

ARBITRATION DECISION NO.:

386

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation and
Developmental Disabilities

DATE OF ARBITRATION:

September 20, 1992

DATE OF DECISION:

October 21, 1991

GRIEVANT:

Rosalyn Royster

OCB GRIEVANCE NO.:

24-01-(90-12-11)-0064-01-09

ARBITRATOR:

Rhonda Rivera

FOR THE UNION:

Robert W. Steele, Sr.
Maxine S. Hicks

FOR THE EMPLOYER:

Mike Fuscardo
Rachel Livengood

KEY WORDS:

Ten Day Suspension
Insubordination
Neglect of Duty
Poor Work Performance
Employer's Failure to
 Meet Step Three
 Response Date

ARTICLES:

Article 24 - Discipline
 §24.01-Standard
 §24.02-Progressive
Discipline
Article 25 - Grievance
Procedure
 §25.02-Grievance Steps

§25.05-Time Limits

FACTS:

The grievant had been an employee of the Department of Administrative Services since 1984 as a Programmer Analyst 3. In January 1988 she became employed by the Central Office of the Department of Mental Retardation and Developmental Disabilities as a Systems Analyst 1, and was later upgraded to Systems Analyst 2 (through Class Modernization). The grievant was rated at least adequate at her mid-probation evaluation, but received a verbal reprimand for poor work performance in August 1988, after her probation had ended. She responded with letters to three superiors of her supervisor, alleging harassment and that she was being held to too rigorous work standards. The grievant received a poor evaluation in August 1989, and was temporarily transferred to another supervisor who also rated her below expectations in all six applicable categories in October 1989.

The grievant continued to perform poorly and received a verbal reprimand in November 1989, a written reprimand in January 1990, and a one day suspension in March 1990. No improvement occurred and the grievant was issued a ten day suspension in November 1990 for insubordination, neglect of duty, poor work performance and inefficiency. Specifically she was charged with refusal to follow a direct order to complete a Cost Accounting System assignment; breach of security by leaving her terminal on overnight twice; failure to complete the transfer of the Purchase File by the deadline; failure to correct errors in a diagnostic report on Workers' Compensation; and user complaints about lack of reports from the cost accounting system. While processing the grievance, the employer failed to send a Step 3 response to the union.

EMPLOYER'S POSITION:

There was just cause for the grievant's ten day suspension. She admitted receiving a direct order to complete the cost accounting system project by its deadline of April 6th and to not meeting the deadline. The grievant compromised the department's security by leaving her terminal on overnight twice. Also, her work was poor, as evidenced by the errors in the 20/20 data base. Her performance did not improve despite the fact that she had been given extensive training and assistance. The grievant had prior discipline for poor performance including a one day suspension.

The fact that the Step 3 response was not sent to the union pursuant to Article 25 does not result in a default by the employer. Section 25.02 allows the union to proceed to Step 4 in the event that no Step 3 response is sent. Therefore, the grievant was not prejudiced by this event.

UNION'S POSITION:

The employer clearly violated Article 25 of the contract by failing to send a Step 3 response to the union. Section 25.02 is not permissive, but commands the employer to send a Step 3 response, thus the employer has granted this grievance by default.

The grievant is not an incompetent employee who cannot perform her job, rather she has been subjected to supervisory harassment. She had been working on the errors in the 20/20 data base but had been unable to correct the problem, the monthly cost accounting system report delay was caused by other employees, and lastly, the grievant only left her terminal on twice which was not a major security breach. She had four years experience with DAS which included two promotions. Additionally, a ten day suspension following a one day suspension was not progressive nor commensurate with the offense.

ARBITRATOR'S OPINION:

No evidence of a Step 3 response was presented at arbitration, thus section 25.02 was violated by the employer. However, this did not prejudice the grievant and does not result in default by the employer. It is a serious issue which demands some adjustment in the penalty.

The employer proved that the grievant did commit the acts contained in the discipline notice. She was responsible for the 20/20 data base which contained errors, she left her terminal on overnight which caused a potential security breach, the monthly cost accounting system reports were not properly done, and she failed to follow a direct order to complete them in a timely manner. The remaining issue is whether the parties

reacted properly to the situation. The grievant's alternatives were to work harder to complete her assignments or to follow orders and grieve later. No supervisory harassment was proven at arbitration and the disciplinary sequence (a ten day suspension following a one day) was not improper. The grievant must follow her supervisor's orders and if the orders violate the contract then she may grieve.

AWARD:

The grievance was denied, however, the penalty was reduced to a seven day suspension due to the employer's failure to send a Step 3 response.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

**OCSEA, Local 11
AFSCME, AFL-CIO**
Union

and

State of Ohio
Employer.

Grievance No.:
24-01-(901211)-0064-01-09

Grievant:
R. Royster)

Hearing Date:
September 20, 1991

Award Date:
October 21, 1991

Arbitrator:
Rivera

For the Employer:
Mike Fuscardo
Rachel Livengood

For the Union:
Robert W. Steele Sr.
Maxine S. Hicks

Present at the Hearing in addition to the Grievant and Advocates were Daniel J. Beck, Manager MR/DD (witness) and David B. Cumming, Systems Analysis II (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection

and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. All witnesses were sworn.

