal blanks rather than reporting them is inappropriate.” The grievant’s removal was reduced to a written warning for failure to report contraband. All references to his discharge was to be stricken from his personnel record. Back pay was made at straight time minus any interim earnings. 914

The Arbitrator held that the Agency failed to establish by preponderant evidence that the Grievant engaged in either sexual activity or sexual contact with a Youth. In addition, preponderant evidence in the record did not establish that the Grievant violated Rule 6.1, Rule 3.1, Rule 3.9, and 4.10. The Arbitrator concluded that the Youth was less credible than the Grievant. The Grievant’s refusal to submit to a polygraph test did not establish his guilt. The slight probative value of polygraphic examinations disqualifies them as independent evidence and relegates them to mere corroborative roles. Because the Agency established the Grievant’s failure to cooperate under Rule 3.8, some discipline was indicated. The strongest mitigative factor was the Grievant’s satisfactory and discipline-free work record. The major aggravative factor was the Grievant’s dismissive attitude toward the Agency’s administrative investigation. 972

Sexual Orientation

- The arbitrator expressly avoided allowing his knowledge of the witness' sexual orientation to have an affect on his judgment of the witness' credibility. 124

Shift Change

- Where the grievant’s request for a shift change for childcare reasons was denied, the arbitrator upheld the employer's decision saying that the
union failed to show there were any openings on other shifts available and that Article 17 would have prohibited a discretionary shift change for the grievant:

**Shoes**

- The employer is not required to provide work shoes or safety shoes for employees, nor compensate them for the purchase of such items. The employer did not require safety shoes, but prohibited tennis shoes and sandals. The department’s regulation only recommends safety or heavy work shoes. No one has been disciplined for the shoes they wore except where they wore tennis shoes or had also been guilty of insubordination because they had refused to change shoes after being ordered to do so. The employer's department's policies about shoes have been in place for several years. Failure to grieve earlier constituted acquiescence in the employer's interpretation of the contract. Finally, 33.01 and 33.02 reference specific requirements regarding the furnishing of uniforms and tools. If the union wanted the employer to supply shoes, it should have negotiated for the requirement. For the arbitrator to impose such a requirement would be to add to the contract in violation of 25.03 which prohibits the arbitrator from doing so: 259

**Short-term Operational Need**

The Union filed separate grievances from Guernsey, Fairfield, Licking, Knox, Perry, and Muskingum Counties that were consolidated into a single case. Implicit in the authority to schedule employees is the ability to alter the work schedule, subject to the limitations in Article 13.07 that the work schedule was not made solely to avoid the payment of overtime. The Arbitrator found that there was no evidence that the schedule change was motivated by a desire to avoid overtime; therefore, no violation of the contract occurred. Based upon the weather forecast known to the Employer on February 12, 2007 justifiable reasons existed to roll into 12 hour shifts. Prior notification under Article 13.02 was not required. No entitlement existed that the employees were guaranteed 16-hour shifts under a snow/ice declaration. The Employer’s conduct did not violate Section 13.07(2)’s Agency specific language. The snow storm was a short term operational need. To conclude that a snow storm is not a short term need but that rain over an extended period of time is, would be nonsensical. The record consisted of over 500 pages of exhibits and three days of hearing. That record failed to indicate that the Employer violated the parties’ agreement. 997

**Sick Leave**

- Failure to file timely request: 150
- Failure to get permission to leave: 148
- Verification of illness: 22
- 29.02 requirement that sick leave policies be fairly applied throughout the state is violated when two employees are absent on the same day (day preceding vacation in this case) and only one is disciplined for failure to supply documentation: 35
- 29.02 indicates the parties contemplated that exceptions could occur to call-in requirement. Grievant's suffering from severe upper respiratory infection and bipolar disease with the associated depression and sleeping give rise to such an exception: 60
- Management has authority to monitor sick-leave usage. The fact that the right exists is clear; it is not open to reasonable debate. Article 29 establishes that the allowance of sick leave is a limited one, available only for defined, limited purposes. Having achieved the limitations during the negotiation of the contract, management is entitled to enforce them. One of the means of enforcement set forth in 29.02 is the requirement that person-to-person report-offs occur between the employee and the immediate supervisor or the supervisor’s designee: 178
- There was a discrepancy between ODOT’s call-in rule and 29.02 to the extent that ODOT's rule did not provide for an exception to the personal call-in requirement in the case where the employee is unable to personally call in. Strict application of ODOT's rule would therefore constitute an overreaching of management rights. However, the arbitrator denied that the defect in the title was a ground for sustaining a grievance when the employee had been able to call-in personally: 178
- The argument that the employer can never deny earned sick leave because sick leave was a bargained for benefit was rejected by the arbitrator. If the argument were correct, then the employer would have to grant sick leave applications even if call-in requirements were not followed. This would practically abolish employee responsibilities set forth in article 29.
The arbitrator held that the contractual call-in requirement sets forth a contractual prerequisite to the contractual sick-leave benefit: 178
- Where the employee's sick leave was approved, the agency still had abundant justification for placing the grievant on a disciplinary track. The employee's obdurate refusal to make himself available for direct communication from his supervisor constituted sufficient grounds: 213
- Management does not have to allow a grievant with a long history of absenteeism to switch one form of leave for another: 284
- The employer notified the grievant that since they had a long history of excessive absenteeism any future sick leave must be verified. The grievant called in sick with diarrhea and stomach cramps. Even if the grievant did not need medical care they were obliged to go to a doctor to obtain a physician’s verification: 284
- When the grievant received sick leave and was actually working at another job, she committed fraud. The fact that the employer knew of the grievant’s second job and approved the grievant’s leave requests is irrelevant. The employer had no knowledge that the grievant was working at the second job while she was claiming sick leave: 291
- In a dispute governed by just-cause principles there is a rudimentary issue which immerses everything else. It is: Was the aggrieved employee quality of the misconduct justifying discipline? Actually, the question contains two parts: arbitral examination must start with whether or not the employee committed the misconduct. The examination should be circumscribed by the employer’s allegation(s) against the employee. An individual cannot be legitimately punished for something not charged. The employer’s charges seek arbitral approval of the grievant’s removal on the general sweeping grounds that the grievant was a bad employee. The arbitrator declared several of the State’s contentions irrelevant because they did not impact on the charge of not following the proper sick-leave notification requirements: 310
- The Union’s argument that no employee, including the grievant, was ever required to satisfy sick-leave notification requirements. This argument went unrebutted by the State and is a complete defense. New and unprecedented ruled must be conveyed before they can be enforced. The Labor Relations Officer did not properly inform the grievant. Unable to reach the grievant since the grievant was too ill, the Officer told the Union Steward the new procedure. The Steward testified that he was not informed of the new call-off requirement just told of the proper leave-request forms that the grievant had to fill out. There was not effective communication; as a result, the grievant could not properly be held culpable for his violation: 310
- Section 29.04 of the Agreement dealing with sick leave. The Agreement specifically and clearly provided for specific notification of 16 hour and 0 hour sick leave balances followed by meetings with the employee to learn of extenuating circumstances, and to suggest Employee Assistance Program where appropriate. The employer argued that this procedure would be implemented after 1 1/30/90 based on the first sentence of Section 29.04, “Sick leave usage will be measured from December 1 through November 30 of each year.” This argument is flawed. The sick leave policy spelled out in 29.04 state the following essentials:
  1. The policy of the State is to grant sick leave when requested.
  2. Corrective action is to be taken for unauthorized use of sick leave and/or abuse of sick leave.
  3. Corrective action is to applied:
     a) progressively
     b) consistently
  4. Policy requires equitable treatment…not arbitrary or capricious: 318**
- Unauthorized sick leave is specifically defined in the Agreement.
  1. Failure to notify supervisor of medical absence.
  2. Failure to complete standard sick leave form.
  3. Failure to provide physician’s verification when required. (The employee must receive an official order that the physician’s verification is required.)
- Fraudulent physician’s verification: 318**
- Misuse of sick leave is defined by Section 29.04 as “Use of sick leave for that which it was not intended or provided.”: 318**
- The employer’s sick leave policy is consistent with the Agreement Sections 29.01 and 29.04. The employer counseled the grievant and appropriately offered Employee Assistance
Program. There was also a record of progressive discipline. Even though the employee’s long pattern of abuse of sick leave had been tolerated by the employer, the employer clearly and fairly warned the grievant that the rule would now be enforced and that failure to comply would now result in discipline: 34

- The employer even took the extra effort to arrange and pay for a physical examination. The examination showed that the grievant had no legitimate excuse for missing work. The grievant was counseled and offered EAP. The employee declined EAP. Since the employer failed to call off properly 5 times in a 7 day period and was absent as well, the removal is just commensurate and progressive: 34

- Article 29 authorized management to take corrective and progressive disciplinary action for the unauthorized use and abuse of sick leave. This discipline includes but is not limited to removal: 5 1 2

- In a case where an employee was excessively absent and maintained a zero balance in her sick leave account, the Arbitrator held that removal was appropriate: 5 5 5

- The Arbitrator found that the grievant had violated Department of Public Safety Work Rule (A)(6)—sick leave fraud—when he failed to inform the department that he held a second job while receiving sick leave benefits. The Arbitrator held that the grievant had attempted to deceive his employer in hopes of receiving both his sick leave benefits and his wages from his other employment: 61 1

The Grievant injured her back at work. She was off on leave and received payments from Workers’ Compensation. She was then placed in the Transitional Work Program. After 90 days, she was placed back on leave and Workers’ Compensation. The state implemented an involuntary disability separation and her employment with the state ended on January 1, 2006. Under Section 1 23:1 -30-01 of OAC the grievant had reinstatement rights for two years. She was cleared to work by her doctor and was reinstated on December 27, 2006. At that time, she requested to have the state restore her personal and sick leave accruals from when she began work in the Transitional Work Program on June 1 3, 2005, through December 27, 2006. The Arbitrator held that the contract articles did not support the Grievants’s request to have the leave balances restored. The Grievant was subjected to an involuntary disability separation on January 1, 2006, so that on December 27, 2006, she was not an employee returning to work under the contract but was an individual who was re-hired pursuant to Section 1 23:1 -30-01 of the OAC, which has no provision for the restoration of accrued personal or sick leave. The Arbitrator held that he must ignore the clarification letter relied upon by the state. The letter represents the Office of Collective Bargaining’s interpretation of the contract and its instructions to the agencies about how to handle the restoration of accrued leave. In addition, while Section 1 23:1 -33-1 7(F) of the OAC provides for the accrual of sick leave while an employee is on occupational injury leave, there is no such requirement in Chapter 1 23:1 -30 relating to separations. 1 01 9

Sign In/Sign Out Policy

- A sign-in/sign-out policy does not violate section 1 3.1 6 that prohibits the introduction of new time clocks. There is some indication hr the opinion that this holding can be attacked by showing that the parties intended the words time clock to have a wider meaning: 1 34

Sleeping on Duty

- No magic number of indicia that must be present to prove grievant was sleeping: 1

- Accusation of brief loss of consciousness is not inconsistent with fact that location was noisy: 1

- Grievant found to have been asleep when observed it out 4 feet away in a sleeping posture, closed eyes, failure to respond when his name was spoken in normal tone of voice, and being startled when aroused: 1

- That everything was in order indicates that grievant merely nodded off and did not deliberately sleep: 1

- A serious offense for a Correction officer. Threatens safety: 1

- Where position involves caring for profoundly retarded persons, sleeping on the job is endangerment to human beings and thus can hardly be tolerated: 37

- Where grievant was found asleep in a room with lights turned off and television volume turned low
while grievant's post was at a different location, grievant was found to have acted deliberately: 4 2

- Sleeping or dozing is not accidental. One always has conscious warnings of drowsiness. Sleep occurs if one does not heed the warnings. (In another passage arbitrator notes that in this case, grievant could have called the office for relief as he had done on previous occasion, or taken a walk, got coffee, soda or a sandwich): 4 2

- Failure to get enough sleep during off duty hours because one must watch one's children during part of the time and is wide awake the rest of the time does not justify sleeping on duty: 4 2

- Assignment to third shift was found not to justify sleeping on duty, even though there were persons with less senior on second and first shift since grievant had been given a choice between second and third shifts when hired: 4 2

- Sleeping on duty is a more serious offense in a developmental center than in the industrial environment. Employees in such centers have responsibilities that exceed those normally attached to positions held in the industrial environment: 5 9

- Removal for sleeping on duty in a developmental center was found to fall within the range of reasonableness given the seriousness of the offense in the clinical environment and the grievant's past work record: 5 9

- Given that accuser saw grievant from a distance in dim lighting, with feet on the floor and not slumped over, the arbitrator was unwilling to conclude that employer had proven that grievant was sleeping: 7 1

- Arbitrator reduced 3 day suspension by 1 day for reason that grievant's drowsiness had been caused by medication and grievant had gotten his prescription changed after discovering that the medication was making him drowsy: 7 7

- The arbitrator found the grievant to be sleeping on the job where

  (1) Twice in one evening, the supervisor had found the grievant slumped in his chair, head back, eyes closed, shoes off, pants unzipped at waist, hands resting on the body, and not responding after being called 3 times each time,

  (2) and the grievant argued that he was awake but did not want to answer (the arbitrator noted such conduct occurred, it would have been insubordination): 1 5 9

- Where the only evidence that the grievant's drowsiness was caused by medication was the grievant's inconsistent testimony, where no medical evidence was given, the arbitrator rejected the defense. The arbitrator pointed out that even if proved, their a second issue arises as to whether the grievant was fit for duty or would be fit for duty: 1 5 9

- If the employee was not sleeping on duty but resting his eyes because his medication made him drowsy, he would still be subject to discipline for failing to intone his supervisor that he was not physically fit to perform his duties. Failure to perform his duties correctly can cause serious injury and property damage: 2 0 2

- The grievant's refusal of shift change was predicated on his need to work 2 jobs to pay off gambling debts and his behavior connected with
the sleeping on duty incident was not indicative of premeditation. This speaks in his behalf. As he testified, he is not a lazy person: 227

- Sleeping on duty, when done by a youth leader, endangers the safety of the institution, its employees, the youth entrusted to its care, the surrounding community, and the youth leader himself. That no harm occurred on this particular night does not mitigate the threat which is real, not speculative. The rule against sleeping on duty is therefore reasonable, and one for which discipline is appropriate to improve and ensure employee performance: 227

- If the grievant was refused paid leave to which he was entitled earlier in the same day when he was found sleeping on the job, the appropriate response would have been to document the refusal, take the offered unpaid leave, and grieve for the lost pay. By not choosing this alternative, he placed himself and others in jeopardy: 227

- While the arbitrator sympathizes with the grievant's problems causing him to fall asleep on duty, the grievant chose to work rather than take leave and thus created a dangerous situation. The arbitrator sustained the grievant's removal: 24

- The grievant was found to be asleep when another employee testified that the grievant appeared to be asleep but she could not tell so she waved her arms around outside the glass walls of the grievant's office. When she got no response, she tapped on the glass with her keys, but the grievant still did not respond. Upon entering the office, the grievant "jumped out of his seat": 25

- It is well established that a person is always given conscious warnings of drowsiness. If he does not heed such warnings, sleep is usually certain to result. I therefore disagree with the grievant's characterization that he did not intentionally fall asleep or nod off: 25

- While the grievant is paid for the entire shift including his breaks and is considered to be on duty the whole time and therefore violated the rules by falling asleep during his break, management also has some fault since the grievant's supervisor told the grievant he could take a break and therefore the grievant could reasonably rely upon his supervisor to watch over the dormitory while the grievant was on break. The arbitrator reduced the grievant's discipline since management was also at fault: 25

- The grievant was held to be sleeping on duty. He was wrapped in a blanket with eyes closed, did not respond to attempts to garner his attention and was startled when someone entered the room: 270

- The arbitrator refused to distinguish between sleeping on duty and "dozing off": 270

- The personal problems raised by the grievant do not serve as valid mitigating factors. These matters could have easily been anticipated. If the grievant was extremely tired he should not have attempted to work or asked for relief to minimize his drowsy state. Such precautions are imperative in a Correction institution which houses convicted felons: 270

- The grievant was held to have been sleeping on duty since he hailed to respond to the waving arms of the superintendent. The arbitrator found that the grievant's claim that he knew the superintendent was present but made a conscious decision not to raise his head was not credible since it was rare that the was visited by the head of the institution: 276

- Falling asleep is a serious offense in a correctional facility: 289

- The grievant, a Therapeutic Program Worker, received a ten day suspension for sleeping on duty. A supervisor tried to awaken the grievant but was not successful, although the grievant had been heard talking to another employee shortly before the incident. The grievant had no prior discipline up to the time she had become a steward, then she received two verbal reprimands. Also her performance evaluations had been above average until the same time, at which point she was evaluated below average in several categories. Lastly, a paddle had been hanging in the supervisor’s lounge with the words “Union Buster” written on it. The arbitrator found that the grievant may have dozed off, but that the employer’s anti-union animus was the cause for the suspension. The paddle in the lounge was evidence of this and the employer had demonstrated reckless disregard for union relations. The arbitrator held that the employer failed to properly apply its rules, thus, there was no just cause for the 10 day suspension. The
discipline was reduced to a 1 day suspension: 4 00

- The grievant was a Psychiatric Attendant who had received prior discipline for refusing overtime and sleeping on duty. He refused mandatory overtime and a pre-disciplinary hearing was scheduled. Before the meeting occurred, the grievant was found sleeping on duty. A 6 day suspension was ordered based on both incidents. The arbitrator found that despite the fact that the grievant had valid family obligations, he had a duty to inform the employer rather than merely refuse mandated overtime and, thus was insubordinate. The employer failed to meet its burden of proof as to the sleeping incident, however due to the grievant’s prior discipline a 6 day suspension was warranted for insubordination. The grievance was denied: 4 04

- The grievant was employed by the Bureau of Workers’ Compensation as a Data Technician 2. He had been disciplined repeatedly for sleeping at work and he brought in medication he was taking for a sleeping disorder to show management. The grievant was removed for sleeping at work. The grievant had valid medical excuses for his sleeping, which the employer was aware of. The arbitrator stated that the grievant was ill and should have been placed on disability leave rather than being disciplined. No just cause for removal was found, however the grievant was ordered to go on a disability leave if it is available, otherwise he must resign: 4 36

- The denial by the grievant that he was sleeping in the face of the record he has compiled is viewed skeptically. The account provided by the State’s principal witness is more credible than that provided by the grievant: 4 80

The Arbitrator held that BWC had just cause for removing the Grievant, since the Grievant was either unwilling or unable to conform to her employer’s reasonable expectation that she be awake and alert while on duty. The agency and the Grievant had entered into a settlement agreement, wherein the Grievant agreed to participate in a 180-day EAP. However, the Arbitrator found that the sleeping while on duty was a chronic problem which neither discipline or the EAP had been able to correct. The Grievant raised the fact that she had a common aging problem with dry eyes and was taking a drug that made the condition worse. However, she never disclosed to the supervisor her need to medicate her eyes. The Arbitrator held that this defense amounted to post hoc rationalization and couldn’t be credited. The Arbitrator felt that a person on a last-chance agreement for sleeping at work and who had been interviewed for an alleged sleeping infraction would take the precaution of either letting her supervisor know in advance about this treatment, take the treatment while on break and away from her work area, or get a witness. 1 033

The grievance was sustained in part and denied in part. The removal was modified to a five-day suspension. The Grievant was granted full back pay and benefits less the five-day suspension. The Arbitrator found that Management satisfied its burden of proving that the Grievant failed to maintain the close supervision for one patient and one-on-one supervision for another patient. The Grievant chose to work without adequate sleep, rather than to seek leave, and her choice placed the residents in her supervision, and the Center at risk. However, Management had created an arbitrary distinction in supervision cases arising from sleeping on duty. The Union established that other similarly situated employees received suspensions and/or other disciplinary action far short of removal for similar conduct. Therefore, the Arbitrator held that discipline was warranted, but the removal was without just cause. 1 037

Smoking

- Where arbitrator believed testimony that grievant was the only person sitting at a desk, that there was a lighted cigarette in an ashtray on the desk, that grievant got up and whispered in the ear of a mildly retarded client, that client came over and took a puff from the cigarette, arbitrator found the evidence to be conclusive proof that grievant was smoking: 4 6.

- Columbus Developmental Center policy against smoking in the living areas of clients is based on sound reasoning: to avoid fires and protect patients form ingesting cigarette butts and smoking paraphernalia: 4 6

- No defense that grievant did not have the lighted cigarette in her mouth: 4 6

- Where grievant was in attendance of a client who was allowed to smoke in the living area, the arbitrator reduced 3 day suspension to 2 day suspension in order that penalty be commensurate with the offense: 4 6
The right of smokers to smoke ends where their behavior affects the health and well-being of others: 4 8

Inhalation of tobacco-smoke polluted indoor air by a nonsmoker is a health hazard: 4 8

A ban on smoking minimizes health risks more effectively than a policy which establishes designated smoking areas: 4 8

"No level" of exposure is safe for non-smokers: 4 8

Given that

(1) the right of smokers to smoke ends where their behavior affects the health and well-being of others.

(2) inhalation of tobacco-smoke polluted indoor air by a non-smoker is a health hazard,

(3) a ban on smoking minimizes health risks more effectively than a policy which establishes designated smoking areas, and

(4) "no level" of exposure is safe for non-smokers, the arbitrator concluded that a ban on smoking was not an unreasonable work rule (Note: may be significant that rule was discussed only as it applied to health department employees. Arbitrator said it is significant that the aim of the department is to safeguard health and promote positive health practices of Ohio Citizens): 4 8

Balancing the fit effects on non-smokers of passive smoke against the ill effects on addicted smokers of a ban on smoking, while neither are frivolous, the latter do not outweigh the former: 4 8

Snowplow operator’s manual

Requirement to "clear snow past intersection before making turn around" does not prohibit backing a vehicle on a highway: 1 3

Snow Emergency

Although the two winter storms of 1996 were severe and declared level three emergencies by sheriffs in 55 counties, the Director of Public Safety did not declare an emergency. Thus, employees were not compensated pursuant to Article 1 3, Section 1 3.1 5 and were required to use leave balances for weather related absences. Though the grievances were denied, the Arbitrator retained jurisdiction to consider individual grievances with special circumstances which may warrant relief: 606

Snow Plow Operator's Manual

Specific versus General Charges

- Every specific violation could also be viewed as a general Rule 8 violation. Such a situation would allow the Employer to charge the grievant with the same misconduct under two separate offense categories, a practice which is undeserving of any support, and can lead to the related abuse of hastening the progressive discipline process, worsening the appearance of an employee’s work record: 4 4 4

- The grievant admitted his racial remarks, violating both Rule 8 and Rule 1 4. However, Rule 8 encompasses a violation of Rule 1 4, and Rule 1 4 is the more specific offense. While charging both violations may make sense to make sure that the offense is covered, the employee cannot be found to have violated both. Such a finding would be duplicative: 4 5 2

- Grievant Sampson was charged with three violations of the Revised Code of Conduct. All three charges are essentially one and the same. Charge #1 encompasses all the other charges and is so broad as to fail to provide sufficient notice to employees of what is forbidden: 4 9 2

Spitting

- The grievant spat at his steward and at another state employee on another occasion. Employees do not have to accept being spit at by their co-workers and the state should not be expected to retain in its employ those who act in such a fashion: 2 2 2

Spousal Abuse

- The grievant was disciplined eleven times for absenteeism prior to her removal. The Arbitrator concluded that the grievant’s attendance problems were the result of continuing and serious spousal abuse and reinstated the grievant. The Arbitrator relied on a decision rendered by Arbitrator Graham in a similar type of case. Arbitrator Graham stated that domestic problems cause a
“frantic and desperate state of mind” that can affect employment: 609

Stacking Charges

- The fair method is to look at each behavior and determine the most serious violation and presume that other less serious violations are included. This error is harmless in this situation because the arbitrator operates on this principle regardless of the paper allegations. (The grievance was still denied): 1 28

- The charge of verbal abuse against another employee is subsumed by the violation of the rule prohibiting fighting and does not justify imposition of an additional penalty: 1 63

- The charges of failure of good behavior and neglect of duty are subsumed by the more serious charges of insubordination, fighting or striking supervisor, and absent without leave/leaving work without permission of supervisor: 1 73

- Charging an employee with a specific infraction dealing with an unauthorized absence, and then charging the same employee with a violation of tailing to follow administrative regulations and/or written policies smacks of pyramiding (stacking charges): 1 81

- The arbitrator held that the employer stacked charges when he charged the employee with general, "catch-all" offenses other charging the employee with more specific charges that covered the same misconduct: 1 82

- Where specific charges were clear, stacking occurred by the inclusion of unnecessary general charges: 1 96

- Where the grievant spat on his union steward just prior to his pre-disciplinary hearing regarding a 10 day suspension for insubordination, it was not stacking of charges for the state to include the spitting charge with the other charge and remove the grievant: 222

- The employer did not stack charges by charging the grievant with both tardiness and submitting false documentation. While the two charges arose from the same incident, the falsification behavior was separate and distinct from the tardiness: 274

- The work rules of requiring a guard to be at the main desk except for an emergency and leaving one’s desk without authorization were found by the arbitrator to be essentially the same offense. Charging the grievant with these two-rule violation and neglect of duty may be stacking charges. If the specific charges are set out in the violation, the general charge may repetitive and stacking: 291

- The charges of possession of drugs on state property and bringing contraband onto state property invokes the same conduct and only one rule violation is proper. The employer stacked the charges in this case: 334

- The grievant was a Correction Officer who had been accused of requesting sexual favors from inmates and accused of having sex with one inmate three times. The inmates were placed in security control pending the investigation. During this time statements were taken and later introduced at arbitration. The arbitrator found that the employer failed to prove by clear and convincing evidence that the grievant committed the acts alleged and management had stacked the charges against the grievant by citing to a general rule when a specific rule applied. The primary evidence against the grievant, the inmates’ statements, were not subject to cross examination and the inmate who testified was not credible. The grievant was reinstated with full back pay, benefits, and seniority. The arbitrator recommended that the grievant be transferred to a male institution: 379

- The grievant was hired as a Tax Commissioner Agent and had received a written reprimand for poor performance while still in his probationary period. He was assigned a new supervisor who developed a plan to improve his performance, however the grievant continued to receive discipline for poor performance and absenteeism, including a ten day suspension which was reduced pursuant to a last chance agreement. It was discovered after the last chance agreement had been made, that prior to the signing of the last chance agreement, the grievant had committed other acts of neglect of duty. The grievant was removed for neglect of duty. The arbitrator held that a valid last chance agreement would bar an arbitrator from applying the just cause standard to a disciplinary action and that the agreement made by the grievant was valid. It was also found that there existed hostility between the grievant and
his supervisor, the employer stacked charges by basing discipline on events which occurred prior to the last chance agreement but the grievant was awarded 4 weeks back pay because of the employer’s failure to comply with the union’s discovery requests: 4 1 2

- In a case involving a grievant who was disciplined for fighting and insulting language, the arbitrator held that the grievant could not be charged with a violation of "failure of good behavior". The use of this charge amounts to stacking because fighting and the use of insulting language are violations of good behavior, and thus the grievant has been charged with the same actions twice. Where an action violates two rules, the more specific rule violation should be chosen. As such, there is no violation of the failure of good behavior: 5 3 4

Stand-By Pay

- Since employer had led employees to believe that the stand-by pay policy had been reinstated, and since the employees had relied on supervision's actions, the employer is estopped from denying that the policy was reinstated. Thus, the employer violated 1 3.1 2 when it did not pay stand-by pay. ("Estopped" means one is not allowed to make a statement since, given one's previous conduct, it would be unfair or unjust to make the statement): 9 2

- Being "on call" is not necessarily the same as being on stand-by. Where as employees are not required to be near a telephone when "on call," they are so required when on stand-by under ODOT procedures. The arbitrator did not decide whether "on call" employees are entitled to standby pay since that was not at issue in the grievance: 9 2

