

THE AMERICAN ARBITRATION ASSOCIATION
BEFORE SANDRA SMITH GANGLE, ARBITRATOR

In the Matter of the Arbitration) Case No. 75-390-00113-93
Between)
)
STATE OF OREGON, EXECUTIVE DEPT.,) Elisabeth Barbara
(Department of Justice),) Bachmeier Grievance
)
) DECISION AND AWARD
The Employer,)
)
and)
)
OREGON PUBLIC EMPLOYEES UNION)
(OPEU), SEIU Local 503, AFL-CIO,)
)
The Union.)

Hearing Conducted: November 9,10, 1993 and
December 6,7, 1993; Salem, Oregon

Representing the Union: Lynn-Marie Crider, Attorney at Law
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Portland, OR 97215

Representing the Employer: John Irvin, Assistant Attorney
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Justice
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Arbitrator: Sandra Smith Gangle
Alternative Solutions, Inc.
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I. Background:

This matter comes before the Arbitrator under a collective bargaining agreement between the parties effective between July 1, 1991 and June 30, 1993. Jt. Ex. No. 1. The parties, having been unable to resolve the matter through the grievance procedure, selected Sandra Smith Gangle, 831 Lancaster Dr. NE, Suite 209, Salem, Oregon 97301, to serve as the arbitrator in the matter pursuant to selection procedures of the American Arbitration Association. The arbitrator was notified of her appointment by letter dated May 27, 1993, and upon accepting the appointment, scheduled a hearing.

The arbitration hearing was conducted on November 9 and 10, 1993 and was continued on December 6 and 7, 1993, in conference rooms of the State of Oregon Department of Justice, in Salem, Oregon. The Employer was represented by Assistant Attorney General John Irvin. Assisting him as a representative of the Employer was Robert Greene, Assistant Chief Investigator and Supervisor of the Criminal Intelligence Unit, Department of Justice. The Union and the Grievant were represented by Lynn-Marie Crider, Attorney at Law, Portland, Oregon. The Grievant was present throughout the hearing. A union representative, Tom Hamilton, was present also during the hearing.

The parties stipulated that the matter was properly before the arbitrator and that there were no objections to procedural or substantive arbitrability. The arbitrator granted a motion to

exclude witnesses from the hearing room.

The parties had a full and fair opportunity to present their evidence and argument to the arbitrator. The arbitrator tape-recorded the hearing as an adjunct to her personal notes only and not as an official record. The parties offered evidence in the form of witness testimony and exhibits. All witnesses were sworn and were subject to cross-examination.

The parties agreed to submit simultaneous post-hearing briefs to the arbitrator, by mailing them to the American Arbitration Association office in Seattle on January 7, 1994. Upon receipt of the briefs on January 13, 1994, the arbitrator officially closed the hearing, and took the matter under advisement.

II. Statement of the Issue:

The parties agreed that the issue to be decided by the arbitrator is as follows:

Was the discharge of the Grievant for just cause and in accordance with progressive discipline, according to Article 20 of the parties' collective bargaining agreement?

If not, what is the remedy?

III. Relevant Contractual Provisions:

ARTICLE 20 - DISCIPLINE AND DISCHARGE

Section 1. The principles of progressive discipline shall be used when appropriate. Discipline shall include, but not be limited to: written reprimands; denial of an annual performance pay increase; reduction in pay; demotion; suspension and dismissal. Discipline shall be imposed only for just cause.

The parties agree that the procedure herein described shall be the only contractual procedure for resolving disputes concerning Discipline and Discharge.

ARTICLE 21 - GRIEVANCE AND ARBITRATION PROCEDURE

Section 1. Grievances are defined as acts, omissions, applications or interpretations alleged to be violations of the terms or conditions of this Agreement.

* * * * *

Section 6. Arbitration (sic) Selection and Authority.

(d) The parties agree that the decision or award of the arbitrator shall be final and binding on each of the parties. The arbitrator shall issue his/her decision or award within thirty (30) calendar days of the closing of the hearing record. The arbitrator shall have no authority to rule contrary to, to amend, add to, subtract from, change or eliminate any of the terms of this Agreement.