Issue

Was the Grievant suspended for ten (10) days for just cause? If not, what shall the remedy be?

Joint Stipulation of Fact

The Grievant has been employed as a Systems Analysis II by the MR/DD Central Office.

Joint Exhibits

1. Agreement
2. Grievance Trail
 - A. Grievance
 - B. Appeal to Arbitration
3. Discipline Trail
 - A. Suspension Order (10 days)
 - B. Prior Discipline (3 pages)
 - C. Notice of pre-disciplinary hearing
4. Training Record
 - A. VAX115/VAX/UMS Utilities and Commands for Programmers
 - B. Application for employment with MR/DD
5. Performance Evaluations (3 evaluations)
July 31, 1989, October 26, 1989 and August 6, 1990
6. Position description (1 page)

Employer's Exhibits

1. Printout showing program sign-offs
2. Program printout with erroneous entries
3. IOC (3/19/90) from D Cumming to Grievant entitled "CAS Production Update"
4. IOC (11/2/89) from Grievant to D.J. Beck, subject "Production Guidelines"
5. IOC (4/6/90) from D. Cumming to D.J. Beck entitled "Production Incident"
6. Log pages (2) of Witness D.B. Cumming
7. IOC (4/11/90 at 9:38 a.m.) from D.B. Cumming to Grievant entitled "Activity Report"

IOC (4/11/90 at 9:49 a.m.) from Grievant to D.B. Cumming entitled "Activity Report" with attachment; IOC (4/11/90 at 12:18 p.m.) from D.B. Cumming to D.J. Beck entitled "Activity Report" with Grievant's Project Status Report attached; IOC (4/11/90 at 1:21 p.m.) to Grievant from D.J. Beck entitled "Activity Report Instructions" with attachment; IOC (4/11/90 at 2:56 p.m.) from Grievant to D.B. Cumming entitled "Activity Report" with attachment.

8. Log pages (2) from Witness D.B. Cumming
9. Sample program with errors
10. IOC (12/12/87) from P. McKinnon to D.J. Beck, subject resignation

11. Letter of Recommendation for Pamela McKinnon by D.J. Beck

Union's Exhibits

1. IOC (4/11/90 at 2:42 p.m.) from D.B. Cumming to Grievant
2. IOC (4/11/90 at 2:13 p.m.) from Grievant to D.B. Cumming
3. Grievant's statement
4. Probationary evaluation of Grievant dated 6/2/88
5. Verbal Reprimand of Grievant dated 8/1/88
6. IOC to Robert Brown, Benjamin Odita, James Flewellen, Robert M. Kula from Grievant dated 9/30/88
7. IOC (11/27/89) from D.J. Beck to Grievant and others, subject "Temporary Reassignment of Supervisory Duties"
8. Supplemental Report: Disability Leave Benefits Employee's Statement dated 8/29/90
9. IOC (9/27/90) from Grievant to Mike Fuscardo
10. Letter to Grievant from D.B. Cumming dated 9/4/90 Re: Request for Leave Without Pay
11. Letter from Grievant to James Flewellen dated 8/3/88
12. IOC (12/19/90) from Grievant to Robert Kula
13. Statement by Grievant dated August 3, 1989 -- attachment to evaluation Joint Exhibit 5

Relevant Contract Sections

§24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

§24.02 - Progressive Discipline

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

- A. One or more verbal reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. One or more suspension(s);
- D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

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

Article 25

Step 3 - Agency Head or Designee

If the grievance is still unresolved, a legible copy of the grievance form shall be presented by the Union to the Agency Head or designee in writing within ten (10) days after receipt of the Step Two response or after the date such response was due, whichever is earlier. Within fifteen (15) days after the receipt of the written grievance, the parties shall meet in an attempt to resolve the grievance unless the parties mutually agree

otherwise. In the Ohio Department of Transportation Step 3 meetings will normally be held at the worksite of the grievant. If the meeting is held at the district headquarters the chief steward will be permitted to represent.

The Agency Head or designee shall process grievances in the following manner:

A. Disciplinary grievances (suspension and removal)

The Step 3 grievance response shall be prepared by the Agency Head or designee and reviewed by the Office of Collective Bargaining. The response will be issued by the Agency Head or designee within thirty-five (35) days of the meeting. The response shall be forwarded to the grievant and a copy to one representative designated by the Local Chapter Officer. Additionally, a copy of the answer will be forwarded to the Union's Central Office. This response shall be accompanied by a legible copy of the grievance form.

If the grievance is not resolved at Step 3, the Union may appeal the grievance to arbitration by providing written notice and a legible copy of the grievance form to the Director of the Office of Collective Bargaining within thirty (30) days of the answer, or the due date of the answer if no answer is given whichever is earlier.