- The distinction between being on stand-by and being on call is that an employee on stand-by is required to keep himself available for work. An employee who is "on call" is not required to respond when contacted by beeper, nor is he required to accept the work. In differentiating the two statuses the important questions are (1) is employee free to use his time for his own benefit and (2) are the call backs so frequent that employee is not really free to use the time for his own benefit: 1 0 0

- The status of the EPA’s On-Scene Coordinator does not depend on whether one calls it on-call or stand-by, but on whether he or she is “required by the Agency…to be available for possible call to work,” under Article 1 3.1 2 of the Contract. “On-call” as used for the On-Scene Coordinators means “stand-by” within the meaning of Article 1 3.1 2: 4 6 4

- Employees who are restricted in their physical location and personal condition or whose time is so interrupted by employer calls that they are not free to use the time effectively for their own purposes, and who are informed that they are required to be available, are working: 4 6 4

- The grievant’s vacancy posting, position description, and class specifications state continuous on-call status as a job duty. It is clear that the grievant had no option but to be on-call and to respond to calls: 4 6 4

The arbitrator determined that there was never a requirement of readiness conveyed to the grievants. This was supported by the fact that in at least thirteen years, the employer had never disciplined anyone for failing to respond. They were not required to stay at a specific location or within close proximity to work tools. The arbitrator noted that although the grievants did alter their lifestyles somewhat to accommodate their employer’s needs, they were largely free to live their lives as they chose: 8 3 1

Standard of Proof

- Moral turpitude offense: 1 1 8

- Where the state provided witness who said she did not remember grievant telling her he was leaving, but witness was not certain that he had not told her, the state did not meet its burden of providing clear and convincing proof that grievant had failed to advise anyone that he was leaving: 9

- Despite the difficulties of managing a program dedicated to caring for persons unable to provide for their own health and safety, the charge of patient abuse carries obvious and severe long-range adverse consequences for an accused employee so that the standard of proof is the same as in other termination cases: 1 0

- Where sole eyewitness did not make the accusation until several days alter the alleged
incident, then recanted his accusation at the pre-disciplinary hearing, but later alleged he had recanted because threatened by the grievant arbitrator held that the witnesses testimony did not rise to the level of preponderance of the evidence that the incident occurred: 10

- The arbitrator held that just cause was not demonstrated where he would have found that the discipline was justified except for procedural defects: 11

- Arbitrator quoted from Elkouri’s treatise: arbitrator may require different degrees of proof in different discharge cases: 14

- Arbitrator cited Elkouri’s treatise: Where proof was not strong enough to support discharge, some arbitrators have found it strong enough to justify a lesser penalty: 14

- Arbitrator cited another arbitration: 25 IA 906: It seems reasonable and proper to hold that alleged misconduct of a kind which carries the stigma of general social disapproval as well as disapproval under accepted canons of plant discipline should be clearly and convincingly established by the evidence. Reasonable doubts raised by the proofs should be resolved in favor of the accused. Employer may, for want of sufficient evidence, be required to rescind punishment where it is fir fact deserved, but this result is inherent in any civilized system of justice: 14

- Proof by clear and convincing evidence should be required where discipline would represent the "kiss of death" for prospects of continued employment in grievant's chosen field. This rule applies in the current case where patient abuse is alleged against a person in the health care field: 14

- Clear and convincing proof of intent to give extra medication was present where several cups contained extra medication while cups for residents alert enough to recognize extra medication had no medication: 14

- A strong inference of a violation is not sufficient if it does not rise to the level of a preponderance of the evidence. Preponderance of evidence was not found where supervisor had not observed violations: 27

- Contract establishes standard of proof as “just cause”: 33

  - "Beyond a reasonable doubt" is not correct standard since arbitrator's task is not public but is to apply the terms of a private contract. While the consequences of dismissal are serious, they cannot be equated with the consequences of a criminal conviction: 33

  - "Preponderance of the evidence" is too weak a standard of proof to justify dismissal given the severe consequences of dismissal and that the contract requires just cause: 33

  - "Clear and convincing" comes closest to meeting the requirement of "just cause" for dismissal: 33

  - Impossible to quantify the amount of proof needed for discharge in actions for moral turpitude: 38

  - If actions involving moral turpitude, arbitrator must be "convinced" that grievant committed the act and that the penalty is appropriate: 38

  - In a disciplinary action where neither side's witnesses are credible, the arbitrator held that the state failed to meet any standard of proof: 38

  - Standard of proof where act alleged could be a criminal offense is not proof beyond a reasonable doubt: 38

  - In absence of nothing more than circumstantial evidence, the arbitrator found for the grievant: 45

  - Standard of proof is at least preponderance of the evidence (removal grievance for absenteeism): 47

  - Grievance was denied because state's witness was more credible than grievant: 52

  - For a termination, employer must prove wrong doing sufficient to support a discharge by at least a preponderance of the evidence: 66

  - Authorities agree that the severity of removal places the burden on employer to prove that grievant was guilty as charged and that his behavior constituted just cause for dismissal: 71, 106

  - Employer must prove by at least a preponderance of the evidence that grievant is guilty of the charges against her: 116
A contention that the criminal standard of proof should attach since the violation is conduct that carries a criminal penalty was rejected on the grounds that the conduct does not carry a criminal penalty. The grievant was charged with neglect but not necessarily of being reckless. The arbitrator pointed out that criminal neglect requires recklessness (a blatant disregard of known risk) rather than mere negligence (failure to act with the care that would be exercised by an ordinary reasonable person): 1 61

Due to the "economic capital punishment" (termination) meted out to the grievant, the evidence has been tested with a higher standard of proof than would attach to disciplines of less severity: 1 61

Where termination is involved, the authorities agree that the severity of this penalty places the burden on the employer to demonstrate by at least a preponderance of the evidence that grievant was guilty of the charges against him as well as the proof that such behavior constitutes just cause sufficient to support discharge: 1 63

The appropriate standard is that the violation more likely than not occurred. Higher standards such as "beyond a reasonable doubt" are used in order to avoid difficult analysis of the facts. Such avoidance of analysis is improper: 1 79

Since the arbitrator is not engaged in determining that the grievant has any criminal guilt, it is not necessary for the state to prove its claims beyond a reasonable doubt. The arbitrator found it sufficient that the State has proved the violations of rules 37 and 22 in this case by clear and convincing evidence: 1 80

Ultimately, the evidence in this case provides the arbitrator no basis for a friar conviction that grievant committed the offense. The best the arbitrator can say in view of the evidence is, "I suspect that Grievant altered the document." A suspicion is not a proven fact. The state failed to meet its contractually prescribed burden of proof and, therefore, the grievance will be sustained: 1 83

The arbitrator recognizes that 24 .01 casts an evidentiary responsibility on the employer which sometimes will be impossible to meet. Many incidents of employee misconduct are committed in secrecy and designed to escape detection. Often, the employer's "proof consists only of circumstantial evidence. Circumstantial evidence is not "bad" evidence. More often than not, it is enough to establish requisite proof. But sometimes (as in the present case) it may not be enough, particularly when direct evidence is available to supplement Circumstantial: 1 83

It is foreseeable that the employer's burden of proof will occasionally permit a guilty employee to escape justice. That risk is inherent in 24 .01 : 1 83

The union has the burden of proving by a preponderance of the evidence that a timely demand for arbitration was sent 1 87

Fraud and perjury are matters involving moral turpitude are to be established therefore beyond a reasonable doubt: 1 87

Clear and convincing evidence, and not simply a preponderance of the evidence is required to make out an "abuse" case: 1 92

Where the alleged violation was a traffic accident while intoxicated, the arbitrator held that "this action is not a criminal one and a proof beyond a reasonable doubt is not required: 1 96

While the account by the state's witness was more credible than the grievant's account, the evidence, which was circumstantial, was not sufficient to prove the charge and sustain the discharge: 235

The test by which discipline, including discharge is measured is "just cause", which the state is required to prove by clear and convincing evidence: 25 1

Where the arbitrator found the accusing witness' testimony very credible he noted that it is possible that she made up the story; that she did so to carry out a secret vendetta against the grievant. But it is improbable. There is no evidence to support such a finding. Essentially, the arbitrator would have to indulge in rank speculation, without a scintilla of continuing documentation or testimony, to discredit her accusation. It is not an arbitrator's task or right to base an award on speculation. His/her job is to weigh and apply the evidence: 25 3

While the charge is so serious that any real doubt must be resolved in favor of the grievant, no such doubt was raised: 260
- The employer's case rested upon the testimony and written statements of 3 inmates. It is crucial that inmate's testimony be supported. It was not. The written statement of one inmate was discredited because the initiate testified he had been forced to write the statement. The written statement of another inmate was discredited because the inmate refused to testify. The arbitrator gave some credence to the written statement of the third inmate, even though he too refused to testify, because he provided so much information that it was hard to believe he had been forced to write the statement. While the evidence was not sufficient to support the discharge, the arbitrator held that it was sufficient to rule against back pay: 265

- The Arbitrator held that when the State depends on inmate testimony to uphold a removal, it bears a heavy burden of proof. The standard of proof is “beyond a reasonable doubt,” which means that even if the Arbitrator believes the case against a grievant, he must find her innocent if he entertains a doubt and it is reasonable. The Arbitrator further stated that “reasonable doubts” could only be raised by facts and not by mere conjecture: 604

**Standard Work Schedule**

The Union filed separate grievances from Guernsey, Fairfield, Licking, Knox, Perry, and Muskingum Counties that were consolidated into a single case. Implicit in the authority to schedule employees is the ability to alter the work schedule, subject to the limitations in Article 13.07 that the work schedule was not made solely to avoid the payment of overtime. The Arbitrator found that there was no evidence that the schedule change was motivated by a desire to avoid overtime; therefore, no violation of the contract occurred. Based upon the weather forecast known to the Employer on February 1, 2007 justifiable reasons existed to roll into 12 hour shifts. Prior notification under Article 13.02 was not required. No entitlement existed that the employees were guaranteed 16-hour shifts under a snow/ice declaration. The Employer’s conduct did not violate Section 13.07(2)’s Agency specific language. The snow storm was a short term operational need. To conclude that a snow storm is not a short term need but that rain over an extended period of time is, would be nonsensical. The record consisted of over 500 pages of exhibits and three days of hearing. That record failed to indicate that the Employer violated the parties’ agreement. 997

**Standard Work Week**

The problem in this case centered upon ad-hoc requests for vacation leave that seek the leave on dates for which the employer has not yet developed the four-week work schedule (i.e. request for one day of vacation eight months later that was held by the employer until the employer had established the work schedule for the four-week period covered) In a previous decision, Arbitrator Brookins held that the bargaining contract does allow the Employer to hold requests for vacation leave until the schedule for the four-week period covered by the leave is established. In Arbitrator Murphy’s opinion, he stated that the test on the applicability of the Brookins’ decision to this case is not whether this arbitrator agrees with the analysis in the Brookins’ Opinion nor whether this arbitrator would have rendered a similar decision had the issue in this case been presented as an original question to this arbitrator. It could not be said that the Brookins’ analysis was egregiously erroneous and substantively without merit. The Brookins’ analysis was based upon construction of the language in the fifth paragraph of Article 28.03 in the context of preceding paragraphs. It was based upon traditional rules of construction of contracts. The Brookins’ Award should stand until the parties choose to change it in bargaining a future contract. 887

**State Law**

- Finding that the Ohio Collective Bargaining law means what it says, the Ohio Supreme Court held that the terms of negotiated agreements entered into after April 1, 1984 prevail over conflicting provisions in Ohio statutes, with limited exceptions listed in Ohio Revised Code Section 4117.10(A). According to the Court, Ohio Revised Code Section 4117.10(A) was promulgated to free public employees from conflicting laws which may act to interfere with the newly established right to collective bargaining: 199

- The arbitrator found the removal order defective because it cited ORC 124.34 rather than pertinent sections of the Agreement The employer failed to introduce any evidence or testimony equating (his standard with the standards specified in either Article 31 or Article 24, Reliance on
this section also conflicts with an Ohio Supreme Court decision which found that the Code cannot be used to supplement or indirectly usurp provisions negotiated by the parties: 220

- The argument that reliance on ORC 1 24 .34 diminishes the grievant's due process and procedural rights under the contract is unfounded since the employer does not seek to use the Code to usurp the collectively-bargained provisions of the contract: 24 3

- Reference to the Ohio Revised Code in the removal letter was not held to be a violation of the contract since it was clear that the grievant was disciplined for violation of a reasonable, published work rule and that the just-cause standard and other disciplinary provisions of the contract prevailed: 260

- The employer was found to have violated 24 .04 by denying the grievant of his right to union representation by issuing a notice of investigation at a time when there was no union representative on the site stating that the grievant would be disciplined if he did not complete a written statement. However, the arbitrator did not modify the grievant's discipline because there was no indication that the employer's violation was deliberate and no prejudice to the grievant resulted: 261

- Reference to the Ohio Revised Code in the removal order does not prejudice the grievant because the arbitrator is deciding the case based on just cause rather than the Revised Code: 261

**Step Four Appeal**

- Under the 1 986-89 Agreement at Step 4 appeal does not have to include a copy of the grievance form. The Union met the contractually imposed requirements at the time of the grievance: 34 9

**Step Increase**

- The parties negotiated that there is to be no step above Step 6 in Pay Range7, and so, the grievant, even though he was promoted from the top step of Pay Range27 to the top step of Pay Range 7, is not entitled to a four percent increase as specified in Article 36.04, which grants a four percent increase upon promotion, and the pay schedule, and pay schedule rules. To create an additional step would be to act outside the authority of the Arbitrator: 4 62

**Step Three**

- It is not a procedural flaw that the Third Step Hearing Officer was the Labor Relations Officer. The Union argued that this precluded the Hearing Officer from being a neutral party. The arbitrator stated that the Agreement does not require a “neutral party”; since the Third Step Hearing Officer is always management, such a person can not be “neutral.”: 291

- The Agreement specifies little about the characteristics of a Step 3 person only that he or she is an Agency designee. There must be a fair and objective investigation to have just cause. There was no evidence that the investigation was unfair or not objective: 291

- One of the main purposes under the Agreement for Step 3 is for the employer at a higher level to review the evidence and hear the employer's version. If the grievant chose not to be heard at the Step 3 as is their right there must still be a full investigation: 291

- There may be a problem with having the Labor Relations Officer as the hearing officer but it was not proved in the instant case: 291

- Although it was not established that the absence of the grievant from all pre-arbitration meetings was the fault of the employer, the employer’s failure to give more than cursory consideration to a postponement and given her prior absence, the employer’s willingness to proceed with the Step 3 meeting gives the appearance of unfairness. This coupled with the 18 months between the alleged incidents to the serving of papers compromised the ability of the Union to defend its member. There is a pattern of disregard for the grievant due process rights. Although much of the damage to the grievant’s defense was overcome, the effect of the 18-month delay is irreversible and prejudicial to the grievant: 31 7

- The grievant was a Correction Officer removed for using vulgar language, conducting union business on work time, and fondling an inmate. The arbitrator rejected the claim that the Union had a right to question witnesses at the pre-disciplinary hearing. Nor did the employer violate Article 25 .08 because the union made excessive document requests. The employer did violate Article 25 .02 by not issuing a Step 3 response for
six (6) months, however the grievant was not prejudiced. Therefore, the arbitrator found, because the inmate was more credible than the grievant, that just cause did exist for the removal: 366

- The grievant injured his back in a car accident and was off work for six months while receiving disability benefits. His doctor released him to work if no lifting was allowed. Because the position required lifting, he either left or was asked to leave work. He failed to call in for three consecutive days and was removed for job abandonment. The union requested arbitration more than 30 days after the date of the Step 3 response. No evidence was offered on the interpretation of 25 .02 and as to when the union received the Step 3 response. The employer failed to overcome the presumption that a grievance is arbitrable. The arbitrator found just cause because: the grievant has served a 5 day suspension for failing to follow call-in procedure while on disability, his doctor’s statement that he should avoid lifting was ambiguous, and he failed to respond to the employer’s attempts to contact him. Filing for Workers’ Compensation was not found not to substitute for contact with employer: 373

- The grievant was upgraded through Class Modernization to a Systems Analyst 2 position. She received an adequate mid-probationary rating but received a verbal reprimand for poor performance afterwards. She alleged supervisory harassment and was transferred to another supervisor who also rated her below average in all six categories. Her performance failed to improve and she received further discipline up to and including the ten day suspension which is the subject of this grievance. She was charged with failure to follow a direct order, breach of security for failing to turn her computer terminal off at the end of the day, and various items relating to proper completion of work assignments. However, the employer failed to send a Step 3 response to the Union. The arbitrator found that the employer did violate section 24 .02 by not sending a Step 3 response to the union, however there was no harm to the grievant. The employer proved that the grievant was guilty of the acts alleged and that there was no supervisory harassment. Progressive discipline was followed (a 10 day suspension following a 1 day suspension) but the procedural violation warranted a reduction to a seven day suspension: 386

- The grievant was removed for unauthorized possession of state property when marking tape worth $96.00 was found in his trunk. The Columbus police discovered the tape, notified the employer and found that the tape was missing from storage. The arbitrator found that the late Step 3 response was insufficient to warrant a reduced penalty. The arbitrator also rejected the argument that the grievant obtained the property by “trash picking” with permission, and stated that the grievant was required to obtain consent to possess state property. It was also found that while the employer’s rules did not specifically address “trash picking” the grievant was on notice of the rule concerning possession of state property. The grievance was denied: 4 32

- The grievant was custodian for the Ohio School for the Blind who was removed for the theft of a track suit. The arbitrator looked to the Hurst decision for the standards applicable to cases of theft. It was found that while the grievant did carry the item out of the facility, no intent to steal was proven; removal of state property was proven, not theft. The arbitrator found no procedural error in that the same person recommended discipline and acted as the Step 3 designee. Because the employer failed to meet its burden of proof, the removal was reduced to a 30 day suspension with the arbitrator retaining jurisdiction to resolve differences over back pay and benefits: 4 39

**Steward's Pay**

- Negotiating history indicates that the employer had opposed any pay for stewards when traveling or away from the facility where they work. In negotiating the contract, the State only yielded to allow that there would be an exception for unusual circumstances. It is the usual circumstance that pre-disciplinary conferences for Muskingum County are held in Licking County. Therefore, the steward cannot receive pay for time and travel to the pre-disciplinary conference in this case: 1 4 3

** Strikes**

- The arbitrator's ruling that the employer does not have discretion to deny personal leave requests submitted at least one day in advance should not be interpreted as approving a wildcat strike
through personal leave applications. Such strikes are illegal and contrary to the agreement. It is apparent beyond debate that the bargaining unit cannot accomplish something by indirection that it is prohibited from doing directly. When and if Article 27 is used to support such action, there is no doubt that the State and any member of its parcels of arbitrators will deal with that problem appropriately: 228

**Striking a Supervisor**

- Persons in an industrial society are expected to know that they should not fight with or strike their supervisor. That conduct results from intent to physically harm the supervisor. The arbitrator held that the offense had not occurred where there was contact but not an intent to harm: 1 73

**Subcontracting**

- Given the commitment of the state to utilize bargaining unit employees to perform work they were performing when the Contract came into effect, the second sentence of Article 39 places upon the State the burden of demonstrating to the Arbitrator that the contract with Miller Pipeline Company to do loop repair work met the contractual criteria of "greater efficiency, economy, programmatic benefits and other related factors." The State was unable to satisfy the economy or efficiency standards established by the Contract: 4 89

- Actual layoff of the bargaining unit members does not have to occur in order for an employer to be found to have compromised the integrity of the bargaining unit through subcontracting. In this situation, there exists the sort of passive reduction of the bargaining unit: 4 89

- The Employer argued that the phrase "deemed necessary or desirable" (in Article 39) evidenced its intention to retain the absolute right to subcontract. Thus, despite the Employer's good faith intention to use bargaining unit employees, it still reserved the right to contract out work. The arbitrator held that the State did not possess an arbitrary or unfettered right to subcontract, and to hold otherwise would have rendered the rest of the first paragraph meaningless. The arbitrator concluded that the second sentence of the first paragraph gave the State the right to contract out work normally performed by bargaining unit employees when the State had a good faith belief that contracting out was necessary or desirable because the end result would be greater efficiency, economy, programmatic benefits or other related factors: 5 1 4 **

- Article 39 required the Employer to notify the Union in advance of its decision to subcontract. The Union was entitled to notice because non-bargaining unit, consultant inspectors were used to perform project inspection work that bargaining unit inspectors normally performed. According to the arbitrator, "passive" displacement occurs anytime contracting out causes bargaining unit employees to NOT be used where they NORMALLY would be: 5 1 4 **

- In deciding that the subcontracting of project inspection services was contractually inappropriate, the arbitrator was most persuaded by the fact that those State employees who were ultimately responsible for the decision to subcontract never attempted to compare the cost of contracting out to the cost of performing the project inspection work in-house. This called into question the legitimacy and degree of good faith of ODOT's stated reasons for subcontracting. The arbitrator concluded that the Contract required ODOT to show that use of consultant project inspectors would result in greater economy, efficiency or programmatic benefits (i.e., to consider different options such as 1 000 hour transfers and/or hiring to fill existing vacancies). ODOT bore the burden of proving that its rationale was legitimate; however, it failed to meet its burden of proof: 5 1 4 **

- There was no violation of the notice provision of Article 39 where the Union received formal notice within ten days of the ODOT decision to subcontract, even though 1 4 bargaining unit positions were abolished as a result. Because the subcontracting affecting only 5.7% of the total number of employees working at the Division of Public Works, the subcontracting was considered "minor". Therefore, the Union was only entitled to "reasonable advance notice". Since neither party argued that the 66 day notice was unreasonable, the State did not violate the notice provision of Article 39: 5 32

Management argued that the grievance was considerably untimely, since the cause of action had occurred fifteen years earlier, when a resident worker started working as a short order cook. The grievance was filed on the same day the cooks were ordered to report to the new location. The Arbitrator held that the
grievance was timely. The Arbitrator found there was insufficient evidence that the reason for giving the Veterans Hall Kitchen cooking duties to the Ohio Veterans Home Resident Workers and changing the work area of the union cooks to Secrest Kitchen was to erode the bargaining unit. Members of the bargaining unit were not displaced. There were no layoffs. Members were not deprived of jobs that were normally available to them. It appears that the only change was the work assignment. There was no evidence of any deprivation of any economic benefit to membership. The Arbitrator held that the 1994 grievance settlement had not been violated. No bad faith was established. Further, the short order grilling was de minis in nature when compared to production quantity work performed by the union cooks. The subcontracting in these circumstances had little or no effect on the bargaining unit, and was permissible under Article 39.01. 1009

Subpoena Duces Tecum

- Arbitrator has jurisdiction to order production of evidence from agency of the state that made an investigation where that investigation was relied upon for disciplinary action even though the investigating agency's employees are not represented by the union: 75

- That tapes are physically with the specific employing agency's agent, does not place them beyond the jurisdiction of the arbitrator: 75

- 4 3.01 gives precedence to the agreement over any statute other than ORC 4117 where such statutes conflict with the agreement. 'Thus, the requirement ill 25 .08 that the state produce evidence requested by the union supercedes the Ohio Highway Patrol's statutory privilege in ORC 1 4 9.4 3: 75

- Arbitrator ordered that the subpoenaed tapes be played to him in camera so that he could determine which portions could be released to the union: 75

Substance abuse

- See Alcohol and substance abuse

- Where the arbitrator reinstated the grievant because of lax enforcement, but the arbitrator believed the underlying cause of the grievant's absenteeism was substance abuse, she reinstated the grievant contingent upon his following the advice of his Employee Assistance Program counselor: 24 9

Substantially Equal Qualifications

The Arbitrator found that there was no evidence to show that the successful applicant was superior to the grievant in regards to the standards of qualifications, experience and education. 707

Summary Judgment

- While arbitrators generally do not have the authority to give summary judgment when the employer rests, the arbitrator does have such authority under our contract since the contract places the burden of proof upon the employer. Employer's right to cross examine the grievant arises only where the grievant testifies. Since grievant did not testify, the employer's right to cross examine the grievant does not prevent the arbitrator from issuing a summary judgment when the employer rests its case: 234

Supervisory Fault: 136, 163

- That grievant had reported the faulty lock on the rear entrance security door does not excuse the grievant from compliance with the well established and reasonable work rule requiring him to know the whereabouts of all residents in his care at all times. To the contrary, that knowledge of increased risk of resident escape heightened the standard of care to be exercised by the grievant: 136

- The arbitrator gave some mitigating weight to the supervisor's contribution to the grievant's fighting violation. 'The employer must bear some responsibility for placing this troubled couple together in a work environment which was likely to bear the explosive results which in fact occurred: 163

Supervisor Hostility

- The arbitrator reduced a removal to a suspension where he found mitigating factors and a history of supervisory hostility toward the grievant. The latter raised doubts about whether the supervisor would have removed any other employee who committed the same offense under the same circumstances. Incidents included in the history of supervisory hostility included
assigning grievant to clean sewers on the day she knew the grievant was to attend his grandmother's retirement luncheon,

assigning extra tasks to the grievant when she knew he had another commitment (and the state offered no evidence that the tasks could not be assigned to someone else), and

throwing the grievant's shoes into the trash can: 25

- Even though there were personality conflicts between the supervisor and the grievant, the objective facts show that the grievant was unable to process the invoices on time. Because deficiencies in grievance performance are plainly demonstrated by objective data, neither the suspension decision nor the determination decision can be attributed to personal bias. Whether or not people like each other is not necessarily related to the question of just cause. The just cause standard is violated only when personal dislikes are the basis for employment decisions which otherwise lack a legitimate, job-related rationale. One way to make this determination is to ask whether the challenged employment decision would have been the same had there been no personality conflict: 288

- The grievant worked in a Medical Records office when a new supervisor was hired in January 1 985. The supervisor changed the office location and began to strictly enforce the work rules. The office layout was also change twice due to new equipment purchases. The supervisor also instituted a physician’s verification policy which was stricter than the previous policy. The grievant went on work related disability in February 1 987. She received Disability Leave benefits and Workers’ Compensation. When these benefits expired she began working for a private employer. She received an order to return to work in July 1 987 because of her other employment. The grievant refused to return to work under her prior supervisor. The grievant appealed her denial of further Workers’ Compensation benefits and lost, after which she contacted the facility to come back to work. The arbitrator found that the grievant failed to prove supervisory harassment or constructive discharge. All the supervisor’s acts were within her scope of authority and related to efficiency. The removal was timely because the three year delay was caused by the grievant’s pursuit of her workers’ compensation claim in state court. The arbitrator held that the grievant abandoned her job and denied the grievance: 384

- The grievant was upgraded through Class Modernization to a Systems Analyst 2 position. She received an adequate mid-probationary rating but received a verbal reprimand for poor performance afterwards. She alleged supervisory harassment and was transferred to another supervisor who also rated her below average in all six categories. Her performance failed to improve and she received further discipline up to and including the ten day suspension which is the subject of this grievance. She was charged with failure to follow a direct order, breach of security for failing to turn her computer terminal off at the end of the day, and various items relating to proper completion of work assignments. However, the employer failed to send a Step 3 response to the Union. The arbitrator found that the employer did violate section 24 .02 by not sending a Step 3 response to the union, however there was no harm to the grievant. The employer proved that the grievant was guilty of the acts alleged and that there was no supervisory harassment. Progressive discipline was followed (a 1 0 day suspension following a 1 day suspension) but the procedural violation warranted a reduction to a seven day suspension: 386

