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VOLUNTARY LABOR ARBITRATION TRIBUNAL

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In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 07-00-020614-0379-01-09
and	*	
	*	
OHIO DEPARTMENT OF	*	Larry Mayfield, Grievant
COMMERCE	*	Removal
	*	

* *

APPEARANCES

For the Ohio Civil Service Employees Association:

Lynn Kemp, Staff Representative
Anissia Goodwin, Staff Representative
Ohio Civil Service Employees Association

For the Ohio Department of Commerce:

Richard G. Corbin
Ohio Office of Collective Bargaining

Chase Canfield
Ohio Department of Commerce

I. HEARING

A hearing on this matter was held at 9:00 a.m. on February 25, 2003, at the offices of the Ohio Civil Service Employees Association in Westerville, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Department of Commerce (the "Department") were Norman Martin, Chief Elevator Inspector; Jon Dixon, Elevator Inspector Supervisor; Kathleen Cain, Elevator Inspector Supervisor and Brad Welsh, Elevator Inspector Supervisor. Testifying for the Ohio Civil Service Employees Association (the "Union") were Robert Daniels, Elevator Inspector (by subpoena); Randy Ward, Elevator Inspector (by subpoena); Sharon Myers, Plans examiner and Steward; Pat Hammel, OCSEA Education Representative and the Grievant, Larry Mayfield. A number of documents were entered into evidence: Joint Exhibits 1-10, Department Exhibit 1 and Union Exhibits 1-7. The oral hearing was concluded at 3:45 p.m. on February 25. Written closing statements were timely filed and exchanged by the Arbitrator on March 5, 2003, whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

The grievance that is the subject of this arbitration arose when an elevator inspector employed in the Department's Division of Industrial Compliance was removed for performance deficiency some twenty months after beginning his employment with the Department.

The Grievant was hired on October 10, 2000, as an Elevator Inspector Trainee. He had no specialized background in elevator maintenance but brought with him his experience in the U.S. Air Force as a jet aircraft mechanic. Upon being employed by the Department he entered a 2000-hour elevator inspector training program consisting of classroom instruction and field observation. This program was developed by the Department to reduce its dependence on the private sector elevator industry as a source of qualified inspectors. It bears noting that the occupation is a multi-discipline skilled trade. Inspectors must apply knowledge of mechanical

and electrical systems and elevator safety regulations to a variety of elevator systems and 54-56 different types of equipment in a hazardous environment. Inspectors work independently, receiving assistance as needed from one of the four supervisors who oversee the work of approximately fifty inspectors deployed throughout Ohio. In order to qualify as an Elevator Inspector, the trainee must pass a written, standardized, national test known as the Qualified Elevator Inspection ("QEI") examination and receive a Certificate of Competency. This certificate or its equivalent is the minimum qualification for the job classification. However, Chief Elevator Inspector Norman Martin testified that passing the written examination is just part of the qualification process, the remaining portion being demonstration of the ability to apply the knowledge in the field.

Martin testified there were concerns about the Grievant's performance as a trainee and his future as an inspector. One of these was whether he would perform his second job as a bail bondsman on state time and use his state cell phone for that job. Other concerns were sleeping in class and his ability to navigate to job sites and to perform competent inspections. None of these concerns were mentioned on the Grievant's probationary performance evaluations which were generally favorable other than a comment on his final probationary evaluation about his difficulty in being on time. Despite Martin's belief that the Grievant would not pass the QEI, he did successfully pass it in the summer of 2001. But because he had not yet demonstrated his ability to operate independently and safely, he was not advanced to Elevator Inspector.

The Grievant testified his troubles began in early August after he had passed the QEI examination and his supervisor was changed from John Foulk to Jon Dixon. Dixon, he said, believed his travel time was excessive and expressed concerns over the Grievant's second job.

They also had daily conflicts over breaks which the Grievant thought were too long. But not until September, when Foulk told him, did he know there was a problem with his performance. On September 10 he received a written reprimand for carelessness after he left a state credit card at a gasoline station and did not report it promptly. He received a second written reprimand for the same rule infraction on October 16 after his state vehicle was destroyed by flooding. In the meantime, unlike the other thirteen members of his training class, the Grievant still was not advanced to Elevator Inspector and was never allowed to go out on his own. Martin did sign a Certificate of Competency for the Grievant, but testified he never issued it.