B. All other grievances

The Agency Head or designee shall give his/her written response and return a legible copy of the grievance form within fifteen (15) days following the meeting. The Agency shall forward the response to the grievant and a copy to one representative designated by the Local Chapter Officer.

§25.05 - Time Limits

Grievances may be withdrawn at any step of the grievance procedure. Grievances not appealed within the designated time limits will be treated as withdrawn grievances.

The time limits at any step may be extended by mutual agreement of the parties involved at that particular step. Such extensions shall be in writing.

In the absence of such extensions at any step where a grievance response of the Employer has not been received by the grievant and the Union representative within the specified time limits, the grievant may file the grievance to the next successive step in the grievance procedure.

Facts

The Grievant has been a state employee since July 9, 1984. She worked for the Department of Administrative Services from July 9, 1984 to January 4, 1988 as a Programmer/Analyst 3. On January 4, 1988, she became employed with the Central Office of the Department of Mental Retardation and Developmental Disabilities (MR/DD) as a Systems Analyst I (under the Classification Modernization Program, she was later reassigned on 11/3/90 as a Systems Analyst 2.) Starting in 1988, she worked in the Office of Information Systems. Her immediate supervisor was Dave Cumming, Systems Analyst II. Over Mr. Cumming was Dan Beck, Manager of Administrative Systems.

On June 2, 1988, the Grievant received her Mid-Probationary Performance Evaluation which the Arbitrator would characterize as "at least adequate." This evaluation covered January 3, 1988, to April 2, 1988 (Union Exhibit 4). On August 1, 1988, the Grievant received a Verbal Reprimand (Union Exhibit 5). The Reprimand read (in pertinent part)

"To is to confirm a Verbal Reprimand given to you August 1, 1988. The reason for this Reprimand is for work performance deficiencies, as work which you produce is unsatisfactory.

You have failed to meet expectations for timely production of reports and projects despite continued attempts to offer guidance. In addition, you have not been available to your supervisor for consultation and

assignments in your work area for extended periods of time without explanation. I will be monitoring your work performance and expect a significant improvement."

The Grievant felt, as evidenced by her testimony at the Arbitration hearing, that the Reprimand was given without any preliminary expression of dissatisfaction with her work. As a consequence of her dissatisfaction, she wrote a two page letter to James R. Flewellen, then Chief of the Office of Human Resources Development. This letter commented adversely on Mr. Beck's management of personnel and asked Mr. Flewellen to "look into the problem I am having with Dan Beck" (Union Exhibit 11). On September 30, 1988, the Grievant sent a 2-1/2 page memo to Robert Brown, James Flewellen, and Robert Kula (all superiors of Mr. Beck) (Union Exhibit 6) reacting to an alleged September 27, 1988 memo from Dan Beck. (The September 27, 1988 memo was not placed in evidence by either party.) In the September 30, 1988 memo, the Grievant stated that she was being held to too rigorous standards of work without receiving adequate guidance and, in essence, accused Mr. Beck and Mr. Cumming of supervisory harassment. On August 8, 1989, the Grievant received an annual evaluation for the period July 9, 1988 to July 9, 1989. This detailed evaluation indicated that she did not meet expectations in Quantity, Quality, Timeliness, Problem Solving, and Communicating. She did meet expectations in Team Effort and Planning (Joint Exhibit 5). The Grievant expressed her disagreement with the evaluation in writing. She claimed that the bad evaluation was a "reprisal" for grieving her previous verbal reprimand.

Subsequently, the Grievant was temporarily transferred to another supervisor. On October 26, 1989, that supervisor, Donna J. Wood, gave the Grievant a special evaluation covering the period August 2, 1989 to October 20, 1989 (Joint Exhibit 5). In that evaluation, the Grievant was rated below expectations in all 6 categories (the 7th was considered not applicable to the job).

On November 2, 1989, Supervisor Dave Cumming notified the Grievant by IOC (Employer's Exhibit 4) of production guidelines. In particular, he stated that CAS production should be ready to start on the first work day of the month. He specifically stated "It is your responsibility to check for the availability of the data ... and to ensure that the output is printed and delivered to the user in a timely fashion." On November 17, 1989, the Grievant was given a Verbal Reprimand by D. Cumming (Joint Exhibit 3). The body of the Reprimand read as follows:

"This is to confirm a Verbal Reprimand given to you November 17, 1989. The reason for this Reprimand is inefficiency and insubordination, as the work which you produce is unsatisfactory and your behavior towards supervisors is argumentative and shows a failure to accept authority.

You have failed to meet expectations for timely production of acceptable, completed reports and projects despite continued attempts to offer guidance. Your work products show inattention to requirements during assignment. Your response to instructions and corrections has been argumentative and uncooperative, and you have wasted time generating unnecessary and inappropriate correspondence. I will be monitoring your work performance and expect a significant improvement.

Consistent with Progressive Discipline, this Verbal Reprimand is the first and lowest form of disciplinary action which can be administered. Should your work performance continue to be unsatisfactory, further and more severe disciplinary action will be taken. A copy of this Reprimand is being placed in your Personnel File."

