ARBITRATION DECISION NO.:
211

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Hazardous Waste Facilities Board

DATE OF ARBITRATION:

DATE OF DECISION:
November 25, 1989

GRIEVANT:
Michael Lepp

OCB GRIEVANCE NO.:
G-87-2931

ARBITRATOR:
Frank A. Keenan

FOR THE UNION:
Daniel S. Smith, Esq.

FOR THE EMPLOYER:
Egdilio J. Morales

KEY WORDS:
Suspension
Insubordination
Ex Parte Contact

ARTICLES:
Article 24-Discipline
§24.01-Standard

FACTS:

Grievant was employed as an Administrative Law Judge/Hearing Examiner with the State of Ohio's Hazardous Waste Facilities Board.

In July or August of 1987 the grievant was assigned the Erieway case. As one of the first items of business, the grievant issued an "Order as to Compliance Data" on September 1, 1987, setting forth various deadlines for the submission of documents by the parties. one of the deadlines set was September 25, 1987. On that same date the applicant filed a "Request for Extension of Time" from September 25, 1987 to October 2, 1981. By order dated September 28, 1987, the request

for an extension was granted. In the interim, the grievant set October 13, 1987, as the date for the pre-hearing conference and set November 6, 1987, as the due date for the pre-hearing statements. The grievant also set forth notice of non-compliance sanctions. Then on October 5, 1987, the grievant, upon his own motion, continued the pre-hearing conference until October 16, 1987. He claimed he had overlooked an eye doctor's appointment. In this Continuance notice, the November 6th date for the pre-hearing statement was characterized as a typographical error and was corrected to October 9, 1987. In the interim, the Assistant Attorney General had entered a Notice of Appearance in the Erieway case which was received on October 2, 1987.

On October 9, 1987, the Assistant Attorney General called the grievant to check on the status of the Erieway case. The particulars of that conversation are in dispute. Then on October 14, 1987, the grievant issued a Report of Ex Parte Communication which detailed a conversation between the grievant and the Chairman of the Hazardous Waste Facilities Board. On November 13, 1987, the Attorney General's office filed a motion to strike the Ex Parte Report. This motion was followed on November 20, 1987, with yet another motion to the Board, namely a motion for Removal of the Hearing Examiner (the grievant), because "the hearing examiner's actions in this case demonstrate personal bias and prejudice against the staff of the Ohio EPA and the staff's counsel, the Attorney General's office." In response to this, on November 24, 1987, the grievant prepared a document entitled "Portion of Record Stricken Sua Sponte". The grievant refused to expunge the alleged irrelevant portions of the Report of Ex Parte Communication as his supervisor asked him to do and he further refused to issue an apology. The grievant was relieved of his Administrative Law Judge duties for this case. A predisciplinary hearing was held on December 11, 1987, and as a result the grievant was suspended for 10 days.

EMPLOYER'S POSITION:

It is the Employer's contention that certain irrelevant statements in the Report of Ex Parte Communication were on their face unprofessional, prejudicial and cast doubt on the integrity of the Hazardous Waste Facility Board's ability to issue safe permits. The central issue to be decided in this case is whether or not the grievant refused to obey a direct order issued to him by his supervisors.

UNION'S POSITION

The Union takes the position that the Employer did not have just cause to suspend the grievant. Specifically, the Union contends that the grievant was not guilty of insubordination because the grievant's act of refusing to expunge a portion of an ex parte report was within his powers as administrative law judge and because the supervisor did not have the power to direct him to expunge a portion of the ex parte report. Secondly, the Union contends that the Chairman of the Board was without authority to discipline the grievant. The grievant, as a Board hearing examiner, was an employee of the Board. Because the Board did not act to suspend the grievant, or to delegate that power to the Chairman, the disciplinary order should be considered null and void. Lastly, the Union disputes the Employer's contention that the discipline was commensurate with the offense.

ARBITRATOR'S OPINION:

The Arbitrator found that there could be no question but that the grievant was given a direct order by his immediate supervisor and that he failed to carry it out, thereby giving rise to an arguable instance of insubordination. While the grievant offered a reasonable argument for relating in his Report of Ex Parte Communication various of the Chairman's comments concerning the Attorney General's office and its personnel, this argument must give way to the greater cause of maintaining the Board's integrity and usefulness. However, the Arbitrator held that the Employer

prodded the grievant into misconduct.

AWARD:

The grievance is sustained in part and denied in part. The grievant's suspension for 10 days was not for just cause. Just cause did exist, however, for the grievant's suspension for 5 days. Accordingly, the grievant shall be made whole for all losses in pay and/or benefits resulting from any suspension beyond the 5 day suspension found to be appropriate.

TEXT OF THE OPINION:

ARBITRATION
BETWEEN

STATE OF OHIO, HAZARDOUS WASTE FACILITIES BOARD

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION LOCAL 11, A.F.S.C.M.E., AFL-CIO

OCB CASE #:
G87-2931
(Grievant Michael Lepp's)
Ten (10) Day Suspension)

APPEARANCES:

FOR THE BOARD:
Egdilio J. Morales,
Management Advocate
Office of Collective Bargaining
Ohio Department of Administrative Services
Columbus, Ohio

FOR THE UNION:
Daniel S. Smith, Esq.
General Counsel
OCSEA/AFSCME Local 11
Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATOR

FRANK A. KEENAN

THE CONTRACT/BOARD RULES:

One or another of the parties refers to a Contract provision or a Board rule in support of a position taken. The party-cited Contract provisions and/or Board Rules are excerpted herein at Appendix I.

STATEMENT OF THE CASE:

At all times material herein, the grievant, Michael Lepp, was employed as an Administrative Law Judge/Hearing Examiner with the State of Ohio's Hazardous Waste Facilities Board. At all material times his position description outlined in pertinent part his duties in order of importance as follows:

"Conducts public hearings and adjudication hearings in complex hazardous waste permit and modification proceedings. Holds preheating conferences and facilitates negotiations between the parties. Supervises the adjudication panel members in the review of evidence submitted into the record. Solely responsible for making all procedural rulings, rulings on the admissibility of evidence, and all other rulings at the adjudication hearing. Reviews the official record of the proceeding and develops findings of fact, conclusions of law, orders, and permit terms and conditions when applicable; and based thereon, issues the statutorily required report and recommendation to the Board. Writes and files rules and conducts public hearing associated with administrative rulemaking; renders legal opinions. Upon request, represents the Board staff in communicating with the Board members and the Assistant Attorney General in the preparation of the statutorily required OPINION AND FINAL ORDER of the Board. This document is prepared for signature of the Board members and when journalized is appealable to the Court of Appeals of Franklin County. As part of this preparation, supervises staff technical personnel in generating technical input regarding the parties, objections to the Report and Recommendation of the adjudication panel and addressing the questions of Board members."

[Performs the same duties outlined in the first paragraph above vis a vis "complex" late files hazardous waste licensing proceedings.]
[Performs] such other duties as assigned by the Legal Advisor and/or the Executive Director.

The grievant is a member of various professional organizations including the National Conference of Administrators; the National Conference of Administrative Law Judges; and the National Association of Administrative Law Judges. By way of affording the grievant administrative leave, and as it so stipulated, the Board has encouraged the grievant's participation in such outside activities. Additionally, the grievant has attended the National Judicial College at the Board's expense. The significance of these activities to the instant case is that all of these groups emphasize the importance of the independence of Administrative Law Judges, a matter elaborated upon at the hearing conducted on February 17, 1989, by the expert witness concerning administrative law matters called by the Union, one Steven Lefelt, Deputy Director and Administrative Law Judge, State of New Jersey Office of the Administrative Law. Relevant testimony of Lefelt is set forth more particularly hereinafter.

The record reflects that at the times in question the Board was comprised of five members: W.B. Clapham, Jr., Geologist, Cleveland State University - Member; Warren Tyler, Chairman of the Ohio Waste Development Authority Member; Richard Shank, Director, Ohio Environmental

Protection Agency - Chairman; Horace Collins, Ohio Department of Natural Resources (Geological Survey) - Member; and Thomas L. Sweeney, Chemical Engineer, Ohio State University - Member.

The Board operates with a small staff. It has an Executive Director, James W. Adair III; a Chief Legal Counsel, Michael Shapiro; an Executive Assistant/Public Information position, held by Andrea Bailey, two Technical Advisors, a secretarial slot and two Administrative Law Judges, the grievant; and, at times material herein, a more senior ALJ, Richard Bruzynski. The grievant and Brudzyski work under the immediate supervision of Chief Legal Counsel Shapiro, who in turn reports to Executive Director Adair.

Applicants for a hazardous waste storage and/or disposal site apply at the outset with the Ohio Environmental Protection Agency, a separate entity from the HWFB. As testified to by the grievant, without contradiction, in most cases the EPA negotiates an agreement with the applicant obviating the necessity of the application going to the HWFB. It is noted that whether handled by the EPA or the HWFB, the applicant is required to commit itself to compliance with the statutorily enumerated criteria and requirements for its operation of the hazardous waste facility. Failure to negotiate an agreement with the EPA results in the application being submitted to the HWFB. Upon submission to the HWFB an adjudicatory hearing is conducted, as indicated in the ALJ position description hereinabove set forth. The Ohio EPA is always a "party" to such proceedings, and as in all matters of litigation and adjudication, the EPA is represented by the State of Ohio's Attorney General's office. In particular, it is the Environmental Enforcement Section of the AG's office which represents the EPA before the HWFB. This section is headed by E. Dennis Muchnicki. In this regard it is noted that Assistant Attorney General Margaret A. Malone and Assistant Attorney General Susan E. Ashbrook work under Muchnicki's supervision. It appears that this same Section also represents the HWFB in matters of litigation.