(e) Fees and expenses of the arbitrator shall be borne entirely as designated by the arbitrator with the arbitrator assigning such expense to the losing party. If, in the opinion of the arbitrator, neither party can be considered the losing party, then such expenses shall be apportioned as in the arbitrator's judgment is equitable. All other expenses shall be borne exclusively by the party requiring the service or item for which payment is to be made.

IV. Statement of the Facts:

The Grievant began her employment with the State of Oregon on December 31, 1991 as a Research Analyst 3 in the Criminal Intelligence Unit (CIU) of the Department of Justice (DOJ), Criminal Justice Division. Her position had been newly established, in part because of a need for a specialist in Asian Organized Crime. The position description for the new position demonstrates that the position involved a wide variety of tasks and duties. Excerpts are as follow:

1. Collects intelligence information from international, federal, state, and local law enforcement agencies as

well as other governmental and non-governmental entities and sources as needed for completion of assigned intelligence projects.

* * * * *

6. Conducts financial analysis of individuals suspected to be involved in criminal conduct to include examination of banking records, personal ledgers or receipts, drug records, or other financial records pertinent to asset gains from unlawful activity or the laundering of those assets through legitimate businesses.

* * * * *

10. Develops new and innovative charting and analytical techniques as needed. Writes training manuals on new techniques. Maintains, designs and develops databases, spreadsheets, and automated computer programs as needed or required to perform analytical duties. Updates existing manuals. Provides training to law enforcement agencies, other analysts, and other personnel on new and existing techniques.

* * * * *

11. Speaks as an intelligence analyst expert at conferences and workshops.

* * * * *

14. Assists criminal investigators by preparing and providing information sufficient to meet federal and state requirements for search warrants.

* * * * *

16. Establishes and maintains liaison activity with organized crime and intelligence units of local, state, federal, and international law enforcement agencies, as well as out-of-state law enforcement agencies to insure the effective exchange of criminal intelligence information to accomplish the criminal intelligence mission of the Department of Justice.

* * * * *

20. Assumes lead criminal intelligence role when assigned, in the formulation, coordination, and operation of multijurisdictional task forces.

State Ex. No. 16

The Grievant had experience as a military intelligence officer in the U.S. Army. She was on active duty for eleven years and served as a reserve officer after completing that duty. She holds Bachelor's and Master's degrees, her Masters being in Political Science with a concentration in East Asian studies. She resided in Asia for five years.

The CIU is a subdivision of the Organized Crime (OC) Section of the DOJ Criminal Justice Division. State Ex. No. 12. Research analysts in the CIU work alongside criminal and financial investigators and legal staff. State Ex. No. 11. Analysts are not sworn police officers. Investigators are. Analysts are members of the OPEU bargaining unit. Investigators are management service personnel and, as such, are exempt from collective bargaining. At the time the Grievant was hired there were six analysts on staff in addition to the Grievant. There were approximately five investigators.

The work of both analysts and investigators is highly sensitive because it involves the investigation of organized crime activity throughout the State of Oregon, in cooperation with local law-enforcement agencies. All employees of the CIU are responsible for maintaining the confidentiality of data and information that is gathered, analyzed and stored in the unit but remains the property of the various local agencies involved in the pending investigations. They must be familiar with the Third-Agency Rule that applies to the data they collect. That rule provides in pertinent part, as follows:

Reports and other investigative material and information received by the Criminal Intelligence Unit shall remain the property of the originating agency, but may, subject to consideration of official need, be retained by the Criminal Intelligence Unit. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies on a right-to-know, need-to-know basis. This policy also applies to individuals, groups or organizations requesting specific records or material under the Freedom of Information Act or Oregon Public Records Law. See OAR 137-90-040(2).

State Ex. No. 14.

Analysts use the information that is gathered, such as telephone toll records, financial records, real estate documents and business records, to generate charts and diagrams, both on computer screens and on visual wall displays. The charts and diagrams are sometimes used as demonstrative evidence in criminal trials.