- The grievant, a Therapeutic Program Worker, received a ten day suspension for sleeping on duty. A supervisor tried to awaken the grievant but was not successful, although the grievant had been heard talking to another employee shortly before the incident. The grievant had no prior discipline up to the time she had become a steward, then she received two verbal reprimands. Also her performance evaluations had been above average until the same time, at which point she was evaluated below average in several categories. Lastly, a paddle had been hanging in the supervisor’s lounge with the words “Union Buster” written on it. The arbitrator found that the grievant may have dozed off, but that the employer’s anti-union animus was the cause for the suspension. The paddle in the lounge was evidence of this and the employer had demonstrated reckless disregard for union relations. The arbitrator held that the employer failed to properly apply its rules, thus, there was no just cause for the 1 0 day suspension. The discipline was reduced to a 1 day suspension: 4 00
- The grievant was hired as a Tax Commissioner Agent and had received a written reprimand for poor performance while still in his probationary period. He was assigned a new supervisor who developed a plan to improve his performance, however the grievant continued to receive discipline for poor performance and absenteeism, including a ten day suspension which was reduced pursuant to a last chance agreement. It was discovered after the last chance agreement had been made, that prior to the signing of the last chance agreement, the grievant had committed other acts of neglect of duty. The grievant was removed for neglect of duty. The arbitrator held that a valid last chance agreement would bar an arbitrator from applying the just cause standard to a disciplinary action and that the agreement made by the grievant was valid. It was also found that there existed hostility between the grievant and his supervisor, the employer stacked charges by basing discipline on events which occurred prior to the last chance agreement but the grievant was awarded 4 weeks back pay because of the employer’s failure to comply with the union’s discovery requests: 4 1 2

- The agency's knowledge of the grievant's unauthorized leave (due to incarceration) cannot be equated with the agency giving the grievant permission to be AWOL. At present, there exists no law or regulation requiring an Employer to hold open an employee's position or grant him leave for the duration of his incarceration. Thus, the Employer's denial of the grievant's leave request was neither arbitrary nor capricious: 5 23

- From the grievant’s history of discipline and the evidence presented, it appeared to the Arbitrator that the suspension was proper. Both of the supervisors testified to substantially similar facts. Each stated that at the time and place complained of, the grievant was out of control, was disruptive, was abusive to the patient, was abusive to the supervisors, and was disruptive to the entire activity that the psychiatric institution was to accomplish: 5 72

**Supervisor Performing Bargaining Unit Work**

- An employer impairs the integrity of a bargaining unit by assigning duties traditionally performed by supervisors to members of the bargaining unit. Such duties dilute management authority as well as the integrity of the bargaining unit. Assignment of supervisory work is a grievable, and thus arbitrable, issue under 25.01 since 1.03 says the employer will not take action for the purpose of eroding the bargaining units. 1 9.03 does not prevent arbitration of the issue because the job audit process is not designed to be dispositive of the issue of whether grievant had been assigned some supervisory work: 1 27

- That supervisor's position description explicitly includes a certain duty does not preclude bargaining unit members from being assigned the same work where there is a long past practice of the bargaining unit members doing the work and where the work is reasonably compatible with the member's job description: 1 27

- The Ohio Penal Industries operates shops in which inmates work and bargaining unit employees supervise them. Prior to June 1 989 three bargaining unit members and two management employees were assigned to the shop. One bargaining unit member then retired, but his vacancy was not posted but rather the duties were assumed by a management employee. The arbitrator rejected the employer’s argument that there had been no increase in bargaining unit work performed by management. It was found that despite general inmate supervision performed by management, the duties assumed after the bargaining unit member's retirement were a material and substantial increase. This increase in the amount of bargaining unit work done by management was held to be a violation of Section 1.03, the grievance was sustained and the employer was ordered to cease performing bargaining unit work and post the vacancy in the shop: 4 06**

**Suspension**

It is not necessary for an employer to suspend an employee more than once in order to insure that the employee is fully apprised of the seriousness of his or her situation. Multiple suspensions can lull employees into a false sense of job security thereby defeating the fundamental purpose of progressive discipline: to offer the employee the opportunity to avoid further discipline through rehabilitation: 288

Suspensions of exaggerated proportion certainly accomplish the purpose of apprising an employee of the seriousness of a situation, but they go beyond that purpose to unnecessarily and
excessively punish the employee. Discipline must be commensurate with the offense. Discipline must be made commensurate with the offense and made in the context of the particular employee and the nature of the job, particularly where the allegations of poor performance are involved: 288

Management’s reason for choosing a suspension of long duration was an attempt to jolt grievant back into concentrating on her job. It deemed two full workweeks without pay to be necessary to accomplish this goal. The second week of the suspension was assumed to be needed to put the employee on notice. The continued extension of the suspension eventually becomes so unrelated to any discernable benefit that it ceases to fall within the limitations of just cause: 288

The grievant’s suspension was modified from ten to five days but her termination was upheld. The suspension was deemed not to be commensurate: 288

- The grievant was upgraded through Class Modernization to a Systems Analyst 2 position. She received an adequate mid-probationary rating but received a verbal reprimand for poor performance afterwards. She alleged supervisory harassment and was transferred to another supervisor who also rated her below average in all six categories. Her performance failed to improve and she received further discipline up to and including the ten day suspension which is the subject of this grievance. She was charged with failure to follow a direct order, breach of security for failing to turn her computer terminal off at the end of the day, and various items relating to proper completion of work assignments. However, the employer failed to send a Step 3 response to the Union. The arbitrator found that the employer did violate section 24 .02 by not sending a Step 3 response to the union, however there was no harm to the grievant. The employer proved that the grievant was guilty of the acts alleged and that there was no supervisory harassment. Progressive discipline was followed (a 10 day suspension following a 1 day suspension) but the procedural violation warranted a reduction to a seven day suspension: 386

- The grievant, a Therapeutic Program Worker, received a ten day suspension for sleeping on duty. A supervisor tried to awaken the grievant but was not successful, although the grievant had been heard talking to another employee shortly before the incident. The grievant had no prior discipline up to the time she had become a steward, then she received two verbal reprimands. Also her performance evaluations had been above average until the same time, at which point she was evaluated below average in several categories. Lastly, a paddle had been hanging in the supervisor’s lounge with the words “Union Buster” written on it. The arbitrator found that the grievant may have dozed off, but that the employer’s anti-union animus was the cause for the suspension. The paddle in the lounge was evidence of this and the employer had demonstrated reckless disregard for union relations. The arbitrator held that the employer failed to properly apply its rules, thus, there was no just cause for the 10 day suspension. The discipline was reduced to a 1 day suspension: 400

- The grievant was a Psychiatric Attendant who had received prior discipline for refusing overtime and sleeping on duty. He refused mandatory overtime and a pre-disciplinary hearing was scheduled. Before the meeting occurred, the grievant was found sleeping on duty. A 6 day suspension was ordered based on both incidents. The arbitrator found that despite the fact that the grievant had valid family obligations, he had a duty to inform the employer rather than merely refuse mandated overtime and, thus was insubordinate. The employer failed to meet its burden of proof as to the sleeping incident, however due to the grievant’s prior discipline a 6 day suspension was warranted for insubordination. The grievance was denied: 404

- The grievant took a magnetic tape containing public information home, which was against agency rules. She intended to return the tape but it became lost, and she was charged with theft of state property. The tape was later recovered by the Highway Patrol during an unrelated investigation. The grievant was transferred to another position without loss of pay or reduction in rank and suspended for 30 days. The arbitrator held that the employer failed to prove that the grievant intended to steal the tape (Hurst arbitration test applied) rather than borrow it. Taking the tape home without authorization was found to be a violation of the employer’s rules. The employer was found not to have applied double jeopardy to the grievant as only one disciplinary proceeding had been brought and the transfer was found not to be disciplinary in nature. The 30 day suspension was found not to be
reasonably related to the offense, nor corrective and was reduced to a 1 day suspension with full back pay for the remaining 29 days: 4 1 7

- The grievant was an Investigator with the Department of Commerce who had been suspended for 5 days for failing to follow his itinerary for travel and filing incorrect expense vouchers. The grievant’s itinerary indicated that he would be in Toledo on a Friday, and he submitted expense vouchers for the trip, however it was discovered that he worked at home during the day in question. The arbitrator found that the employer violated Section 24 .04 by failing to provide witness lists and documents and not answering the grievants letters. Section 25 .08 was not found to be violated. The employer’s selection of the pre-disciplinary hearing officer was unwise because she had an interest in the outcome and that the investigation was incomplete and unfair. The arbitrator also found that the grievant’s itinerary was a contemplated itinerary and that he had informed his supervisor of schedule changes, however the grievant was AWOL as there was no provision for working at home. Disparate treatment was suspected by the arbitrator, who also noted that the grievant exhibited a contemptuous attitude towards management. The suspension was reduced to a 1 day suspension: 4 30**

- The grievant was given a 10 day suspension for neglect of duty after failing to assist a youth in his care at the Indian River School. The youth’s finger was caught in a door which the grievant had closed. The arbitrator found that just cause did not exist because of the lack of credibility of the employer’s evidence. The grievant was more credible than the youths who testified against him. Neglect was found not to be proven because as soon as the grievant was sure the youth was injured, he obtained medical assistance for the injury. The grievance was sustained and the grievant made whole: 4 35

The Employer had just cause to discipline the grievant, but not to remove her. The Employer was not timely in initiating discipline, it merged separate infractions to apparently build a case against the grievant, preventing progressive discipline, and charged the grievant with a general work rule rather than a more specific charge, which led to ambiguity. The Employer also failed to have a clear doctor’s verification policy. The grievant did not abandon her job. She did, however, fail to follow the call-off and sick leave policies, and so some measure of discipline is warranted. The removal was modified to a 60 day suspension: 4 4 4

Considering the grievant’s past discipline for the same violation, a two day suspension for a late call-off, and the fact that she had been retrained regarding the call-off policy three days before the first of several calling off late infractions, the Employer had just cause to issue a six-day suspension: 4 6 3

A seven-day suspension is a very serious penalty, which must be warranted by a very serious offense. That the grievant called in late, reported to work well after his call-in, failed to complete a request for leave form for his absence, and failed to obtain a doctor's verification is not enough to justify such a penalty. With just a one-day suspension on the record, only a two-day suspension is warranted: 4 6 8

The removal is set aside, and a twenty-day suspension is imposed. The Employer had just cause to discipline the grievant, but removal following a one-day suspension is not progressive unless the offense was so serious as to warrant removal. In this case, the removal was not progressive, commensurate nor fairly applied: 4 7 7

The Arbitrator is clearly convinced that grievant Sampson did, on at least the occasions charged, throw away what he knew or should have known to be first class mail. However, the evidence is not clear regarding grievant Lawson. Therefore, the discipline of Lawson was not for just cause. Given the lack of recent discipline, the length of grievant Sampson’s service and the lack of proof of malice, a 10-day suspension is not commensurate. However, given his apparent reckless disregard for the rules and mail of inmates he is sworn to protect, and the seriousness of the offense, a five-day suspension is warranted: 4 9 2

Management has the burden of showing just cause for punishing an employee. If the past practice of employees and management had never before been disciplined, then subsequent discipline of an employee for that practice may be denied for lack of just cause: 4 9 4

- The State upheld the principles of progressive discipline by giving oral and written reprimands
and suspensions for violations of the call in policy. The State then executed an EAP agreement as a conditional discharge. The grievant was eventually discharged for failing to comply with the terms of the EAP agreement: 516

- In a case where a grievant was progressively disciplined as he accrued twelve violations of work rules, the State had just cause to issue five and ten day suspensions to the grievant, even though the grievant was not offered EAP: 522

- The arbitrator found just cause for the grievant's suspension as reduced from ten days to five days. Given the seriousness of the violations, with two of the four allowing for first offense removal, the arbitrator stated that the grievant must take some time off so as not to convey the message that the conduct was acceptable: 530

- The arbitrator concluded that there was just cause to suspend the grievant for fifteen days: twelve days for striking another employee and three days for using abusive and insulting language toward another employee: 534

- The employer had just cause to suspend the grievant in a case where the grievant was progressively disciplined for neglect of duty in the past: 562

- The grievant was originally suspended for twenty days by the Rehabilitation Services Commission and this was reduced to a thirteen-day suspension in the original arbitration. The State refused to pay the grievant for the seven days reduced by the Arbitrator. The Arbitrator found that the grievant did not lose any disability pay because of the change in suspension dates. As a result, the length of the grievant's suspension period (twenty days or thirteen days) had no effect on the grievant losing any money. The Arbitrator held, however, that if the reduction in suspension is nullified, management is not penalized for its procedural misconduct that prejudiced the grievant. Therefore, the grievant is entitled to two days back pay, not as a make whole remedy, but as a penalty to management: 562(A)

- The arbitrator reduced a ten day suspension to three days for a grievant who misplaced his security equipment in an area not accessible to inmates for a short time: 578

- The grievant was charged with patient abuse after pushing a patient towards his bed. The Arbitrator held that although the conduct did not rise to the level of abuse, it was nevertheless inappropriate. Therefore, the discharge should be reduced to a two-week suspension: 585

- The grievant, accused of misusing a State vehicle, admitted the misconduct and waived his right to a pre-disciplinary hearing. He subsequently received a ten-day suspension. The Union contended that management did not have just cause to discipline the grievant. The Arbitrator held that since the grievant admitted the misconduct, management met the just cause standard and the discipline was justified: 598

The evidence clearly established that the grievant was 25 minutes late for work. The arbitrator noted that management's policy did not support its position that an employee could be both tardy without mitigating circumstances and AWOL for the same period of 30 minutes or less.

The arbitrator found that management violated §24.04 when it denied the grievant representation at a meeting regarding his timesheet. Management had already spoken to the Union regarding this matter, but at a subsequent meeting the next day denied representation. The employer prevented the grievant from choosing wisely when he was given a direct order to correct his timesheet within 5 minutes. 770

The grievant was suspended for several alleged charges stemming from a verbal altercation with her supervisor and a co-worker. The arbitrator found that the grievant’s actions were intimidating but not threatening. He noted that the grievant’s actions were related to her behavior and not her performance. He was convinced that if her misconduct continued it would eventually result in removal and that reduction of the suspension should not be construed as condoning the
The arbitrator concluded that the use of more charges than required and the failure to prove the most serious offense—threatening a superior or co-worker—required a reduction of the suspension. 782

Management used a written reprimand to shape the level of discipline in violation of Article 24.06. The grievant’s action should have been treated as a first offense who was on notice, not as a second offense. Management’s denial of access to documents hindered the Union in its investigation. Pursuant to Article 25.08, management has an obligation to provide documents available to assist the Union in meeting its burden of proof. If management requested the release of redacted documents for inspection by the Union under the umbrella of privilege, it was unreasonable of it to refuse the same request by the Union for the documents need for its case. The arbitrator concluded that the documents in question would have buttressed the Union’s position that other examiners were copying, but were not disciplined for their actions and while they others may be guilty of neglect or poor judgment, they were not guilty of insubordination since they were not under orders not to copy. Therefore, the charges of neglect and poor judgment were not justified.

The grievant was under orders not to copy and it was determined that he clearly disregarded the order; therefore, discipline for insubordination was justified. 799

The grievant was charged with failing to initiate payments, which resulted in negative cash flows in projects, and making an inappropriate payment. She was also charged with failing to reconcile documents and failing to file documents in a timely manner. She received a fifteen-day suspension. The arbitrator stated that a lack of specificity makes it virtually impossible for the Union to establish a defense strategy. He concluded that the circumstances surrounding the charges against the grievant clouded the State’s proof of misconduct. The alleged errors occurred when the existing system was being automated. The employer also relied on the grievant’s prior disciplinary history. The arbitrator determined that the Union proved its unequal treatment claim and that a proper and impartial investigation that should have been conducted did not take place. 81

During her brief employment with the State of Ohio, the grievant accumulated a number of disciplines: an oral reprimand, a written reprimand, a three-day suspension and a five-day suspension. Violations included misplaced files, incomplete claims, and claims which were processed improperly. The employer had been aware of the grievant’s poor work performance for some time and the various disciplines were its attempts to correct the problem. The arbitrator found that the progressive disciplines which increased in severity did nothing to correct the grievant’s performance. The employer could not have reasonable confidence that the grievant’s work would reach an acceptable level. The discipline imposed was justified. 904

A patient escaped and was subsequently hurt. The grievant did not notice the patient’s absence and reported that the patient was present when making her rounds. The grievant’s actions did not rise to the level of recklessness because she was not indifferent to the consequences, nor did she intend that there be harmful outcomes. The facts were not enough to establish “abuse.” However, the grievant was negligent. She allowed herself to be fooled by a pile of blankets, a cold room, and by not taking greater care during her rounds to see what was under the blankets. This was not abuse, but it was neglect of duty and warranted corrective discipline. Language in the written policies was not specific and there was room for a range of interpretations about what the grievant knew was required or what she should have known. The burden management places on an employee to speak up if they don’t understand the
written policy, overlooks the possibility that an employee may be confident he or she understands what to do and yet, in reality, be wrong about their understanding. Management did not prove that patient abuse occurred and, therefore, did not have just cause to remove the Grievant. But Management did have just cause for discipline. The Grievant was reinstated to her former position with full back pay, seniority, and benefits, less two days pay. Her discipline record reflected a 2-day suspension for a first offense of Neglect of Duty. 95

The Arbitrator found that the Employer applied the principles of progressive discipline and no evidence existed that the Employer’s conduct was arbitrary, unreasonable or capricious. The Grievant was given a ten-day suspension for failure to notify the employer of an absence within the 30 minutes required. Grievant also was absent without pay on one day, assuming he had not exhausted his FMLA leave after an extended disability leave. The Union considered the ten-day suspension punitive and asked the Arbitrator to consider medical reasons as extenuating circumstances warranting mitigation and to lessen the discipline. The grievant’s history of FMLA use, plus four prior disciplines involving the exact issue of this grievance, failed to convince the Arbitrator that the grievant’s conduct was an honest mistake. In considering mitigation for a long-term employee (24 years), quality of service must also be weighed. The grievant engaged in repeated violations of the work rules and seemingly made no effort to change his conduct, despite progressive discipline. Discipline imposed was reasonable and fair in an effort to correct his conduct. The discipline was issued for just cause. 95 4

The Employer did not have just cause to terminate the Grievant, but did have just cause to suspend her for a lengthy suspension for accepting money from a resident. There was a sufficient basis to convince the arbitrator that the Grievant did accept money from a resident. The lax enforcement of Policy No. 4 lulled the employees into a sense of toleration by the Employer of acts that would otherwise be a violation of policy. This lax enforcement negates the expectation by the Grievant that termination would have occurred as a result of the acceptance of money from a resident. The age of the resident and the amount of money involved called for a lengthy suspension. The Arbitrator held that there was no evidence to support the claim that the Grievant had received a defective removal order and that the requirement that the Grievant be made aware of the reasons for the contemplated discipline was met. 970

In the period leading up to his dismissal the Grievant was having issues with members of his household and his own health. The Grievant did not call in or show up for work for three consecutive days. The Arbitrator held that employers unquestionably have the right to expect employees to come to work ready to work when scheduled. However, just cause also demands consideration for the surrounding circumstances of a violation, both mitigating and aggravating. The Arbitrator found the circumstances in this case did not indicate a “troubled employee” such as one suffering from addiction or serious mental illness. Rather, the Grievant was an otherwise good employee temporarily in crisis (because of circumstances beyond his control) and unable to help himself. This case, in which professional intervention may eventually rehabilitate the employee, was ripe for corrective discipline rather than discharge. The Grievant received a thirty-day suspension to impress upon him his responsibility to inform his employer of his status. 983

The Employer’s procedural objection as to timeliness was denied because the record failed to indicate that the Union received notification in writing to comply with Article 24 .06 of the CBA. The Grievant was involved in breaking up an altercation between two youth offenders and was then accused of injuring one of the youth offenders. The incident was recorded by video camera. The Employer attributed all of the youth offender’s injuries to the Grievant; the Arbitrator disagreed. In the opinion of the Arbitrator the youths were not credible, in either their own statements or their combined statements and testimony, because they were not able to recall with sufficient clarity the material facts of an incident that was not complicated. In addition, in their hearing testimony each youth admitted that his written statement was at odds with the video. The grievance was granted; however, the Arbitrator stated: “If in fact the Grievant committed those violations the finding that this evidence failed to demonstrate just cause should not be viewed as a victory only that, in my opinion the evidence fails to support that the discipline was for just cause.” In other words, the state failed to prove their case, but the Grievant was not found innocent. 984

The failure of the Grievant to timely call off by 4 7 minutes is not in dispute, nor is the past disciplinary record which contains various interventions and four
separate, but similarly related infractions that resulted in discipline. The Grievant maintained that over-the-counter medication she took for severe leg cramps caused her to oversleep. The Grievant was certified for certain medical conditions recognized under the FMLA; however, none of the Grievant’s certified FMLA medical conditions affected her ability to call off properly. The facts failed to support a finding that “circumstances” precluded proper notification. The Arbitrator held that BWC exercised discretion under Art. 29.03 and the Work Rules when it determined removal should not occur and instead imposed the suspension. Given the choice of removal versus suspension, BWC acted properly. “Just cause” existed and no standards were violated in disciplining the Grievant. The record is undisputed that the Grievant received increasing levels of discipline, including economic penalties, to impress upon her the significance of her non-compliance with the attendance procedures. The absence of attendance infractions since her last discipline indicates that the Grievant can correct her behavior.

Verbal exchanges between two corrections officers resulted in a physical struggle between the two officers. The Arbitrator held that the Agency failed to prove that the Grievant violated either Rule No. 19 or Rule No. 37. The Arbitrator held that more likely than not, the other officer was the aggressor in the events leading up to the struggle. The Grievant acted in self defense and believed that any reasonable person would have acted similarly. Rule 19 was not intended to deprive the Grievant or other corrections officers of the right to defend themselves against a physical attack from a fellow staff member. The Arbitrator held that it strained credibility to argue that the purpose or spirit of Rule No. 37 was to deprive correctional officers of the right to protect themselves against attacks from coworkers. The Grievant’s behavior was the kind of misconduct that undermines the Grievant’s position as a role model for the inmates. However, the altercation took place where only a handful of inmates were present. The Grievant’s fault or misconduct in this dispute was her voluntary participation in verbal exchanges with the other corrections officer that led to a physical struggle between the Grievant and that Officer. That misconduct warranted some measure of discipline. The Arbitrator held that the Grievant was not removed for just cause. The Agency should not terminate a fourteen-year employee for self-defense conduct or for engaging in juvenile verbal exchanges with a coworker, even though the behavior is clearly unacceptable. Some measure of discipline is clearly warranted to notify the Grievant and the other corrections officer that verbal barbs have no place in the Agency and will not be tolerated. A three-month suspension without pay should sufficiently deter the Grievant and others from embracing such conduct. The agency was ordered to reinstate the Grievant.

The Grievant was removed after two violations—one involving taking an extended lunch break, the second involved her being away from her work area after punching in. Within the past year the Grievant had been counseled and reprimanded several times for tardiness and absenteeism, therefore, she should have know she was at risk of further discipline if she was caught. Discipline was justified. The second incident occurred a week later when the Grievant left to park her car after punching in. The video camera revealed two employees leaving after punching in. The other employee was not disciplined for it until after the Grievant was removed. That the Reviewing manager took no action against another employee when the evidence was in front of him is per se disparate treatment. No discipline for the parking incident was warranted. Management argued that removal was appropriate since this was the fourth corrective action at the level of fine or suspension. The Grievant knew she was on a path to removal. But she also had an expectation of being exonerated at her Non-traditional Arbitration. Her 3-day suspension was vacated by an NTA decision. That fine was not to be counted in the progression. The Grievant was discharged without just cause.

– T –

Tape Recording

- Where grievant refused to unequivocally deny that the voice on a tape recording was his own, arbitrator concluded that it was his voice: 67

Tardiness

- Employer has the right to establish reasonable work rules dealing with tardiness: 8

- Removal would be justified for a third occasion of serious discipline for tardiness hr approximately one year’s time: 11

- The contract requires the employer to consider "extenuating and mitigating circumstances" in tardiness cases (section 1 3.06). Factors which the arbitrator gave some weight to: difficulties in finding childcare. Lack of evidence that tardiness prevented grievant from completing work assignments. Only 4 of 24 tardies were greater
than 30 minutes (the time at which the employer would have to reassign grievant's work to another employee): 1

- Difficulties in finding child care for three year old child is of some mitigating concern although it was her obligation to arrange for more reliable care: 1

- While the arbitrator was sympathetic with the grievant's reasons for tardiness, the arbitrator ruled that the grievant could have avoided the problem through use of flextime. She should have actively pursued permission for flextime and continued to do so until she got an answer one way or another: 80

- Even where grievant has received verbal reprimands for tardiness, a two-day suspension for being 1 minute late is not commensurate. A one-day suspension is commensurate: 97

- It is necessary for employees to be on time for work at Oakwood forensic center if for no other reason than to enable previous shift employees to leave. At all times the patients in the various sections of the facility must be supervised and handled: 97

- Where grievant argued because he was delayed on the way to work, the arbitrator responded that the appropriate action Grievant should have taken was to leave earlier to factor in the delays: 97

- Absenteeism and tardiness are not excused by grievant's failure to own a telephone or car. The employer cannot be expected to bear the costs of the grievant's lack of these items: 1 1 1

- Absenteeism and tardiness are not excused because grievant was experiencing domestic difficulties: 1 1 1

- Section 1 3.06 notes that for tardiness, extenuating and mitigating circumstances shall be taken into consideration by the employer in dispensing discipline: 1 5 1

- That White had neither a telephone nor car and relied on a fellow employee who was frequently late to pick him up are excuses which cannot be considered as mitigating. While these circumstances are no doubt true and the reason for White being tardy and unable to call in a timely fashion, the fact that an employee has no phone or car does not lessen his obligation to follow attendance rules and procedures for calling in. Grievant has been disciplined for tardiness in the past and had ample opportunities to correct the problems: 1 5 1

- Problem in gaining entry to the facility may be a mitigating factor where it is a general problem causing tardiness among many employees. However, where no evidence was given to show that anyone other than grievant was having a problem, the arbitrator would not give the problem any mitigating weight: 1 5 1

- If the 6 day suspension had been based solely on 3 occasions of being late less than 5 minutes, one might view the incidents as being minor with no real consequence to efficiency and question the just cause of imposing such severe discipline: 1 5 1

- In this case, the grievant did not report to work and failed to call off within the appropriate time frame. The attempt to clothe this infraction as a tardiness occurrence seems totally unwarranted. The specific violation did not deal with a traditional tardiness occurrence. Tardiness takes place when an employee arrives at work at a time which exceeds the required reporting time: 1 81

- Running out of gas does not excuse tardiness. The employee is responsible for insuring that his tank is full. Running out of gas is not the sort of "extenuating and mitigating circumstances" contemplated by the agreement: 201

- That state knew that the grievant's son was ill and that she had recently suffered from depression. In the circumstances of this case, it must be determined that the concepts of "extenuating and mitigating circumstances" set out in the agreement at 1 3.06 are applicable. The employer must not be permitted to disregard them as to do so would deprive them of their vitality: 21 0

- That the facility was experiencing construction is immaterial to excusing the grievant's tardiness. The other employees made it to work on time. If the journey to work was to be extended by virtue of file construction project it was incumbent upon the grievant to adjust his travel schedule accordingly: 21 4

- A six day suspension for a total of 8 minutes tardiness over four days is unusual, to say the least. If that suspension were to be considered in
isolation it would most certainly be determined to be excessive. However, the tardiness takes on greater significance when viewed in the context of the grievant's extensive record of tardiness which extends over his entire employment history with the State. The true issue here is not the amount of time the grievant was late for work but rather his continued pattern of tardiness: 21 4

- If 7 minutes tardiness were the grievant's only offense, removal would not have been commensurate. However, the tardiness and improper call off occurred after 2 last chance suspensions. Whether the grievant was 1 minute late or 5 9 minutes late, he demonstrated a clear disregard for the warning he had been given. Sudden and unexpected illness of a helpless relative would be a mitigating factor. However, the grievant took his father on a planned appointment and could have come home much earlier and gone to bed. The arbitrator doubted the grievant's father was helpless since he lived alone. She said, "No evidence shows that the grievant, under a final warning, took any measures to assure his attendance at work on time."; 221

- The employer did not stack charges by charging the grievant with both tardiness and submitting false documentation. While the two charges arose from the same incident, the falsification behavior was separate and distinct from the tardiness: 24 0

- While one could argue that the actual time involved in this discipline was minimal and the failure to have a Doctor's slip was minor and might succeed in another case, given the grievant's previous disciplines, the grievant was clearly on notice as to expected behavior with regard to absenteeism, tardiness, etc. In that position, the grievant should have gone to extra lengths to be on time, sign in and sign out properly, etc; 24 4

- The duty of the grievant was to get to work on time. If a car has a faulty battery, the grievant has a number of options: get a new battery, call a cab, call a friend, or start walking in sufficient time. If the grievant was held up at the metal detector or by the basketball team, his responsibility was to adjust his time to allow for such problems: 24 5

- The removal was commensurate with the offense, even though the two incidents added up to only 3 minutes of unauthorized leave because these violations were only the last straw in a history of attendance problems and demonstrate that further efforts at corrective discipline would be futile. The grievant had been progressively disciplined, had signed a last chance agreement, had been properly forewarned that further violations would result in termination and had received a great deal of forbearance when given a 5 day suspension in lieu of discharge for the previous violation: 25 8

- The suggestion that time clocks may have been inaccurate was refuted by testimony that the clocks were checked and synchronized each morning by a management representative: 25 8

- The grievant's excuses for tardiness, that he overslept and had car trouble were not given any weight by the arbitrator. The responsibility of the employee is to be on time and the responsibility of a Correction officer on whom other person's work and safety depends is to give the employer sufficient notice to meet emergencies. With 5 previous disciplines in this area the grievant should have been acutely sensitive to his responsibilities. His responsibility included provision of an adequate mechanism to ensure that he awoke on time to get to work. His responsibility also included maintaining the reliability of his car or arranging alternative methods to get to work: 270

- The arbitrator found the grievant's excuse for submitting a false car repair slip to document his tardiness to be unbelievable: that he was merely following his supervisor’s orders. The arbitrator did not believe that the grievant would understand the supervisors demand for documentation to be a demand for false documentation. If the grievant did so understand the order, then the fact that grievant would carry it out indicates a deficiency in character which would show that the grievant could not be relied upon in the future: 270

- In a case involving a grievant who signed an EAP agreement to correct his persistent tardiness due to drinking, the State had just cause to remove the grievant when his problems continued and when he failed to enroll in a detoxification program. Although the EAP agreement was to last ninety days, the arbitrator concluded that the State did not act prematurely in removing the employee:  5 21

- In a case involving a grievant who had been progressively disciplined through twelve violations of work rules for absence and tardiness, the State had just cause to issue one five-day suspension followed by one ten-day suspension.
The grievant had been put on notice prior to the five-day suspension that his problems needed to be corrected by the fact that he had received prior discipline. Thus, even though most of the infractions that led to the ten-day suspension occurred while the five-day suspension was being processed, the grievant was not denied an opportunity to correct his behavior between the two disciplinary actions in question: 5 22

- In light of the grievant's disciplinary record, including four attendance-related infractions, the grievant received progressive discipline and his removal was for just cause. The grievant's prior discipline progressed from verbal reprimand, to written reprimand to suspension according to the WRPH's policy, and according to this policy, the next step was removal. Although it was undisputed that the grievant was given a copy of and training on the tardiness policy, the grievant continued to arrive at work late and refused to record the time he actually arrived at work: 5 26

The evidence clearly established that the grievant was 25 minutes late for work. The arbitrator noted that management’s policy did not support its position that an employee could be both tardy without mitigating circumstances and AWOL for the same period of 30 minutes or less.