Formerly employed by the State Legislature in the Legislative Services Commission beginning in 1973, the Grievant was hired by the Hazardous Waste Facilities Board in 1982. The record reflects no disciplinary action taken against the grievant during his tenure of employment with either the Legislative Services Commission or the Board,[1] until the matter under scrutiny here. In that regard the grievant was assigned as the ALJ for what was known as the Erieway case, Case No. 87-MR-0387, in July or August, 1987. Erieway, Inc. was the hazardous waste applicant and was seeking renewal of its permit and expansion of its extant facility at Bedford, Cuyahoga County, Ohio. It has a unique aspect and that was that for the first time since the inception of the Ohio EPA, the Ohio EPA was opposing an application. It appears that EPA's opposition was based upon some past violations of the law by Erieway, Inc.

The grievant, as the ALJ in the Erieway case, as one of the first items of business, apparently[2] issued an "Order as to Compliance Data" on September 1, 1987, setting forth various deadlines for the submission of documents by, inter alia, the applicant, one of which was September 25, 1987. On that same date the applicant filed a "Request For Extension of Time" from September 25, 1987 to October 2, 1987. By order dated September 28, 1987, said request for extension was granted. In the interim, on September 23, 1987, the grievant issued a "Notice of Prehearing Conference - Order To File Prehearing Statement," a routine document in the proceeding. This document set October 13, 1987, as the date for the pre-hearing conference; it set November 6, 1987, as the date for the due date for the prehearing statements. It also set forth the following notice of non-compliance sanctions:

"A party who is not appropriately represented at the prehearing conference may be deemed to have waived its right to present evidence, argument, and cross-examine witnesses at the

adjudication hearing either in whole or in part. In addition, a party who refuses or fails, for whatever reason, to submit a prehearing statement in conformity with the prior paragraph may be similarly so deemed and, further, may be precluded from offering proposed findings of tact and conclusions of law after the closing of the record."

As the grievant explained, this notice of sanctions had been set forth in like documents ever since his prior Monsanto case in 1984 or 1985. Then on October 5, 1987, the grievant, upon his own motion, continued the prehearing conference to October 16, 1987. As he explained, he had overlooked a previously scheduled eye doctor's appointment and his eyes were seriously bothering him. In this Continuance notice the November 6th due date for the pre-hearing statement set forth in the Notice of September 23rd was characterized as a typographical error and corrected to October 9, 1987. In the interim, Assistant Attorney Generals Malone and Ashbrook had entered a Notice of Appearance in the Erieway case, received at the HWFB on October 2, 1987.

On October 9, 1987, Ashbrook called the grievant to check on the status of the Erieway case. Ashbrook's account of her conversation with the grievant is set forth in an affidavit within Attachment #1, appended to this Opinion and Award. Ashbrook did not testify at the arbitration hearing; her affidavit is clearly hearsay here. The grievant testified as to his conversation with Ashbrook and this account follows: "A. I think it was on October 9th, Susan Ashbrook called me and said -- Susan Ashbrook called me and said, 'When is the prehearing statement in this case due? Don't tell me it is today.' So I said, 'Yes, as a matter of fact, it is today.'

And she--you know, she is saying, 'well, it is going to be really difficult for us to do this,' and that conversation with her did not really last too long.

I mean, I can't put a number in terms of minutes on it, but it wasn't particularly long. It was clear that she wanted a continuance, but at that time --

Q. Was it hostile?
A. No, it wasn't particularly hostile. It was just -- I would say it would be her request for a continuance, something relatively routine.
Q. Okay.
A. However, she -- apparently Dennis Muchnicki was around in the office somewhere, and so she said that -- you know, something to the effect -- I think she even used the word that, you know, 'Dennis is here, and he is going to be galant enough to talk to you about this,' so he got--
"**Q.** What was your response to her, initially? I mean, did you say yes or no to the continuance?
A. I said -- I don't know the precise words that I used, but I am sure that I indicated that I wasn't, or couldn't -- or I couldn't do it.

We didn't really get into a discussion of why it was that that was my position. However --
Q. Okay. Why didn't you just say okay?
A. Well, I didn't just say okay because the resolution 387 was -- you know, was an albatross, essentially, around my neck, because I knew that it would be very difficult, at best, to fulfill the 18-month requirement, to fulfill the November '88 requirement.

That would be just a very difficult thing to fulfill, and I would have really been relatively pleased with myself just to come close to it.

But if you start with continuances, especially early in the case, we start with continuances early in the case, it sets the tone.

There had already been one continuance on the case, one that I had issued on my own, a brief one, and I did not want to get into continuances."

* * * *

"So in any event, my reaction was that it would be -- it would really be very bad to issue this continuance.
Q. Okay.
A. It would be disruptive of the time line.
Q. So Miss Ashbrook said, 'Dennis is around,' or words to that effect?
A. Yes.
Q. What happened then?
A. She said Dennis is something -- I just remember the term 'galant,' because I thought it was an interesting term, and that he was going to take the phone, and he did, and he started talking to me."

Muchnicki's version of his conversation with the grievant is set forth in an affidavit within Attachment #1. Muchnicki did not testify at the arbitration hearing and his statement is clearly hearsay here. The grievant did testify concerning this conversation and his account follows:

"**Q.** What was the nature of that conversation? What happened?
A. Well, initially, again, it was a relatively routine call for a -- for a continuance. And Dennis said that he needed the continuance, and he wanted to know why -- you know, why I wasn't going to give them one.

And he knew, apparently, at that time I wasn't. I probably said -- in response to his initial request or anything he said at the outset of that conversation, I probably had said, no, you know, I don't feel disposed to this continuance.

And he said, you know, 'Well, what is the authority,' and I said, well -- I said, you know, it is clearly resolution -- it is clearly resolution 387,[3] where the Board has set out time frames.
Q. And how did the conversation progress?
A. Well, I think the best way of putting it would be that it deteriorated. What was initially a relatively routine request for a continuance, really developed, in time, into what I felt to be highly unprofessional behavior on the part of Mr. Muchnicki. He just was -- he was --
Q. Well, don't characterize it.
A. Okay.
Q. To the best of your recollection, say what happened, what you recall him saying, what you recall responding.
"**A.** Well, what he said was very disturbing. He said, you know, 'I am going to have to call the director.'

How did he put this? 'I am going to have to call the director,' and, you know, 'your ass is going to be grass.' And I said I didn't think this was appropriate, and I said, 'Well, you know, you can call the governor, you know, it is up to you.'

That was my response? and -- but at the same time, I just was -- I was -- I really was shocked, really, by Mr. Muchnicki, you know.

I had no reason to believe he would ever do something like that.
Q. Well, what happened? How did the conversation end?
A. Well, he -- he continued to be -- well, you don't want me to characterize it, but let me just say he was unprofessional.

I mean, he continued in that vein, and I said to myself, well, it is evident that I am going to start responding in the same manner, because I guess I have a limit when provoked, myself.

And so what -- I did something that I probably have only done once or twice in my life. I hung up

the phone.
Q. Any other words of the conversation that you recall?
A. He asked me the authority -- I think he asked me the authority that I had to set up sanctions as I did in the notice of prehearing conference.

I think that was where that was stated. And I said, 'Well, this has been been my practice established ever since the Monsanto case."

It was a practice that I had established while the case was-ongoing, because the E.P.A. did not show up at a prehearing conference in this case.

And it seemed to me that that was a very important step in the case, the prehearing conference, and that there had to be some sanctions applied, so I did apply a sanction.
Q. And in applying that sanction -- I mean, was that -- were "You told not to do that? I mean, was that something that was --
A. In other words, I never heard one word about it.

Arbitrator Keenan: What was the sanction in the Monsanto case?

The Witness: The sanction in the Monsanto case was that E.P.A. was allowed to cross-examine, but they were not allowed to conduct a direct case.

By Mr. Smith:
Q. When was the Monsanto case? When did that take place; a year, best you can recall? Sometime prior to the Erieway case?
A. It was before. It was either 1985 or 1984.
Q. Okay.
A. So what I had done is reduced that sanction that I had applied, I had reduced that to writing so that people would know about it in advance.
Q. Okay. After you got off the phone with Mr. Muchnicki, what happened?
A. Well, thereafter, after that, after that conversation, there was an interval, you know, I think I reported it as 30 minutes, and that is probably about right, where the Chairman, Mr. Shank, at the time called me."

Chairman Shank did not testify, nor does the record contain any affidavit or other statement setting forth his October 9, 1987 conversation with the grievant. The grievant's account follows:

"The first thing Mr. Shank did was to say something to the effect that Dennis Muchnicki has a few friends at 1800 Watermark Drive.

Those were not his exact words, but that was the substance of what he said. He then said that he had just spoken with Mr. Muchnicki, and there was a problem on representation at a hearing that was upcoming.

I think it was probably a preliminary injunction. I think it was probably upcoming the next week.

"And the staff of the A.G., the Attorney General staff, needed the time that afternoon, which if I recall was probably a Friday afternoon, the staff of the Ohio E.P.A. needed that afternoon to prepare.

They didn't have time to do a preliminary statement because they were preparing for this preliminary injunction the following week, and this was an important case. He went on about how important it was.

And I said that -- he said, you know, he wouldn't put it past Dennis to send -- if he didn't get this, if he didn't get this continuance, he wouldn't put it past Dennis to either not have anybody show up at all, or have a legal intern show up at this big case that was coming up the following week.

Finally, he had asked me why it was that I felt the continuance was not appropriate, so I told him that we had had problems with the E.P.A. before.

And he said, 'Well, that is true.' He said he has heard -- he said -- he says he has had problems with the E.P.A.

And I said I would help draft a letter for him for his signature, ultimately, because he was working on one, help draft a letter for him detailing the instances where the E.P.A. had not been operating -- I don't know what the proper word is, you know -- not doing what it was supposed to be doing.

It was a rough approximation of what I want to say.

Q. Go ahead.

A. The -- that conversation ended. Mr. Shank was – we talked about -- as I see it here, we talked about the certified mail, which I might add, the certified mail was discussed in this earlier conversation with Muchnicki, too. I did not recall that earlier, but it was, in fact.