On November 27, 1989, Dan Beck temporarily assumed the supervisory duties of Mr. Cumming over the Grievant and over 3 other workers (Union Exhibit 7). On January 3, 1990, the Grievant was given a Written Reprimand by D. Beck (Joint Exhibit 3) which read as follows:

"In giving full consideration to all the facts in your case and in accordance with the existing labor agreement, you are hereby reprimanded on the following grounds:

On or about December 7, 1989, you extended your lunch thirty (30) minutes without your supervisor's prior approval. On or about December 28, 1989, you failed to report for work at your scheduled starting time which is 7:45 AM. You did so without notice or prior approval. Your actions on the above dates constitute neglect of duty.

Please be advised that should you continue to violate department policy a more severe disciplinary response may result. Current rules and regulations for the conduct of employees, as you are aware, require full compliance. It was your responsibility to follow these rules and regulations.

A copy of this Written Reprimand will remain in your personnel file for a period of one (1) year in accordance with the appropriate labor agreement."

On March 8, 1990, the Grievant was suspended for one (1) day (Joint Exhibit 3). The body of the suspension order read as follows:

"The reason for this action is that you have been guilty of neglect of duty, poor work performance and inefficiency in the following particulars to wit:

On November 28, 1989 an assignment was made with a due date of December 1, 1989. The report was not submitted until December 5, 1989 and was not complete.

On December 9, 1989, you reported that you have completed the transfer of POS Vendor file to 20/20. On January 31, 1990, you reported that the transfer of POS Vendor file to 20/20 was not complete.

On January 3, 1990 one of your assignments was found totally misfiled.

On January 2, 1990, assignment deadline was made for January 12, 1990. Assignment was not submitted until January 19, 1990. The Report was incomplete and contained obvious errors.

This suspension follows a Verbal Reprimand on November 17, 1989 for inefficiency and poor work performance, and a Written Reprimand on January 3, 1990 for over-extended lunch period and tardiness. Any further problems with work performance or violation of policy will result in more severe corrective action."

The suspension was served March 14, 1990 (Wednesday), and the events which surrounded the discipline at issue followed that suspension. Those events culminated in a Pre-disciplinary Notice to Grievant on November 7, 1990 (Joint Exhibit 3C) and an order for a ten (10) day suspension on November 27, 1990 (Joint Exhibit 3). The order made the following charges:

"The reason for this action is that you have been guilty of Insubordination, Neglect of Duty, Poor Work Performance, and Inefficiency. You refused a direct order to perform an assignment. You have failed to complete assignments in a timely and appropriate manner. You continue to produce poor quality of work. To wit:

On April 5, 1990, you refused a direct order to perform an assignment of the Cost Accounting System production.

On April 2, 1990 to April 4, 1990, you breached security by leaving two sessions with your system staff privileges active overnight on an open terminal accessible to anyone.

On April 9, 1990, you still had not completed the transfer of the Purchase Order File to 20/20 spreadsheet access, even though a deadline of April 6, 1990 had been set on March 20, 1990 and you had not reported

any problems to your supervisor.

On March 22, 1990, you submitted a diagnostic report on Worker's Compensation with inadequate review for obvious and basic errors. A subsequent report on March 23, 1990 showed similar errors and lack of attention with no attempt to detect or mention the presence of errors. You missed the deadline for the report of March 28, 1990 with no communication to your supervisor.

On April 5, 1990, users called to complain about lack of reports from the Cost Accounting System. You had not successfully completed production but had not followed production procedure to monitor successful completion, nor had you informed your supervisor of problems.

This suspension follows a Verbal Reprimand on November 17, 1989 for inefficiency and poor work performance, a Written Reprimand on January 3, 1990 for Over-extended lunch period and tardiness, and a one-day Suspension on March 14, 1990 for neglect of duty, poor work performance, and inefficiency." On December 11, 1990, the suspension was grieved (Joint Exhibit 2) and on February 8, 1991 Arbitration was requested (Joint Exhibit 2).

At the Arbitration hearing, Mr. D. Beck explained that his office was part of the Central Office Support Staff of the Department of MR/DD. This Staff is charged with backing and supporting State and community based housing and programming needs for thousands of mentally retarded and developmentally disabled citizens of the State of Ohio. Mr. Beck is Manager of the Computer Network within the Support Staff and has been employed since 1978. Within his domain are two computer sections: Administrative which handles administrative, fiscal, and operational information and Residents System which handles information on Residents. Within the Administrative Section, a very important administrative tool is the Cost Accounting System of the State (CAS). The CAS monthly production report was the responsibility of the Grievant. Once each month is completed, production of the monthly report on the previous month must begin immediately and should be available by the 5th of the new month. Mr. Beck said that in November and December of 1989, in particular, serious timeliness problems had occurred with the Report and that the Grievant had clearly been notified of those problems.