The Grievant protested not being promoted by filing a grievance charging disparate treatment, harassment and supervisor intimidation. In January of 2002 this grievance was settled by appointment of the Grievant to Elevator Inspector retroactive to September 28, 2001. The December 21, 2001, Step 2 grievance answer from Superintendent Williamson states that

> there were issues regarding Mr. Mayfield's full knowledge and understanding of the essential elements and duties of his position as reflected in his QEI score and field observation/evaluations. Pending resolution of these issues, Mr. Mayfield was not advanced with other members of his training class. While these issues have yet to be resolved, management is prepared to grant advancement to full inspector pay level.... (Joint Ex. 8)

A January 9, 2002, memorandum from Williamson to the Chief of Operations and Maintenance advising him of the promotion states, "This individual [Larry Mayfield] has satisfied all requirements as Elevator Inspector Trainees [sic], has earned a Certificate of Competency, and is now fully qualified as an Elevator Inspector" (Joint Ex. 8). Martin, however, still had misgivings so did not assign him to do inspections on his own because, he testified, he could not justify exposing the Grievant and the public to the safety hazards. He was frustrated, he said, because

the Grievant had already been exposed to so much training but it was not being effective. He believed he needed to turn the Grievant's performance around or remove him. He therefore developed a "Performance Plan" which he testified was designed to identify the Grievant's shortcomings, respond to those deficiencies and then to reassess. If improvement could not be documented, then Martin would seek to remove the Grievant from his position.

The purpose of the plan as stated on the document itself is "to evaluate the ability of Field Inspector Larry Mayfield to perform the essential functions of his job duties as a Q.E.I. certified elevator field inspector....The utilization of the Performance Plan is designed to allow the inspector to demonstrate his abilities and to measure the inspector's effectiveness" (Joint Ex. 3). The plan was structured to expose the Grievant to all types of equipment in a fairly short period of time with a variety of supervisors. The stated responsibilities of the Grievant during the term of the action plan were:

$ Leaving your headquarters in a timely manner.
$ Demonstrating your ability to organize your workday and navigate successfully and efficiently from work site to work site.
$ Demonstrate your ability to apply industry safety practices and procedures including the wearing of the appropriate safety equipment
$ Safely and properly gaining access to pits, car-tops and machine rooms.
$ Demonstrate the ability to use all issued inspection equipment
$ Demonstrate ability to understand the operation of a variety of new and existing equipment as shown in the table below.
$ Demonstrate your ability to perform assigned inspections for new installations, altered installations and routine annual and semi annual inspection as shown in the table below:
[table omitted]
$ Demonstrate the ability successfully [sic] communicate the results of completed inspection reports to building representatives during inspections and during exit interviews.
$ Demonstrate the ability to communicate written reports to your supervisor including inspection reports, weekly itineraries and other related documents. (Joint Ex. 3, p. 20-21)

On January 24, 2002, before this plan was implemented, Martin met with the Grievant and a

Union representative. Martin testified he read the plan and explained that an inability to perform up to expectations could result in discipline up to and including removal. The Grievant testified he believed the purpose of the plan was to evaluate whether he could be put out on his own. He did not think it was to give him feedback and help him improve. A "mention" or "brief statement" was made, he said, to the effect that it could determine whether he stayed with the department. He said he did have concerns about his conflict with Dixon, but he did not know his job was on the line. He also stated he did not see any goals and there was no discussion about how his performance would be measured. He nevertheless signed the plan acknowledging he had read and understood it. The Grievant thus began a four week rotation with four different supervisors, Jon Dixon, Kathleen Cain, Brad Welsh, and Martin, himself. Each supervisor gave daily feedback to the Grievant and supplied written notes to Martin.

Supervisor Dixon, who wrote detailed comments about the first five days, testified what stood out was the Grievant's uncertainty about correct procedure, tools, the code book and equipment. There were some safety situations and the Grievant missed some obvious violations. The Grievant also had trouble getting to the job on time. There were some good things, too, he said, which he documented in his report. However, he did not see any improvement during the week and never felt safe. In his opinion, the Grievant was not ready to be released to work independently. His major concerns were the Grievant's knowledge of the equipment and the safety of the Grievant and others.