And he, of course, made it clear that -- I mean, at all times he was generally civil, polite. I don't mean to say that he wasn't.

But he made it clear that he wanted a continuance to be issued in this particular case.

Q. Did you -- did you tell him that you would grant a "continuance in that first conversation?

A. No, I did not.

Q. So how did the conversation end?

A. I think the conversation ended in saying that he would call me back. He was very busy. He was apparently preparing to go on vacation, and he was very busy, and he said he would call me back.

Q. So did he call you back?

A. Yes, he did.

Q. When, that same day?

A. That same day, within -- I would have to just approximate, within, maybe, 45 minutes, somewhere in that neighborhood.

Q. Okay. And what was the nature of that conversation?

A. Well, it was -- it was -- essentially the same territory was discussed. And to be perfectly honest about it, now that I think about it, it is hard to distinguish what was said in which conversation, as opposed to the first or second conversation with the chairman.

Q. Okay. How did he end the second conversation?

A. Well, he said he was going on vacation, and I said, 'I hope you have a good time on your vacation.'

Q. Did you talk about whether you were going to grant a continuance or not?

A. No, I didn't get into that particular point.

Q. What happened after that?

A. Well, after that -- after that, I thought about this.

Q. Did you act on the continuance that day?

A. Yes, I did, and I granted -- I granted the continuance for the prehearing conference, but just deleted the requirement for the prehearing statement. The reason I did that is because there is a rule of the board where the prehearing statement has to be -- there has to be an interval of at least five days between the prehearing statement and the prehearing conference. We made the prehearing conference for the following Thursday, so there was no time to have a prehearing statement. The Board rule on this is clear."

Then on October 14, 1987, the grievant issued a "Report of Ex Parte Communication," which read as follows:

"On October 9, 1987 an ex parte communication occurred between the Chairman of this Board and the undersigned. The matter discussed involved the issue of whether a continuance should be granted to the Ohio EPA as to its obligation to file a prehearing statement in the above application on October 9, 1987. This communication was in the form of two telephone calls placed by the Chairman to the undersigned. In the course of these calls the Chairman stated that:

"Dennis Muchnicki of the Attorney General's office has few friends at 1800 Watermark Drive;

Mr. Muchnicki had just discussed on the telephone with the Chairman the issue of whether the Attorney General's office would be able to provide adequate representation for the Ohio EPA in a case involving a preliminary injunction that would be reaching a critical point by the next week;

The case involving the preliminary injunction was a very vital case for the Ohio EPA and the State of Ohio;

A continuance probably should be granted to the Ohio EPA as to its obligation to file a prehearing statement in the above-captioned case;

Letters were being developed over the signature of Richard Shank as Director and as Chairman of this Board detailing the past instances of poor services rendered by the Environmental Enforcement Section of the Attorney Generals' Office, headed by Mr. Muchnicki."

In the course of these calls the undersigned stated to the Chairman that the Environmental Enforcement Section of the Attorney Generals' Office had on several times in the past apparently not received certified mail sent by this Board but that this Board had proof that the mail was received by the Attorney Generals' Office."
"The above two calls were preceded by a telephone conversation between Mr. Muchnicki and the undersigned in which Mr. Muchnicki attempted to secure verbal assurances from the undersigned that a motion for a continuance which had not yet been filed in this case would be granted. Mr. Muchnicki made known in no uncertain terms his severe dissatisfaction with the undersigned's predisposition not to grant the continuance stated above. Mr. Muchnicki's call preceded the first call of the Chairman to me by about 30 minutes. In the course of the conversation between Mr. Muchnicki and myself, reference was made to the fact that the Chairman could be contacted in the matter of this continuance.

The undersigned believes the conversations that he had with the Chairman were the result of a telephone call to the Chairman from Mr. Muchnicki.

As a parenthetical matter, the undersigned wishes to inform Mr. Muchnicki that further instances of apparent attempts by him to intimidate the undersigned will be reported directly by him to the Disciplinary Counsel of the Ohio Supreme Court."

The grievant offered the following explanation for creating this Report of Ex Parte Communication:

"**Q.** Okay. Why did you believe it was important to report it as a report of ex parte communication?
A. Well, it was something that should not have occurred. It was something that should not have

occurred.

And it was important for all to know that the integrity of the process would be maintained. That was the goal of the Board, that the integrity of the Board would be maintained at all times.

And it was important for the parties to know that if something inappropriate happened, that they would know about it, and their fear in that respect should be put to rest.

They didn't have to worry about this kind of thing. If it happened, it was something not routine.

Q. Why did you consider it wrong? I mean, explain why you considered it wrong in terms of the rules of the Board?

A. Well, the rules of the Board -- First of all, the rules of the Board prohibit ex parte communications.

And that would be -- okay. They prohibit ex parte communications, and they also impose upon hearing officers "the responsibilities that obtain under the Code of Judicial Conduct.

Q. Well, let's turn to rule 3437-1-61, and that is the rule that applies to ex parte communications; correct?

A. Yes, it is.

Q. And it has been tossed about a little bit this afternoon. Did you ever see, prior to our preparation for this arbitration, the memo identified as Union Exhibit No. 2, Mr. Sahli's memo?

A. No, that indeed was the first time. I didn't even know it existed.

Q. I guess -- can you offer to the Arbitrator your legal understanding as to what 34 -- 3734-1-61 means?

A. I am not sure this is what you want, or this is what you are asking, but the very essence of this whole section is to establish for one and all to know that the Board operates under very ethical principles, and its hearing officers also operate under very ethical principles.

And that there is, indeed -- there is never any question that the hearing officer is going to be relating his own independent judgment, a reasonable judgment, of course, and that the board, too, is going to be free from pressure, and that the hearing officer is going to be free from pressure.

That is the whole essence, that is the whole thrust of this section, is to alleviate that nagging concern that they have that perhaps they are not getting a fair shake at an administrative hearing.

Q. Did you have a hand in drafting that section?

A. Yes, I did.

Q. Well, Mr. Sahli says that Mr. Shank's communication to you was not an ex parte communication because, one, Mr. Shank was not a party, and two, because it did not concern a matter at issue in a proceeding.[4] What is your response to "that argument?

A. Well, the first thing is that it, in fact, did concern a party, in two respects. Number one, the Attorney General's Office represented a party, so they were, in effect, a party, number one.

Number two, Mr. Shank, as head of the staff of Ohio E.P.A., was clearly a party, so it was, in point of fact, an ex parte communication from both aspects; that is, both from the A.G.'s communications, and both from Mr. Shank's concerns, so both ways it was ex parte.

Number two, what happened, again, was indeed relevant because as has been stated earlier, normally there is no problem with ex parte if it strictly concerns procedure, that is true.

There is no particular -- any problem if it's merely procedure. And in fact, judges and administrative law judges routinely get calls that are just procedures.

And sometimes they -- it's a close call. I mean, sometimes what is procedure can -- you know, can run over into what is substance.

But here there was something else going on here. This wasn't just procedure, and for anybody to suggest that it was merely procedure is really --

Q. Well, what was that something else?

A. There was -- there was -- to be polite, there was very palpable pressure in the background.
Q. Okay. Did this have anything to do with the training that you had received through the conference in terms of preserving the integrity of the process and the independence of the hearing officer?
A. It had everything to do with the process. I mean, it couldn't have been more directly related.
Q. Okay. Now, the Board has also -- or there has been testimony today, that this was permitted, and was considered not to be ex parte communication by the Code of Judicial "Conduct, and specifically, I think rule 34A, or A4?
A. That is true, and -- that is very true, but there is also another rule in the Code of Judicial Conduct, and I am trying to cite it from memory, and I am not sure I will be successful, 3-B-3, or 3-B-4, which is called the squeal rule, it has been denominated the squeal rule in publications, or publications the judges publish, but in fact, this requires a judge or person acting in the capacity of a judge to take -- quote, to take appropriate action in the case of --
Q. Hold on a second. Let me identify for the record – I guess I will mark it as Union Exhibit No. 2. by Mr. Smith:
Q. Mike, before you -- I have tossed a copy of the Code of Judicial Conduct, and I marked it as Union Exhibit No. 2, and you were referring to a rule other than rule 34?
A. Yes.
Q. Which you thought compelled you to report or incorporate some things into the report of ex parte communication?
A. Yes
Q. What rule were you referring to?
A. I was specifically talking about canon 3B, 3-B-3, which states, quote, a judge should take or initiate appropriate measures against the judge or lawyer for unprofessional conduct of which the judge may become aware.
Q. And what was the unprofessional conduct which you were referring to in the last part of your report of ex parte communication?
A. Well, it was Mr. Muchnicki's -- his demanding, his -- his failure to realize that he was speaking to someone who is trying to render a decision in a case, and he just flew off the handle. He was totally off base.
Q. And what was your means of -- well, never mind.
I guess maybe I am going over something again, but did you consider this contact with both Muchnicki and Shank to be merely procedural?
A. No. No. Again, what started off relatively routine "and relatively innocent, became something quite not routine, quite not innocent.
Q. Okay.
(Pause.)
Mike, I can't think of any other questions right now. Is there anything that you think I have left out?
A. I would just a soon you asked about these paragraphs of which there have been mention made, the first and the last indented paragraph of the Ex Parte Report.
Q. Well, okay.
A. I mean, if you don't want to, that is up to you.
Q. Did you consider those portions irrelevant?
A. No, not at all. They were also relevant. These were relevant for, you know -- these were most definitely relevant, yes.
Q. And what were they relevant to?

A. They were relevant to give the context of what had happened.

What had happened is something that had started out innocently, which is why I was involved in it, because something that was basically innocent and routine had become wrong.

Something had to be said in here to indicate -- and I couldn't just give an opinion. Something had to be in here about how I got involved in something that was -- started out innocently enough, and ended up -- did not end up innocently.