On April 5, 1990, Robert Kula, Chief of Fiscal, came to Mr. Beck and said that the March report was not properly available. Mr. Beck then called the Grievant to his office and asked about the report. Beck said that the Grievant indicated that she knew of no problem. He directed her to D. Cumming to "straighten it out." According to Mr. Beck, Mr. Cumming then came to him and reported that the Grievant had come to him and told him (Cumming) that the problem was Randy Blackstone's and he should straighten it out. Mr. Beck then called in Blackstone, Cumming, and the Grievant. Beck determined, with information from Blackstone, that the Grievant had failed to follow certain steps in a checking procedure which caused the errors. Mr. Beck then dismissed Mr. Blackstone. Beck testified that he spoke directly to the Grievant in Cumming's presence. He said that regardless of past, production must be timely. He said he "directed her to do a written analysis of the production procedure, find errors, and suggest changes. He said the errors and the production were her responsibility and not Mr. Blackstone's. Mr. Beck testified that he then said "I am giving you a direct order to do this analysis." According to Mr. Beck, the Grievant said "This is not my responsibility" whereupon she stood up and left saying "I am going to see the Director." Mr. Beck and Mr. Cumming went immediately to Mr. Kula, the Director, arriving at the same time as the Grievant. In that meeting, Mr. Kula told the Grievant that Mr. Beck's order was legitimate. Mr. Beck set a deadline of April 12, 1990 at noon. Mr. Beck testified that the analysis was not done by April 12th.

Mr. Beck also testified that on April 4th, Mr. Cumming reported to him that the Grievant had failed to close out two sessions on her terminal, leaving one program "open" overnight and a second program "open" over two (2) nights. Mr. Beck said that leaving a program on over night was a serious problem because after hours, non-departmental persons had access to the office and the terminals.

Mr. Beck also reported on a third problem, namely the data on the 20/20 purchase file. The 20/20 data base was to be completed on April 6, 1990. When he called it up on April 9, 1990, he found the file accessible but the data corrupted. The Grievant was responsible for the 20/20 program. When Mr. Beck

found the corrupted data, he turned the problem back to Mr. Cumming to handle with the Grievant.

On cross-examination, Mr. Beck said that he had concerns about the quality and timeliness of the Grievant's work almost from the beginning but that he attributed the problems to her newness and the newness of the position. He admitted that the deadline was missed on her final probationary evaluation; he attributed this error to the fact that, at the time, focus was on her verbal reprimand and its repercussions. He said that to remedy her deficiencies she was sent to various training programs (see Joint Exhibit 4A), and provided with help in the person of Randy Blackstone, a more experienced analyst. Mr. Blackstone provided extensive help. (See Employer's Exhibit 3, Blackstone's update to Grievant.) Moreover, one of the reasons the Grievant was hired was because of her apparent familiarity with CAS (see Joint Exhibit 4B, bottom of page 3 application).

Mr. Cumming, a Systems Analyst II and the Grievant's immediate supervisor, also testified. He stated in November 2, 1989, he had written the Grievant a memo reiterating the production guidelines, explicitly stating that CAS production should be ready to start on the first day of the month (Employer's Exhibit 4). He said he was very familiar with the events of April 4 and 6 and that on April 4, 1990 at 11:01 he had sent an IOC to Mr. Beck detailing those events (Employer's Exhibit 5). Mr. Cumming identified 2 pages from a log he kept with regard to the Grievant's work projects. He noted from those pages that on March 20th he had given her a deadline of April 6, 1990 to have the YTD purchase order file available for viewing in "20/20." On April 9, 1990, when he received no report, he checked and found that the 20/20 YTD file was accessible but that fifty percent of the records were unintelligible, and all the records contained invalid amount fields (E-6).

On April 11, 1990 at 9:38 a.m. EDT (Wednesday), Mr. Cumming sent the Grievant an IOC by electronic mail asking for her activity report which had been due Monday (April 9, 1990) (Employer's Exhibit 7). At 9:49 a.m. EDT, the Grievant replied that "coincidentally" she was in the process of creating it, and she would send it shortly (Employer's Exhibit 7). At 12:18 p.m., the Grievant sent Mr. Cumming her activity report. The report stated that inter alia the Purchase Order 20/20 file was completed (Employer's Exhibit 7). On April 11, 1990 at 1:21 p.m., Cumming replied to the Grievant as follows (Employer's Exhibit 7):

"In my memo to you earlier today I instructed you specifically to give me an activity report for last week and a separate one for this week by this Friday. You have chosen to ignore these instructions. In view of this fact, I want an activity report by the close of business Friday (4/13/90) for the period 4/11/90 thru 4/13/90. Thereafter, I expect a weekly report by the close of business each Friday covering one week's activity. If your memory is so poor that you can not remember this requirement after two years, I suggest you set up reminders on the VAX.

Concerning the activity report, the first item under "Progress Report" does not make any sense. What does the POEXPEN report have to do with the monthly BWC production? Please clarify.

The purchase order file transfer to 20/20 for FY90 is not complete. If you would try to read the file in 20/20 or Datatrieve, you would see that it contains gibberish in many fields.'