The Grievant's position description contains the following requirement with respect to trustworthiness:

The individual in this position must exhibit strong traits of honesty, integrity and confidentiality. An in-depth background investigation is conducted upon the person filling this position. This individual must possess a thorough understanding of the Criminal Intelligence Guidelines which define criteria for information handled by CIU members.

State Ex. No. 16, page 6.

Assistant Chief Investigator Randy Martinak was the supervisor of the seven research analysts at the time Grievant was hired. He was administratively reassigned to supervise the investigators' unit in January of 1992 and Assistant Chief Investigator Bob Greene was appointed supervisor of the analysts.

In spite of the reassignment, Martinak actually continued to serve as supervisor of the analysts, including the Grievant, until May of 1992.

Both Martinak and Greene were frequently on the road in the performance of their regular duties. They traveled throughout the state of Oregon and were frequently involved in court proceedings. Analysts reported day-to-day problems and concerns to Randy Banks, Chief Criminal Investigator, when their regular supervisor was away. After Greene took over the supervisory role in May of 1992, he tried to maintain daily contact by phone with the analysts and with Banks.

The Grievant and three other analysts, Paul Smith, Jr., Ed Higgins and Robert Williams, shared a single office in one corner of the CIU. There were four desks with telephones, computer stations and bookcases in the office, but no room dividers. There was no door between the analysts' office and the outer office area. See State Ex. No. 10. The other three analysts, Sue Porter, Tom Hamilton and Scott Partridge, each had an individual office elsewhere in the unit.

All five analysts' offices, as well as the offices of Randy Banks, Bob Greene, Chuck Pritchard, the Attorney-In-Charge (AIC) of the Criminal Justice Division, and Bob Hamilton, AIC of the OC unit, are housed in the basement of a Department of Justice Building on Cottage Street in Salem. Entrance to the basement area is restricted through the use of a buzzer. A video camera records those who enter.

A number of support staff work at various desks and machines in the general area in the center of the unit and in a side room called the Watch Center. All the private offices as well as several conference and interview rooms, evidence and property rooms, file storage, electronic machines and a kitchen area, are located on the outer rim of the unit, surrounding the support staff's open work area. See Union Ex. No. 14.

Some of the employees in the work area are considered CIU staff; others are not. Some of the file materials in the work area are confidential Third-Agency files; others are not. On occasion, police officers, repair people, janitors, employees from other work areas in the building and other visitors walk through the unit for various reasons.

From the time of her initial hire, the Grievant did not "fit in" well with the other analysts in her work area. Interpersonal conflicts developed which were not resolved adequately. Ed Higgins did not like the odors of the food she ate at her desk for lunch or the fact that she sometimes read out loud. All three of the Grievant's co-workers were at least aware of the fact that she out-ranked them in her military reserve role. The Grievant told Supervisor Greene at one point that she felt she had been hired at too low a salary level for her training and experience. Her co-workers, however, indicated they thought she was overpaid. They believed she was charging more overtime, or exchange time, than they were. At least two of the Grievant's co-workers in her four-person office chose not to talk to her

after April or May.

When the Grievant's initial trial service period was near its end, her supervisors were unhappy with her progress. A decision was made, however, to extend her trial service an additional three months in order to give her more training and experience, particularly in the tactical area and use of computers, and to allow her to improve her interpersonal relationships with her co-workers. See State Ex. No. 1. Greene asked Ed Higgins to work with her on tactical issues. He encouraged the Grievant to work with analysts outside the four-person office, particularly Kathy McLaughlin and Scott Partridge, to improve the interpersonal relations problem and to learn computer skills. At the end of the extension period, on or about September 29, 1992, Supervisor Bob Greene informed the Grievant that she had satisfactorily completed her trial service and was accepted as a permanent employee.