Supervisor Cain, who oversaw the Grievant the second five days, testified the Grievant was disorganized and unaware of his surroundings. He made some dangerous errors, she stated, two of which stood out. Although he did some things correctly (which she documented), she did

not feel comfortable releasing him as an independent inspector because he was very inexperienced and she was afraid he would hurt himself or others.

The Grievant was assigned to Supervisor Welsh for ten days. However, on one of these days the Grievant did no inspections because of a meeting with his former supervisor. On two other days, he performed inspections on his own but, according to Martin, these inspections were not accepted and Welsh later went to the sites and reviewed the Grievant's reports. During the seven days Welsh accompanied the Grievant in the field he saw several recurring issues. One was inadequate use of proper terminology. Another was that he had not developed an inspection pattern. Both of these were basic to the job and taught in training. He also did not announce his intentions prior to moving, but he did improve in this regard. Welsh testified that he would not release him to be an independent inspector primarily because of concerns for the Grievant's personal safety and that of those among whom he would have to work.

Chief Martin accompanied the Grievant on the final two days of the plan's term. His summary documents disorganization and constant review of reference materials that added "significantly" to the length of the inspections, failure to inspect or test a number of elevator components, allowing an elevator to get "out of step," handling the load side wiring while inspecting a mainline electrical disconnect box, and calling a car down on himself while he stood in the pit. Because of the latter, a memorandum was issued amending the acceptance inspection procedure to specifically prohibit the practice.

The Grievant described this period, which ultimately stretched until March 7, as "five weeks of hell," beginning with Dixon with whom he had problems immediately. He did do some inspections on his own (7 on February 20 and 6 on February 21) and felt he performed as well as

anyone else. At the conclusion of the plan the Grievant was assigned to a desk for computer work while Martin performed his analysis.

The process Martin used to evaluate the Grievant was to summarize the supervisors' comments and compare them to the criteria in the plan. These were:

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Knowledge, understanding and use of standard elevator code and reference documents;

$ Ability to identify, understand and apply industrial safety practices on the job and at the work site;

$ Ability to describe and apply the appropriate safety codes and demonstrates an understanding of various types of equipment;

$ Ability to demonstrate knowledge and inspection ability on a variety of equipment;

$ Ability to identify, describe and apply the proper usage of required inspection tools;

$ Ability to travel, locate and report to the scheduled work site. (Joint Ex. 3, p. 6)

One of the tools Martin used was a checklist where for each day and each criterion he indicated with a checkmark if the Grievant had been deficient. His interpretation of the data collected was that the only dimension on which the Grievant improved was getting to work on time. Based on this analysis Martin concluded that the Grievant was unable "to satisfactorily or safely perform the minimum essential elements of his assigned position" and recommended that he be administratively removed (Joint Ex. 3, p. 165). He testified that he had no confidence in the Grievant and believed him unsuited to elevator inspection work. He vehemently denied having a personal vendetta against the Grievant and he would have preferred it had the Grievant succeeded because the Department needs qualified inspectors and invests a great deal to develop them. Never before, he said, had such a package been put together to salvage an individual.

A pre-disciplinary meeting was held on April 16 at which Martin presented the case against the Grievant on the charge of Rule #1, Neglect of duty or inadequate job performance.

Among the observations detailed in the pre-disciplinary meeting and packet were two of those witnessed by Martin. One of these occurred on March 6 when the Grievant

> opened the cover to the mainline electrical disconnect to observe the connections and fuses. He placed his hand on the load side wiring instead of using a non-conductive probe, thus endangering his safety. He then compounded the safety issue by allowing the disconnect cover to remain open while he opened the cover to the elevator controller. Had I not been present and shouted for him to stop his actions, he would have likely made accidental contact with the live parts of the 3 phase 480 volt disconnect with the door of the controller, likely killing him as well as myself if I had attempted a rescue while he was touching the metal parts. (Joint Ex. 3, p. 157).