And in addition, something had to be in here as to explain the action I took; namely, which was to essentially delete the requirement of a prehearing statement, and to continue the prehearing conference.

Something had to appear in here, and that is what these two were all about. And I can explain further.

I haven't said exactly how that works, but I mean, that is what they were here for.

Number one, quote, Dennis Muchnicki of the Attorney General's office has few friends at 1800 Water Mark Drive.

"That was an attempt -- and I could -- I could think of no other way to show how it was, and I use this word visibly, because that is the only word I can think of when I think it portrays a very accurate depiction of what happened.

That is the way the Director and the Chairman, Mr. Shank -- he seduced me into this. That is really what happened.

I was seduced into this discussion with him. Something that shouldn't have happened, did happen. And number two and that it meant anything else, you know, this is really okay.

The last paragraph, this last indented paragraph, was for -- in order to explain why it was that I was satisfied at the moment, and went ahead and, in effect, issued the continuance.

I did that, obviously -- and, you know, one must ask why, in fact, I did it. Well, I did it for a number of reasons. One, I felt pressured. That is very obvious.

But also, the Director had -- in fact, he had in fact assured me that quote, you know, something to the effect, I can't -- I shouldn't say quote, because I can't do that, but something to the effect that this problem was going to be taken care of, the problem where the A.G. was inattentive to Board actions, wasn't really performing on the level it should be.

Something was being done about this. That is why those two things were there.

Arbitrator Keenan: Well, am I to understand from that, a very careful testimony, that you had the impression that the Chairman, Mr. Shank, was saying 'Just this one more time, and it is in the works to call Mr. Muchnicki on the carpet and let him get off with this one more extension?'

The Witness: That is one way of saying it. One last time, and we will take care of this.

Arbitrator Keenan: And that you felt that he, Shank, was simpatico with your impatience with Muchnicki's requests?

The Witness: Again, the word simpatico is an excellent word to describe what, in fact, I perceive to be his statements, his motivations, et cetera.

Arbitrator Keenan: Is there anything in this conversation between you and Mr. Shank that is not reflected in anything of substance that is not reflected in this report of ex parte communication?

The Witness: Well, I outlined what he said earlier. There is nothing that I could think of."

As to the propriety of creating the Report of Ex Parte Communication, the Union called as a witness Steven Lefelt, currently an Administrative Law Judge and Deputy Director of the State of New Jersey Office of Administrative Law and qualified him as an expert in administrative law matters.

Confronted with an outline of the situation confronting the grievant, it was Lefelt's testimony that

in his opinion: "Any administrative law judge who knows anything at all about administrative practice would have felt that the initial contact made to Mr. Lepp was improper . . . in the model rules that we've developed . . . if you have an ex parte contract, you disclose it on the record as a means of curing it."

This same sentiment was shared by the grievant's co-worker and Co-administrative Law Judge Brudzynski who indicated in his testimony that, faced with the grievant's situation, he too, would have issued an ex parte communication, which later he characterized as constituting a quasi-judicial act, "And if the Board, up front on the record wants to order -- says that it is improper, or the Court of Appeals or any other subsequent judicial body wants to say that is an improper act, take it back, or make some other arrangement, then that is the proper chain of authority."

It is also noted that it was the grievant's testimony that his superior, Shapiro, initially "was 100% in favor of it" i.e. the Report of Ex Parte Communication, and commented, "It's important that this go out." Shapiro did not directly deny this attribution and was otherwise vague and evasive on the point. I credit the grievant's account.

Effective October 19, 1987, Richard Sahli assumed the position of Deputy Director at Ohio's E.P.A. and as such became a legal advisor to E.P.A. Director Shank. Shank solicited his legal opinion as to the propriety of the grievant's Ex Parte Report and on October 27, 1987, Sahli prepared a memo for Shank (Attachment #2) ultimately concluding that no basis existed for the issuance of an ex parte report and additionally concluding that much of the content of the report was "irrelevant and may raise issues of bias while diminishing confidence in the integrity of the adjudicative process." Notwithstanding this memo, at the hearing herein Sahli testified that:

"I think the Hearing Examiner (ALJ) was well within his rights to make the report of ex parte communication, even though I might have disagreed with him about the ultimate legal issue involved. However, I certainly thought that even if the report of ex parte of communication were to have been an issue, which again were in the prerogative of the hearing examiner, some things within this report were clearly inappropriate. . .unprofessional . . . erratic type behavior . . .when a report is made of an ex parte communication, it is required to lay out the essential facts amounting to an ex parte communication what actually was said which may have amounted to ex parte. I thought clearly in this document there were items that were irrelevant to that, were quite inflammatory . . .Irrelevance could be perceived as indicating bias and antipathy between the HWFB and the Attorney General's office . . . the integrity of that process was suspect due to this conflict."

I also note other testimony by Sahli. Thus it was Deputy Director Sahli's testimony that ". . . we think our operations must, at all times be free from controversy. Absolutely free from any suggestion of bias or prejudice. And also that the independence and integrity of the hearing examiner has to be solidly enforced. And constantly reinforced to have the strictest possible integrity for our permitting process." The Deputy Director also opined that the irrelevancies within the ex parte report furnished ready made grounds for appeal by the parties.

It is also noted that Deputy Director Sahli conceded that Muchnicki had "a hot temper" and that Muchnicki "can be forceful." Asked if Shank ever indicated to him that anything set forth in the Report of Ex Parte Communication was untrue, Sahli testified that Shank had not ever so indicated.

According to Sahli, Chairman Shank directed Adair and Shapiro to instruct the grievant to strike irrelevant portions of his Report of Ex Parte Communication. Still further on this point, according to Sahli, "the intent was to make sure that the extraneous portions of this document which brought the credibility of the process into question would be appropriately dealt with.

Whether that was going to be by expungement or to strike, whichever one was the more appropriate, would have been fine with us." As Sahli also put it, "we wanted (by expungement) to cure the problem and retain Lepp as Hearing Examiner."

On November 3, 1987, the grievant was called to Executive Director Adair's office. Adair advised the grievant that the Board had lost confidence in him; that he was to expunge the matters in the ex parte report referring to the Attorney General; and that he was to apologize. Adair advised the grievant he had until Monday, November 9, 1987, to do so. As the grievant put it, his meeting with Adair "scared him silly" and he agreed "to expunge the whole thing and to write an apology." The grievant then engaged legal counsel, one Diane Porter. Porter, however, advised against expungement and against apologizing. A meeting was held, with Porter, Adair, Shapiro, Brudzynski and the grievant on November 9, 1987, at which time Adair was specific concerning what in the Ex Parte Report was to be expunged.

On November 13, 1987, the Attorney General's office filed a Motion to Strike the Ex Parte Report (Attachment #1) with the "entire Board" on the grounds that the Report " . . . is premised on a basic mistake of the facts and law involved: there was never any ex parte communication, and there never should have been a report of such. In addition, the report is an abuse of discretion. It is unprofessional and contains irrelevant and highly prejudicial remarks. The Report has no place in the official record or any file associated with the case." This Motion was followed on November 20, 1987, with yet another Motion to the Board, namely a Motion For Removal of the Hearing Examiner (the grievant), because "the hearing examiner's actions in this case demonstrate personal bias and prejudice against the staff of the Ohio EPA and the staff's counsel, the Attorney General's office."

In response to the A.G.'s Motion to Strike, the applicant, Erieway, Inc., filed a formal "Answer" with the Board in which it observed that "it appears to Erieway that this proceeding, intended to adjudicate its right to a hazardous waste facility permit, now has become a test of wills between the Attorney General's office and at least one member of the Board's staff. It is legitimate to ask whether the animosities arising out of the events described in the documents in question are limited to the persons named in those documents or have spelled over to other members of the Attorney General's office and the Board staff, such that a fair and impartial hearing now cannot be had by Erieway."

Erieway went on to urge mediation of its permit application, an approach previously rejected by the Ohio E.P.A. In conclusion Erieway asserted that "if the Board does not find a requirement to mediate to be an appropriate response to the motion of the Attorney General's office, then Erieway respectfully requests that no documents be stricken from the record, in order to preserve all of Erieway's rights of appeal that may have occurred as a result of the events described in the Motion of the Attorney General's office."

On November 24, 1987, the grievant prepared a document entitled "Portion of Record Stricken Sua Sponte." It read in pertinent part:

"In furtherance of the best interests of the Board, the Report of Ex Parte Communication dated October 14, 1987, is hereby stricken from the record sua sponte.

To set forth more particular reasons underlying the above action would be to engage in injudicious behavior. As a quasi-judicial officer bound to act within certain parameters, the ALJ is clearly not at liberty to do so."

As the grievant testified to without contradiction, he was relieved of case duties, and perforce of any duties vis a vis the Erieway case, shortly thereafter and this document striking the Report of Ex Parte Communication never issued. On this same date the Board's Chief Legal Counsel,

Michael Shapiro at Chairman Shank's behest, spoke with the grievant. Shapiro testified at the arbitration hearing essentially as per his virtually contemporaneous memorialization of his conversation with the grievant, which reads as follows:

"On November 24, 1987, I, Michael A. Shapiro, pursuant to instructions from Chairman Shank, informed Michael B. Lepp that he was hereby ordered to:

1. expunge the irrelevant materials from the document entitled "Report of Ex Parte Communication", and

2. issue an apology directed to all persons who received such document, stating that he (Mr. Lepp) let personal feelings get in the way of professional judgment,

or

"disciplinary actions, including possible termination of employment, would commence.

Mr. Lepp stated that he had issued that morning a document entitled "Portion of Record Stricken Sua Sponte" in which he, upon his own motion, struck from the record the "Report of Ex Parte Communication." Mr. Lepp further stated that he would not issue an apology unless specific preconditions were met.

I then informed Mr. Lepp that I would relate this information to the Chairman and that I was of the opinion that disciplinary action would commence.