The arbitrator found that management violated § 24 .04 when it denied the grievant representation at a meeting regarding his timesheet. Management had already spoken to the Union regarding this matter, but at a subsequent meeting the next day denied representation. The employer prevented the grievant from choosing wisely when he was given a direct order to correct his timesheet within 5 5 minutes. 770

The grievant was charged with various alleged violations including unexcused tardiness, AWOL, and Failure of Good Behavior for not following the directions of a superior when he was told to take a midday lunch break before going to his next appointment. He chose not to take the break and to proceed to his next appointment. The arbitrator found that the initial determination by the employer that the AWOL and Failure of Good Behavior charges were “serious” was correct. However, these charges were ultimately found to have been improperly leveled against the grievant. The unexcused tardiness allegation was considered diminished in severity by the fact that some of the tardiness charges were simply in error, others were withdrawn and one was improper. The arbitrator found that the employer gave proper weight to the insubordination charge and that the remaining tardiness charge was recidivist in nature. He found that the charge of Exercising Poor Judgment was proper in this instance because the offense followed specific counseling regarding how to handle his lunch break. This charge was conceded less serious than insubordination, and the 1 0-day suspension was reduced to an 8-day suspension. 809

Grievant was terminated from his position as Cook 1 at the Department of Youth Services for reporting to work 22 minutes late on June 1 5, 2003 and one minute late on June 1 6, 2003. Due to the fact that the employer does not discipline an employee unless they are late more than once in a pay period, the Union contends that essentially the employer dismissed the grievant for being one minute late. However, the arbitrator found that the grievant’s removal was justified because he was late for work on two consecutive days, and the grievant did not deny the fact that he had prior problems with tardiness. 862

The grievant was charged with a pattern of tardiness on multiple occasions after a 30-day suspension for similar offenses. The arbitrator found that the employer made every effort to assist the grievant in correcting her attendance issues. Management changed the grievant’s supervisor, changed her starting time repeatedly, allowed her to receive donated leave and allowed her to bring her children to work on at least two occasions. The arbitrator was particularly disturbed that the grievant returned to her old pattern of tardiness within days of returning to work from a 30-day suspension. The grievant was unable to correct an obvious problem, even in the face of losing her position. She took no responsibility for her actions and did not admit that her employer had the right to expect her to come to work on time. The arbitrator doubted that another suspension of any length would correct the problem. 906

The grievant was observed arriving late for work on two separate dates and upon arrival did not clock in. The grievant stated that he did not clock in because he was on an LCA and did not want to get into additional trouble. During his pre-disciplinary meeting the grievant stated he was forced to sign the agreement, his representative misled him regarding the agreement and its effects, and he had been wrongly placed on an
LCA because his disciplinary record was incorrect. A ten-day suspension had been reduced to a five-day suspension through NTA. The arbitrator found that the grievant and the Union should have sought to correct the grievant’s record prior to the LCA and based upon the untimely manner in which the issue was raised there was no longer appropriate relief. The agency’s conduct complied with the intent of the LCA and no mitigating factors were presented to warrant reversing the removal. 931

**Technological Change**

The Employer’s decision to employ three maintenance repair workers and not to use the full complement of boiler operators and stationary engineers was because the new equipment did not require boiler operators or stationary engineers to work on the new gas systems. That decision does not violate Article 38: 4 5 9

**Temporary Reassignment**

- The Employer was ordered to compensate the grievant for the premium pay (overtime) lost as a result of the Employer’s unauthorized temporary work area reassignment decision: 4 4 8

The Union asserted that the employer failed to create a temporary CO position to escort contractors outside the perimeter of the facility. The employer contended that it was a past practice to escort contractors within the perimeter of the facility only. The arbitrator found that the employer did not violate the contract or the PAP agreement when it decided not to create a temporary post. The arbitrator’s ruling was based on: 1 ) the work was completely performed outside of the perimeter of the facility and 2) it was performed during a period when there were no inmates present in the area of the contractors. 884

**Theft**

- To show that a theft occurred, the employer must show the following elements:

  1) Personal goods of another are involved
  2) The goods must be taken without the consent of the other
  3) There must be some "asportation". (Defined as the removal of things from one place to another, typically with felonious intent).

  4) Both the taking and the asportation must be done with the intent to steal, or an intent to deprive the owner of his property permanently: 1 1 8

- The ultimate use of the item or its value to the employer are not deemed to be critical aspects which distinguish theft versus legitimate activities. These determination are solely within the employer's domain of responsibility: 1 1 8

- Theft of employer property ranks as one of the most serious offenses and thus discharge for the first offense, absent extraordinary mitigating circumstances is generally upheld. A moderately long period of employment and a record unblemished by prior discipline are not the sort of extraordinary mitigating circumstances needed: 1 93

- The arbitrator was unimpressed by the fact that the object stolen was of little value: 1 93

- Under the disparate treatment concept embedded in the applicable just cause standard, the slightly mitigating circumstance of not having initiated the theft is insufficient to support the totally disparate treatment of no discipline whatsoever versus discharge: 1 93

- The arbitrator found that the grievant did not have an intent to steal, but was merely intended to "borrow" the gas and pay the next day based on the following evidence:

  1) The grievant's conduct at the scene did not evidence an intent to steal. She did not attempt to escape.

  2) When discovered by the police she was going back to the office to leave a note.

  3) While grievant had a five dollar bill in her purse, the arbitrator believed the grievant's testimony that she thought she had no money, since the bill was in the bottom of a purse cluttered with other items.

  4) The grievant's demeanor at the hearing as well as testimony and evidence from character witnesses support a finding that the grievant is an honest and good person.

  5) The grievant knew that the missing gasoline would be noticed the following morning: 21 2

- The grievant made an error in judgment in "borrowing" gas from the ODOT garage and assuming that she could make payment the next
day when, in fact, there is no past practice or mechanism for making such payments. There were alternatives such as calling her husband for money or attempting to get the car to a gas station 1/2 mile away: 21

- Management does not have to post a rule or obtain contractual language to inform employees of what they already know. For example, every rational adult human being knows, without being told, that stealing from one's employer is disciplinary misconduct. A posted rule or a contractual prohibition to that effect would be surplusage; it would do nothing to enhance the employee's understanding. By the same token, employees are presumed to know that they must be available for communications from their employer when on indefinite leaves of absence. The arbitrator upheld discipline of the employee for failing to do so: 21

- Progressive discipline is a concept that represents the general rule with respect to application of discipline. It does not represent a set of standards that must be slavishly followed, irrespective of the severity of the offense which may prompt discipline. If an employee with an unblemished record and long service were found to have stolen from the employer, or perhaps to have vandalized the employer's premises, the Union would be in an insupportable position if it argued against a discharge on grounds that progressive discipline had not occurred. There must be a balancing of the severity of the offense and the severity of discipline: 21

- Theft of employer's property is so obviously wrong that no prior notification of discharge is necessary: 235

- Theft of employer's property is one of those offenses for which discharge may be warranted on the first offense: 235

- The smallness of the amount of fuel stolen was not a mitigating factor: 235

- The grievant was informed by his supervisor that he was not to use the State computer system for personal business. This directive was not necessary. There is a generalized prohibition in society against use of an employer’s equipment, supplies or facilities for personal business. When employees do so against the prohibition it is known as theft. It is unnecessary for the employer to issue a policy against such activity – the moral compass of people should serve to guide them not to do so: 332

- The employer does not provide enough evidence of theft when a copy of a letter that was stolen from a work locker is found in the grievant’s possession. Copies of that letter were circulating throughout the locker area and another employee actually handed the copy to the grievant: 333

- The grievant, an Employment Services Representative, was found to have recommended her daughter for two positions that the daughter was not qualified for without her supervisor’s permission. The arbitrator found that job openings were an asset and the grievant’s misconduct is that of theft-in-office. The arbitrator saw little conceptual difference between stealing publicly-held job rights and stealing public funds: 35

- The grievant knew that illicit referrals were being made and willingly participated. She cannot excuse her own corrupt practice by establishing that her superior engaged in similar misconduct: 35

- Theft of property of any value is so violative of the necessary bond of trust between employee and employer that discharge on the first offense is reasonable. The grievant’s attempts at restitution do not amend the breach of trust and the arbitrator cannot require the employer to adjust the penalty because of these attempts. This would send an inappropriate signal to the work place that one can escape discharge for first acts of detected theft if restitution is made. The claim that theft was a product of the stress of family illness baffles the arbitrator and she would give this argument no weight: 362

- The grievant was involved in a check-cashing scheme involving stolen state checks from another agency, along with two other state employees. His role was that of an intermediary between the person who stole, and the person who cashed the checks. He served 4 5 days of a criminal sentence. The grievant was found to be deeply
involved with the scheme and received a substantial portion of the proceeds. The violations were found to be connected to the grievant's job as theft of state property is harm to the employer. The grievant was found to be not subjected to disparate treatment when compared to other employees not removed for absenteeism while incarcerated: The other employees cited for disparate treatment purposes had not stolen state property: 370

- The grievant ran out of gasoline as he entered the parking area of his facility. He was unable to buy gasoline on his way to work because the station would not take his fifty-dollar bill. He was seen siphoning gasoline from a state vehicle to use in his truck until he could go to buy more at lunch and replace the gasoline siphoned. He did not speak to management about his situation because his regular supervisor was not present. The arbitrator found that just cause existed for some discipline because the grievant showed poor judgment in not obtaining gasoline before work and not speaking to management personnel. The grievant was found to lack the intent to steal instead for merely borrowing the gasoline, thus the grievant was reinstated without back pay: 378

- The employer removed the grievant for two reasons: 1) The grievant committed theft because he had been named as the supplier of checks that had been returned to the Bureau of Workers’ Compensation, to another state employee in order to cash the checks (see arbitration decision #370); 2) falsification of his job application because he admitted during the investigation that he had prior felony convictions which he failed to report on his employment application. The arbitrator found that the employer failed to prove that the grievant intended to steal the tape (Hurst arbitration test applied) rather than borrow it. Taking the tape home without authorization was found to be a violation of the employer’s rules. The employer was found not to have applied double jeopardy to the grievant as only one disciplinary proceeding had been brought and the transfer was found not to be disciplinary in nature. The 30 day suspension was found not to be reasonably related to the offense, nor corrective and was reduced to a 1 day suspension with full back pay for the remaining 29 days: 4 1 7

- The grievant was removed for unauthorized possession of state property when marking tape worth $96.00 was found in his trunk. The Columbus police discovered the tape, notified the employer and found that the tape was missing from storage. The arbitrator found that the late Step 3 response was insufficient to warrant a reduced penalty. The arbitrator also rejected the argument that the grievant obtained the property by “trash picking” with permission, and stated that the grievant was required to obtain consent to possess state property. It was also found that while the employer’s rules did not specifically address “trash picking” the grievant was on notice of the rule concerning possession of state property. The grievance was denied: 4 3 2

- The grievant, a Therapeutic Program Worker, took $1 5 0 of client money for a field trip with the clients. The grievant was arrested en route and used the money for bail in order to return to work for his next shift. The grievant was questioned about the money before he could repay it, he offered to repay it when he was paid on Friday, but failed to offer payment until the next Monday. He was removed for Failure of Good Behavior. While the employer was found to have poorly communicated its rules concerning use of testimony and testimony of others involved in the scheme. The grievance was denied: 4 0 1
client funds, the grievant was found to have notice of its provisions. The arbitrator found that the grievant lacked the intent to steal the money, however the grievant’s failure to repay was not excused, thus just cause was found for discipline. Because of the grievant’s prior disciplinary record, removal was held commensurate with the offense and the grievance was denied.

- The grievant was custodian for the Ohio School for the Blind who was removed for the theft of a track suit. The arbitrator looked to the Hurst decision for the standards applicable to cases of theft. It was found that while the grievant did carry the item out of the facility, no intent to steal was proven; removal of state property was proven, not theft. The arbitrator found no procedural error in that the same person recommended discipline and acted as the Step 3 designee. Because the employer failed to meet its burden of proof, the removal was reduced to a 30 day suspension with the arbitrator retaining jurisdiction to resolve differences over back pay and benefits.

- Under Article 24.02 the employer’s decision to pursue discipline must be timely. In the instant case, waiting an entire year before instituting disciplinary action for the grievant’s alleged but unproven misappropriation of a state issued check was not reasonable.

- The grievant was removed for just cause. ODOT established a nexus between the shoplifting offense and the grievant’s position as an ODOT employee and Union shop steward. The grievant was actually on duty when the incident occurred and there was notable media coverage of it. The removal was commensurate with the offense, because the grievant had been previously convicted of theft, but not removed. The mitigating circumstances (i.e., kleptomania diagnosis, length of service, involvement in a rehabilitative program) did not overcome the circumstances and the severity of the offense.

- The arbitrator found that there was just cause for the grievant’s violations of several Employee Conduct Rules, which included dishonesty, the falsification of documents and theft. The grievant was removed as a result of these charges.

- The arbitrator held that the grievant was not rightfully removed from his position for allegedly misappropriating funds where there was insufficient evidence and the grievant was later acquitted of the charges in a criminal proceeding.

- The grievant and a co-worker were charged with stealing two snow blowers from the center. The Union contended that the grievant was removed without just cause and that the evidence showed that the grievant did not steal the snow blowers. In order to resolve the question of whether the grievant was guilty of theft the Arbitrator determined the credibility of the witnesses. The Arbitrator determined that the State’s witnesses were more credible and subsequently held that the grievant was removed with just cause.

- The grievance was upheld. The Grievant was reinstated with all back pay, seniority, and any other economic benefit. To establish theft, the evidence must show that the Grievant intended to deprive the agency of funds provided to employees to attend conferences. The funds were operated as a short-term loan. No written policy or consistent pattern was present regarding repayment by users. The arbitrator held that it was irrelevant how many days it took the Grievant to repay the fund since the Employer essentially allowed each user to determine the date of repayment. The Arbitrator found that several factors mitigated against removal: lax/inconsistent enforcement of rules/policies governing the fund undermines any contention that the Grievant was put on notice regarding the possible consequences of her actions; the Grievant’s treatment of the fund were explicitly or implicitly condoned by her supervisor; and other similarly-situated users of the fund were treated differently from the Grievant. No theft of public funds was proven; when put on notice by Management that immediate payment was required, the Grievant complied.

The Arbitrator held that to sustain a charge of threatening another employee an employer must have clear and convincing proof. Here the proof did not even rise to the preponderance standard, being based solely on the report of the co-worker allegedly threatened, who had a deteriorated relationship with the Grievant since the events of a prior discipline. The investigator did not consider that the co-worker may have exaggerated or over-reacted. Management’s handwritten notes were held to be discoverable under Article 25.09. It had refused to produce them until

**Third-Step Hearing Officer**

The Arbitrator held that to sustain a charge of threatening another employee an employer must have clear and convincing proof. Here the proof did not even rise to the preponderance standard, being based solely on the report of the co-worker allegedly threatened, who had a deteriorated relationship with the Grievant since the events of a prior discipline. The investigator did not consider that the co-worker may have exaggerated or over-reacted. Management’s handwritten notes were held to be discoverable under Article 25.09. It had refused to produce them until
after the grievance was filed and then had to be transcribed for clarity, which delayed the arbitration. The investigator breached the just cause due process requirement for a fair and objective investigation which requires that whoever conducts the investigation do so looking for exculpatory evidence as well as evidence of guilt. Then, to make matters worse, the same investigator served as the third step hearing officer, essentially reviewing his own pre-formed opinion. 985

**Threats:**

The grievant and a former girlfriend were both employed at ToCI. The relationship did not end amicably. During and following roll call the two co-workers had a verbal confrontation. The grievant allegedly struck the former girlfriend in the presence of witnesses. The arbitrator found that the conduct of both individuals was deplorable and neither had convinced him that either was the victim in this situation. He determined that the “…the discipline conduct was demonstrated by the grievant not Pedro. The quid pro quo being, that is Pedro had engaged in similar conduct the result would have been similar in my viewpoint”. The arbitrator found no mitigation to lessen the discipline. 832

The grievant was notified that she would be removed from her position as a Therapeutic Program Worker as a result of her threatening comments to the charge nurse on duty as well as several instances of tardiness and attendance violations. However, prior to the imposition of the removal, the grievant and NBH entered into an agreement that would hold the removal in abeyance for 180 days if she successfully completed the EAP program and remained free from other policy violations during that period. On January 3, 2003, the grievant called off sick without sufficient sick leave balance. She successfully completed the EAP program on May 2, 2003 but was later notified that as a result of the January 3rd AWOL violation, she had failed to remain free from policy violations. Therefore, her removal held in abeyance was reactivated. The arbitrator ruled that to support a claim for violation of the Workplace Violence Prevention Policy, the employer must demonstrate that a specific threat occurred and the grievant had the power to carry it out. Also, the victim must have feared or had reason to fear for her safety. Here, the arbitrator found that the evidence was insufficient to support a finding or inference that a specific threat occurred. In addition, there was no evidence to suggest that the grievant had the power to direct clients and/or others to physically harm or cause property damage to the victim. Finally, after reviewing the victim’s own written statement and testimony, the arbitrator concluded that the victim did not perceive the grievant’s conduct as a threat. Therefore, the arbitrator ruled that the employer failed to meet its burden of proof with respect to this incident. With regard to the EAP violation on January 3rd, the arbitrator found that there were several mitigating circumstances that did not justify removal of the grievant- the fact that the grievant was employed for 24 years with NBH coupled with the fact that NBH originally sought to decrease the punishment for the confrontational incident and the attendance violations to a five day fine subject to successful completion of the EAP program. The arbitrator concluded that since the employer failed to meet its burden of proof regarding the workplace violence incident, reinstatement of the grievant is appropriate. However, he found that since the grievant received a written reprimand on a prior occasion for similar violent behavior, NBH’s zero tolerance policy for workplace violence, and the grievant’s violent conduct in the present action, the grievant will not receive back pay and the five day fine shall remain as part of the grievant’s discipline record. 865

The grievant involved in a verbal and physical confrontation with a co-worker. The testimony presented by the employer’s witnesses was found credible by the arbitrator. The arbitrator noted that no evidence or facts were presented to indicate that the co-worker made any physical gestures towards the grievant. The arbitrator stated that the grievant’s confrontational behavior during the incident and her continued aggressive behavior towards co-workers convinced him that the employer met its burden of proof. He also noted that the employer had shown a previous measure of restraint in its unsuccessful attempt to correct the grievant’s behavior. The arbitrator stated that a long-term employee could not seek protection if he/she was continually abusive towards co-workers or management. 867

The grievant was charged with allegedly using profanity, being disrespectful to a superior and using excessive force in his attempt to break up a fight between two youths. The arbitrator held that the agency established that the grievant used the “F” word in referring to how he would handle any further improper physical contact by a youth. It
was determined that the grievant was disrespectful towards his superior. The arbitrator found that the employer did not provide sufficient evidence to support the excessive force charge. Because the employer proved that the grievant had committed two of the charges leveled against him, the arbitrator found that some measure of discipline was warranted. The aggravating factors in this case were the grievant’s decision to use threatening, abusive language instead of allowing his Youth Behavior Incident Report to go through the process and his decision to insult his superior. He also continued to deny that he used profanity. The arbitrator noted that his decision were unfortunate because as a JCO, he had the responsibility to be a role model for the Youth at the facility. 907

The grievant was discovered eating food that he had not purchased, in a supermarket. When he was approached by security and told he would have to pay for the food, the grievant refused to do so, using obscene language to emphasize his point. He threatened the store’s security officer stating that he would take the officer’s weapon. He also attempted to use his State ID to intimidate the security officer, store manager and police officers who were summoned. The arbitrator found that the grievant violated the employer’s Standards of Employee Conduct and failed to display exemplary behavior in the store. The obscene language used was undignified and humiliating to the store employees, law enforcement and to the general public. The aggravating factors in this grievance were the obscene language and his threatening or intimidating behavior. The grievant also deliberately involved his employer and its reputation when he presented his State ID in hope of receiving favoritism during the incident. Mitigating factors were the grievant’s twenty years of state service. The arbitrator found that the aggravating factors outweighed mitigating factors in this instance, and the removal was for just cause. 910

The grievant allegedly made threatening statements to his supervisor and co-workers. He did not refute the testimony of the witnesses regarding his actions or statements. The grievant argued that a medical condition (diabetes) was the primary cause for his outbursts. However, he never indicated to anyone that he was sick. The employer stated that the grievant’s act of praying for harm to come to others was a deliberate act and not the conduct of an ill man. The Union argued that progressive discipline was not used; however, the arbitrator cited an arbitration decision which stated, “The principles of progressive discipline allow for leeway. In following them, an employer is not obligated to issue a verbal reprimand for a first offense of murder, mayhem, or sabotage.”  (*Walker v. OBES, #G87-998, Dworkin, 4 -21 -99, p. 21 , Decision #1 23*) While the grievant did not physically harm supervisors or co-workers, his threats certainly should have been and were taken very seriously. To that end, DR&C did not act arbitrarily or capriciously in determining that removal was appropriate based upon the conduct of the Grievant. 911

The grievant was charged with failing to provide a nexus form to his employer regarding the incarceration of his brother. He was also charged with threatening an inmate with bodily harm. The employer failed to prove that the grievant did not inform it of his relationship with an individual under the supervision of the State of Ohio. However, the employer provided substantial proof that the grievant threatened an inmate. The grievant had only been a fulltime correction officer for seven months prior to the incident. There were no mitigating factors to warrant reducing the removal to a lesser discipline. 922

The grievant was involved in a verbal altercation with an inmate at the facility. At arbitration the employer attempted to introduce an enhanced recording of a taped conversation which also contained the argument between the grievant and the inmate. The arbitrator found that the enhanced tape did not exist during the investigation and could not be presented. He determined that all other evidence – the original tape, interviews of both the grievant and the inmate and the grievant’s lack of remorse or acknowledgment of what occurred during the confrontation – supported management’s position that the grievant was removed for just cause. The grievant threatened the security and safety of the inmate by challenging the inmate to engage in a physical confrontation. The arbitrator stated, “...the evidence of the egregious conduct by the Grievant under the three rules—24, 38, and 44—stands alone as a basis for the justification for the removal in this case.” The Union’s allegation that the grievant’s removal was in retaliation for a sexual harassment suit filed against the institution was unfounded. The arbitrator noted there was no
The grievant was a Correction Officer charged with threatening an inmate and using abusive language towards the inmate. The arbitrator found that the grievant’s conduct warranted discipline; however, the Union demonstrated that a co-worker who previously committed a similar offense was treated differently. The employer offered no explanation for the disparate treatment. The removal was ruled excessive and the grievant was reinstated. 95 7

Making

- In a case involving a grievant who violated work rules by threatening a co-worker with bodily injury, the arbitrator found that there was just cause for removal: 5 1 7

- The grievant threatened to bring back a .38 and shoot her co-worker during a confrontation in the restroom. The grievant stated that she threatened the co-worker because she feared for her safety and the safety of her unborn child. Although the Arbitrator did not believe this defense, he concluded that the grievant’s statement was made in the heat of the moment, that she was not a violent person and it was not probable that she would point a gun at a person. The Arbitrator reviewed both the positive and negative aspects of the grievant’s work record to support his conclusion: 61 0

- The grievant’s accuser testified that the grievant threatened to murder a co-worker at the Gallipolis Developmental Center. The Arbitrator said that threats of this nature could not be considered in deciding whether the removal was justified, however, because the State had violated Section 24 .02 of the Agreement by depriving the grievant of discipline: 61 5

- The Arbitrator emphasized that making threats in order to deter employees from testifying during the disciplinary process was a valid concern for Management; however, he ruled that evidence of alleged threats made by the grievant in this case were inadmissible during the arbitration hearing. The Arbitrator, in making this decision, ruled that evidence of an unrelated charge, acquired after the grievant had received notice of discipline, would inevitably and unfairly prejudice the grievant and, consequently, could not be used in determining the outcome of the original charge: 61 8

The Arbitrator found that the evidence showed the Grievant had violated Work Rule Neglect of Duty (d) and Failure of Good Behavior (e). The evidence failed to demonstrate any words or conduct that rose to the level of a threat or menacing. The Arbitrator held that the removal was excessive due to the Grievant’s medical condition; the Grievant’s acute personal issues; a relatively minor discipline record at time of removal; eleven years of satisfactory service; and the absence of threatening conduct. The Arbitrator reinstated the Grievant with conditions: she will successfully complete an EAP program for anger management and stress—failure to do so would be grounds for immediate removal; discipline of a 1 5 day suspension without pay for violating the work rules; she shall receive no back pay, seniority and/ or any other economic benefit she may have been entitled to; she shall enter into a Last Chance Agreement, providing that any subsequent violation of the work rules for a year following her reinstatement will result in immediate removal. 999

The grievance was sustained in part and denied in part. The removal was reduced to a suspension. The Grievant was placed on administrative leave that continues until he completes an EAP-designed comprehensive anger-management program for a minimum of twenty consecutive work days. If the Grievant fails to successfully complete the EAP program, his removal shall be immediately reinstated.