Concerning the abnormal award amounts for BWC, I do not want Brian Henry to talk to the BWC folks without your presence. While Brian may have valuable input to make, you are the one who will need to modify the code. That's why I asked you to set up a meeting with you, Brian, and BWC to get this resolved. Brian told me he would be happy to participate."

On April 11, 1990 at 2:13 p.m. EDT, the Grievant replied to Mr. Cumming as follows (Union Exhibit 2).

"My activity report was in route prior to my reading your memo of instructions for sending separate weekly activity reports. I did not ignore your instructions because I did not read them until I had returned from lunch this afternoon.

Since I am in the office, and with a critical issue as this, communicating verbally would have sufficed and

would alleviate misunderstanding and confusion."

On April 11, 1990 at 2:42 EDT, Mr. Cumming replied to the Grievant as follows (Employer's Exhibit 7).

"Regarding the attached reply to my memo, I wish to make three points very clear to you:

- 1) One and one-half hours elapsed between my instructions to you and your activity report being E-mailed (10:48 AM to 12:18 PM). This was ample time for you to read your mail before sending your activity report.
- 2) I will communicate with you in whatever fashion I deem appropriate and useful.
- 3) If you would submit timely and correct activity reports, there would be no need for me to communicate with you on this subject.

I expect this to be the last word on the matter. I would, however, like a response concerning the other issues raised."

On April 11, 1990 at 2:56 EDT, the Grievant sent a revised Activity Report which indicated in a footnote that the "completed 20/20 program" contained problems. The footnote read as follows.

"The purchase order FY90 20/20 file is accessible to 20/20. However in conjunction with my other duties I have been trying to find out why some records are showing correctly on the file while others are overlapping and have erroneous data in them. I have been trying to find the problem for a while now and I could use some help on this problem since I have just started using RDO and RDB commands. At this point I'm not sure where or why this problem is occurring."

Mr. Cumming identified 2 pages in his log dealing with the BWC "errors" program (Employer's Exhibit 8). After detailing the discussions with the Grievant from March 20, 1990 through April 9, 1990, he identified Employer Exhibit 9, a printout which illustrated the errors still remaining in the program on April 9, 1990. On cross-examination, Mr. Cumming said that his working relationship with Grievant was "adequate" but that it became strained as the work problems continued over time. He said he had no personal animosity to her. He said he communicated with all his workers both verbally face to face and by electronic mail, about 50/50 each method. He said he probably communicated by electronic mail with the Grievant somewhat more than other analysts because more problems arose with her work. No other analyst, he stated, had missed deadlines to his knowledge. Mr. Cumming identified Employer's Exhibit 1 as the printout showing that the Grievant had left 2 programs "on" overnight. He also identified Employer's Exhibit 2 as a printout showing the "corruption" in the 20/20 file on April 9, 1990 at 12:56.

The Grievant testified and in addition presented a written statement (Union Exhibit 3) (which is attached to this Award). The Grievant noted that she had graduated from DeVry Institute of Technology in June of 1964 with a B.S. in Computer Science. She stated that prior-to her service at MR/DD she had worked for DAS for 4 years, receiving two promotions during that time (Joint Exhibit 4). She said that prior to the verbal reprimand given in August of 1988 (Union Exhibit 3) she had received no notice of any deficiencies and relied on her mid-probationary evaluation which indicated that she was doing fine. She stated that the Verbal Reprimand (Union Exhibit 5) came "out-of-the clear blue sky." She said her letter dated September 30, 1988 to her bosses was designed to let "them" know how "I was being treated." She acquiesced that "perhaps" the letter of September 30 was a bit "harsh" and that ever since then she had found it difficult to do her job. She said she regarded the temporary supervision by D. Beck reflected in the IOC of November 27, 1989 as "priming her for removal." She said that her disability from depression after the birth of her child was directly attributable to the stress on her at the job (Union Exhibit 8). She said that in April she had made a lot of mistakes but received no help. (The Grievant then introduced Union Exhibits 9, 10, 11; however all of these documents discussed events after the events in the discipline, and the Arbitrator finds them irrelevant.) With regard to the submission of Activity reports, the Grievant said that "something on the report was always questioned," that "every little mistake was held against her," and she was subject to "hostile and negative reactions."

With regard to the evaluations, she said that none were ever, discussed with her and that Donna Wood had never looked at the work she had given the Grievant. She said she probably had, inadvertently, left the terminal on but had never done so in prior three years.

The Grievant admitted that with regard to the CAS production she had received a direct order. She said she didn't refuse it "only questioned it because Randy was really the one." She said she did do the analysis but "never received a deadline." "I was," she said "unhappy with the manner"; "the order was awkward to me."

The Grievant also spoke of the 20/20 program. She said the records were transferred over and that transfer was what she meant when she said in her Activity Report that the 20/20 was "complete" and that she had told Cumming verbally about the other problems. She said the second Activity Report merely elaborated and enlightened upon the first. The Grievant said Cumming used E-mail to make her look bad.