While it could be clearer, it appears that Shapiro's reference to Lepp's conditioning an apology on certain "specific preconditions," was a reference to the grievant's offer to apologize to Muchnicki if Muchnicki apologized to him, and his desire to have a face-to-face meeting with both Muchnicki and Chairman Shank.

It's also important to note that Shapiro confirmed that he participated in the decision making process of Management, which led to the decision to discipline the Grievant with a 10 day disciplinary suspension, and that in these deliberations Management regarded the grievant's sua sponte Motion to Strike as "continuing the controversy," indeed exacerbating the situation. Further in this regard Shapiro conceded that he did not confront the grievant with the perception of his sua sponte Motion to Strike, and contended that such was implicit in his indicating to the grievant that said motion would likely not avert discipline.

It was further Shapiro's testimony with respect to Shank's conversations with the grievant about granting the EPA's motion for a continuance that "while I am of the opinion that it was not an ex parte communication, I can understand where some people would say it was an ex parte communication. "

With respect to the grievant's references to the A.G.'s office in his Report of Ex Parte Communication, it was Shapiro's testimony that he "perceived the purpose as being an attack on the Assistant Attorney General . . .an attack [on] the Director . . . either as Chairman or as Director . . ." and "I think it had a separate agenda and that separate agenda was to embarrass Mr. Muchnicki and Mr. Shank, and as a guise for getting out that separate agenda, they use the ex parte communication."

It was further Shapiro's testimony "that a hearing examiner, being a judge, being an arbitrator, must be fair and impartial. And if that person takes an adversarial position, or implies that, you are calling into question the entire process . . . without that apology, we still got that perception of an

adversarial proceeding with that trier of fact." On their latter point it was Deputy Director Sahli's testimony that they were seeking the grievant's apology because such would go to meet the A.G.'s recusal request.

On December 3, 1987, HWFB Deputy Director Janietta R. Smith forwarded to grievant a letter notifying him of a pre-disciplinary conference. It read in pertinent part:

"This letter is to notify you that a pre-discipline conference has been scheduled for you on Friday, December 11, 1987 at 9:00 a.m. in the 4th floor conference room in the Office of Human Resources at the Ohio EPA's WaterMark facility, 1800 WaterMark Drive, Columbus, Ohio. This conference is being scheduled to determine if a recommendation should be made to the Chairman of the Hazardous Waste Facility Board, Richard L. Shank, to take disciplinary action against you up to and including a suspension without pay. I have been designated by Chairman Shank to be the impartial hearing officer to preside at this conference. William R. Kirk, Labor Relations Officer for the Ohio EPA, will represent management.

The specific instances which give rise to the proposed discipline are:

On or about November 24, 1987 you were directed by your supervisor to:

1. expunge irrelevant materials from a "report of ex parte communication", written and signed by yourself, involving Case No. 87-MR-0387 and dated October 14, 1987. and;
"2. issue an apology directed to all persons who received this "report of ex parte communication" to let them know that the irrelevant information was inappropriate and was retracted by you with regrets for any distress that it may have caused to individuals concerned with the integrity of the permitting process.

You were also informed at that time, by your supervisor, that your failure to comply with these directions would result in discipline.

As of this date, you have refused to comply with both of these directives, and as a result, you are alleged to be guilty of insubordination and to have violated Ohio EPA Policy and Procedure Memo Number 4.04 (Work Standards) and ORC 124.34, all of which, together or in part, constitute just cause under the current agreement between OCSEA/AFSCME and the State of Ohio."

The hearing referred to was held on December 11, 1987, and following it the grievant was suspended for 10 days pursuant to Chairman Shank's letter to the grievant on December 18, 1987, which read:

"This letter is to inform you that you are hereby suspended for ten (10) work days commencing December 21, 1987 and ending January 1, 1988. You are to report back to work at your normally scheduled time on January 4, 1988.

Upon reviewing the report of Janietta R. Smith, Deputy Director, Human Resources, and all relevant documentation, I have determined that just cause exists for this action.

The charges you have been found guilty of are insubordination (O.R.C. 124.34). Further infractions may lead to further discipline, up to and including removal."

The instant grievance, challenging the validity of this disciplinary suspension was then filed.

THE STATE'S POSITION:

The State takes the position that "the record supports its position that the grievant was insubordinate in his refusal to expunge the irrelevant portions of the "Report of Ex Parte Communication and in his refusal to issue an apology to the individuals who received this report." The State argues that "it is undisputed that the grievant received a direct order to expunge the irrelevant comments from the document and issue an apology."

It is the State's contention that certain irrelevant statements in the Report of Ex Parte Communication, are "on their face, unprofessional, prejudicial arid cast grave doubt on the integrity of the Hazardous Waste Facility Board's ability to issue safe permits," and that instead of complying with these orders, "he aggravated the situation by insinuating in his [sua sponte striking of the Report of Ex Parte Communication] that there were reasons underlying his actions that he could not report and that an impropriety had occurred."

It is the State's position that "whether or not the grievant acted appropriately in originally refusing the request for a continuance and threatening sanctions is irrelevant. Whether or not Mr. Muchnicki's conversation with the Director of the EPA constituted an interlocutory appeal is irrelevant. The central issue to be decided in this case is whether or not the grievant refused to obey a direct order issued to him by his supervisors."

By way of elaboration the State asserts that:

"It is undisputed that the grievant refused to obey the order. The grievant's own testimony revealed that he was willfully insubordinate. He stated that on the advice of his attorney, he refused to expunge the irrelevant portions of the document and he refused to issue the apology. However, being insubordinate on the advice of counsel does not justify or mitigate the seriousness of the act. The grievant is responsible for his own actions and understood the disciplinary consequences of his refusal to obey his superiors.

The union would have the Arbitrator review the administrative rules of the Board and make a determination on the legality of the order. However, management strongly contends that interpretation of the Board's administrative rules is not within the scope of the Arbitrator's authority. The Arbitrator must make a determination on just cause based on the terms of the Collective Bargaining Agreement. We ask the Arbitrator to focus on the grievant's responsibility once he had received a direct order. If the grievant thought the order was illegal, he should have, at a minimum, informed management, and specifically his supervisor, about this alleged predicament. However, the grievant . . . never informed anyone in management about this concern until after discipline had been imposed. Management therefore requests that very little weight be given to the allegation that the order was illegal as the grievant had a duty to inform management if he could not complete the order based on the legality of compliance."

The State takes the position that:

"The ten day suspension that the grievant received was justified given the circumstances surrounding the case. Section 24.02 of the Collective Bargaining Agreement states that, 'Disciplinary action shall be commensurate with the offense.' Similar language, '. . . disciplinary measures imposed shall be reasonable and commensurate with the offense . . .,' appears in Section 24.05. The cases adjudicated before the HWFB are extremely sensitive and arouse intense public interest. At the time of suspension, the grievant was involved with one of the most controversial cases before the Board. It was the first case in which the Ohio EPA had protested the renewal of a hazardous wastes permit. More than ever, there was a primacy on protecting the

credibility of the Board. However, in the face of this challenge, the grievant included clearly irrelevant comments in a report that was received by every party in the Erieway Case. The State firmly contends that these statements can only be explained as having been motivated the the grievant's personal malice against Mr. Muchnicki. No argument that the union presented can justify the inclusion of the statement, 'Dennis Muchnicki of the Attorney General's office has few friends at 1800 Watermark Drive.' Neither is the statement, 'Letters were being developed over the signature of Richard Shank as Director and as Chairman of this Board detailing the past instances of poor services rendered by the Environmental Enforcement Section of the Attorney General's office, headed by Mr. Muchnicki,' justifiable. These statements, along with the grievant's threat to report Muchnicki to the Disciplinary Counsel of the Ohio Supreme Court, are personal attacks on Muchnicki and did nothing but indulge the grievant's animosity, embarrass Chairman Shank, and discredit the processes of the Board.

Next, after he had been given a clear order to expunge the irrelevant comments, he willfully disobeyed and issued the "sua sponte" notice instead. He was told that this action did not meet the order he received. He understood this and he had been told the consequences of his failure to obey. However, he chose to aggravate his insubordinate act by adding inflammatory statements to the notice. He contended that he was not told that the sua sponte notice was considered in the discipline. However, he also said that he was not told to expunge the irrelevant portions of the 'Report of Ex Parte Communication.' The testimony of the union's own witness, Brudzynski, revealed otherwise, and hence the grievant's credibility was impeached. He was told that the sua sponte notice did not meet the order and that discipline would result. He knew that the sua sponte notice was considered a further act of insubordination and aggravated the situation."

The State takes the position that the grievant "tried to explain away his poor judgment by donning the appearance of a simple employee who was the victim of manipulation at the hands of a suave and 'simpatico' cabinet member. However, in making this defense, the grievant revealed how truly emotion ridden his actions had become. He contended that Chairman Shank played against the grievant's own anger against Muchnicki. The comments written by the grievant were doubtlessly a projection of this anger. He used his position to strike out at an individual whom he believed had insulted him. He admitted that he slammed down the telephone, abruptly ending his conversation with Muchnicki. In the midst of one of the most important cases ever before the Board, the grievant had marred the official record of the proceeding with a strong inference of bias and injected the strong possibility of prejudicial error into the proceeding while pursuing this private agenda.

The potential consequences of the grievant's insubordination to the operations of the Board were extremely serious. The grievant's role of hearing officer was central to the function of the Board. In order for the Board to protect its credibility, even the appearance of bias on the part of hearing officers must be avoided. Mr. Sahli testified that the order given to the grievant was a step taken to avoid such an appearance. Management attempted to cure the process and to take measures which would allow the grievant to continue as hearing officer. The grievant was ordered to expunge the personal attacks on Muchnicki and issue an apology. He refused. While management awaited the grievant's compliance, the AG made a motion for recusal of the hearing officer, and the applicant, Erieway, seized the opportunity to establish the grievant's report as a future rationale for appeal. The ability of the grievant and thus of the Board to fairly conduct a controversial hazardous waste permit hearing was questioned.