REASONS: The evidence does support a finding that just cause exists for discipline under Rule #6 because it was the clear intent of the Grievant to threaten the co-worker. A picture posted in the break room by the Grievant was offensive and was intended to threaten and intimidate the co-worker. However, just cause does not exist for removal. The evidence fails to indicate that during the confrontation in the break room the Grievant engaged in any menacing or threatening behavior toward the co-worker. The co-worker’s initial response to the posting of the picture failed to demonstrate any fear or apprehension on his part. In fact, his reaction in directly confronting the Grievant in the break room underscores his combative nature, and was inconsistent with someone allegedly in fear or apprehension.

The Arbitrator took into consideration several mitigating factors. None of the Grievant’s allegations against the co-worker were investigated. The facts are unrefuted that the Employer failed to provide any documents or witness list before the pre-disciplinary hearing, in violation of Article 24 .05 . The Grievant’s
immediate supervisor was directed by his supervisors to alter his evaluation of the Grievant. The revised evaluation contained four “does not meet” areas, whereas his original evaluation had none. Witnesses from both sides, including management, were aware of the animus between the co-workers. The Employer was complicit in not addressing the conduct or performance issue of the Grievant and the co-worker, which escalated over time and culminated in the break room incident. 1 01 3

To the Security of the Institution

- According to the wording of the Standards of Conduct, this charge is appropriate only where the offense is not a violation of any more specific rule: 232

An inmate was dead in his cell of an apparent suicide. The grievant was charged with failing to perform cell checks. The arbitrator found that the condition of the body and the filthy condition of the cell indicate that if the grievant had made the two rounds per hour as required, the inmate’s suicide attempt would have been discovered much earlier. The grievant was a “short-term” employee with a prior discipline for inattention to duty. The arbitrator found no mitigating factors to warrant reducing the removal to a lesser discipline. 923

To Inmates (Coercion)

The grievant was a Correction Officer charged with threatening an inmate and using abusive language towards the inmate. The arbitrator found that the grievant’s conduct warranted discipline; however, the Union demonstrated that a co-worker who previously committed a similar offense was treated differently. The employer offered no explanation for the disparate treatment. The removal was ruled excessive and the grievant was reinstated. 95 7

Time and Mileage

Time Clock

- A sign-in/sign-out policy does not violate section 1 3.1 6 that bans the introduction of new time clocks. There is some indication in the opinion that this holding can be attacked by showing that the parties intended the words time clock to have a wider meaning: 1 34

Time Clock Installation

- Both the 1 986 and 1 989 contracts allow installation of time clocks within ninety days of the contracts’ effective dates. The employer began installation of time clocks under the 1 986 contract, removed the systems and then reinstalled an updated system nine months after the effective date of the 1 989 contract. The arbitrator found that the triggering event for grieving was the first installation, but no grievance was filed at that time. The arbitrator found that the first installation was not a pretext to avoid violating the contract. The second system was found to be a replacement, not an addition, thus its installation did not violate the contract: 369

Time Limits

- While the arbitrator agreed with the general principle that where there are reasonable doubts about time limits they should be resolved in favor of arbitrability, he held that in this case another principle was more appropriate: "An arbitrator does not have an unfettered discretion in such matters. His primary duty of interpreting a contract requires him to reject an untimely grievance unless some basis exists for waiving the prescribed time limits": 1 5 8

- The contract says that grievances not appealed within the designated time limits will be treated as withdrawn grievances (25 .05 ). It would be an injustice to both parties for the arbitrator to allow the language of the contract to be outweighed by on the grounds of a clerical error by a temporary employee: 1 64

- Adherence to contractual time lines is critical and to move the grievance forward where time limits have not been met requires circumstances and considerations which overwhelm contract language. Failure of a temporary employee to carry out the task in an appropriate manner is simply not the basis to override contract language: 1 64

- Having set up its own procedural rules unilaterally, it was incumbent upon the agency to follow them: 1 92

Timeliness

- The grievant had a thirty-day time limit on filing her grievance starting from the date the grievant became or reasonably should have
become aware of the occurrence giving rise to the grievance. The event giving rise to the grievance occurred when the grievant continued to be carried as a probationary employee after sixty days of employment. The grievant had thirty days from the date when she was wrongfully listed as a probationary employee. The Union’s argument that the grievant was not harmed until she was later removed was dismissed. The arbitrator found that as soon as the grievant was kept on probationary status and did not receive the full protection and rights of seniority status. The employer is also not liable for the training of the employee in her right to bring a grievance. The employer did not act in bad faith to keep the grievant in the dark as to her rights. The employee also had worked for the State previously and had adequate time to discover the issue of her probationary status and raise it in a timely fashion.

The grievance was not arbitrable since it was untimely. The timeliness of the agreement are clear and mandatory. A grievance filed at third step must be filed within 14 days of notification. In the event the deadline is missed the grievance is deemed withdrawn.

If the grievant or the Union had some misgivings regarding the Step 2 outcome, they had an affirmative duty present the employer with a grievance in writing within ten days of the step 2 response. Nothing in the record indicates that the parties mutually agreed to extend the time limits. The grievant received and partially concurred with the Step 2 response and yet he waited approximately a year to formally raise his concerns with the Labor Relations Officer. A subsequent event, when the grievant tried to refile his request for travel allowance could be said to again start the thirty-day grievance time limit. The grievant did not file within 30 days of this event. The arbitrator found that the settlement of the grievant’s claim served as a settlement for all similarly situated employees.

The untimely Step 3 grievance is deemed withdrawn and is not arbitrable. The arbitrator was reluctant to summarily dismiss grievances on purely technical grounds. At the same time, he recognizes his limitations. The arbitrator does not have the power to dispense justice or fairness if doing so would violate the Agreement.

The arbitrator rejected the employer’s position that since the grievants accepted their employer’s mileage limitations policy for 4 months they therefore waived their right to grieve. Each time the grievants were not reimbursed for their mileage a new grievable event occurred. That nearly 4 months of these events took place before a grievance was filed does not make a reoccurrence in the fourth month arbitrable. What matter is whether the grievance was filed within the time limitations of any one of the events.

The denial of mileage reimbursement is held to be a continuing act and since the grievant filed ten days following the last in the series, it was timely and therefore arbitrable.

The grievant’s basis of refusal to return to work was that he was under a doctor’s care and the doctor had not yet ordered him back to work. For this same injury three separate specialists agreed the grievant could return to work. Another reason the grievant gave was that he was under medication and could not drive. The grievant could not support either excuse. The mere fact that drugs were prescribed does not prove that the doctor ordered them used to such an extent that the grievant could not drive. There was just cause for the grievant’s removal.

The grievant had been on a disability separation and had been refused when he requested reinstatement. The arbitrator found the grievance arbitrable because section 4 3.02 incorporated Ohio Administrative Code section 1 23:1-33.03 as it conferred a benefit upon state employees not found within the contract. The grievant thus had three years from his separation to request reinstatement, which he did. The grievance was also found to be timely filed because there was no clear point at which the employer finally denied the grievant’s request for reinstatement and the union was not notified of the events by the employer. Additionally, the employer was estopped from asserting timeliness arguments because the employer was found to have delayed processing the grievant’s request for reinstatement. The physician who performed a state-ordered examination released the grievant to work, thus the employer improperly refused the grievant’s reinstatement request. The grievant was reinstated with back pay less other income for the period, holiday pay, leave balances credited with amounts he had when separated, restoration of seniority and service credits, medical expenses which would have been covered by state insurance, PERS contributions, and he was to
receive orientation and training upon reinstatement: 375

- The grievant had held several less than permanent positions with the state since March 1 989. In December 1 990 the grievant bid on and received a Delivery Worker position from which he was removed as a probationary employee after 1 1 7 days. The grievant grieved the probationary removal, arguing that his previous less than permanent service should have counted towards the probationary period. The arbitrator found the grievance not arbitrable because it was untimely. The triggering event was found to have been the end of the shortened probationary period, not the removal. The union or the grievant were held obligated to discover when an employee’s probationary period may be abbreviated due to prior service. The employer was found to have no duty to notify a probationary employee of the grievant’s eligibility for a shortened probationary period when it is disputed. There was no intentional misrepresentation made by the employer, thus the employee waived his right to grieve the end of his probationary period and the employer was not estopped from removing the grievant. The grievance was not arbitrable: 4 1 1

- The discipline was timely. A statewide investigation takes time. The grievant being allowed to work during the two months between her confession and termination did not violate the contract. Her day-to-day performance was not at issue. The Employer did not condone her actions by allowing her to work: 5 2 7

- Article 24 .02 ensures that discipline be administered in a timely fashion. The passage of one full year in which four investigations were conducted between the event and the discipline does not meet the contractual standard of initiating discipline as soon as "reasonably possible": 5 3 1

The Employer’s procedural objection as to timeliness was denied because the record failed to indicate that the Union received notification in writing to comply with Article 24 .06 of the CBA. The Grievant was involved in breaking up an altercation between two youth offenders and was then accused of injuring one of the youth offenders. The incident was recorded by video camera. The Employer attributed all of the youth offender’s injuries to the Grievant; the Arbitrator disagreed. In the opinion of the Arbitrator the youths were not credible, in either their own statements or their combined statements and testimony, because they were not able to recall with sufficient clarity the material facts of an incident that was not complicated. In addition, in their hearing testimony each youth admitted that his written statement was at odds with the video. The grievance was granted; however, the Arbitrator stated: “If in fact the Grievant committed those violations the finding that this evidence failed to demonstrate just cause should not be viewed as a victory only that, in my opinion the evidence fails to support that the discipline was for just cause.” In other words, the state failed to prove their case, but the Grievant was not found innocent. 984

- **Timeliness of:**

  **an Arbitration Hearing**

- Where arbitration hearing was postponed several times and the employer claimed that the union was either estopped by the doctrine of tactics or because it had waived the right to arbitration, the arbitrator found that both parties were at fault and that the Union had not intentionally relinquished the grievance. Given the employer's fault and the grievant's right to a day in court, the arbitrator found the grievance arbitrable. But since the union was also at fault, and this fault hurt the employer by affecting the availability of witnesses and the clarity of memories, the arbitrator announced that if the grievance was sustained, the award would be diminished: 236

**Beginning Disciplinary Process**

- Grievant was an Examiner for the Department of Taxation assigned to work in a county courthouse during normal courthouse hours which were from 7:30 a.m. to 4:00 p.m. Due to a backlog of work, the Agency assigned another employee to the courthouse on a temporary basis. When a supervisor called to check on the work being done, the temporary employee informed the supervisor that the Grievant had been absent and/or tardy on numerous occasions. The supervisor maintained a log after that date listing the dates and times he attempted to contact the Grievant but was unable to reach Grievant. The supervisor contacted the Agency's enforcement unit, and the unit conducted surveillance of the Grievant for approximately two weeks. The total absences for an entire day or part of a day were eighteen for a two month period. The Agency's
laxity was not a mitigating factor. The laxity was not part of the evidentiary record in this case. The Agency satisfied the timelines requirement. Section 24 .05 requires action by the Agency head as soon as reasonably possible but no more than 4 5 days after the pre-disciplinary hearing. The Agency notified the Grievant of the discharge 30 days after the disciplinary hearing. Section 24 .02 requires the Agency to begin disciplinary proceedings in a timely manner. After learning of the absences, the Agency conducted a thorough investigation. Given the gravity of the offense and the extent of the investigation, the process was commenced in a timely manner: 36

- The employer's policy statement setting forth deadlines self-imposed by the employer, employees are entitled to rely. The arbitrator is required by 24 .02 to consider the timeliness of the employer's initiation of the disciplinary process: 1 06

- Arbitrator rejected the argument that the initiation of the discipline had been untimely on the grounds that the employer had been engaged in good faith attempts to accommodate Grievant to induce her to obey instructions. The actual event that triggered discipline was much later than the beginning of the misconduct: 1 23

- Article 24 , section 24 .02 obligates the Employer to discipline without unreasonable delay. The negotiators made the requirement unmistakably clear. Not only did they state in mandatory terms that discipline "shall be initiated as soon as reasonably possible," They underscored their purpose by instructing arbitrators to consider the Employer's timing when deciding grievances over discipline. It is apparent that the parties meant to place the strongest emphasis on this aspect of the Employer's duties; to the point that timeliness of discipline was made ma indispensable ingredient of just cause itself: 1 4 0

- An 8-day period before the employer initiated the discipline did not violate 24 .02's requirement of timeliness of discipline, especially since the employer investigated in the interim to confirm its suspicions. It is inconceivable that the Union would view the contractual language on timing as calling for knee jerk disciplinary responses to mere suspicions: 1 4 0

- Reading sections 24 .02 and 24 .05 together leads to the conclusion that the 4 5 days is an absolute maximum. It supplements, but does not entirely supersede the Employer's responsibility to react to a disciplinary event "as soon as reasonably possible": 1 4 0

- Where the department's own policy required initiating discipline within 3 days, the discipline was not initiated until 8 days, but the employer needed the extra time to investigate. The arbitrator concluded that the delay was minimal and did not prejudice the grievant’s rights nor contravene the contract: 1 4 0

- The grievant, accused of misusing a State vehicle, admitted the misconduct and waived his right to a pre-disciplinary hearing. He subsequently received a ten-day suspension. The Union contended that management committed a procedural violation by waiting nearly one year after the conclusion of the criminal investigation to initiate the discipline. The Arbitrator held that management complied with the contract by waiting until after the disposition of the criminal investigation: 5 98

**Carrying Out Discipline**

- That 5 1 days elapsed between the incident and the hearing and a total of 3 months went by before the grievant was actually relieved of his duties raises doubts as to whether the grievant received due process. In particular it raises questions as to whether the employer really thought that keeping the grievant on the job constituted a continuing threat and was incapable of rehabilitation: 227

- The Employer failed to timely take disciplinary action against the grievant: 4 4 9

- Article 24 .04 expressly grants the Employer the right to delay discipline when a criminal investigation is underway: 4 70

- The Arbitrator rejected the Union’s argument that a 1 0-month discipline process is warranted under any circumstances: 4 70

- While the Arbitrator is troubled by a seeming lack of urgency on the part of the State, given the Contract’s clear requirement of timely initiation of discipline under Section 24 .02, there was no need to rule on the timeliness issue due to the resolution of the remaining issues: 4 81
- Article 24 .04 expressly grants the Employer the right to delay discipline when a criminal investigation is underway: 4 70

- The Arbitrator rejected the Union’s argument that a 1-year discipline process is warranted under any circumstances: 4 70

- While the Arbitrator is troubled by a seeming lack of urgency on the part of the State, given the Contract’s clear requirement of timely initiation of discipline under Section 24 .02, there was no need to rule on the timeliness issue due to the resolution of the remaining issues: 4 81

The grievant was charged with sexual harassment of a co-worker. The record indicated that no action taken during investigation was sufficient to modify or vacate the suspension, however some of the statements the investigator collected could not be relied upon because they were hearsay or rebutted by the witness. The arbitrator noted that the matter came down to the testimony of one person against another and there was no substantial evidence to sustain the charge. The arbitrator determined that the matter was properly before her because it was appealed within ninety days of the Step 3 response. The arbitrator noted that the fact that it was appealed before the mediation meeting did not invalidate the appeal. 807

The Arbitrator overruled the timeliness issue raised by the union. Article 24 .06 gives the employer the option to delay the decision to discipline and halt the running of the forty-five days until after any criminal investigation. The evidence was clear that there was a fight and that the Grievant and several other JCO’s were injured. However, the evidence was clear from witnesses that the Grievant hit and kicked the Youth once the Youth was on the ground. Considering the severity of the assault, the Arbitrator found the removal to be correct. 1 020

Filing Grievance

- See Procedure

- Where the director of the agency agrees to extend the filing deadline, the grievance is not untimely and grievance is arbitrable: 20

- The wisdom of applying time limits was for the parties to decide when negotiating the contract.

However, there are several situations in which arbitrators have held that strict compliance with the parties time limits would be unreasonable: when the parties have agreed to an extension of the deadline, prior laxness fit enforcing the deadlines, if employer failed to raise timeliness issue prior to arbitration, failure of grievant to discover the action against him, notice by the union to employer of a reasonable basis for delay. This arbitrator would be likely to find a contractual time limit inapplicable if grievant was under some disability that prevented timely filing: 1 26

- The grievant's claim that he did not know the time limit is not a sufficient reason for setting aside contractual filing deadlines. The grievant and the union are on constructive notice of the deadlines since those deadlines are included in the contract: 1 26

- Since the state raised the issue of timeliness, it has raised an affirmative defense; therefore it has the burden of proof, whether in the sense of going forward with the evidence or establishing its case by a preponderance of the evidence: 1 88

- It is not when the grievance was received by the state which is critical to the timely filing of the grievance. Under Article 25 .01 (D), it is the postmarked date within the appeal period that is critical: 1 88

- Although the grievant received the order of termination on May 29, lie worked on June it may very well be that the substance rather than the form of termination took place on June 1. In light of the timeliness of grievance filing issue raised by the state, I believe it would be highly inappropriate to utilize May 29 as the date of termination rather than June 1: 1 88

- Where a discussion had taken place, within the contractual time limits for filing a grievance, between the labor relations officer at the institution and the steward, which made the state aware that the union was grieving a disciplinary action, the arbitrator ruled that the grievance was timely filed in spite of the fact that the official grievance form was postmarked on a date that was arguably outside of the contractual time limit for filing: 203

- While the grievance was filed 4 months after the basis for the grievance arose, it was nevertheless timely because it was initiated as soon as the
grievant became aware that their seniority dates were incorrect: 21 5

- The triggering event for a grievance to be timely is not the grievant’s removal but the alleged improper classification of the grievant as a probationary employee. Even if the grievant did not know he was a probationary employee until his removal, as he claims, he should have known much earlier. Numerous occasions existed to put the grievant on notice upon which a reasonable person in the grievant’s place could have acted: 4 5 5

- The filing window commenced each time the grievant was on call and not compensated with stand-by pay: 4 64

- In this grievance regarding life insurance benefits, it was timely filed as it became ripe when the grievant’s heirs sought a benefit on behalf of her estate and were denied: 4 69

- A grievance which was filed over one year after the event giving rise to the grievance is not arbitrable in accordance with the contract language of Article 25 .02: 5 1 5

- In a case involving a grievance filed over a year after the event giving rise to the grievance, the State did not waive its right to raise the timeliness issue at the arbitration hearing due to its failure to identify the issue during the grievance process: 5 1 5

- The arbitrator ruled that a steward with seven years experience should have known "not to rely upon a receptionist to provide advice about the proper filing of a grievance". The contract language is clear and unambiguous as to the time and place of filing the step 3 grievance and, although a change in policy regarding the location from where a grievance number is obtained occurred, this policy change does not in any way modify the express terms of the contract. The arbitrator concluded that for at least two years before the present grievance was filed, OCB had made it clear that any delay in returning an improperly filed grievance would count against the time for filing a grievance. Therefore, the case is not arbitrable: 5 38

- The continuing violation argument is widely recognized as an exception to time limits for filing, and it is generally narrowly construed. The present case did not involve a “new” violation. The continuing failure to enter the vacation leave on the grievant’s account was a consequence of the original failure to credit him

The Arbitrator found the grievance to be timely filed where the grievant had been assured by the Personnel Office that the problem would be corrected. The grievant filed the grievance when he learned that nothing was going to be done to correct the problem. The grievant’s belief that the problem would be corrected was reasonable: 5 4 6

- The Arbitrator concluded that the grievance was timely under Article 25 of the Contract, because the grievance was filed within 30 days of when she became aware of the occurrence giving rise to the grievance. The Arbitrator held that the event giving rise to the grievance was the failure of the state to return the grievant to her previous position and make her whole. The Arbitrator must, therefore, grant the grievance: 5 5 1

- The Union contended that the employer waived its rights to argue arbitrability by accepting and processing a grievance that was untimely filed. However, the Arbitrator concluded that the Union's waiver argument was not valid, because the Department of Rehabilitation and Correction clearly raised its procedural objection at the third step meeting. Thereafter, the Department discussed the case on its merits and that does not constitute a waiver: 5 82

- The grievant was put on notice of his employment status on or about April 27, 1 994 , and he did not file a grievance until September 26, 1 994 . The grievant’s detrimental reliance argument was not sufficiently supported by the record to constitute an "unusual circumstance" and is insufficient to overcome the clear language of the pertinent Contract Article. The grievance, therefore, was not filed in a timely manner and is not arbitrable: 5 84

The arbitrator found that the grievance was not filed properly – it was not filed on the proper form nor filed within 1 4 days of notification pursuant to the Collective Bargaining Agreement. The arbitrator stated that if the grievance had been properly filed, it would have been denied on its merits. 805

The arbitrator found that, while on his watch, the grievant witnessed an inmate being assaulted by another Correction officer. The grievant
cooperated in a conspiracy with other officers to cover up the incident. By doing so, the grievant failed to follow appropriate post orders and policies, falsified his report of the incident, interfered with the assault investigation, and failed to report of the work rule regarding the appropriate and humane treatment of an inmate. The arbitrator found that all of this conduct by the grievant violated Work Rules 7, 22, 24, and 25. The arbitrator further found that the grievant violated the work rule on responsiveness in that the grievant failed to remain fully alert and attentive at all times while on duty and to properly respond to any incident. The arbitrator concluded that all of these work rule violations, when taken together, along with the aggravated circumstances of the brutal assault of an inmate on the grievants watch justify the termination of the grievant. 820

The grievant bid on a Storekeeper 1 position. He won the bid but was never placed in the position. The arbitrator found that the State’s failure to place the grievant into the position was immediately apparent. “If the union believed that the work was being done by others in violation of the collective bargaining agreement, it would have been obvious at that time and it could not wait two and one-half years to file a grievance.” The arbitrator found the grievance to be filed an untimely manner and did not rule on its merits. 903

The grievant was removed from his CO position in May 2003. The grievant filed a grievance. The grievant was reinstated as a result of a Settlement Agreement. While this grievance was pending, the Grievant filed an unemployment claim, and a determination was issued that the removal was not for just cause. The Employer appealed this decision. Another hearing was conducted, and when the hearing officer inquired as to the status of the grievant’s discharge grievance, the Employer submitted the Settlement Agreement. The hearing officer reversed the redetermination, finding the grievant was on a disciplinary layoff for misconduct in connection with his work. No appeal was filed to request a review, so ODJFS sought repayment from the grievant. It was not until after the deadline had past for appeal and ODJFS sought repayment, that the grievant appealed the determination of overpayment of benefits. A hearing was held regarding the order of repayment, where a discussion ensued regarding whether the grievant had appealed the determination that he was ineligible for benefits, since a final determination of ineligibility was necessary for a determination of amounts overpaid. The grievant’s attorney requested a copy of the redetermination decision. This was followed by a fax of the grievant’s appeal of the redetermination, which was undated. The appeal disputes that the grievant was on disciplinary lay-off while receiving benefits, asserts that his Employer’s references to the Settlement Agreement were improper, and asks that the determination that he received overpayment of unemployment benefits be overturned. The Arbitrator denied the grievance. The Arbitrator framed this grievance as three separate issues. First, was the grievance substantively arbitrable? The Arbitrator held that the collective bargaining agreement (CBA) contemplates arbitral interpretation and enforcement of settlement agreements; thus, the grievance is substantively arbitrable. Settlement agreements are a product of Article 25. Second, was the grievance timely filed? The Arbitrator held the CBA contains specific timelines for filing grievances, but in this case there are a number of ambiguities. Further, the Employer failed to make the procedural objection until arbitration; therefore, the Employer is deemed to have waived the contractual requirement of timeliness. The third issue is whether the Employer violated the terms of the Settlement Agreement when it gave it to the unemployment compensation hearing officer. The Arbitrator held that the Employer violated the terms of the Agreement, but it was a harmless error. The Agreement was only used to frame the issue and did not affect the substance of the decision. The Arbitrator also held that because the Agreement makes no reference to the unemployment claim and it expresses the parties’ desire to reach “a full and final settlement of all matters and causes of action arising out of the claim set forth above,” it effectively draws a line between what is contained in the Settlement Agreement and what is not. The presumption is that since the unemployment appeal is not mentioned, there was no agreement one way or the other. 919

The grievance was not dismissed as untimely. The Arbitrator held that the grievant was mistaken in her belief about what the grievable event was. However, only work performed by others during the ten days preceding her grievance, which was work normally performed by the grievant, would be compensable. The Arbitrator found that the project work of developing, testing, and implementing changes to the
On April 24, 2006 the Agency posted a position for an Environmental Specialist 1 (ES1). Later the Agency withdrew that posting and applicants were sent letters on or about May 26, 2006 that the position would not be filled. Then the agency posted for an Administrative Assistant 2, with a job description which was essentially the same as that of the ES1. That position was filled on June 26, 2006. On July 6, 2006 the Union filed a grievance arguing that assigning an exempt employee to that position violated Articles 1.05 and 1.7.05 of the CBA. The Agency raised a timeliness objection. The Union contended that the triggering event was the June 26 filling of the AA2 position with an exempt employee and not the announced withdrawal of the ES1 position. The Arbitrator held that the Agency effectively waived its right to raise the issue of procedural arbitrability by waiting until the arbitration hearing to assert that issue. Each Party has an obligation to scrutinize the substantive and procedural aspects of a grievance while processing it through the negotiated grievance procedure and to raise relevant procedural and/or substantive objections before going to arbitration. When procedural objections are not raised earlier in the grievance process, there is a risk of losing relevant information or losing opportunities to negotiate settlements. The Arbitrator was persuaded that Article 25.03 does not impose a duty on the Union to establish a prima facie case before arbitrating the merits of a dispute. The Agency’s argument rests on their own interpretation of that Article. However the Arbitrator held that reasonable minds may differ on their interpretations; consequently, reinforcing the need for a review of the issues in an arbitration. The Agency arguments also rest on several assertions that have not been established as facts in the dispute (e.g. “bargaining unit work does not exist in the ESS.”) These assertions are better left to an arbitration. The Arbitrator held that because of the special nature of collective bargaining relationships, there is a heavy presumption in favor of arbitration when disputes arise.

Management argued that the grievance was considerably untimely, since the cause of action had occurred fifteen years earlier, when a resident worker started working as a short order cook. The grievance was filed on the same day the cooks were ordered to report to the new location. The Arbitrator held that the grievance was timely. The Arbitrator found there was insufficient evidence that the reason for giving the Veterans Hall Kitchen cooking duties to the Ohio Veterans Home Resident Workers and changing the work area of the union cooks to Secrest Kitchen was to erode the bargaining unit. Members of the bargaining unit were not displaced. There were no layoffs. Members were not deprived of jobs that were normally available to them. It appears that the only change was the work assignment. There was no evidence of any deprivation of any economic benefit to membership. The Arbitrator held that the 1994 grievance settlement had not been violated. No bad faith was established. Further, the short order grilling was de minimis in nature when compared to production quantity work performed by the union cooks. The subcontracting in these circumstances had little or no effect on the bargaining unit, and was permissible under Article 39.01.

The grievance was denied on the basis it was not arbitrable, because it was not timely filed. A Criminal Justice Policy Specialist (CJPS) bargaining unit position was eliminated on December 1, 2006. A grievance was filed on November 28, 2007. The Union argued that they were led to believe the DMC bargaining unit work had been distributed to other bargaining unit employees and that the occurrences giving rise to the grievance still existed today as they did in 2006. The Arbitrator held that the Union knew or should have known as of December 1, 2006 that the CJPS position had been eliminated, thereby putting the Union on notice of that position’s duties being distributed to other employees. The Arbitrator held that the record established that the grievance was not filed pursuant to Article 25.02 (Step One); therefore, she was without authority to hear the merits of the grievance.