The next day Martin commented, "During the conduct of the passenger inspection, Larry insisted upon placing himself in the pit and having the car run down on himself to check clearances" (Joint Ex. 3, p.159). At his request, the Grievant was given time to respond in writing, which he did in a detailed 25-page document including attachments. Martin responded in writing point-by-point on April 25. Sharon Myers, the steward assigned to represent the Grievant at his pre-disciplinary hearing, testified she submitted the Grievant's answers to two follow-up questions posed by the pre-disciplinary hearing officer after she received Martin's response. The two questions were, "Why was Mr. Larry Mayfield underneath the car?" and "Why was Mr. Larry Mayfield on top of the car?"

On May 24 the hearing officer issued his report recommending removal. In so doing he stated in part,

> It is clear that the Employee's performance was not perfect. He may have gotten lost more than usual, he may have been out of uniform on occasion, and he may have had to make extra trips back to his vehicle in order to get the appropriate tools. Nevertheless, none of these things are detrimental enough reasons to terminate someone's employment. Independently, none of these reasons promote an unsafe environment. However, they do support a pattern of disorganization and uncertainty.

> What is detrimental is that the Employee repeatedly demonstrated inefficient and unsafe performance. Grabbing a 480-volt wire with his bare hands, climbing into an elevator pit and calling the elevator on top of him, and failing to inspect major components of the elevator are all potentially dangerous, if not catastrophic issues. (Joint Ex. 2, p. 11)

As stipulated by the parties, the Grievant's termination was effective June 6, 2002. The grievance protesting this action, which was filed the following week, states in part,

> On January 24, 2002, Larry Mayfield, a Qualified Elevator Inspector (QEI) was notified that a "Performance Plan for Larry Mayfield" was being recommended to "evaluate your (his) ability" as an elevator inspector to which he agreed. This evaluation process was proposed to take place over a four week period beginning on January 28, 2002. The evaluation that took place did not develop a corrective action plan or provide specific training and feedback to the inspector. The 'performance plan' was utilized as the investigative tool, and was the substantial basis for, management's termination actions." (Joint Ex. 2)

This grievance was subsequently fully processed to arbitration where the stipulated issue is: *Was the grievant, Larry Mayfield, terminated from his position of Elevator Inspector with just cause? If not, what shall the remedy be?*

In arbitration, the Grievant said that at the time of the plan it was common practice for inspectors to call a car down on themselves and this was how he was trained. With respect to the 480-volt circuit, he said he pulled the power and then checked the connections at the bottom of the box to see if they were secure. He testified that many inspectors do this because if they are not secure the elevator could stop unexpectedly. He also defended two other criticisms. One of these was his failure to check an emergency alarm bell. He stated that he simply had not gotten to it yet when he was "reminded" of it. Anyway, if he had forgotten it, he would have noticed his oversight when he filled out his checklist. With respect to the hoist ropes, the reason he did not stop when he found one bad one was that it may take more than one bad rope to shut an

elevator down. Though he may not have done everything right during the period of the plan, he did as he was trained to do.

The Union also called two elevator inspectors and two people with Union positions. Steward Sharon Myers testified she had met with Elevator Inspector Trainees and surveyed them with respect to calling elevators down on top of them to check override clearances. She said all had observed the practice. A total of 44 or 45 inspectors said they had been trained to check override clearances by entering the pit. Two Elevator Inspectors, Robert Daniels and Randy Ward, testified that was how they were trained and that it was accepted practice until the memo put an end to it. Myers, who is a licensed architect, and both Elevator Inspectors, one of whom was formerly an electrical inspector, also testified it is acceptable practice to touch insulated wire on the bottom side of the main disconnect means. However, Daniels admitted the top side is still hot and one could accidentally electrocute oneself. Daniels testified he had worked fifteen complete days with the Grievant and found him to be on par with other trainees. Most of this time was when the Grievant was a trainee. Pat Hammel, who is the Union's Education Representative, testified about the Ohio Performance Review System that became effective under Article 22 of the Collective Bargaining Agreement on July 2001. She said it consists of three phases, performance planning and goal setting, a lengthy performance monitoring, and the annual performance review.