The union argues that management intruded on the autonomy of the grievant as administrative judge. They contend that management had encouraged hearing officers to assume this autonomy. However, management gave the grievant a direct order in unequivocal terms. He knew that his actions violated this order and he understood the consequences. The extent of autonomy that the

grievant desires does not exist for an employee in his position and this was made clear to him by Mr. Shapiro and Mr. Adair, the individuals who communicated the order. Instead of accepting this fact, at the hearing the grievant continued in his assertion of unbridled autonomy and in his disregard of the chain of command.

Insubordination is an egregious offense warranting serious discipline because it is an attempt to undermine management's inherent and contractual rights to direct the workforce. The union seeks to diminish the contractual rights provided under Article Five of the Agreement. It is a well established principle of labor relations that an employee desiring to challenge an order perceived to be unreasonable must first obey the order and then file a grievance."

The State takes the position that "if, in the alternative, the Arbitrator had the authority to interpret administrative rules [which, as has been seen, the State contends he does not] the union's position still would have, no merit. The grievant contended that he refused to comply with the order to expunge because the origin of the order was illegal. . . . when Mr. Brudzynski, the union's expert witness on the Board's administrative rules, was asked to point out the legal foundation for this assertion . . . he pointed out rule 3734-1-61 (A) and (B). However, neither of these paragraphs has anything to do with the authority of the Board's chairman to issue a direct order to a hearing officer through the Executive Director arid senior staff. Paragraph (A) states that:

"No party shall submit an ex parte, off-the-record communication to the Board or to the hearing examiner about any matter in issue in a proceeding; and the Board and the hearing examiner shall not request or entertain any such ex parte, off-record communication.(emphasis added)

Clearly, this paragraph does not limit the authority of the grievant's supervisor to give him a direct order. Mr. Shapiro's order to expunge the irrelevant portions of the document was not violative of this paragraph. Mr. Shapiro or the chairman could not be said to be engaged in an ex parte communication with the grievant because Mr. Shapiro, as a HWFB staff member, and the chairman, as a board member, are not parties to the proceeding. Further, the order would not, by any means, cause the hearing officer to entertain an ex parte communication. The subject of the alleged ex parte communication was a fait accompli at the time the order to expunge was made. The Erieway continuance had already been granted by the grievant. The grievant was simply ordered to edit portions of the document which management considered immaterial to the alleged ex parte communication. Rule 3734-1-61 (B) states that:

"All communications prohibited by paragraph (A) of this rule shall be reported immediately to the hearing examiner who shall place the communication or a memorandum thereof, in a public file associated with the case, but separate from the record material upon which the Board will rely in reaching a decision."

This paragraph does not restrict the authority of the HWFB chairman, senior staff, or executive director from issuing a direct order to a hearing officer to expunge the irrelevant portions of the document in question. The rule requires the placement of a memorandum of an ex parte communication in a separate public file. However, the content of the memorandum should be matters material to the alleged ex parte communication. Just as the grievant did not include the details of his discussion on other extraneous matters, such as the Chairman's vacation plans in his report, personal attacks and threats to report an individual to the Disciplinary Counsel of the Ohio Supreme Court are not appropriate or material to the memorandum. The Chairman of the Board, and both Mr. Shapiro and Mr. Adair as the grievant's superiors had the authority to review the memorandum and require the grievant to expunge his irrelevant comments.

The union speciously contends that rule 3734-1-50 diminishes management's authority to order the grievant to expunge irrelevant portions of a report of ex parte communication. Mr. Brudzynski hesitantly and unconvincingly agreed when this rule was brought to his attention by the union advocate. However, the list of documents to be prepared and maintained as part of the record of proceedings cited in the rule does not include memoranda of ex parte communication. Paragraph (B) of 3734-1-61 cited above makes this clear stating that such memoranda shall be placed in 'a public file, but separate from the record material upon which the Board will rely in reaching a decision.' If anything, 3734-1-50, supports management's position. As Shapiro stated, the expunged material would not have been destroyed, but rather placed in a separate file, like confidential material.

The union has not met its burden to prove that obeying the order to expunge would have resulted in an illegal act. On the contrary, management contends that the testimony and evidence reveal that the order was legal and that, given the structure of the Board, the grievant had an obligation to obey his superiors . . . Further, the union's other expert witness on administrative law, Steven Lefelt, states that expungement does occur. Although he stated it was 'highly unusual,' he admitted that it happens. Thus, management contends that LeFelt's testimony supports the legality of the order. Nothing the union has presented should compromise the rights provided in Article Five of the Agreement.

Management has the right to direct the workforce. As clearly testified to, management believed the irrelevant and embarrassing paragraphs were 'highly unusual' on their face and that expungement was appropriate. Management acted . . . to maintain the integrity of, and public confidence in the State's hazardous waste permitting process. The grievant was in no position to deny management's order."

So it is that the State urges that the grievance be denied in its entirety.

THE UNION'S POSITION:

The Union takes the position that "the employer did not have just cause to suspend the grievant for ten working days. Specifically, the Union contends that the grievant was not guilty of insubordination because the grievant's act of refusing to expunge a portion of an ex parte report was within his powers as administrative law judge and because the authority of his supervisor to direct him to expunge a portion of the ex parte report was unlawfully derived. Secondly, the Union contends that the Chairman of the Board, Richard Shank, was without authority to discipline the grievant. The grievant, as a Board hearing examiner, was an employee of the Board. Because the Board did not act to suspend the grievant, or to delegate that power to the Chairman, the disciplinary order should be considered null and void. Further, the Union contends that the Employer, to buttress its arbitration case, has included additional allegations against the grievant at the arbitration hearing which were never before considered as the basis for disciplinary action. Lastly, the Union disputes the Employer's contention that the discipline was commensurate with the offense."

By way of elaboration, the Union contends that examination of the Rules of the Hazardous Waste Facilities Board demonstrates that the Chairman of the Board, in this case Chairman Shank, did not have the authority to order the grievant to expunge or strike part of the grievant's report of ex parte communication. Thus the Union asserts that "nowhere in the Board's rules is the Chairman of the Board alone granted the authority to act for the Board or on his own behalf in adjudication hearings which are assigned to hearing examiners." In this regard the Union cites O.A.C. Rule 3734-1-21(A) as establishing that at least three of the Board's five members must concur before the Board will hear a case. Additionally, the Union contends that O.A.C. Rule 3734-1-21(B) makes clear that hearing examiners such as the grievant "have complete control of a case

until and unless the Board, by at least three votes, decides to hear a case. Pointing to O.A.C. Rule 3734-1-21(D)(6) and (D)(9) the Union contends that "the grievant, and not the Chairman of the Board, had sole authority to act on procedural matters."

The Union contends that at the arbitration hearing the Employer attempted "to rely on the comment to O.A.C. Rule 3734-1-61 (C) which provides in part that this paragraph does not preclude a board member from consulting with the staff, whose function is to aid the board members in carrying out their adjudicative duties.' Such reliance is misplaced. Board members must first have adjudicative duties to carry out before they have the right to consult with staff. O.A.C. Rule 3734-1-21 (A) makes it clear that Board members have no adjudicative responsibilities until the Board votes to hear a case rather than assign it to a hearing examiner. A review of Judicial Canon 3A(4) confirms this reading. Canon 3A(4) permits a judge to communicate with other judges or court personnel 'to aid the judge in carrying out his responsibilities.' Lastly, the Employer's interpretation would conflict with the preceding paragraph in the rule which provides that 'The board members at their discretion may not respond to ex parte letters of communication and all such letters may be transmitted to the board staff. . . ' Clearly, the Chairman had no authority to order the grievant to expunge, strike or delete in any way the Report of Ex Parte communication. The decision to do so was solely that of the grievant . . . . The Employer made great efforts to demonstrate that it was only requiring the grievant to expunge the irrelevant or inflammatory portions of the grievant's report. This, however, is itself irrelevant. Chairman and Director Shank was not in the position to determine what was or was not irrelevant. He had no authority to screen the grievant's work to eliminate portions which he thought were irrelevant or inflammatory."

In any event, argues the Union, "even if the Chairman had authority to interfere in the [grievant's] conduct of a hearing, the order given was unlawful." In support thereof the Union points to O.A.C. Rule 3734-1-50(A), and asserts that "in other words, the record is to be a complete record of all proceedings . . . [T]he grievant was instructed to expunge [i.e. obliterate and erase] certain portions of his Report of Ex Parte Communication . . . The order to expunge the 'irrelevant and inflammatory' portions clearly would have violated the Board's own rule. Furthermore, the grievant, if he had obeyed the order, would have violated Ohio Revised Code Section 149.351(A), . . . No exception to this rule [which provides that 'all records are the property of the public office concerned and shall not be removed, destroyed, mutilated, transferred or otherwise damaged or disposed of . . . '] exists in state statute which apply to the grievant's situation. Consequently, the Employer would have been requiring the grievant to perform an unlawful act."

It is the Union's position that whereas the Employer "greatly stressed that the grievant's actions damaged the credibility of the Board . . . an equally forceful argument can be made that the Chairman's actions, first to seek a continuance for the OEPA and then to retaliate against the grievant for reporting the action, were the actual events which damaged the Board's reputation; if it were damaged . . . If the truth as reported [in the ex parte communication] actually damaged the Board's reputation, then the fault lies not with the grievant, but with Chairman and Director Shank." Further on this point the Union asserts that "the [full] Board could have publicly admonished the grievant if it felt the grievant acted improperly or 'had his own agenda' as alleged by the Employer. This would certainly have cured any public misperception as alleged by the Employer. The point is that the Board took none of these actions. Instead, the chairman, who is also Director of an agency who was the party affected by the grievant's actions without Board authorization took action to penalize the grievant.[5] This action alone was the act which called into question the integrity arid autonomy of the Board."