**Final Disciplinary Decision**

- See 45-day time limit

- Where state took some time before issuing final disciplinary decision, the arbitrator found no violation of 24.05 because

1. delay was due to state conducting a thorough investigation before pre-disciplinary meeting, and

2. the final disciplinary decision was issued less than 45 days after both investigatory interview
and pre-disciplinary meeting (so that whichever meeting triggered the 45 day period, the 45 day time limit was not exceeded): 36

- Discipline that is unduly delayed may be difficult to sustain: 81

- 24 .02 states that any arbitrator deciding a discipline grievance must consider the timeliness of the employer's decision to begin the disciplinary process: 99

- The arbitrator sold he could find no reason for the employer to issue a written reprimand and then follow it 2 months and 8 days later with a suspension for the same offense. The evidence showed grievant was guilty and that he could have been suspended to begin with. A suspension issued over three months from the date of the offense clearly does not fall within the spirit of 24 .02: 99

In General

- The state cannot claim that the grievance may not be heard on its merits due to a procedural defect committed by the union when it has committed a procedural error itself: 203

- The presence of a thorough paper trail overcomes to a large extent the effect on witnesses of the delay: 236

Initiating Discipline

- See forty-five day time limit

- Article 24 .02 requires that "disciplinary action shall be commensurate with the offense" and "initiated as soon as reasonably possible consistent with the requirements of the other provisions of this article." Where the grievant had continued to work for 1 1/2 months after the offense before being terminated, "this, in itself, tends to raise questions regarding management's view of [the grievant's] actions as sufficient to warrant termination: 212

- Fundamental notions of "just cause" simply prohibit the Employer coming back months and months later, and resurrecting and relying on such stale instances to support any discipline, much less severe discipline: 218

- The arbitrator found that delay in implementing discipline represented due consideration of the issues by specialized staff and higher authority rather than unwarranted delay: 243

- The state did not violate 24 .02 when it did not initiate the removal right away. The state held a pre-disciplinary meeting for a minor suspension and then, as more facts were uncovered, determined that the incident was more serious and decided the grievant should be removed. The arbitrator determined that the disciplinary action was initiated as soon as reasonably possible: 257

- Where delays in initiating discipline were solely the result of an employee's misrepresentations, and the employer initiated discipline as soon as it learned the truth, the employer action was not untimely: 268

- Discipline was not initiated as soon as reasonably possible where the grievant was seen sleeping on duty on June 10 and June 28, the pre-disciplinary meeting was held on July 18, and the removal notice was issued on July 25. The arbitrator said that while he appreciated the employer's concern with due process, the time periods seem excessive and unreasonable: 270

- When the employer claimed that the grievant's AWOL was the cause of the delay in initiating discipline, the arbitrator rejected the justification because the employer did not introduce a request for leave form or other documents suggesting that it refused this request: 270

- By failing to initiate discipline in a timely manner, unwarranted expectations can easily be engendered leading to perceptions that infractions will be dealt with leniently: 270

- The notice of investigation was dated June 10, 1989. The removal was not effective until August 22 (35 days after the removal letter. The employer simply cannot be heard to argue that the grievant constituted a danger to the security of the facility while simultaneously keeping him on duty for weeks on end: 276

- The grievant was removed for failing to file the proper forms required for a medical absence. The Union argued that because the State waited nine months between the initial AWOL notice and the subsequent discipline, the discharge should be void for being untimely. The Arbitrator held that there was ample evidence of the grievant's defiance of the employer's authority to justify
discipline, but removal was unreasonably severe under the unusual circumstances of this case: 601

Notice of Charges

- That the state did not notify the grievant of the charges against him until it notified him of the date for the pre-disciplinary hearing, did not prejudice the grievant. There is no substantial difference between notification at one time or the other. The union does not claim that the reasons submitted for the grievant's conduct would be different had he been informed of the charges earlier: 25 0

Notice of Pre-Disciplinary Conference

- If the delay in providing notice of pre-disciplinary meeting is caused by a witness' original refusal but later consent to testify, the delay is reasonable: 230

Pre-Disciplinary Conference

- That 5 1 days elapsed between the incident and the hearing and a total of 3 months went by before the grievant was actually relieved of his duties raises doubts as to whether the grievant received due process. In particular it raises questions as to whether the employer really thought that keeping the grievant on the job constituted a continuing threat and was incapable of rehabilitation: 227
- Section 24 .04 was also violated by untimeliness in holding the pre-disciplinary meeting. The meeting was not held until a month after the incident despite the fact that the violation was unequivocal: 25 5

The pre-disciplinary hearing was not conducted until three months after the investigation was concluded. However, the Arbitrator held that there was no evidence that the delay had an adverse impact on the union’s case. The Arbitrator found the Grievant guilty of dishonesty. His incident report failed to mention his assault on the Youth or any allegations against another JCO. The Arbitrator found that it was clear the Grievant used inappropriate and unnecessary force on the Youth. The Grievant knew the difference between Active and Combative Resistance. The Youth’s hands were underneath him and the other witnesses support the testimony of the JCO who said he saw the Grievant hit the Youth six (6) to eight (8) times. The Arbitrator held that the discipline was commensurate with the offense and the Grievant was discharged for just cause. 1 023

Promotional Bid

- The burden is on the employee to initiate the application process. Where applications must be “timely” to be valid, there should be a policy to provide a method of validating “timeliness” and a method to validate and acknowledge receipt of the application.

While the employee has the burden of filing a timely application, the burden of establishing reasonable and fair office procedures which ensure safety and accuracy of application filings falls on the employer: 5 4 8

Raising Issue

- For the Union to ask the arbitrator to interpret and apply the Fair labor Standards Act when the possible violation was not brought up until the arbitration hearing smacks of unfairness. The carefully drawn class grievance has been in the pipeline for two years and the possible FLSA violation by the employer should have been brought up before the hearing. The arbitrator does not wish to categorically hold that every issue must always be explicitly raised in the initial grievance. Many times grievances are drawn by persons who are untutored in specificity. Holding such persons to highly formalistic rules is unfair; pleading by inference in such cases is just: 34 5

Request for Arbitration

- Much as this arbitrator may be sympathetic toward the argument that the grievant has been deprived of a hearing because of the technical application of contractual terms, the circumstances of this case (an untimely appeal to arbitration following an untimely response by the employer from an earlier step in the grievance process) do not authorize this neutral to order an arbitration hearing on the merits on equitable grounds: 1 5 8

- The union has the burden of proving by a preponderance of the evidence that a timely demand for arbitration was sent: 1 87

Steps in Disciplinary Process

- Where the employer has published guidelines for timeliness in steps of the disciplinary process which were presumably relied upon by employees, since 24 .02 requires that disciplinary
action be initiated as soon as is reasonably possible and directs that the arbitrator consider "timeliness of the Employer's decision to begin the disciplinary process, and since Just cause under 24.01 requires fairness in the imposition of discipline, having promulgated the guidelines. The employer must follow them: 83

- Training insufficient: 168, 216

- The arbitrator found as a mitigating factor the fact that the grievant had never received any training as to how a crew leader should respond to the type of incident that occurred (one crew member had waved a knife in front of another crew member): 168

- In the circumstances facing the grievant, the type of discipline that was administered in this situation is inappropriate. The grievant was in a desperate situation and took the action that was available to her. Her reactions were instantaneous and instinctive. They occurred at a time she was in pain, fearful of damage to her hand, and during a physical struggle that evidenced fire patient's strength. It is impossible to find 12 hours of training, covering diverse topics, occurring over one year prior to the incident sufficient to overcome the grievant's instinctive reaction. The grievant was engaged in self-defense rather than patient abuse. Consequently the removal must be overturned: 216

**Timely Discipline**

- In a case involving a grievant who was disciplined on December 21 for a violation which occurred on August 2, the arbitrator found that the State reasonably initiated and followed through with the disciplinary process. Management reasonably notified the grievant that a pre-disciplinary hearing would be held and met the time limitations in the contract. The main delay was caused by the fact that the grievant was suspended during part of the interim because of previous violations: 521

**Training**

- Section 30.06 is an express limitation of the rights of management as found in Article 5 of the agreement. It grants to a limited and defined category of employees who have "technical or specialized skills who exercise independent judgment in their jobs." Employees must have both "technical or specialized skills" and "exercise independent judgment." The arbitrator found that although most of the Classification Specification of both a Local Veterans Employment Representative (LVER) and Disabled Veterans Outreach Specialist (DVOS) are general requirements both must have in their subsequent employment specific knowledge of agency policy and procedures. The LVER and DVOS employees meet the first prong of the test having technical and specialized skills. The next issue is one of independent judgment. The arbitrator equated the word judgment with discernment and the ability to discriminate between choices. Since all the work that the DVOS and LVER employees do which requires judgment is carried out under general supervision it cannot be said to be independent. Few employees will qualify under Section 30.06. The number of employees that qualify is further narrowed by the last provision of the section. The meeting must be a "work related professional meeting." The fact that the employer paid for other meetings which it was not required to do so under Section 30.06 means that the LVER and DVOS employees were discriminated against under Section 2.02 of the Agreement. Only because the leave denials were discriminatory is the employer directed to reimburse the grievants for their leave requests: 331

- Under 37.03, it is mandated that the employer pay overtime or reimburse travel expenses. The word "required" in Section 37.03 was defined by the arbitrator as required by the employer. If the employer requires the employee to attend then the employer is required to pay. The employers choice to require or not to require attendance to a meeting is entirely within the Article 5 management rights: 345

- The Union argued that the employer's classification of the training as voluntary (37.04 4) as opposed to required (37.03) is unreasonable. The arbitrator denied this claim. The employer did not act in bad faith, the action was not capricious or discriminatory, and the decision was in accord with the Agreement. The employer did not treat training differently in the past but that was because it was a pilot program. To differentiate after a trial period is not capricious. See Denver Publishing and Denver Typographical Union 52 LA 55 3: 345

- Since the employees were not eligible for pay beyond their regular hours under 37.04 they
Training Insufficient

Training of Contract Employees

The Arbitrator found that the first sentence in Article 39.01 was clear; that it banned the use of bargaining unit employees in training contractor’s employees. The Arbitrator determined that the unarmed self-defense training went well beyond “policies,” “procedures,” and “operations.” The Arbitrator noted that the session totaled 32 hours of instruction. Also, the Arbitrator determined that while the bargaining unit employees themselves would not be replaced, they were required to train individuals for positions that would otherwise be filled by bargaining unit members. Finally, the Arbitrator noted that the evidence showed that DRC knew that bargaining unit employees could not be used to provide unarmed self-defense training for the contractor’s new employees. Thus, DRC violated Article 39.01 when it required bargaining unit employees to provide the 32-hour training to the contractor’s employees. 724

Transfer

- The resignation of an OBES Claims Examiner 2 created a vacancy which the employer did not post, but instead transferred in a Claims Examiner 2 from an office outside the district. The transferred employee received a new Position Control Number, but not the one vacated by the employee who resigned. A violation of the contract was conceded by the employer, and the sole issue was the appropriate remedy. The arbitrator ordered the position in question to be vacated and posted for bids. The transferred employee was allowed to remain in the position until the status of her application was determined. If she fails to obtain the position she occupied, the employer was ordered to place her back into the office which she had left so as to prevent any lost wages due to the transfers. If a person other than the transferred employee receives the position, that employee must be made whole for any lost wages and benefits: 399

- The grievant took a magnetic tape containing public information home, which was against agency rules. She intended to return the tape but it became lost, and she was charged with theft of state property. The tape was later recovered by the Highway Patrol during an unrelated investigation. The grievant was transferred to another position without loss of pay or reduction in rank and suspended for 30 days. The arbitrator held that the employer failed to prove that the grievant intended to steal the tape (Hurst arbitration test applied) rather than borrow it. Taking the tape home without authorization was found to be a violation of the employer’s rules. The employer was found not to have applied double jeopardy to the grievant as only one disciplinary proceeding had been brought and the transfer was found not to be disciplinary in nature. The 30 day suspension was found not to be reasonably related to the offense, nor corrective and was reduced to a 1 day suspension with full back pay for the remaining 29 days: 417

- The grievant should have been on notice that he was incorrectly classified as a probationary employee. The grievant was required to resign from his job in order to transfer to another job within the agency, the grievant went down a pay range, the grievant signed an evaluation which was clearly marked as “A MID-PROBATIONARY EVALUATION” and the grievant was told not to worry about being on probation. Once the grievant was put on notice of his probationary status and did not file a timely grievance, then the grievance is untimely: 455

- The State argued that the other candidate was not barred by Article Section 1 7.05 (A) from applying for the Carpenter 2 position since he had merely made a lateral transfer as defined by Article 1 7.02(F). “Lateral Transfer” is defined as “an employee-requested movement to a posted vacancy within the same agency which is in the same pay range as the classification the employee currently holds.” The Arbitrator agreed with the State that the employee merely made a lateral transfer and was not within the probationary period: 617

Training insufficient

- The arbitrator found as a mitigating factor the fact that the grievant had never received any training as to how a crew leader should respond to the type of incident that occurred (one crew member had waived a knife in front of another crew member): 168

- In the circumstances facing the grievant, the type of discipline that was administered in this situation is appropriate. The grievant was in a
desperate situation and took the action that was available to her. Her reactions were instantaneous and instinctive. They occurred at a time she was in pain, fearful of damage to her hand, and during a physical struggle that evidenced the patient’s strength. It is impossible to find 1 2 hours of training, covering diverse topics, occurring over one year prior to the incident sufficient to overcome the grievant’s instinctive reaction. The grievant was engaged in self-defense rather than patient abuse. Consequently the removal must be overturned: 21 6

The grievance was granted. The Grievant was reinstated to his post and to be made whole. The employer removed the Grievant contending that he failed to protect a Youth; that he placed the Youth on restriction for seven to ten days without a Supervisor’s approval in order to conceal the Youth’s injuries; and that he failed to report Child Abuse. The Arbitrator held that the discipline imposed was without just cause. The Arbitrator found no evidence that the Grievant failed to protect the Youth. The evidence did not support the contention that the Grievant failed to see that the Youth got medical attention. The Arbitrator opined that “for the employer to assert that the Grievant should have substituted his judgment for that of the medical staff on this set of facts is unrealistic.” The Arbitrator also found that there was clear evidence that Unit Managers receive no training and there is no written policy on restrictions. The Arbitrator found there was no evidence that the Grievant failed to cooperate or to file other reports as required to report Child Abuse. Management was aware of the incident. If the employer wanted the Grievant to complete a specific form, per its own policy, it should have given the Grievant the form. 1 022

Transporting/Using A Cell Phone Inside an Institution

The Arbitrator concluded that more likely than not the Grievant transported a cell phone into the institution within the period in question, violating Rule 30, by using it to photograph her fellow officers. The Arbitrator held that the Agency clearly had probable cause to subpoena and search 1 3 months of the Grievant’s prior cell phone records. The prospect of serious present consequences from prior, easily perpetrated violations supported the probable cause. The Arbitrator held that the Grievant violated Rule 38 by transporting the cell phone into the institution and by using it to telephone inmates’ relatives. The Arbitrator held that the Grievant did not violate Rule 4 6(A) since the Grievant did not have a “relationship” with the inmates, using the restricted definition in the language of the rule. The Arbitrator held that the Grievant did not violate Rule 24. The Agency’s interpretation of the rule infringed on the Grievant’s right to develop her defenses and to assert her constitutional rights. The mitigating factors included: the Agency established only two of the four charges against the Grievant; the Grievant’s almost thirteen years of experience; and her record of satisfactory job performance and the absence of active discipline. However, the balance of aggravative and mitigative factors indicated that the Grievant deserved a heavy dose of discipline. Just cause is not violated by removal for a first violation of Rules 30 and 38. 1 003

Travel Reimbursements

- Travel reimbursement is an entirely different issue than travel time and appears to be covered by 32.02: 1 60

- Section 30.06 is an express limitations of the rights of management as found in Article 5 of the agreement. It grants to a limited and defined category of employees who have “technical or specialized skills who exercise independent judgment in their jobs.” Employees must have both “technical or specialized skills” and “exercise independent judgment.” The arbitrator found that although most of the Classification Specification of both a Local Veterans Employment Representative (LVER) and Disabled Veterans Outreach Specialist (DVOS) are general requirements both must have in their subsequent employment specific knowledge of agency policy and procedures. The LVER and DVOS employees meet the first prong of the test having technical and specialized skills. The next issue is one of independent judgment. The arbitrator equated the word judgment with discernment and the ability to discriminate between choices. Since all the work that the DVOS and LVER employees do which requires judgment is carried out under general supervision it cannot be said to be independent. Few employees will qualify under Section 30.06. The number of employees that qualify is further narrowed by the last provision of the section. The meeting must be a “work related professional meeting.” The fact that the employer paid for other meetings which it was not required to do so under Section 30.06 means that the LVER and DVOS employees were discriminated against under Section 2.02 of the Agreement. Only
because the leave denials were discriminatory is the employer directed to reimburse the grievants for their leave requests: 331

- Under 37.03 it is mandated that the employer pay overtime or reimburse travel expenses. The word “required” in Section 37.03 was defined by the arbitrator as required by the employer. If the employer requires the employee to attend then the employer is required to pay. The employers choice to require or not to require attendance to a meeting is entirely within the Article 5 management rights: 345

- The Union argued that the employer’s classification of training as voluntary (37.04 ) as opposed to required (37.03) is unreasonable. The arbitrator denied this claim. The employer did not act in bad faith, the action was not capricious or discriminatory, and the decision was in accord with the agreement. The employer did not treat training differently in the past but that was because it was a pilot program. To differentiate after a trial period is not capricious. See Denver Publishing and Denver Typographical Union 5 2 LA 5 5 3: 345

- Since the employees were not eligible for pay beyond their regular hours under section 37.04 they are not eligible for overtime under section 1 3.07 of the agreement: 345

Trespassing

- ODOT’s direct order that the grievant not enter ODOT property during his suspensions was reasonable where the suspensions were for fighting and for theft: 205

– U –

Unauthorized Absence of Two or Fewer Days

The Arbitrator also found that the emergency leave policy and practice was not clear enough to allow employees to predict with reasonable certainty whether their requests for such leave would be granted; also, the employees were not told what the consequences of the denial would be under the circumstances. 728

The Grievant was a Highway Worker 3 who reported 1 2 minutes late for work, went to the lunchroom, sat down and then suddenly fell out of his chair and passed out on the floor. An emergency squad was called, and he was taken to the nearest medical clinic. At the clinic, medical personnel were unable to determine a medical cause for the Grievant’s passing out or other behavior. The Grievant resisted taking a test and orchestrated a number of delays. After approximately one hour, the Grievant finally complied with the order and provided a urine sample. The Employer did not arrange for a union steward to be present prior to the testing. The sample was negative for alcohol but positive for cocaine. The Grievant had active discipline in his file in the form of counseling, a written reprimand, a one-day fine, and a three-day suspension. He was offered a Last Chance / E.A.P. agreement several times over the course of four days, but he refused the offer. The Employer then terminated his employment for violations of the directives regarding drug testing and unauthorized absence. Evidence undeniably established that the Grievant had reported to work under the influence of an illicit substance. The Arbitrator followed the “plain meaning rule” in determining that the contract language made a clear distinction between employees subject to federal law and all other employees, and found that the Union did not prove that federal law requires union representation as a pre-condition to testing. The Arbitrator further stated that, under the circumstances, the presence of a Union representative would have had no impact on the eventual outcome, especially in view of the fact that there is no claim or any evidence of procedural defects neither in the testing procedure itself nor of any actual rights violations to the Grievant. The Grievant’s refusal to use available rehabilitation opportunities precluded any opportunity for continued employment with ODOT. 944

Unapproved Behavioral Intervention/Inconsiderate Treatment

The arbitrator’s award was issued as a one-page decision. There was no rationale stated for the conversion of the grievant’s removal.

The grievant was returned to work as a Custodian with no back pay and her record reflected no break in seniority and service credit. The grievant’s removal was converted to a 2-day suspension and she was indefinitely returned to a position that was not in direct contact with residents. The grievant retained bidding rights to non-direct care positions. Her pay was redlined at
The arbitrator’s award was issued as a one-page decision. There was no rationale stated for the conversion of the grievant’s removal. The grievant was returned to work as a Custodian with no back pay and her record reflected no break in seniority and service credit. The grievant’s removal was converted to a 2-day suspension and she was indefinitely returned to a position that was not in direct contact with residents. The grievant retained bidding rights to non-direct care positions. Her pay was redlined at the TPW rate until her Custodian pay rate caught up to the redlined rate. Vacation and personal time would accrue only for those hours during the time the grievant was removed.

Unauthorized Leave

- See absenteeism

- There are extenuating circumstances in the grievant’s removal for unauthorized absence. The employer created through its inaction a false sense of security. The employer allowed grievant to be on unauthorized leave for four and a half months without warning him of the possible discipline or advising him in any way that he should be concerned:

Regarding the first incident, the Arbitrator held that the charge of unexcused absence for 32 minutes was sustained because there was no testimony or evidence presented as to why the grievant was late returning from lunch. Regarding the second incident, the Arbitrator affirmed the charge of unexcused absence because there was no credible evidence that the grievant notified anyone of his whereabouts for a short period of time when he left his work site:

The grievant failed to report to work for several months because he was incarcerated and he was subsequently removed for taking unauthorized leave. The Arbitrator held that the employer usually prevails when an employer discharges an incarcerated employee on the basis of absenteeism caused by an employee’s incarceration. The reason such a discharge is proper is not because of the crime the employee has committed, but rather it is simply that through the employee’s own action he has made it impossible to fulfill his obligation to report to work:

Unauthorized Relationship with an Inmate/Parolee, or Ex-Inmate

- See Inmate, unauthorized relationship with

- It is unreasonable to believe that an inmate “snitch” would disclose information about violations by other inmates when hanging around the grievant’s desk. The grievant also never explained the reason why she went into a locked restroom with the inmate. It is relevant that the restroom was such a small room. The close quarters makes a reasonable inference that the grievant was engaged in improper conduct. It is incumbent on the grievant to keep the door open so that the appearance of impropriety would not be created:

- Playfulness or teasing of a highly suggestive nature indicates a familiarity with the prisoners that is inappropriate in a correctional facility:

- Once the State proved that the grievant was frequently in a locked rest room with the inmate and allowed the inmate to help him with pack ups, the burden was on the grievant to refuse or satisfactorily explain these actions:

- The grievant jeopardizes the safety of the other Correction officers by carrying the “man-down” alarm when she was with an inmate in a locked rest room or out on the landing:

- The failure of the grievant to submit to a polygraph examination was given no weight:

- The phone records of the grievant showing calls from the correctional facility to his house, were taken as reliable evidence. A number of collect calls were person to person. It is impossible to be charged for these calls without the consent of someone at the residence. The records are objective proof of a series of unreported and improper contacts between the grievant and the inmate. The inmate’s testimony that he was blackmailing the grievant and that the grievant sold marijuana to the inmate were corroborated by the marijuana found in the inmate’s cell, a blackmail note written by the inmate and the telephone calls between the inmate and the
grievant. There was just cause for the removal: 31

- Even if the unauthorized relationship is not extensive it could give the appearance of wrongdoing and leave the employee open to manipulation by the inmate’s and distrust by fellow co-workers. The officer’s reputation influences their ability to perform their job through its impact on relationships with inmates and co-workers. The rule prohibiting unauthorized off-duty relationships has a nexus with employment: 31 3

- When a Correction Officer may have learned of a rowboat for sale from an inmate and went to the inmate’s wife house the officer did violate work rule 4 0 by having an unauthorized relationship, but this did not warrant termination: 31 3

- The past cases of different treatment for work rule 4 0 violations, unauthorized relationships show the flexibility of discipline. The arbitrator found that there should have been flexibility in this case. The grievant should not have been removed. His violation involved a single financial transaction with only a tenuous and limited connection to inmate or his family member. The grievant was also a three year employee with a good work record: 31 3

- The grievant’s friendliness and native compassion for fellow human beings, including inmates, puts her out of place as an employee of a prison. The arbitrator found that the grievant lacked the coolness and detachment that permits Correction employees to distance themselves from their charges. The grievant understood the work rules against unauthorized relationships and still befriended inmates. She sent one inmate a Valentine’s Day card. The arbitrator agrees that the grievant is entitled to compassion, but finds the removal was for just cause. For that reason the arbitrator is powerless to overturn the discipline. Once the just cause is established, an arbitrator has no authority to embellish job security by interposing their personal sympathies. The most the arbitrator can do for the grievant is to leave the institution with a clean record. The grievant will be permitted to resign voluntarily and if she does the employer will be required to expunge her record and give no less than a neutral recommendation to potential future employers: 320

- All employees working in a Correction environment are responsible for safety: 320 See 27-1 2-89-02-0030-01 -03 February 20, 1 990

- The grievant had an unauthorized friendship with a youth that was released from the facility. The discipline of termination is not corrective in this case. The grievant is a six-year employee with a good work record; the offense was serious but the employee was not without the potential for learning. The grievant is to be reinstated under a Last Chance Agreement: 338

- The Employer had just cause to remove the grievant because she violated Rule 4 5, prohibiting giving preferential treatment to inmates, and Rule 4 6(e), prohibiting personal relationships with inmates. The grievant, a food service coordinator, corresponded by mail with the inmate. In addition, the inmate and the grievant were alone together on several occasions and were also observed having sexual intercourse: 4 4 2

- The Employer had just cause to remove the grievant, a Correction Officer, for violating Rule 4 6(e) of the Standards of Employee Conduct. She engaged in an unauthorized personal relationship with a parolee. The grievant engaged in a long-term relationship with a parolee prior to and following her appointment, and she failed to disclose the matter after orientation and training involving the specific work rule: 4 5 1

- Unauthorized relationships, involving a close personal relationship, consistent telephone contact, and a scheme to avoid detection, between a Correction Officer and an inmate is a serious offense. The activities create problems for the correction facility, and therefore there is just cause for appropriate discipline. In these situations, appropriate discipline can be removal of the employee: 4 9 5

- The grievant was denied reinstatement of her position as a Correction Officer because she violated work rules designed to protect prison guards by limiting personal contact between the guards and the inmates. The grievant had a physical relationship with an inmate, was involved in an extortion scheme with the same inmate and gave her unlisted phone number to another inmate. The arbitrator found that the grievant was terminated for just cause: 5 0 2
- In a case involving a correction officer grievant who allowed an ex-inmate to come to the institution to pick up the grievant's car for a tune-up, the arbitrator held that the grievant was involved in an unauthorized relationship with an inmate. In making his decision the arbitrator considered evidence of previous involvement between the grievant and the ex-inmate and noted that the grievant was previously warned about his involvement with this specific ex-inmate: 5 1 7

- The grievant was removed for just cause, because it was found that the grievant had formed an unauthorized relationship with an inmate by committing a prohibited transaction with an inmate: 5 4 3

- The Arbitrator held that the grievant was removed for just cause in light of the evidence and testimony which clearly established that she was engaged in a relationship with an inmate. The Arbitrator noted that an unauthorized relationship does not necessarily require romantic or sexual aspects. In this case the contents of the phone conversations were sufficient to establish the unauthorized relationship: 6 0 7

- The record does not establish a sexual relationship between grievant and any inmate. Nor is there credible evidence to establish that the inmate was twice out-of-place in the grievant’s area. The evidence offered to support these allegations is either hearsay or double hearsay. However, there is credible circumstantial evidence that the grievant and the inmate were acquaintances with a personal relationship that Rule 4 6(b) contemplates and prohibits. Substantial inconsistencies in the testimonies of the grievant and the inmate regarding a money order and the newspaper clipping led the Arbitrator to find that the grievant and inmate had a business/personal relationship in violation of Rule 4 6(b). 7 3 6

- Without independent corroborative evidence, the employer’s frequent observations of the inmate being out of place in the grievant’s work area did not demonstrate a relationship between the grievant and the inmate. On the other hand, the greeting cards had some probative capacity because they establish a basis for inferring a relationship between the inmate and the grievant. The language in the cards themselves is sufficiently emotional and personal to support an inference that the person who sent them more likely than not had a personal relationship with the inmate. The cards are insufficient to establish that a sexual relationship existed. Nor did the employer formally accuse the grievant of engaging in a sexual relationship with the inmate. 7 4 5

- It was determined that the grievant violated Rule 4 6(a), however, the Arbitrator found that the grievant’s misconduct was limited to exchanging personal information with the inmate and failing to report the correspondence she received from him 7 5 0