III. ARGUMENTS OF THE PARTIES

Argument of the Department

The Department argues that it had just cause to remove this short-term employee because he was unable independently and safely to perform the basic functions of his job despite eighteen

months of thorough training. The Department developed a plan to provide him with an opportunity to demonstrate his expertise in a real world setting. It was not an annual evaluation but a special evaluation. Special evaluations are not prohibited by the Collective Bargaining Agreement. Moreover, they have been in use for many years and have been endorsed and reviewed by panel arbitrators including Dr. Pincus and this Arbitrator. During the 21 days under the plan the Grievant repeatedly demonstrated his lack of basic skill and knowledge. This is shown by the comments made by experts in the field during their independent observations and evaluations. Each and every supervisor observer said the same thing: the Grievant was not able safely and independently to perform his duties as required. Union efforts to discredit or minimized their evaluations was for naught. It is ludicrous to believe that four supervisors conspired to portray the Grievant in a negative light. None of the Union's witnesses were present when the Grievant was evaluated and none are responsible for ensuring he is properly qualified. Myers' drawing was made without visiting the site and she has no elevator inspection background. Her survey respondents were inexperienced trainees and she was not present when the incident occurred. Ward worked with the Grievant only once, yet believed him competent. He also believes that pulling the main shutoff renders the box and associated wires harmless, yet his testimony on this was contradicted by Daniels. As for Ward, he only worked with the Grievant early in the Grievant's training and testified he performed as expected for a trainee.

The Department submits that given its mission of safety first and the inherent dangers to the inspector, co-workers and the public, it cannot wait for the Grievant to develop. The Grievant was given ample opportunity to demonstrate his aptitude, but he failed. The

Department has met its burden not to act hastily, unreasonably or with improper motive and there is no evidence to prove otherwise. For these reasons, the grievance must be denied.

Argument of the Union

The Union's position is that the Department lacked just cause to terminate the Grievant. In the first place, the performance plan was never intended to improve the Grievant's performance. It was simply used as a tool to set the Grievant up for termination. The Grievant did not believe the plan could lead to dismissal. He viewed it as a tool for improvement, but he was not given that opportunity. The plan lacked jointly set, specific, measurable goals and a mechanism for improvement. It did not last a year, but only five weeks. In short, it was not the tool agreed to by the parties. Nevertheless, Martin's checklist shows the Grievant's performance did improve over the term of the plan.

As further evidence of a set-up, the Union points to the fact that the Grievant was under a microscope for weeks. There is no question he was being scrutinized because of his difficulties with Dixon. Dixon's log proves he was after the Grievant. As for the other evaluators it is unclear from their testimony whether they had ever even seen the performance plan. Finally, the Grievant's regular supervisor was entirely excluded from the process.

In the second place, the Grievant is not incompetent. He holds a Certificate of Competency and a QEI license, both issued by the Department. The Department allowed him to work without a performance plan for six months, but now it claims it had concerns all along. Nevertheless, he was allowed to inspect at least thirteen elevators on his own in February. How incompetent can he be if he was allowed to do that? Moreover, Union witnesses proved that most if not all of the alleged unsafe practices cited by the pre-disciplinary hearing officer were

not unsafe at all but accepted practice. The Grievant was not on notice that using these methods could result in discharge since he had seen other elevator inspectors and supervisors perform them. He was simply applying what he had learned in on-the-job training.

The Union concludes that termination requires substantial proof of guilt which the Department does not have. What is more, discharge is not commensurate with the alleged offense. It asks that the grievance be granted, the Grievant be reinstated and granted full back pay and benefits without offset by his earnings as bail agent.

IV. OPINION OF THE ARBITRATOR

The Grievant's Capability

The first question to be answered is whether there is convincing evidence the Grievant is unable safely and independently to perform the duties of his job. I am persuaded there is. Because of the allegation that Dixon and Martin were out to get the Grievant, I have considered the Department's case both with and without their own direct observations. At the outset, it must be said that Dixon's reports are vastly more detailed than the others. This does not necessarily reflect bias on Dixon's part or worse performance on the Grievant's. It may simply be a matter of style. Some writers are more verbose than others. This does not, in and of itself, mean they are less honest or observant. Supervisors vary in other ways. Some are more demanding than others; some emphasize one set of skills, some another. Welsh's comments and testimony, for instance, focused on organized procedure and communication to a greater extent than the other supervisors' did. Despite these and other differences, both Cain's and Welsh's (as well as Martin's and Dixon's) opinions of the Grievant's abilities were supported by specific