"The Union needs only to briefly comment on the other act the grievant refused to perform which

the employer considered insubordinate; that is that the grievant refused to issue an apology which stated that he acted improperly and out of personal and not professional reasons. The grievant did not believe that he acted improperly or is there personal reasons. Thus, the Employer was requiring the grievant to tell the parties in a case something he did not believe to be true. The Employer can not discipline the grievant for refusing to lie. This certainly runs afoul of the most basic of public policies, that our government remain honest. Further, the Employer's direction smacks of an inappropriate form of disciplinary action. What better form of punishment is there for an administrative law judge but to make him apologize after a heated dispute, retract his words, and blame himself for the problem. This runs afoul of that part of Section 24.05 of the Agreement which provides that disciplinary action will not be imposed in the presence of other employees, clients, residents, inmates or the public. It, in and of itself, is a form of punishment which is not provided for in Section 24.02 of the Agreement, which limits disciplinary action to verbal or written reprimands, suspensions or removal."

The Union additionally contends that "the Employer has violated the Agreement by raising allegations to support the discipline which were not raised at the prediscipline meeting or at lower steps in the grievance procedure. Specifically, the Employer claims that the grievant's initial creation of the Report of Ex Parte Communication and the grievant's later attempt to strike a portion of the record sua sponte were part of an overall pattern of insubordinate conduct which had consequences for the credibility of the Board. The attempt to include these two additional fact situations as bases to support the disciplinary action are contractually [Section 24.04 of the Agreement] improper." The Union asserts that the grievant testified without contradiction that these two matters were not raised prior to the arbitration hearing. The Union additionally argues that contrary to Management's contention, these two additional allegations should not be inferred. "First, the Agreement does not condone inference. It requires explicitness. Second, Management was also obligated to provide those documents [or at least a list of documents] used to support the discipline to the employee and the Union. The Employer did not provide the Union or the employee with a copy of the grievant's sua sponte motion to strike... "

Finally the Union argues that in any event "the discipline [imposed] is not commensurate with the offense. Thus the Union contends that "without abandoning the above arguments, the discipline [of a ten day suspension] is inappropriate even if some cause were established. First and foremost, the grievant committed no act which justifies a leap in the outline of progressive discipline. The grievant was a longtime, career state employee with no prior discipline. The issue which created the problem (the authority of the chair of the board to direct the conduct of a hearing officer) was one which was unprecedented. The Chair's conduct did not conform to past practice and was not clearly established by statute or rule. The grievant at all times conducted himself both in a manner which he believed was in the best interests of the Board and which conformed to the training and professional activities which the Board had for years encouraged him to attend. The Employer's Step Four answer acknowledges that as a member of the legal community, the grievant was held to a higher standard. This higher standard made the traditional industrial standard of "work now grieve later" inappropriate. As a member of the legal community, work now grieve later is not a sufficient solution... The Judge has a duty to the parties in the case before him. The grievant, contrary to the Employer's attempts to portray him as a troublemaker, was not a crusader, did not have a hidden agenda, and was not crazy. He was a professional who sought to adhere to his high standards in the midst of controversy. He did not bow to hidden or explicit pressure. He acted with integrity and with a mind to further the integrity of the process. He should not suffer discipline for this conduct."

So it is that the Union urges that "the grievance be granted," and that "the ten-day suspension be removed from the grievant's file and that the grievant be made whole."

THE ISSUE:

The stipulated issue is as follows:

"Was the Grievant suspended for ten days with just cause?
If not, what should the remedy be?"

DISCUSSION AND OPINION:

As has been seen a great deal of the Union's contentions as to why the State's discipline of the grievant was improper, and failed to meet the applicable just cause standard, is grounded on assertions that the State's discipline of the grievant is unlawful (i.e. contrary to statute) and/or without authority (i.e. contrary to the Board's administrative rules). With respect to all of these contentions the State first and foremost contends that the Arbitrator is simply without authority to interpret and apply these rules and statutes and that rather, "the Arbitrator must make a determination on just cause based on the terms of the Collective Bargaining Agreement." While I disagree with the State-urged Proposition that I am "simply without authority" to interpret the Board's rules or applicable statutes, nonetheless the admonition to in essence "stick to the contract" is a sound viewpoint. After all, it is the Arbitrator's expertise vis a vis the contractual concept "just cause," which the parties have principally bargained for by inserting in their contract the just cause standard for discipline coupled with a grievance/arbitration provision, and not his acumen for statutory and/or administrative rule construction and interpretation. Additionally, the parties' respective positions concerning legality or illegality of the discipline of the grievant under the Board's administrative rules depends in large part on that most slippery of legal distinctions, namely, that between a "procedural" versus a "substantive" matter.

Moreover, I find it significant that neither party cites any judicial authority in support of their respective positions vis a vis the rules and statutes cited, thereby leaving the impression that the urged constructions are of first impression, a phenomenon which virtually invites judicial review by whichever party fails to prevail with respect to any one rule's interpretation. But judicial review is the antithesis of the "final and binding" concept the parties hope to achieve from the contractual arbitral process. Thus, unless absolutely necessary, I find it imprudent to ground the decision herein on any particular construction of one or another of the arguably applicable administrative Board rules or statutory provisions. And in my judgment, the facts and circumstances here readily present a factual pattern amenable to analysis under well established contractual arbitral principles inherent in the contractual "just cause" standard and hence within the parameters of the expertise the parties bargained for.

Thus, here there can be no question but that the grievant was given a direct order by his immediate supervisor and that he failed to carry it out, thereby giving rise to an arguable instance of insubordination. But skeletal circumstances hardly tell the whole story. If, as the Union contends, Management, (Chairman Shank to be specific) was also at fault, then, as a well established arbitral principle holds a mitigating circumstance would thus be made out, which circumstance would warrant a diminution, or perhaps all obliteration, of the discipline meted out. This well-established arbitral principle, inherent in the "just cause" concept, is treated by the Elkouris in their learned arbitration treatise under the heading of "Management-Also-At-Fault." As the Elkouris appropriately observe: "Where an employee is guilty of wrongdoing but Management (ordinarily the supervisor) 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 assessed by Management.[6] By way of illustration this principle was applied by Arbitrator Daniel Kornblum in Franklin Textiles, Inc., 68 LA 223 (1976). As Arbitrator Kornblum put it in the Franklin Textile case at page 225: "But it was the (Employer's) breach of the Contract to begin with that prodded these employees to engage in the acts of self help it now complains against." Moreover, the underlying concept behind this arbitral principle has also received judicial approval. Thus it has been particularly well articulated by the Fourth Circuit Court of Appeals in N.L.R.B. v. M & B Headwear Co., 59 LRRM 2829 (1965), wherein the Court
observed and found as follows:

"The employer contends, however that its misconduct, even if originally violative of the Act, is absolved by Vaughan's later insubordination. It is conceded that she was angered by her layoff, that she threatened to harm the supervisor who had observed her union activities, and that she was rude to a vice-president several days later, telling him to shut up when he intruded upon her discussion with the president about her being rehired. We in no way condone insubordination and in normal situations it would be a justifiable ground for dismissal. But we cannot disregard the fact that the unjust and discriminatory treatment of Vaughan gave rise to the antagonistic environment in which these remarks were made.
An employer cannot provoke an employee to the point where she commits such an indiscretion as is shown here and then rely on this to terminate her employment. See NLRB v. Tennessee Packers, Inc., 339 F .2d 203, 57 LRRM 2665 (6th Cir. 1964). The more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression. To accept the argument addressed to us by the company would be to provide employers a method of immunizing themselves from the only real sanction against violations of section 8(a)(3). Reinstatement in the instant case is not as the employer puts it, a reward to the employee for insurgency. Rather, as we see it, refusal to reinstate her would put a premium on the employer's misconduct." (Emphasis supplied.)

Before applying this contractual "Management-also-at-fault" analysis to the "facts" at hand, because the Union in essence asserts that its legal/Board-rule based arguments render the grievant's discipline "null and void," some consideration to these arguments must be given, for if said discipline is indeed "null and void," then that would be the end of the matter and there would be no basis to apply the additionally Union-urged analysis of Management-also-at-fault. In this regard, these legal/Board-rule based alleged infirmities all rest on the discipline of the grievant emanating from the Chairman. According to the Union, the Chair's disabilities render the Chair's imposition of discipline improper and null and void. These same alleged legally/Board-rule based disabilities of the Chair do not apply, however, to the grievant's immediate supervisor, General Counsel Shapiro. The impediments, if any, to the validity of Chairman Shank's discipline of the grievant lie in the fact that he was a participant (or potentially so) in the ultimate decision to be made in the Erieway case and in the fact that he also served as Director to the E.P.A., a party to the Erieway proceeding. And while to be sure Shapiro at first reacted to the grievant's conduct as not improper, the genesis for a viewpoint of impropriety emanating initially from the Chairman, by the time Shapiro actually gave the orders the grievant failed to obey, the grievant's conduct had created a virtual malestrom of controversy, such that there cannot be any doubt but that at that point in time Shapiro himself personally viewed the grievant's conduct as excessive and improper. It must therefore be said that Shapiro had come to adopt the Chairman's view to the effect that the grievant's conduct was improper. In my judgment it was therefore not improper for Shapiro, as the

grievant's immediate supervisor, to intervene and seek to correct the grievant's "excessive expression" (as the M & B Headwear court would put it) if indeed it was "excessive," by way of seeking to have the grievant retract it.