The grievant was charged with having an unauthorized relationship with an inmate. Handwritten notes to the inmate were analyzed and determined to be from the grievant. The arbitrator found that the employer met its burden of proof and based its findings on both direct and circumstantial evidence. 7 5 8

The grievant was accused of having an unauthorized relationship with an inmate and of writing checks to the inmate. The arbitrator stated that the grievant’s testimony and statements were inconsistent and did not match the facts. While he accepted the premise that some of the witnesses had motivation to lie, the arbitrator noted that neither the order of events which occurred nor the documents nor the testimonies supported the grievant’s conspiracy theory. The arbitrator found that the evidence and testimonies presented made a convincing case that the grievant was involved with the inmate which threatened security at the institution. 7 7 3

The grievant, a Correction Officer, was observed in the company of a particular inmate on several occasions, including an incident in which another correction officer witnessed the inmate rubbing the grievant’s back. The arbitrator concluded that sufficient evidence existed to support the employer’s position. The inmate’s statement and the CO’s statement corroborated each other and were credible. The arbitrator noted that testimony from two Union witnesses who observed the grievant’s behavior and viewed the grievant’s conduct as inappropriate enhanced that credibility. The arbitrator determined that the employer provided conclusive and substantial evidence that the grievant had unauthorized contact with the grievant. The employer provided evidence that the grievant emailed the inmate’s mother and indicated that she wanted the inmate’s mother to call her. The fact that the grievant failed to
comply with the direct orders to provide her son’s cell phone number – pivotal in determining whether or not phone calls occurred using that particular phone – indicated to the arbitrator that the grievant did not want to disclose the number. There were no mitigating factors in this case. The grievant was aware of the risks and the consequences of her actions. She continued her actions anyway. The arbitrator found removal was for just cause. 798

The arbitrator found that the grievant failed to inform her employer of a past casual relationship with an inmate. The grievant had a duty to notify her employer of this information. In this instance, the grievant had ongoing contact with the inmate as a Word Processing Specialist 2 responsible for telephone and office contact with the inmate. The arbitrator also found that the grievant sent confidential official documents to the inmate without approval. He noted that the fact that the mail was intercepted does not negate the severity of the grievant’s actions. Her actions potentially placed the parole officer in charge of the inmate’s case at risk for retaliation by the inmate. 803

The grievant was charged with an unauthorized relationship with an inmate. She denied having a relationship with the inmate while working overtime on a unit to which he was not regularly assigned. Following an investigation, which included review of video tape of the grievant entering and exiting a laundry room with an inmate during a formal head count, management determined that the grievant failed to obtain authorization before he released an inmate from her cell during a formal count. He placed himself in a compromising position by being in a dark room with an inmate for ten minutes. He was removed from his position. The arbitrator determined that based on the evidence the grievant violated agency rules of conduct, however, aggravating and mitigating factors in this instance do not warrant removal. The arbitrator found the removal to be “unreasonable, arbitrary, and capricious”. The arbitrator based his decision on the grievant’s ten years of service, his spotless disciplinary record and presumed satisfactory evaluations. Additionally, he maintained a respectable status in his community. More importantly, the arbitrator found that the agency failed to give the grievant adequate notice and access to policy regarding unauthorized relationships between a CO and an inmate cannot exist. 875

The grievant was charged with an unauthorized relationship with an inmate. The former inmate, who was not under the supervision of the State at the time of the arbitration, did not attend the hearing and could not be located. The arbitrator listened to six selected taped telephone calls and determined that the voice she heard was that of the grievant; and, that she did in deed have a personal relationship with the former inmate. The arbitrator found that the affidavits presented by the grievant did not place the grievant somewhere else at the time of the calls. The grievant only presented denials and testimony of her family members. The arbitrator determined that in light of what she heard herself, there was insufficient evidence to overturn the removal. 885

The arbitrator found the grievant did not want to disclose the number.
inmate movement during counts. The arbitrator stated, “Even though the grievant must have understood the broad, commonsensical guidelines about inmate movement during counts, it is unfair to hold him fully accountable for specific provisions in rules where the Agency has not shown that he either knew of the rules or had reasonable access to them.” 890

It is the Arbitrator’s opinion that the employer had just cause to remove the Grievant for violating Standards of Employee Conduct Rule 4-6 (B). The Grievant was engaged in an unauthorized personal relationship with Parolee Young who was at the time under the custody or supervision of the Department. The Arbitrator also noted that evidence discovered post-discharge is admissible as long as it does not deal with subsequently discovered grounds for removal. Furthermore, the Arbitrator concluded that Article 25 .08 was not violated in this circumstance because the Union’s information request did not meet the specificity requirement contained in the provision. Finally, the Union failed to plead and prove its disparate treatment claim since it did not raise the issue at Third Stage or Mediation Stage. 893

The grievant was a CO who was charged with allegedly giving preferential treatment to an inmate and having an unauthorized relationship with an inmate. The grievant admitted at arbitration that on occasion he provided an inmate cigars, scented oil and food from home and restaurants. He admitted that he accepted cigarettes from inmates who received contraband. The arbitrator found that the grievant was removed for just cause. His misconduct continued for an extended period of time; thus his actions were not a lapse in judgment. He attempted to conceal his misconduct by hiding food so the inmates could find it. Therefore, the grievant knew what he was doing was wrong. The grievant accepted “payment” for the contraband when he accepted cigarettes in exchange for the food and other items he provided to the inmates. The arbitrator found that grievant’s actions compromised the security and safety of inmates and all other employees at the facility. 95 3

Unauthorized Removal of Documents

The grievant, an attorney for the Department of Commerce – Enforcement Section of the Division of Securities (Division), was engaged in making criminal referrals to the prosecuting attorney of the proper county “any evidence of criminality” discovered by the Division. The grievant made such a referral to the Attorney General’s office as the result of an investigation of alleged fraudulent scheme involving the exchange of promissory notes for an investment in golf practice facilities. The arbitrator found that there were no Division rules – written or oral – instructing the grievant in her selection of documents to share with the SEC, under the access agreement the Division had with the SEC. The record failed to prove that the communication from the AG’s office was a communication between attorney and client. It was noted that the telephone calls between the prosecutor’s office and the grievant were initiated by the prosecutor’s office as a result of a complaint by a citizen. The grievant had a duty to cooperate with an official investigation. The arbitrator found that the grievant did fail to prepare subpoenas in a timely manner and the grievant offered several reasons for the neglect. The arbitrator noted that the employer had a disciplinary grid which established sanctions for the first four offenses. Therefore, the arbitrator converted the removal to a written warning to be placed in the grievant’s personnel records. 797

Unauthorized Use of Information

The grievant was a Training Officer with seventeen years of service with the State of Ohio, with an impeccable work record, no disciplines and several letters of commendation. He received information that a Parole Officer (PO) was driving on a suspended driver’s license from the PO’s partner (and friend of the grievant). This information originated via telephone to the PO’s partner from a Municipal Court Clerk/Police Officer. The PO’s partner did not wish to become involved and asked the grievant to relay the information to the proper people. When he took
this information to the PO’s supervisor, he was advised to obtain and present proof of this allegation. The grievant contacted the Municipal Court Clerk/Police Officer who provided a LEADS printout to him. The grievant erased the key number from the printout in an attempt to protect the identity of the Officer. The employer contended that the grievant’s conduct involved unauthorized use, release or misuse of information, that he interfered with an official investigation and that his actions could prohibit a public employee from performing his/her duties. The Union argued that the PO’s supervisor’s advice to obtain proof of the allegation was an implicit authorization to do just that. The arbitrator determined that the employer did not establish proof of all of the alleged violations leveled against the grievant. The one violation established by the employer – erasing the key number – was de minimis. The grievant is a seventeen-year employee with no active disciplines and an exemplary work record. The arbitrator noted that the grievant’s conduct complied with Rule 25 of the “Performance-based Standards Track” and the provisions of the Whistleblower Statute, “thereby advancing the explicit and desirable goals of the Adult Parole Authority and the State of Ohio.” The Whistleblower Statute specifically prohibits the removal or suspension of an employee who complies with the requirements of the statute. The arbitrator also found that the grievant was a victim of disparate treatment when comparing the serious violation of the Parole Officer and the minimal measure of discipline imposed upon him. The arbitrator concluded that the grievant’s removal “was unreasonable, arbitrary, and capricious and not for just cause.” 84 9

Unauthorized Use of State Property

The grievant was charged with accessing employee email accounts without authorization. He was removed for failure of good behavior; unauthorized use of state time/property/resources for personal use. The Union argued that a procedural flaw occurred in this matter in that the disciplinary action was untimely. In its implementation of discipline, management relied upon a report that took 1 ¾ years to complete. It was not reasonable to expect the grievant to remember events over such a long period of time. The Union noted that there was a distinction between accessing an email account and actually viewing the emails. Accessing the accounts did not violate the grievant’s network privileges. The employer could not prove that the grievant did indeed view the contents of the accounts. The grievant had a good work record prior to the discipline. The employer did not implement progressive discipline in this instance. The arbitrator rejected the Union’s timeliness objection, stating that the employer moved in a timely manner once it was satisfied that the grievant had violated policy. The arbitrator noted that the employer allowed ample time for the Union to conduct a proper investigation. The arbitrator found that management could prove that the grievant logged on to several accounts, but could not prove that he actually read the contents. Management could not prove that the grievant used state resources for personal use or gain. The arbitrator noted that a co-worker had also accessed email accounts that were not his but he had not been disciplined. The arbitrator stated, “If it is a serious offense to log on to accounts other than one’s own the question arises as to why one employee was discharged and the other was neither discharged nor disciplined.” The grievance was sustained. The grievant was reinstated. He received back pay minus any earnings he received in the interim from other employment due to his removal. The grievant received all seniority and pension credit and was to be compensated for all expenditures for health incurred that would have been covered by state-provided insurance. All leaves balances were restored and any reference to this incident was ordered stricken from the grievant’s personnel record. 924

Unauthorized Use of State Vehicle

- Arbitrator found grievant had taken his truck to an unauthorized location since the truck was already loaded and he could not load the additional item he had intended to load at that location: 1 1 3

The Arbitrator concluded that the grievant showed poor judgment in not seeking permission, and he used a State vehicle to transport the dirt without consent. She found the grievant guilty of unauthorized use of State equipment and leaving work without permission. The grievant received a thirty (30) day suspension. 71 0

Unemployment Board of Review

- The results of the other proceedings and investigations which were carried out by the FBI, the grand jury, the state highway patrol, the
Legislature's Correctional Institution Committee, and the Unemployment Compensation Board of Review were produced under different rules and for different purposes than those which govern this arbitration. Thus, those results carry no weight in this arbitration: 1 80

Unpaid Leave

- Section 31 .01 © of the Contract requires a doctor’s verification for medical unpaid leave, which the grievant provided consistently. The Employer waived its right to insist retroactively on a medical doctor’s verification, as opposed to a psychologist’s verification, because the Employer never raised the issue with the grievant. In the future, the Employer may insist that any diagnosis of mental illness be verified by a psychiatrist: 4 4 6

- Unpaid leave was improperly denied the grievant. The second medical opinion received by the Agency was ambiguous and not the proper basis for a decision that the grievant was physically capable in mind and body to return to work: 4 4 6

- The Employer did not violate the Agreement when it denied the grievant leave without pay. Approval of leave is not automatic: 4 6 8

- The Union demonstrated that it has been a past practice to grant employees unpaid leaves in order for them to accept Union representative positions. Article31 .01 specifically instructed employers to grant unpaid leave to Union representatives not just to Union officers. The language was clear and ambiguous: 4 9 7

Unsafe Working Conditions

- Duty to report: 1 6 8

- Under most circumstances, an employee is insubordinate if he refuses an order. The rule is "obey now, grieve later." There is an exception where a reasonable person would believe that by carrying out the work assignment, he/she would endanger his/her health or safety. That the grievant did not refuse to work earlier, that the Division of Occupational Safety and Health did not close the plant down, that tests did not reveal that the asbestos did not exceed recommended standards, that the grievant's physician was unable to substantiate that the grievant's health problems were caused by the working conditions, and that grievant rejected an offer that would have lowered his contact with the asbestos, were all bases on which the arbitrator concluded that a reasonable person would not have refused to work: 2 2 0

- Section 24 .04 was violated where the grievant was never specifically informed that his actions could result in removal. The employer attempted to skirt this issue by alleging that the grievant actions (refusal to obey an order on the basis of a claim that working conditions were unsafe) amounted to a malum in se offense. This arbitrator disagrees because the nature of this specific insubordinate offense differs significantly from the "obey now grieve later" situation. (Note that in this case the arbitrator did find that the grievant should have obeyed the order because a reasonable person would not have believed the working conditions unsafe): 2 2 0

Unwarranted Force

The Arbitrator relied on the video evidence. The video indicated that the youth was not engaged in any conduct that required imminent intervention by the Grievant. The Arbitrator held that, given the seriousness of the use of unwarranted force by the Grievant and his failure to follow proper procedures when judgment indicated that a planned use of force was required, just cause for discipline existed. However, removal was inappropriate. The Grievant’s record of fourteen years of good service as well as his reputation of being a valued employee in helping diffuse potential problem situations mitigated against his removal. The incident was hopefully an isolated, one-time event in the Grievant’s career. 9 9 6

Central to the issue was the credibility of the Grievant. There was evidence to contradict the Grievant’s statement that the youth threatened to harm himself. Reliable evidence existed to conclude that the youth was not suicidal and did not state that he was going to harm himself. Even though the Grievant claimed the youth was going to harm himself, he did not implement a planned use of physical response per DYS policy 301 .05 . The physical response utilized by the Grievant was unwarranted under the facts, and it constituted a violation of Rule 4 .1 2. The Grievant escalated the situation by removing items from the youth’s room—an action that was not required. The Grievant could have utilized other options, but did not. After physically restraining the youth, the Grievant contacted two operations managers. If he was able to contact his supervisors after the restraint, what was the imminent intervention that precluded his contacting them prior to
the altercation? The Arbitrator held that DYS had just cause to discipline the Grievant and given his prior discipline of record, their actions were not arbitrary, unreasonable, or capricious. 1 002

The grievance was sustained in part and denied in part. The Grievant was reinstated and received a forty-five day suspension. The Grievant acted contrary to the Employer’s training and directives and admitted he acted inappropriately. The Youths made verbal comments that were tied in to their combative behavior. The Arbitrator found that there were grounds for discipline, but did not think removal was warranted. Considering the total evidence, the discipline was not progressive and needed to be modified. The removal was changed to a forty-five day suspension. 1 015

The Arbitrator overruled the timeliness issue raised by the union. Article 24 .06 gives the employer the option to delay the decision to discipline and halt the running of the forty-five days until after any criminal investigation. The evidence was clear that there was a fight and that the Grievant and several other JCO’s were injured. However, the evidence was clear from witnesses that the Grievant hit and kicked the Youth once the Youth was on the ground. Considering the severity of the assault, the Arbitrator found the removal to be correct. 1 020

The pre-disciplinary hearing was not conducted until three months after the investigation was concluded. However, the Arbitrator held that there was no evidence that the delay had an adverse impact on the union’s case. The Arbitrator found the Grievant guilty of dishonesty. His incident report failed to mention his assault on the Youth or any allegations against another JCO. The Arbitrator found that it was clear the Grievant used inappropriate and unnecessary force on the Youth. The Grievant knew the difference between Active and Combative Resistance. The Youth’s hands were underneath him and the other witnesses support the testimony of the JCO who said he saw the Grievant hit the Youth six (6) to eight (8) times. The Arbitrator held that the discipline was commensurate with the offense and consistent with ODYS’s work rules and past practice. 1 026

The grievance was sustained in part and denied in part. The removal was reduced to a 1 0-day suspension. The Arbitrator found that the Grievant committed the alleged misconduct; therefore, the Employer had just cause to discipline her. However, there was not just cause to remove her. Considering all the circumstances, the Grievant had an isolated and momentary lapse in judgment. There was no physical harm or dire consequences from the momentary lapse. Recent arbitration awards between the Parties, uniformly reinstated--without back pay--employees involved in physical altercations more substantial that the Grievant’s. (See Arbitration Decisions: 971, 995, 996.) The Grievant was reinstated without back pay, but with seniority restored. 1 034

Vacated Suspension

The Grievant was removed after two violations—one involving taking an extended lunch break, the second involved her being away from her work area after punching in. Within the past year the Grievant had been counseled and reprimanded several times for tardiness and absenteeism, therefore, she should have know she was at risk of further discipline if she was caught. Discipline was justified. The second incident occurred a week later when the Grievant left to park her car after punching in. The video camera revealed two employees leaving after punching in. The other employee was not disciplined for it until after the Grievant was removed. That the Reviewing manager took no action against another employee when the evidence was in front of him is per se disparate treatment. No discipline for the parking incident was warranted. Management argued that removal was appropriate since this was the fourth corrective action at the level of fine or suspension. The Grievant knew she was on a path to removal. But she also had an expectation of being exonerated at her Non-traditional Arbitration. Her 3-day suspension was vacated by an NTA decision. That fine was not to be counted in the progression. The Grievant was discharged without just cause. 992

Vacation Accrual

- Section 1 6.02 defines seniority and continuous service. Service is continuous unless certain enumerated events have occurred. A layoff is not
one of the events. Thus, the grievant's seniority and continuous service must include the period of the layoff and of the employment prior to the layoff. Contract language signifies that seniority can be adjusted retroactively for periods prior to the contract the arbitrator ordered that the grievant's longevity pay and vacation accrual be calculated on the basis of the grievant's seniority which includes the layoff and the time prior to the layoff: 21 5

**Vacation Canvas**

A Consent Award was issued by the Arbitrator. The Employer shall not implement a policy which eliminates vacation usage in the Claims Management Department. Vacation requests shall be considered on an ad hoc basis based on the totality of the facts and circumstances. A yearly vacation canvas shall be conducted in October or November of each year for the upcoming calendar year. Vacation requests that are approved will be for one week or more and will be based on seniority. All other vacation requests will be considered on an ad hoc basis. Those vacation requests that are approved will be approved on a first come, first served basis. When the Claims Management Department determines that it needs to implement leave restrictions beyond minimum staffing levels it will communicate those circumstances to the Union President and/or designee prior to issuing notice to the bargaining unit members of the department. 934

**“Vacation Dump”**

Article 28 is clear in that permanent part-time employees earn and are to be credited with paid vacation leave the same as permanent full-time employees but pro-rated for the hours worked. The Agency has complied with column one of the schedule; however, it has ignored the second column in the milestone years, thus denying these employees their entitlement to the full pro-rata amount earned in the milestone year. While it was true that neither the CBA nor the part-time policy mention “vacation dump”, this was the method used for years for other public employees in Ohio in the milestone years. A “vacation dump” is a lump sum credit of earned vacation that has not accrued on a biweekly basis by virtue of the fact that accrual rate increases lag increases in earned annual vacation leave by one year. The mere fact that there has been a practice of not making similar adjustments for most part-time State employees does not evince a binding past practice. A past practice is binding only when it rests on a mutual agreement. There was no such evidence here. 973

**Verbal Abuse of a Co-worker**

- The charge of verbal abuse against another employee is subsumed by the violation of the rule prohibiting fighting and does no justify imposition of an additional penalty: 1 63

- The arbitrator held that there was just cause to discipline the grievant for calling his co-worker a "moron" and his supervisor a "wimp": 5 34

- The grievant was removed for fighting with and threatening a co-worker. The Arbitrator noted that the grievant was not a physical battler; rather she fought with her mouth. The Arbitrator held that despite grievant’s threat to shoot her co-worker, there was not evidence to indicate that the grievant was inclined toward violence. Thus, the grievant was reinstated without back pay or reinstatement of benefits, but with full seniority: 61 0

- The grievant’s accuser testified that the assault that occurred on September 15 was not an isolated act of misconduct and that the grievant verbally abused co-workers to the point that the grievant constantly “made people feel afraid. Because the State had not disciplined the grievant for prior misconduct in a manner consistent with Section 24 .02 of the Agreement, however, the charges concerning verbal abuse of co-workers could not be considered as a cause for removal: 61 5

- The grievant was removed for fighting with and threatening a co-worker. The Arbitrator noted that the grievant was not a physical battler, rather she fought with her mouth. The Arbitrator held that despite grievant’s threat to shoot her co-worker, there was not evidence to indicate that the grievant was inclined toward violence. Thus, the grievant was reinstated without back pay or reinstatement of benefits, but with full seniority: 61 0

- The grievant’s accuser testified that the assault that occurred on September 15 was not an isolated act of misconduct and that the grievant verbally abused co-workers to the point that the
The grievant constantly “made people feel afraid. Because the State had not disciplined the grievant for prior misconduct in a manner consistent with Section 24.02 of the Agreement, however, the charges concerning verbal abuse of co-workers could not be considered as a cause for removal: 61

The grievant involved in a verbal and physical confrontation with a co-worker. The testimony presented by the employer’s witnesses was found credible by the arbitrator. The arbitrator noted that no evidence or facts were presented to indicate that the co-worker made any physical gestures towards the grievant. The arbitrator stated that the grievant’s confrontational behavior during the incident and her continued aggressive behavior towards co-workers convinced him that the employer met its burden of proof. He also noted that the employer had shown a previous measure of restraint in its unsuccessful attempt to correct the grievant’s behavior. The arbitrator stated that a long-term employee could not seek protection if he/she was continually abusive towards co-workers or management. 867

**Verbal Promise**

- The Employer verbally promised that if the grievant’s transfer did not work out, she could return to her old position. There was no time limit on this promise, and so the grievant should be allowed to return to her old position: 446

**Verbal Reprimand**

- The arbitrator stated that an oral non-documented verbal reprimand cannot be equated with an officially documented verbal reprimand: 209

**Visa**

The Arbitrator held that the Grievant was neither eligible for, nor entitled to, reinstatement. Based on the degrees of fault the Grievant was entitled to twenty-five (25) percent of the back pay from the date of his removal to the date of the Arbitrator’s opinion. In addition, the Agency shall compensate the Grievant for twenty-five (25) percent of all medical costs he incurred and paid for out-of-pocket, as a direct result of his removal. The triggering event for the removal was the failure to extend the Grievant’s visa. The following factors contributed to the untimely effort to extend the visa: (1) the Agency’s failure to monitor the visa’s expiration, leading to a belated attempt to extend the visa; (2) the Agency’s failure to monitor the Grievant’s job movements; (3) the Grievant’s decision to transfer to the Network Services Technician position, which stripped him of proper status under his visa; and (4) the Grievant’s decision not to notify his attorney about the transfer to the NST position. The Grievant’s violation of a statutory duty, together with his silence, looms larger in the lapse of the visa than the Agency’s violation of its implicit duties. The Arbitrator held that the Agency failed to establish that the Grievant violated Rule 28. Because the Grievant was out of status with an expired visa, the Arbitrator held that he was not entitled to reinstatement. As to comparative fault, the Agency and the Grievant displayed poor judgment in this dispute and neither Party’s fault absolves the other. 980

**Vocational Training Programs**

- The decision to allow a training opportunity for inmates involved the assignment of new work, not a transfer of work customarily done by the bargaining unit. There were educational opportunities and goals assigning inmates to do the renovation: 446

**Voluntary Quit**

- Even a thoughtless outburst can be considered a voluntary quit. The employee needs to be psychologically impaired to the extent that he/she could not be held responsible for their act for the quit not to be voluntary: 278

- The grievant was being investigated for theft. The highway patrol in its investigation asked the grievant and another employee to take a polygraph examination. The grievant agreed to take the test which was administered two to three weeks after the alleged incident of theft. The grievant “failed” the test. When given an option of resigning with no mark on her personnel record, the grievant resigned. The Union challenged whether the resignation was voluntary. The basic criteria to decide whether the grievant’s resignation was voluntary is:

1) Was she operating under such emotional deficit as to render her incompetent?
2) Was the grievant’s decision made voluntarily or was it induced by misrepresentation, coercion, or duress?

The grievant clearly understood the possible consequences of her decision to resign or not to resign. She displayed no emotional instability; she ate lunch, talked with co-workers, read the paper.
There was no evidence of coercion or distress. The grievant had weeks to consider the scenario:

- Since the grievant knowingly and voluntarily resigned, the grievance is not properly before the arbitrator. As an ex-employee, the grievant had no standing to grieve:

- The State argued that the grievant voluntarily quit her position as a correction officer. Further, the State cited cases which noted that anxiety or thoughtless outbursts does not excuse one from the responsibility for voluntary acts and decisions. However, the Arbitrator stated that these cases do not apply in this situation since the grievants in those cases signed written resignations whereas in this case, the grievant refused to sing a quit slip:

Three grievances with a factual connection were combined.

The Arbitrator held that the events of August 23, 2006 clearly indicated an intention on the part of the Grievant to resign. The Grievant and her supervisor met in the supervisor’s office. At some point in time the Grievant threw the lanyard that held her ID card and her key card onto the supervisor’s desk and said “I’m out of here.” She left to go home. The Union argued that the comment “I’m out of here.” was the result of a panic attack and the Grievant was suffering from safety concerns arising out of the performance of her work. The Arbitrator found that the Grievant’s panic or anxiety arose in part from her decision to challenge her supervisor "to burn in hell.” She then learned that this challenge had been reported by the supervisor. The Arbitrator held that there was no retaliatory discipline against the Grievant for expressing safety concerns about where she was assigned to work; nor was she denied emergency personal leave.

- W –

Waiver

- Where arbitration hearing was postponed several times and the employer claimed that the union was either estopped by the doctrine of laches or because it had waived the right to arbitration, the arbitrator found that both parties were at fault and that no intentional relinquishment of the grievance had occurred. Given the employer's fault and the grievant's right to a day in court, the arbitrator found the grievance arbitrable. But since the union was also at fault, and this fault hurt the employer by affecting the availability of witnesses and the clarity of memories, the arbitrator announced that if the grievance was sustained, the award would be diminished.