On cross-examination, the Grievant was asked what the prior problems were (as referenced in her letter)? She stated that other minority persons had told her that the former minority woman in a similar position (Pamela McKinnon) had had trouble with Mr. Beck and was forced out by him. With regard to the direct order of April 6, the Grievant again said she received it, understood it, but she said no deadline accompanied it. Then she said "I understood the analysis was due before the next month's production was due." The Grievant said she "didn't agree with the assignment or its legitimacy." When asked if she had the authority to question the legitimacy of an order, the Grievant said that "when treated unfairly she had a right to question an order -- not refuse it -- just question it."

She admitted she did not know the 20/20 program was not correct until told so by her superior.

With regard to the evaluation from Ms. Wood, she said she was out of the office when Ms. Wood left the evaluation on her chair with a note saying "if you have any questions, let me know and we'll discuss it." The Grievant said she did not contact Ms. Wood.

The Grievant was shown her position description (Joint Exhibit 6) and directed to Section 3 which states "Analyzes and evaluates existing hardware and operating computer systems and investigates problem areas found in existing systems; confers with user management and modifies or designs corrective systems as necessary."

The Grievant acknowledged that performing an analysis is her job.

On rebuttal, the Employer, through Mr. Beck, introduced Employer's Exhibit 10, Ms. McKinnon's resignation letter indicating she was moving to California, thanking Mr. Beck for his help, and asking for a reference. Employer Exhibit 11 was introduced which was Mr. Beck's favorable recommendation of Ms. McKinnon.

Employer's Position

The Grievant admitted the direct order and simultaneously denied receiving a deadline. Then by her own admission she stated the deadline. The Employer, by clear evidence, has proven each charge in the discipline order. Management has tried to help this employee. She has been given specialized, expensive training; she has been given extensive help by another analyst. She has demonstrated an antipathy to authority. She was not harassed. She failed the basic method of obey now and grieve later. The ten day suspension is appropriate. All the previous discipline (Verbal, Written, and 1 day suspension have failed to cause correction.

Assuming arguendo that a third step answer was not made in a timely manner, the remedy is not default. Under §25.02 of the contract at page 42, the remedy is that the Union can go forward without the Step 3. The contract contains no default language for this issue.

The Grievant was disciplined for just cause, and the Grievance should be denied.

Union's Position

The Employer violated the contract at §25.02 by failing to provide a Step 3 response. Section 25.02 language is "shall" and thus mandatory. This failure should cause an automatic award in favor of the Grievant; i.e., "default" the Employer.

The Grievant is a well-qualified employee with 8 years service with the State. Her excellent background is attested to by her success at DAS which included two promotions.. Thirdly, the discipline was not progressive nor commensurate. Ten days is too harsh a discipline and amounts to punishment. The Grievance should be sustained because the Grievant was disciplined without just cause.

Discussion

Procedural Issue

No evidence of a timely Step Three (3) response was adduced at the Hearing. The Employer violated the contract at §25.02 which mandates (shall) such a response. The remedy, however, is not to default the discipline and grant the Grievance. No explicit default language is attached to this section. Default language does occur in section 25.05, so clearly the parties could have included such language in §25.02 if they so intended. A failure of a Step 3 response was provided for on page 42 in §25.02 where the Union is allowed to proceed forward without the Step 3 response. However, the Union and the Grievant could be seriously prejudiced by not receiving that Step 3 response, and the Employer must be aware of its failure (see Award). In this case, however, the Arbitrator finds no evidence of prejudice sufficient to prevent a proper hearing.

Substantive Issue

The Employer has by clear and convincing evidence shown that the Grievant did, indeed, do all the acts complained of in the November 27, 1990 discipline notice (Joint Exhibit 3). The facts as outlined show that testimony and documentary evidence overwhelmingly support the Employer's charges. Moreover, the Grievant admits receiving a direct order and obfuscates when asked if she obeyed that order. The real issue for this Arbitrator is whether the Grievant willfully refused the order or was incapable of carrying out the order in a timely manner. One reasonable conclusion is that the requirements of the MR/DD position have continuously overwhelmed the abilities of the Grievant. The next question is how the Employer and the Grievant reacted to this problem. Assuming arguendo that her first written reprimand for poor work came out of the blue and a proper foundation was not laid by her supervisor, the Grievant reacted inappropriately (even if humanly). She had two clear cut courses of appropriate action, and she could have taken both simultaneously: 1) Buckle down and work extraordinarily hard to master something difficult and 2) grieve the discipline. No evidence was adduced on #2, but clearly she had the opportunity to do #1. Evidence shows that the Employer provided both training and support to make #1 possible.

The Grievant wrote a letter over her supervisor's head. This arbitrator does not fail to recognize her first amendment rights, however, the reaction of her supervisor to keep logs and written records was not an unusual nor improper response. Supervisors can fear retaliation as well as employees. Obviously, a tense situation became more tense. However, no evidence was introduced to indicate any inappropriate or harassing behavior by the supervisors. The Grievant's charges of harassment against a former employee who was also a black female were clearly rebutted.