But was the grievant's conduct excessive and therefore deserving of correction? In my view it simply can't be seriously challenged but that it was "excessive." Thus, while concededly the grievant offered a "colorable" explanation for relating in his Report of Ex Parte Communication various of the Chairman's comments concerning the A.G.'s office and its personnel in order to "flesh out" the "context," and apparently explain why he didn't simply shut off the Chairman's purported endeavors to pressure him at the very outset of the Chairman's conversation with him; (the grievant claimed the Chairman's pressure was "seductive" and simply "evolved"), assuming for the sake of analysis the sincerity of this explanation, the common sense which the Board had a right to expect of the grievant, coupled with his experience level, would dictate that expression of such comments by the Chair would foreseeably and predictably trigger the kind of controversy and consternation among the parties it in fact did, thereby undermining the integrity of the Board's process. Moreover, this expression was indeed "excessive" because it was simply unnecessary to make the concededly legitimate point of having been purportedly subjected improperly to pressure from the Chair. Whatever colorable claim the grievant may be said to have had to legitimatize relating the Chairman's comments must give way to the greater cause of maintaining the Board's integrity and usefulness.

Next addressed is whether or not this excessive expression was wrongfully provoked. Again, in my view it simply can't be seriously challenged but that it was wrongfully provoked. Thus the engine that drives this entire case from start to finish as testified to by Deputy Director Sahli is the necessity for the appearance of justice, i.e. the appearance of fairness and impartiality. Here the Chairman, who would participate (or potentially so) in the ultimate decision in the Erieway case, intervened on behalf of his Agency party, the E.P.A., of which he was Director. This could only be perceived as improper even if technically the Board's administrative rules could be construed to permit it. Indeed I find that the HWFB virtually conceded this point when its principle witnesses, Sahli and Shapiro, both indicated that the grievant's issuance of a Report of Ex Parte Communication was understandable and in essence justified and defensible. In sum then it is found that the Chair improperly created both the appearance and the reality of pressuring the grievant to grant the E.P.A.'s request for a continuance, which pressure provoked the grievant's Report of Ex Parte Communication in which he excessively reacted. But for the Chair's impropriety there would have been no Report at all, and perforce no "excessive expression" therein. The grievant's self help in terms of his excessive expression and failure thereafter to obey the direction to retract it (insubordination)[7] must be said to have been "prodded" by the Chair's indiscretion. Management was also at fault here in connection with the grievant's misconduct. But the record is totally devoid of so much as a shred of evidence which would indicate that any consideration whatsoever was given to the Chair's provocative indiscretion and its role in the entire matter when Management fixed the grievant's discipline at a ten-day suspension. Hence this level of discipline must be modified. In addition, as the Union points out, on the one hand the grievant's discipline was in part based on his sua sponte motion to strike, a matter viewed as further aggravating his misconduct, but on the other hand he was never confronted with this allegation until the arbitration phase. This represents a clear due process shortcoming violative of Article 24.04, as the Union alleges. Thus this shortcoming provides additional justification for modifying the penalty as meted out by Management.

In situations such as these, it falls upon the Arbitrator to fashion an appropriate remedy. As has been seen, the State view was that the grievant's conduct was insubordination, a serious matter,

worthy in its judgment of a ten-day disciplinary suspension. It is well established that insubordination is indeed a serious offense. But in light of the mitigating finding herein that Management was also at fault in connection with the grievant's misconduct, the discipline imposed is reduced to a five (5) day suspension. This modification serves to preserve the sending of a serious message to the grievant in an effort to correct his misconduct, and at the same time recognizes and corrects Management's share of the fault for triggering the grievant's misconduct, as well as its due process shortcoming.

Finally it is noted that even if it were found that applicable statutes and/or Board rules rendered a finding of insubordination improper in this case, the fact remains that the grievant's unnecessary relation of all of Chairman Shank's sentiments, the grievant's excessive expression, represented a serious, if uncharacteristic (see the grievant's most recent evaluation vis a vis his "judgment") lapse in good judgment and hence represents a negligent performance of his job. But as the Elkouris[8] properly observe: ". . . it should be noted that 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."

So it is that I would find the penalty fashioned here to be proper in any event.

AWARD:

For the reasons more fully set forth above, the grievance is sustained in part and denied in part. The grievant's suspension for 10 days was not for just cause. Just cause did exist, however, for the grievant's suspension for 5 days. Accordingly, the grievant shall be made whole for all losses in pay and/or benefits resulting from any suspension beyond the 5 day suspension herein found appropriate.

DATED: NOVEMBER 25, 1989

FRANK A. KEENAN
ARBITRATOR

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[1] The most recent employee evaluation of the grievant was completed May 31, 1985. On a scale of 1 to 15 (15 being the best), the grievant was rated as follows: quality of work 12, on the cusp between "highly accurate" and "exceptional"; quantity of work - 11, "rapid worker"; on a scale of 1 to 10, (10 being the best) the grievant was rated as follows: knowledge of work, 8, on the cusp of "good understanding" and "excellent comprehension"; adaptability, 7, "adapts readily"; dependability, 8, on the cusp between "seldom needs checking" and "highly reliable;" cooperation, 7, "gets along well"; judgment, 9, "creative"; initiative, 8, on the cusp between "considerable" and "highly motivated; and personality, 8, on the cusp between "polite, courteous" and "exceptional." Under "Areas of Specific Strengths the following relevant notations were made: "His work . . . is in keeping with the high standards of the legal profession . . .. Conducts himself in a manner which is in keeping with the Code of Judicial Conduct and the Code of Professional Responsibility... Under the heading: "Areas of Greatest Opportunity/Program of Improvement," it was noted that the grievant "has a strong interest in and should continue to increase his understanding of the techniques and practices employed by administrative law judges. Program: Encourage Mr. Lepp's participation in the National Conference of Administrative Law Judges . . ."

[2] All of the documentation in the Erieway case was, mercifully, not submitted here.

[3] This resolution was passed by the HWFB to keep cases within certain time frames. It apparently came about in response to an understanding between the United States Environmental Protection Agency and the Ohio EPA. As applied to the Erieway case the Board's processing was due by November 1988. I note further in this regard that EPA Deputy Director Sahli indicated in his testimony that an HWFB adjudicatory hearing could take up to six (6) months to complete and involve as many as 15,000 pages of testimony. Following the hearings the ALJ/Hearing Examiner, such as the grievant, has 100 days to prepare a Report and Recommendations to the Board.

[4] See attachment #2 for Sahli's memo to Chairman Shank concerning the grievant's Report of Ex Parte Communication.

[5] In its post-hearing brief the Union argued that "in taking disciplinary actions, public bodies like boards or commissions take a vote and that vote is recorded .... A copy of such a disciplinary action, issued by the Ohio Industrial Commission is attached as Union Exhibit 4 to illustrate the process and paperwork which must occur. This document is a public record." By letter dated September 29, 1989, Management Advocate Morales characterized proposed Union Exhibit 4 as "additional evidence," and asserted that "it is the State's position that the record was closed at the end of the hearing and it is inappropriate to submit additional evidence with a posthearing brief. Management never had an opportunity to see this document nor was management made aware of its existence prior to our receipt of the union's brief.

Even if the document had been presented at the hearing, it is irrelevant. Whether or not an entirely different appointing authority decided that a vote of their board was appropriate to remove a hearing officer has no bearing on whether a vote is necessary to take disciplinary action at the Hazardous Waste Facility Board. Further, the union's assertion that such action was necessary at the Industrial Commission is completely unfounded. The document itself does not establish this and Mr. Smith did not present any evidence at the hearing to document his apparent afterthought. The State requests that the document be given no weight in the disposition of the grievance."

The undersigned solicited the Union's response. In pertinent part the Union asserted in a letter dated October 13, 1989, that Union 4 "is a public document which was identified and stipulated to as authentic by both parties in the grievance arbitration concerning [it] . . ..

Further, the document was not submitted for your attention to prove that Director Shank had to seek approval from the HWFB to discipline Mr. Lepp. Rather, the document was submitted to illustrate the process which the Director should have gone through if, by the testimony and evidence presented, the arbitrator found the Director's authority to be unlawful. Therefore, I did not consider this document to be strictly speaking 'evidence.' Rather, I considered this document to be like arbitration decisions or statutes that are submitted with a brief to support the party's arguments.

Regardless, in order to facilitate the process[ing] of this case ... the Union has no objection to the exclusion of the document if the arbitrator finds the document to have been inappropriately submitted ..."

This very proceeding is all about fairness. Clearly Union 4 is proposed to persuade the Arbitrator of the rectitude of the Union's position, and in that sense is clearly "evidence." The difficulty is that it is simply unfair to bring it forth at this point in time after the hearing is closed, and for the first time in the post-hearing briefs. Finding it to have therefore been "inappropriately submitted" it is rejected and "given no weight in the disposition of the grievance."

[6] See: How Arbitration Works, Elkouri and Elkouri, 4th Edition, 1985, BNA Books, Inc., Washington, D.C., p. 688

[7] If the demand that the grievant apologize was improvident, his refusal to do so can't fairly be viewed as insubordination, and in my judgment the demand of an apology was improvident. As noted elsewhere herein, the focus of the Board's concern quite properly was the impact on the appearance of justice and the Board's integrity the grievant's failure to retract his excessive statements purportedly had. Clearly, however, Muchnicki's behavior was to say the least, insensitive to the process and intemperate, in conformity with the "hot temper" ascribed to him by Deputy Director Sahli. Indeed Attachment 1 is attached hereto principally to highlight the intemperate tone Muchnicki set. As this Attachment demonstrates, no potential legal flaw or other possible shortcoming is left untouched upon, such as, for example, the allegation that the grievant's report was "libelous." Yet interestingly enough,

there was never so much as a contention that the grievant inaccurately set forth the Chairman's sentiments and truth is a defense to libel. So it is that I fail to see how a unilateral apology by the grievant to Muchnicki would have served to advance the integrity of the Board's process. Such a personal approach would have unduly disempowered the grievant in his role as Hearing Examiner/ALJ both in the Erieway case itself and in future cases. Finally on this point, I find no merit to the Union's point that the demand for an apology was an inappropriate form of discipline under Section 24.05. In the first place, the demand to apologize was not a disciplinary step. Secondly, I am unwilling to establish such a sweeping principle for the reason that an apology may well be the least onerous discipline in a given situation.

[8] How Arbitration Works, Supra Footnote 5 p. 676-677