Weapon

- Realizing that a crew leader cannot discipline his fellow bargaining unit members severely limits the extent of his authority as a crew leader in an incident where one crewmember was waving a knife in front of another. To assure the safety of the crew, the grievant should have voiced his concern immediately upon observing the conduct so as to defuse what was potentially a dangerous and unsafe situation. To merely observe the conduct and say nothing is inconsistent with the crew leader's duty to assure the safety of the crew and "doing the job right." The arbitrator said that the grievant was wrong to think that it was not a serious matter even though employees often carry knives at work and the employee waving the knife did not appear serious to the grievant:

- Where the grievant had forgotten that the weapon was in his brief case, the arbitrator held this does not absolve the grievant of the responsibility to comply with regulations:

- When the grievant was sent back to his car to leave his weapon, but still had a bullet in his brief case when he returned, the arbitrator said the grievant should have known how many bullets were in the brief case and counted them to make sure he removed all of them:

- At TBMFU, a facility that houses mental patients, some of whom have committed violent crimes, weapons on the grounds pose an exceptional hazard to patients and employees. A violation of the policy prohibiting weapons is, therefore, a major breach of security warranting severe discipline. Removal is a penalty commensurate with the offense even if the conduct was not intentional but only negligent since the possible consequences are so serious:

- On hospital grounds:

- Where an inmate was escaping with hostages, and one of the hostages said "do as he says, he has a gun," the grievant acted reasonably in surrendering his weapon, even though the grievant
could not see the inmate's gun. Even though the grievant was an excellent marksman, it was not unreasonable for him to choose not to shoot it out. The grievant and the hostages could have ended up getting killed. The inmate was desperate. But there was also no mention of deadly force being used by the inmate: 223

The grievant was charged with allegedly carrying an unlicensed, concealed weapon in his travel bag. He was required to conduct training classes and it was necessary to stay at a hotel close to the training facility overnight. He discovered the weapon in his travel bag which he placed in the bag for a previous camping trip. An incident with a sick coworker caused him to forget the weapon which he placed in the hotel night stand upon discovery that he had the weapon with him. The next guest to stay in the room found the weapon, turned it in to the front desk and the Agency was called. Additionally, an issue of nepotism was raised because the grievant’s wife was Superintendent of the Agency. The Arbitrator found that the evidence in the record did not prove that the spouse’s presence as Superintendent somehow caused the Agency’s penalty decision to be unreasonable, arbitrary, and capricious or an abuse of discretion. The Arbitrator determined that management established that the grievant committed the violation and that some measure of discipline was warranted. The aggravating factors in this case were: 1) the grievant brought a deadly weapon onto state property. This was a 4th level, and very serious violation; 2) the grievant knew or should have known that the weapon was in his travel bag; 3) The grievant was the Agency’s only Training Officer and should have exercised due care to comply with all of the Agency’s rules and policies. The mitigating factors included the grievant’s fifteen years of satisfactory and sometimes exemplary state service. The grievant also had no active disciplines on his record. The grievant was reinstated under a two-year Last Chance Agreement in which he agreed not to convey any kind of weapon, firearm, ammunition or dangerous ordnance onto any state property. Violation of the agreement would result in termination. He received no back pay and his seniority remained unaffected by the arbitrator’s decision. 909

Weather Emergency

The State of Ohio abused its discretion when it failed to declare an emergency under the circumstances on four selected dates. Review of the data reflected heavy and wide-spread weather emergency activity on December 23, 2004, December 24, 2004, January 6, 2005, and January 7, 2005. The arbitrator was aware that the State of Ohio was able to declare an emergency under Article 1.3.1.5 and was not attempting to add or subtract from the existing language in the Collective Bargaining Agreement. The award is non precedent setting and the full remedy requested by the Union is inappropriate for the four dates. This particular case shall not be cited in any future dispute involving Article 1.3.1.5 -weather emergency. 960

The Union filed separate grievances from Guernsey, Fairfield, Licking, Knox, Perry, and Muskingum Counties that were consolidated into a single case. Implicit in the authority to schedule employees is the ability to alter the work schedule, subject to the limitations in Article 1.3.07 that the work schedule was not made solely to avoid the payment of overtime. The Arbitrator found that there was no evidence that the schedule change was motivated by a desire to avoid overtime; therefore, no violation of the contract occurred. Based upon the weather forecast known to the Employer on February 1, 2007 justifiable reasons existed to roll into 1 2 hour shifts. Prior notification under Article 1.3.02 was not required. No entitlement existed that the employees were guaranteed 1 6-hour shifts under a snow/ice declaration. The Employer’s conduct did not violate Section 1.3.07(2)”s Agency specific language. The snow storm was a short term operational need. To conclude that a snow storm is not a short term need but that rain over an extended period of time is, would be nonsensical. The record consisted of over 500 pages of exhibits and three days of hearing. That record failed to indicate that the Employer violated the parties’ agreement. 997

The decision to lift Wood County’s emergency declaration after 1 0:00 a.m. was based upon a process that involved various state departments, the identification of public safety problems, impact assessment of the snow, and recommendations to the Governor and key staff. The decision to lift Wood County’s declaration was based upon the conditions existing within the geographic area of Wood County, not those of its neighbors. Wood County was removed from the list of counties designated for a snow emergency, while all surrounding counties were not. The facts indicate that reliable evidence existed for DPS to decide that lifting the ban on Wood County was appropriate. This is especially true when considering that the County had been downgraded to a Level 2 by its Sheriff’s Department, whereas all of the neighboring
counties remained at a Level 3. The Arbitrator held that the decision by DPS in not extending the declaration of emergency beyond 1:00 a.m. for Wood County was not arbitrary or capricious and was, in fact, supported by reliable, probative, and substantial evidence. 1 000

**Wildcat strike**

See strikes

**Witness Duty Pay**

- There is no doubt that the parties reached an agreement that the Ohio Administrative Code would be applied to witness leave situations, and when the parties bargained again in 1989, they continued in the Agreement the existing language: 4 73

- Section 30.05 of the Agreement is to be interpreted as reflecting the operation of Ohio Administrative Code 1 23:34 -03, “Court Leave”: 4 73

- Employees subpoenaed to appear before any court, commission, board or other legally constituted body authorized by law to compel the attendance of a witness shall be granted leave with pay at the regular rate of that employee EXCEPT that if that employee is a part to the dispute, he or she may be granted use of vacation time, personal leave, compensatory time or leave of absence without pay: 4 73

- A party to an action shall be considered to be an employee who is either a plaintiff, petitioner or defendant in a judicial or administrative proceeding. This should be considered to include those proceedings which may involve juveniles. A grievant under the Agreement would not be considered a part for purposes of Section 30.05 : 4 73

**Witness, Failure to Produce**

- Employer's failure to present manager who had submitted request for discipline forms was found by arbitrator to be a "critical factor" in the case: 7

- Where manager who initiated disciplinary process by filling out request for discipline forms was not presented as a witness at the arbitration, the arbitrator determined that use of such forms was a well-established, routine practice so that, in the absence of evidence showing a history of frivolous or arbitrary requests for discipline, there is a strong inference that the grievant failed to turn in leave request slips: 7

- 25 .08 specifically provides that not only documents but witnesses reasonably available from the employer be made available for arbitration: 1 06

- Arbitrator reduced penalty because of employer's failure to provide union requested witnesses during grievance process: 230

- 25 .06 and 25 .08 require employer to honor reasonable requests from the union during the grievance process for access to witnesses relevant to the case: 230

- 24 .04 , 25 .06, and 25 .08 do not require employer to supply union-requested witnesses prior to the grievance procedure: 230

- Work area: 26

**Work Area Agreement**

- The Employer’s ability to implement scheduling changes is restricted by the “work area” language negotiated by the parties in the “Memorandum of Understanding.” This was supported by the job groupings contained in the pick-a-post posting and the grievant’s job description. To disregard an employee’s pick-a-post selection by changing a work area would directly violate the negotiated work provisos. Operational needs cannot be used to bypass the work area requirements contained in the Memorandum of Understanding: 4 4 8

**Work Assignment**

- The grievant was a LPN who had been assaulted by a patient at the Pauline Lewis Center, and she had to be off work due to her injuries for approximately 1 month. When she returned she was assigned to the same work area. She informed her supervisor that she could not work in the same work area, and was told to go home if she could not work. The grievant offered to switch with another employee whom she identified, but the supervisor refused. She then told her supervisor she was going home but instead switched work assignments. The grievant had prior discipline including two 6 day suspensions for neglect of duty. The supervisor concluded that the grievant was given a direct
order to work in her original work area. The grievant erroneously believed that switching assignments was permitted. Despite the grievant’s motivation for her actions, the grievant’s prior discipline warranted removal, thus the grievance was denied: 4

- The following rules apply in determining “good management reasons” for denying an employee a pick-a-post position.

  A performance evaluation that meets expectation should not preclude an employee from being awarded a bid job unless the collective bargaining agreement specifically provides that the employee with the best performance review will be awarded the job.

  Ordinary, run of the mill discipline which has been removed from the employee’s personnel file after two years cannot form the basis for a “good management reason” to deny the grievant the bid to special duty post.

  Finally, when considering attendance deficiencies of an employee, only those deficiencies that subject the employee to discipline can be considered for purposes of exclusion from a bid job: 5

- **Work Assignment, Institution** (See Goldstein decision)

- See bidding rights, waiver

- The decision deals with the definition of a work area. The definition of a work area governs the rights of employees to transfer and rotate within the work area. The case is limited to direct care employees. These employees work in State institutions and are employed in full-time, custodial and security positions. The institution covered by this decision are Rehabilitation and Correction; Youth Services; Mental Health and Mental Retardation/Developmental Disabilities; Ohio Veterans Home; and the Ohio Veterans Children’s Home. battering and Correction was separated from the other agencies in the decision. The Union and State each submitted proposals to Mr. Elliot Goldstein, the arbitrator. The Union argued for strict seniority bidding, for work selection in the smallest feasible unit, post, ward or cottage, with unlimited selection rights and no limitations on the “ripple effect.” The ripple effect is the bumping and confusion caused by the constant reassignments. The proposal is feasible and is working in other AFSCME represented institutions and facilities.

- The State argued that the Union’s proposal was impossible. The Union agreed to negotiate on several points. The Union could establish a waiting period before seniority can be exercised, limit the frequency of exercising seniority rights and limit the number of times an employee can be reassigned. The arbitrator awarded the following:

  1) In all agencies except for Rehabilitation and Correction the arbitrator found that the work area is defined as the smallest subdivision of regular work assignment in the physical setting wherein an employee performs his or her assigned work on a regular basis. Seniority is to be one of the criteria utilized in the selection of work area; other criteria are skills and abilities and the professional needs of the facility. If the latter two factors are equal, seniority shall control. Employees are limited to exercising their right to select a post to twice in one year. Job reassignments resulting from a selection are limited to two in number.

  1) In the area of rehabilitation and Correction the arbitrator urged the parties to come to an agreement. The arbitrator retained jurisdiction that if the parties could not come to an agreement Arbitrator Goldstein would accept the last best offer.

- The Union and the State could not reach an agreement. The arbitrator accepted the State’s last best offer. The Union argued that the key distinction between work areas was stress level and not physical location. The Union proposed that the employees should be rotated among the most and least desirable positions in an even-handed and structured way. The Union’s plan would result in an individual Correction Officer being required to spend no more than one six month period out of every eighteen months in a high stress position.

- The State contended that the Union’s proposal did not follow the actual manner in which jobs are actually categorized. The State offered four designated zones of rotation – Housing A, Housing B, Non-Housing and Relief. The arbitrator rejected the seniority principle and the “Pick a Post.” A reservation of some discretion in the employer to assign work duties in an institutional structure must be recognized. There is a need for rotation that provides a mix of experienced personnel and there is a need for training opportunities. The arbitrator found that the Union’s proposal did not consider
geographical or physical location, concerns for training, security for a mix of experienced and inexperienced. The State’s proposal considered these factors and also included in their plan certain stress levels. The Union’s proposal would not solve the problem of work area merely fracture the institutional work area.

- With reference to Rehabilitation and Correction, a rotation to occur every six months. There will be four different types of work to be defined by the parties and the rotations shall include one job assignment in each over the course of two years.

**Work Assignment, Volunteering**

- The fact that the grievant’s in this case volunteered for the work assignment does not mean that they can abridge the Agreement. Side deals cannot supersede the negotiated terms of the Agreement. It is not relevant that employees volunteered. They worked their normal number of hours and no more. Had there been no volunteers the State would have assigned people from the second shift to work on the machine: 329

**Work Performance**

The Arbitrator held that the Employer had just cause to terminate the Grievant. The Grievant’s disciplinary record exhibited several progressive attempts to modify his behavior, with the hope that progressive penalties for the same offense might lead to positive performance outcomes. As such, the Grievant was placed on clear notice that continued identical misconduct would lead to removal. The Arbitrator also held that the record did not reflect any attempt to initiate having the Grievant enroll in an EAP program within five days of the pre-disciplinary meeting or prior to the imposition of discipline, whichever is later. This barred any attempts at mitigation: 1030

**Work Release Judgment**

- Work release judgments by the Court of Common Pleas are not binding on the employer. They permit the grievant to be employed, but do not require the employer to employ the grievant: 145

**Work Rules**

- Lax enforcement: 87

- It has been reported, on the basis of examining over 1,000 cases, that one of the two most commonly recognized principles in arbitration of such cases is that there must be reasonable rules or standards, consistently applied and enforced and widely disseminated: 130

- In order for a rule to be considered reasonable, at a minimum, an employee should know that certain conduct fails to conform to the Rule, and thus constitutes a violation of the Rule: 130

- At least in the context of Phoenix 2 (where the residents have multiple handicaps and very low intelligence) disciplinary policy OP/P-5 is not an unreasonable work rule even though it does not distinguish between negligence and intentional abuse or recklessness. The arbitrator said that

  (1) the distinction was "of no moment" to the residents given their low intelligence,
  (2) the danger is the same whether the grievant was negligent, reckless or intentionally abusive, and
  (3) it is not unreasonable for the employer to require a high standard of care from employees: 161

- It is widely recognized that an employer has the right to adopt and enforce reasonable work rules not on conflict with the contract: 474

- The Employer complied with Section 44.03 of the Contract when it notified the Union about the new grooming policy and provided it with a draft copy: 474

- Discipline was imposed upon the grievant for just cause. The State provided eyewitness testimony that the grievant was observed standing beside the open salvage door when no loading was in progress. Given the grievant’s continued dishonesty in the face of credible eye witnesses and his extensive disciplinary record (which including numerous reprimands for dishonesty and neglect of duty, failure to carry out work assignment, willful disobedience of direct order and violations of agency policies and procedures) the removal was commensurate with the offense: 493

- The grievant was denied reinstatement of her position as a Correction Officer because she violated work rules designed to protect prison
guards by limiting personal contact between the guards and the inmates. The grievant had a physical relationship with an inmate, was involved in an extortion scheme with the same inmate and gave her extortion scheme with the same inmate and gave her unlisted phone number to another inmate. The arbitrator found that the grievant was terminated for just cause: 5 02

- The grievant was removed for dishonesty and failure to cooperate in an official investigation when she ignored doctor's orders and went bowling during a training session and then lied about her activities. The grievant violated Rules #1 and #26 of the Standards of Employee Conduct but since removal was improper for a first offense, the grievant was reinstated with no loss of seniority but was denied back pay: 5 04

- The grievant was removed for allegedly violating work rules by abusing an agitated patient during treatment. The State could not establish a causal connection between the grievant's blow and the patient's injuries. Therefore, the grievant was improperly removed: 5 1 0

- Article 29 authorized management to take corrective and progressive disciplinary action for the unauthorized use and abuse of sick leave. This discipline includes but is not limited to removal: 5 1 2

- The grievant was found to have violated three separate work rules on document falsification, deceitfulness and interference with an investigation. Recognizing that the contract provides that work rules be reasonably set forth, published and applied, the arbitrator found no evidence of unreasonableness in the rules themselves or in their application. Considering that even one of these offenses carried with it the possibility of removal, and that the grievant had received three other recorded reprimands within the past year, the arbitrator rules that the grievant's removal was permissible: 5 4 2

- The Arbitrator found that the grievant had violated Department of Public Safety Work Rule (A)(6)—sick leave fraud—when he failed to inform the department that he held a second job while receiving sick leave benefits. The Arbitrator held that this violation was adequate to justify the grievant’s removal. 6 1 1

- This Arbitrator concluded that the choice made by the grievant to complete the dietary requisition before putting away the frozen commodities was completely lacking in common sense. The Arbitrator found that the grievant was in violation of the work rules, specifically neglect of duty, and the last chance agreement. 6 1 2

- The Arbitrator found that if the JCOs had to remain for roll call, they also had to remain for announcements. The language in the Directive included the word, “released,” and it indicated to the Arbitrator that JCOs were free to roam in and out of roll call at will; therefore, the JCOs were under a strict regulated schedule during roll call. 7 1 2

Work Schedule

- See Schedule change

- 1 3.01 requires that work days and days off for employees who work non-standard work weeks shall be scheduled according to current practices at time the agreement was negotiated: 5 5

- Where Oakwood Forensic centered provided 26 weekends off to employees at time agreement was negotiated, the Center violated the agreement by later providing only 17 weeks off: 5 5

- An employee is on a "regular" schedule, for the purposes of 26.02 and 1 3.07, if the schedule is predictable. Thus, even a rotating schedule can be a regular schedule: 9 3

- Generally, many arbitrators have recognized that unless the agreement says otherwise, the right to schedule overtime remains in management. This "right" of management be limited it the union can prove that scheduling changes have been implemented to avoid the payment of overtime. Article 5 and ORC 4 1 1 7.08(c) clearly provide the employer with the right to determine matters of inherent managerial policy; maintain and improve the efficiency of operations; and to schedule employees. Thus, these provisions allow employer to alter work schedules to improve efficiency based on operational needs. Sections 1 3.01 and 1 3.02 underscore the employer's ability to schedule work. Section 1 3.02 defines work schedules as "an employee's assigned shift." Obviously, if the employer can make work schedule assignments, the employer an also establish work schedules: 1 4 9
The right to alter original work schedules does not have to be linked to changes in the work schedules of third parties. The agreement does not restrict the employer's right under these circumstances. The employer is obligated, however, to notify employees about changes in their work hours which are precipitated by altered third party schedules. These types of changes are quite different from changes initiated by the employer: 1 4 9

Management has the right to schedule work with a view to optimize efficiency (but cannot alter the schedule to avoid overtime): 1 4 9

The employer changed the grievant’s work schedule in 1987 during golf season (the grievant is a golf course worker) from a Monday through Friday workweek to a Tuesday through Saturday workweek. The Union argued that this was a violation of Section 3.07 of the Agreement which prohibits the State from changing an employer’s work schedule to avoid overtime. The Arbitrator found that the State did not violate Section 1 3.07. When the State placed the grievant on a Monday –Friday schedule in the years before the Agreement it did not create a practice which would bind it forevermore. The parties were confronted with a challenged environment. For the first time in 1987 they were operating under a collective bargaining agreement. One event or action does not serve to bind the employer or the Union. It takes constant repetition to create past practice: 303

The grievant was found to be working within his classification and whether a supervisor is present at work is a matter for the employer to determine. The presence or absence of a supervisor does not go to the issue of whether the employer is rescheduling the grievant to avoid overtime: 303

A “regular” schedule as contemplated by Section 1 3.07 of the Agreement is not limited to Monday-Friday. In the case where the grievant works six months on a Monday-Friday schedule and six months on a Tuesday-Saturday schedule neither schedule is more irregular than the other. The standard work week must be forty hours followed by two consecutive days off. Section 1 3.07 is instructive in its silence; a standard work week does not necessarily mean a Monday-Friday schedule: 303

The Employer’s ability to implement scheduling changes is restricted by the “work area” language negotiated by the parties in the “Memorandum of Understanding.” This was supported by the job groupings contained in the pick-a-post posting and the grievant’s job description. To disregard an employee’s pick-a-post selection by changing a work area would directly violate the negotiated work area provisos: 4 4 8

Operational needs cannot be used to bypass the work area requirements contained in the negotiated work area “Memorandum of Understanding”: 4 4 8

Work Standards

Management retains the right to set standards of work quality and quantity of production: 78

Work Stoppage

When the Grievant organized, planned, and promoted a work stoppage she violated Rule 30B. The Arbitrator believed she developed the plan and solicited the participation of other employees. When the grievant organized a work stoppage in the face of an approaching winter storm, she engaged in “action that could harm or potentially harm . . . a member of the general public” and violated Rule 26. Grievant violated Rule 4 by interfering with the investigation of the work stoppage. Testimony from other witnesses showed that the grievant was not truthful in her accounts of the events. The Arbitrator believed the state conducted a full and fair investigation. The Arbitrator did not believe the grievant was the object of disparate treatment. Leaders of work actions are identified and discharged, while employees playing a lesser role receive less severe penalties. The Arbitrator did not believe the state failed to use progressive discipline. In the case of very serious misconduct an employer is not required to follow the usual sequence of increasingly severe discipline. Mitigating factors of long service, good evaluations, and behaving in a professional manner in her work as a union steward did not offset the seriousness of the Grievant’s misconduct. The Arbitrator concluded that when the Grievant organized a work stoppage in the face of major winter storm she provided the state with just cause for her discharge. 95 6
Work Time, Misuse of

- Where the employer had truncated the employees' work duties, the arbitrator held that the employer would be hard pressed to establish the underlying rationale for discipline that "work time is for work" and not for the composition of personal letters: 21 8

Worker's Compensation

- The Arbitrator found that the Contract does not provide for vacation leave to accrue while the grievant is on Worker's Compensation leave. Article 27 and 29 both contain language which provide for employee's to accrue benefits while on worker's compensation leave. Article 28, dealing with vacations, does not provide for this. The failure of the contract to provide similar entitlements for vacation time as it does in Article 27 and 29, is evidence that no entitlement was intended: 5 4 6

The grievant sustained two injuries at work, both in an attempt to restrain youths who refused to follow directives. The grievant followed the application process. No evidence was submitted to establish that the grievant submitted false data. The grievance was granted subject to the following: 1) the grievant was paid his remaining OIL benefits not previously received due to his injuries; total OIL benefits not to exceed 960 hours; 2) reinstatement within fourteen days of award with back pay, benefits - seniority subject to medical proof of fitness; 3) if grievant is unable to return to work due to his medical condition, he should seek remedy through BWC. 84 2

Working Outside of One's Classification

- When Child care workers were assigned the duty of supervising recreation which they had not done before, (his had allowed management to combine the recreation director's position with another supervisory position, and the number of recreation aides had dropped from two to none, the arbitrator still held that the Child Care Workers were not being required to work out of their classification. He gave the following reasons:

(1) exercising its rights under article 5, management determined that it was necessary to have child care workers (CC W's) present during recreational activity periods to monitor the children's conduct and insure the safety of those entrusted to their care.
(2) No evidence was presented showing that CCW's had to plan or implement recreation programs, nor were they actively required to participate. CCW's were only instructed to supervise the conduct of the children and encourage the children to participate. Thus they did not assume the duties of the Recreation Aide.
(3) The classification specification ranks the overseeing and monitoring of social and recreational activities as one of the most important functions of a CCW.
(4) The arbitrator determined that supervision of recreation periods was also implicitly included in the position description which required supervision and guidance of children and performing other duties as required when directed by the immediate supervisor in regard to care and needs of children in the home.
(5) Combining the recreation director's position with another supervisory position does not violate the contract.
(6) The recreation aide position has not been absorbed by the CCW position since an interim recreation aide has been hired while one of the original aides was on disability leave and management is actively seeking to fill the other position.
(7) While the CCW's are not given as much opportunity to seek to build the children's character and self-esteem within the private environment of the cottage situation, they now have an opportunity to pursue the same goals in the recreational situation: 25 6

- The arbitrator determined that since the new duties assigned the grievant's were not "inappropriate to their classification", Administrative Rule 1 23:1 -1 7-1 6 was not violated by the employer: 25 6

The Arbitrator held that the proper resolution of this issue lies within Article 1 9. To hold that Article 1 9 is inapplicable to the grievance would require the Arbitrator to ignore the parties' CBA and the plain meaning of Article 1 9. The plain language of Article 1 9 does not forbid multiple grievances over a similar infraction, but only limits the remedy to individual claims. The Arbitrator held that the Agreement does not guarantee that classifications will remain unchanged throughout the life of the agreement. The analysis sought to resolve each claim needs to occur in
accord with Article 19 to determine the appropriate remedy. 979

**Working Level Pay**

The arbitrator determined that the grievance was arbitrable. Article 7.10 refers to a time limit for TWL positions – 120 days. That time limit must be interpreted. The arbitrator was not persuaded by the State’s interpretation of the Agreement. He determined 120 days for a TWL meant 120 days. The language in the Agreement is clear and unambiguous. To allow the State to keep individuals in positions outside the bargaining unit for more than 120 days would negate the 120-day limitation. 813

**Workplace Violence**

- The Arbitrator found that the State failed to demonstrate fairness to the grievant during the investigation. He determined that the elements in this case supported the “nullification of the discipline of the grievant at least on the charge of workplace violence.” 716

The grievant was accused of striking his supervisor, causing injury to his eye. The arbitrator found the supervisor’s version of what happened to be credible over the grievant’s testimony. The arbitrator noted that the grievant showed no remorse, did not admit to what he did not commit to changing his behavior. The arbitrator stated that without the commitment to amend his behavior, the grievant could not be returned to the workplace. 780

The grievant involved in a verbal and physical confrontation with a co-worker. The testimony presented by the employer’s witnesses was found credible by the arbitrator. The arbitrator noted that no evidence or facts were presented to indicate that the co-worker made any physical gestures towards the grievant. The arbitrator stated that the grievant’s confrontational behavior during the incident and her continued aggressive behavior towards co-workers convinced him that the employer met its burden of proof. He also noted that the employer had shown a previous measure of restraint in its unsuccessful attempt to correct the grievant’s behavior. The arbitrator stated that a long-term employee could not seek protection if he/she was continually abusive towards co-workers or management. 867

The grievant allegedly made threatening statements to his supervisor and co-workers. He did not refute the testimony of the witnesses regarding his actions or statements. The grievant argued that a medical condition (diabetes) was the primary cause for his outbursts. However, he never indicated to anyone that he was sick. The employer stated that the grievant’s act of praying for harm to come to others was a deliberate act and not the conduct of an ill man. The Union argued that progressive discipline was not used; however, the arbitrator cited an arbitration decision which stated, “The principles of progressive discipline allow for leeway. In following them, an employer is not obligated to issue a verbal reprimand for a first offense of murder, mayhem, or sabotage.” (Walker v. OBES, #G87-998, Dworkin, 4-21-99, p. 21, Decision #123) While the grievant did not physically harm supervisors or co-workers, his threats certainly should have been and were taken very seriously. To that end, DR&C did not act arbitrarily or capriciously in determining that removal was appropriate based upon the conduct of the Grievant. 911

The grievant was charged with striking a co-worker during a verbal altercation at work. The arbitrator found that the security video tape demonstrated the grievant was the aggressor during the incident. A review of the tape recording and testimony supported the employer’s position that termination was warranted. The arbitrator noted that the supervisor could have been more effective in diffusing the situation before it escalated. Although the co-worker may have been a “problem employee”, the workplace violence displayed by the grievant should not be tolerated and removal was for just cause. 935

**Working Under the Influence of Drugs**

The arbitrator found that the grievant lied about having a handgun in his truck on State property. The State did not prove that the grievant threatened a fellow employee. The arbitrator stated that it was reasonable to assume that the grievant was either prescribed too many medications or abusing his prescriptions. The arbitrator determined that the grievant’s use of prescription medications played a major role in his abnormal behavior. The grievant’s seniority and good work record were mitigating factors in this case and his removal was converted. 808
Written Statements

- Arbitrator gave no weight to written statements of alleged victims that did not testify: 68

  – X –

  – Y –

Youth Leader

Youth Statements

- The duties of the youth leader require that he/she has the "most contact with the youth" in overseeing their activities. They see to it that the youth do not disturb or damage property and that they do not hurt themselves or others. If there is an escape by the youth the Youth Leader is the first to know about it. If the Youth Leader fails to perform his/her duties properly, it creates a major security risk: 25

  - The employer must provide the full and complete witness statements before the Pre-Disciplinary Hearing not a summaries of the witnesses statements. The rationale that the State provided of protecting the youth was nebulous and failed to overcome the clear language of the section 24 .04 . Altered or unavailable evidence can be severely prejudicial to the Union’s effort to defend the grievant. The arbitrator would have reinstated the grievant without back pay but because of the state’s violations back pay was awarded after the 1 81 st day of the grievant’s removal: 308

- The State’s withholding of the youth witnesses statements is a violation of the Agreement. The argument that the state advanced that the youths would be subject to threats or retaliation is without merit. None of the youths were still incarcerated in the same facility. The Union knew the identity of three of the four witnesses. There is no point in withholding these statements once the youth is identified as a witness: 31 7

- The Employer violated Section 25 .08 by not providing the relevant and reasonably available documents the Union requested until the morning of the arbitration hearing. The employer gave no reason it could not provide these documents earlier than the day of the hearing: 31 7

- The arbitrator found that the union did receive witness lists and documents, but did not receive the Unit Administrator's report which contained witness statements and additional photographs. The employer is obligated to produce information relied upon to support discipline, with the pre-disciplinary hearing notice. Therefore, the employer did violate section 24 .04 . The grievant was prejudiced when the employer failed to disclose pre-disciplinary conference reports when the discipline imposed was decided by the employer. Further, the Unit Administrator's investigation was not complete. She never interviewed the grievant. She was not an assigned investigator but she acted as an investigator. The employer must follow contractual procedures and its own policies and that did not occur in this case.

  The employer violated the contract by improperly withholding information and failing to investigate the incident properly. However, the grievant has substantial prior discipline and has committed a serious offense. Therefore, there is just cause for discipline: 326

- The grievant was given a 1 0 day suspension for neglect of duty after failing to assist a youth in his care at the Indian River School. The youth's finger was caught in a door which the grievant had closed. The arbitrator found that just cause did not exist because of the lack of credibility of the employer’s evidence. The grievant was more credible than the youths who testified against him. Neglect was found not to be proven because as soon as the grievant was sure the youth was injured, he obtained medical assistance for the injury. The grievance was sustained and the grievant made whole: 4 35

  – Z –