The Grievant has had three prior disciplines plus this discipline. This disciplinary sequence can be corrective. The Grievant needs to take orders and do her job. If she is over her head, she needs to seek training and guidance both internally and externally. She need not like her supervisors nor their orders. If those orders violate the contract, she must and should grieve them. But first she must obey them.

The Union questions the 10 day suspension as too harsh. The Grievant was suspended for 1 day for virtually the same offense only 7 months earlier. Ten days is a tough amount but the Arbitrator cannot find, given the context, that 10 days is not progressive or commensurate. However, the Arbitrator notes that the Employer failed to provide a timely Step 3 response which expressly violates the contract. The Arbitrator reduces the suspension to seven (7) days because of this contract violation.

Award

Grievance denied; suspension reduced to seven (7) days.

Rhonda R. Rivera
Arbitrator

October 21, 1991
Date

9-20-91
My Statement of Objectives to the Allegations which have been brought against me for the 10 day suspension which is being Arbitrated this day, September 20, 1991 at the Office of Collective Bargaining, 65 E. State Street.

Submitted by Rosalyn Royster
September 20, 1991

EXHIBIT U-3

Ms Arbitrator,

I am prepared to refute the allegations brought against me. Although I would like to bring to your attention the following:

* I have all of the credentials and skills necessary for this position and I am qualified for this position. I graduated from DeVry Institued of Technology with a Bachelors Degree in Computer Science, I have recommendations from Instructors and past employers. I worked for the Dept. of Administrative Services for over 3 years as a Programmer Analyst. I received good evaluations and two promotions from supervisors during my tenure with DAS.'

* Had I been given a fair opportunity, I would have also been successful in my position of Systems Analyst with the Department of Mental Retardation. In fact, I did receive a good evaluation from Dan Beck within my first six months in this position. (Doc 1) Not long after that Mr. Beck served me with a reprimand without ever discussing with me that there were problems with my performance. In fact, Mr. Beck was my Manager not my immediate supervisor. Dave Cumming was my supervisor and he had never discussed or mentioned any problems concerning my performance. The way I received this reprimand, was as though Dan Beck had come to a conclusion about me overnight. (Doc 2)

* I grieved the reprimand and I thought it was appropriate to inform upper management of how I was being treated so I wrote a letter .(Doc3) This letter, I believe is one of the main reasons I am here today.

* The allegations against me are motivated by retaliation, sheer hatred and a personnel vendetta Dan Beck has had against me for over 3 years. Mr. Beck was determind to get rid of me, In fact, they had to give me this suspension in order to discharge me.

Mr. Beck made a conscientious effort, collaborating with Management, to set me up for failure in my position by:

- 1) Continuously discrediting my performance and never giving me credit for work which I produced.
- 2) Mr. Beck and Mr. Cumming rejected verbal communication with me. They preferred to keep a paper trail going via Electronic Mail (EM) thru the Computer, even though our offices were within 20 ft. of each other. (Doc 4)
- 3) Mr. Beck took over Mr. Cumming's supervisory responsibilities, making himself the immediate supervisor so that he could impose discipline and prime me for removal of my position. (Doc 5) Discipline must come from the immediate supervisor. During Mr. Beck's tenure as supervisor, I received 1 reprimand (Doc 6), 1 suspension for (1) day (Doc 7). I grieved each of these thru the union and even though the allegations were not substantiated the decision was in management's favor.
- 4) Mr. Beck and Mr. Cummings caused me a great deal of emotional trauma and distress which resulted in my getting counseling and therapy. During my pregnancy the emotional distress I was under was so great that my doctor ordered me to go on disability to avoid complications with my pregnancy. When I requested an extension of disability leave for 3 months, even though I was still under my doctor's care, Mr. Beck sent me a certified letter ordering me back to work on a specified date and threatening me that if I didn't return I would be disciplined or removed. (Doc 8).
- 5) In spite of my doctor's recommendation, (Doc 9) and communicating with management, advising that a transfer to another supervisor would be appropriate because the strained employee-manager relationship could cause continued problems, management informed my doctor and insisted with me that a transfer was not an option, however a mutual resignation would be accepted. Mr. Beck was so angered and cruel that with me having over 8 years of state service, he could not assist me with a transfer to resolve the differences. He would rather that I resign. I felt that was a bit severe in terms of resolving the situation.
- 6) I was removed from my office and was alienated and separated from all of the other systems analysts. I was moved to a location which I shared with 2 data system coordinators whom I had no work in common with. I wrote a letter to the chief, Robert Kula, indicating I felt this was unfair, yet I didn't receive any response. (Doc 10)

I still can't believe this type of harassment, hostile and disparate treatment was allowed to continue. What they've done to me is detrimental and no one should ever have to fight to salvage their career and credentials or be put through emotional distress, mental anguish and suffer financial hardship, all because of one manager's personal vendetta & hatred of an employee.

The allegations brought against me are driven by retaliation and has no true reflection of my work and performance.