observations of his behavior on the job.[1] Moreover, they were providing him feedback, giving him advice and other forms of assistance, yet a number of the same issues arose repeatedly. As the pre-disciplinary hearing officer found, some are not serious enough to justify termination. Some could, given the chance, respond to corrective discipline and would be appropriate for that strategy because they do not create dangerous conditions and because the Grievant has shown, in the case of tardiness and communicating his movement intentions, responsiveness to corrective feedback. But the fact of the matter is that despite the eight months of training he received before he took the exam and the seven-plus months of additional training before the Performance Plan was implemented, he was still making very serious errors of both omission and commission right up until the last day of the plan and was still so disorganized and lacking in job knowledge that it took him twice as long to complete inspections as these two supervisors thought a new inspector should take. This is true even without considering the testimony and reports of the two supervisors the Union claims were out to get the Grievant. Looking at Dixon's and Martin's observations, the Grievant does not, in the main, deny what these supervisors reported. Instead, he defends what he did in various ways, principally by saying this was how he was trained or that he had not seen this type of equipment or this particular installation before and that henceforth he would satisfy them on the particular matter where error was noted. The Arbitrator appreciates the difficulty of the situation in which the Grievant found himself which was having

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[1]Cain described an incident with a hydraulic elevator and another one in a traction acceptance test wherein the Grievant created unsafe conditions. Welsh explained how using wrong terminology and failure to work in a pattern can compromise safety. Both of these supervisors believed as a result of these observations that he was not safe to work as an independent inspector.

to inspect a wide variety of systems while being scrutinized by four different supervisors, none of which was the one he had had for most of his time with the Department. However, he was not without experience, having had fifteen months of training during which he was exposed to a variety of inspector styles and types of equipment. Yet he still struggled like a trainee, not a new inspector, with the result that not one of the four supervisors felt confident that he could perform safely and independently in the field. In light of this, I find the Department carried its burden of proof.

The Union's assault is on several fronts. For one, it offers witnesses who say the Grievant is competent and only engaged in accepted practices. However, those witnesses' own direct experience with the Grievant was extremely limited and/or lacking in recency. As to their opinions about the two specific incidents cited by the pre-disciplinary hearing officer, none of them saw the boxes of the disconnect and controller, their positions relative to each other, or whether the door of the controller was within striking range of a hot wire, so were in no position to judge the danger. In addition, their opinions on the safety of handling electrical wire were directed to the unpowered side whereas Martin testified he observed the Grievant touching the wire on the hot side with his bare hands. As to the argument that the Grievant is competent because he is certified and licensed, a certification only creates the presumption of a certain quality. That presumption can be rebutted. The issue here is not whether the Grievant is certified, but whether he can adequately perform his job. The fact that he was allowed to work for months after he passed the exam does not speak to his ability to work independently because those months were spent working with other inspectors. It is true that he was allowed to inspect thirteen elevators on his own, but a supervisor went to the sites later and reviewed his reports,

negating any undue risk to the public. Thus, these inspections are not sufficient, even with the Union's other evidence, to overcome the Department's case.

The Plan

The next question to be answered is whether the plan used to assess the Grievant was fundamentally fair. The record is confusing about what the intended purpose of the plan was. Sometimes it was said to be a tool of assessment and development. At other times it was said to be merely an evaluation tool. One thing it was not was the Ohio Performance Review System, which is a comprehensive MBO year-round activity used to develop all employees, not just problem ones. Instead, it was a special evaluation plan to measure perceived performance problems of a particular employee. The evaluators also provided daily feedback, thus adding an opportunity for performance improvement. It was therefore also a form of intense one-on-one training and a qualitative assessment of the Grievant's ability to respond to such training. There is nothing inherently unfair about such an instrument. The legitimacy of such a tool is in its design and application. The design and application of this particular instrument has given me pause. On the one hand, putting so many different elevator systems before the Grievant assured he would see some new to him, but it also would have assured that he saw familiar ones. He was thus allowed to demonstrate his competence with the familiar and with his approach to the unfamiliar, both of which he would encounter as an independent inspector in the field.

Another matter of interest was the rotation among supervisors and the order in which they evaluated him. I am not troubled by the absence of the Grievant's regular supervisor so much as I am by the "bookends" of the two who may have been prejudiced against the Grievant. If an employee is thought not to be developing properly, his current supervisor may be part of the problem, so it would be informative to see how he does under other supervisors. But using supervisors who have already formed an opinion taints the process, especially when degree of

improvement is to be measured and these supervisors are the first and last to evaluate the employee. However, two other supervisors were included, neither of which had a history with the Grievant and they reached the same conclusion as those who are claimed to be biased.

A third area of concern was whether the plan was in effect long enough to produce useful information. When an employer has already invested considerable resources in an employee's development over an extended period of time and the assessment process measurably adds to that investment, it is not reasonable to require that employer to make significant additional investment when the assessment shows little expected return. In short, it is not reasonable to require an employer to throw good money after bad. Therefore, the focus of this inquiry is not whether the plan was in effect long enough to turn the Grievant around because without an initial evaluation of current performance level and capacity to learn, one has no idea whether turnaround is a job of days, weeks, years, or futility. Instead, the question is whether the plan was in effect long enough to determine whether the Grievant was already (or by its end) fully functional and, if not, whether he could be made so without undue additional investment. If no, then the Grievant was not given a fair chance because the plan did not last long enough. If yes, then he was because the plan's term was long enough to learn whether he was in need of development, how much was needed, and how much investment was required. I am, in fact, persuaded the plan did its job. Four or five weeks of nearly constant supervision with feedback did produce improvement in a couple of areas, but this was not dramatic improvement. No one was reporting data showing rapid improvement or growth across the range of knowledge, skills and abilities where he was perceived to have deficiencies, and not one gave a report that indicated he was ready or just about ready to go into the field alone where development would be

less intense and less costly. Because of these results it was not unreasonable for the Department to make its decision based on five weeks of data from the plan. In other words, given that the Grievant made limited progress in the five weeks and all supervisors' reports showed he still had a long way to go despite the intensity of supervision, it was reasonable to expect that little could be gained from an additional few weeks of having a supervisor provide one-on-one supervision instead of attending to other duties.

Finally there is the question of whether the Grievant knew or should have known his performance under the plan could lead to discipline up to an including removal. The plan does not, on its face, put the Grievant on notice. However, the Grievant admitted in his testimony that discipline was mentioned and that there was a "brief statement" that the plan could determine whether he stayed with the Department. He therefore knew the potential consequences of his performance.

Was removal excessive?

I agree with the department that this is not a discipline case. The Grievant's problem was not that he was intentionally underperforming. There is no allegation or evidence for misconduct. If there were, a fine or suspension might motivate the Grievant to mend his ways. Rather, this is a competency case wherein the correction for inadequate performance is supplied by such things as reassignment to jobs the individual can perform, training, or separation. Reassignment is frequently the remedy of choice for long-term, good service employees who are no longer able to perform their jobs. The Grievant is a short-term employee who has never been fully functional in the job for which he was hired to develop into. The only classification lower than the one he held at the time of his discharge is that of Elevator Inspector Trainee. However,

an employer cannot be required to maintain in perpetual training an employee who shows little or no evidence of ever achieving at least a minimum level of competency. If an incompetent employee cannot be trained to perform adequately and there is no other place in the organization for him, administrative separation (as distinguished from disciplinary discharge) is justified. Thus, the only issue is whether the Grievant should receive further training and another chance to show he is capable. Since the Department has already made that determination and I have upheld its process as fair, its evidence as substantial, and its conclusion as reasonable, no additional analysis is necessary. Removal was not excessive because there were no reasonable alternatives. The Department brought substantial evidence that the Grievant was unable to perform his job safely and it already made reasonable efforts to help him attain that state. For these reasons, the Grievant was terminated for just cause.

V. AWARD

The Grievant, Larry Mayfield, was terminated from his position of Elevator Inspector with just cause. The grievance is denied in its entirety.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
June 9, 2003