During the summer of 1992, two significant changes occurred in the record-keeping practices of the research analysts. Those changes are pertinent to the facts of this grievance. The first change involved implementation, on or about July 1, of a computerized time-keeping program, to replace the prior manual recording system. The new program allowed for more detailed information to be recorded on the various activities performed by the analysts and the amount of time spent on each activity. See State Ex. No. 21, 24; Union Ex. No. 4. The second change, on or about August 5, involved initiation of a system by which analysts

were required to obtain pre-authorization for overtime work and accrual of "exchange time" (paid compensatory leave). According to the new system, analysts were required to state the reason for the needed overtime and the amount of time expected to be spent completing the task on a "goldenrod" colored form. See Union Ex. No. 5.

On November 4, 1993, the Grievant participated in the execution of a search warrant in the Cottage Grove area. She had assisted Detective Dean Finnerty of the Cottage Grove Police Department in the drafting of the affidavit for the warrant and was eager to learn about the actual implementation of the warrant.

Several law-enforcement agencies cooperated in the operation, which generally involved a drug search in residences at two separate locations. Three employees from the Department of Justice, including the Grievant, joined 25-35 police officers from Cottage Grove Police Department, the Oregon State Police (OSP) and Douglas County Sheriff's Department for the operation. Dean Pershing of the OSP gave the overall briefing to everyone involved in the operation at approximately 5:30 a.m. The overall scene commander was Larry Worsham of the Cottage Grove Police Department. The narcotics team commander for the operation was Sergeant Michael Nores of the Sheriff's office. The evidence officer was Zack Williamson.

The Grievant and DOJ investigator Kathy McLaughlin stayed together at one of the residences during the entire operation,

which lasted several hours. They entered the residence after it had been secured by the police. They remained in the living room and kitchen for the most part, looking through papers and documents that they found there. DOJ Investigator Paul Smith, Sr. did not stay close to the two women. He was working with the narcotics search team and was in and out of the residence throughout the day.

After the search was over, Greene heard two reports about the work the Grievant and McLaughlin had done during the warrant exercise. The first was from Dean Finnerty of the Cottage Grove Police Department, who spoke informally to Greene when the two men happened to meet in the Eugene courthouse. Finnerty reported that the two women had done an "outstanding job" and that they had "come up with information that was extremely valuable". The second was from the Grievant herself, during a telephone conversation. Greene did not ask McLaughlin for a report, nor did he call Larry Worsham or Sergeant Nores for a report.

Throughout the first half of November, Bob Greene was in Eugene participating in the criminal trial of former State Representative Peg Jolin for alleged dishonesty in the solicitation of political campaign funds. The trial resulted in a well-publicized felony conviction of the legislator.

On Friday, November 6, 1993, the Grievant filled out a "goldenrod" form requesting approval of exchange time for four hours of work which she expected to do on Saturday, November 7, at home. Since Mr. Greene was in Eugene at the time, the

Grievant submitted the request to Randy Banks. Banks denied the request, writing on the form "prefer you do it at work". Union Ex. No. 17. The following week the Grievant spoke with Greene about the overtime denial. She told him she had worked the four hours on Saturday, November 7, anyway, to prepare a presentation on Asian Organized Crime, but did not expect to be paid for her time. Greene told her to refrain from working any unauthorized overtime in the future.

During late October or early November, there was some discussion in the office about potential layoffs in the Department. Chuck Pritchard spoke with each of the employees privately and informed them that a reduction in force was being contemplated. The Grievant and Ed Higgins were the two analysts whose continuation was at risk.

On November 25, 1992, Supervisor Greene presented the Grievant her first annual performance appraisal. See Union Ex. No. 6.

Greene had submitted the performance appraisal to Banks and Pritchard for their approval prior to showing it to the Grievant. Both superiors said they thought it was "too positive". They did not require Greene to make substantive changes, however. An excerpt from the section of the performance appraisal entitled Accomplishments/Results is as follows:

During the past ten months, Ms. BACHMEIER has been assigned a number of intelligence tasks and has carried a case load of up to twelve cases. Ms. BACHMEIER's accomplishments have included strategic examination, research and analysis of Asian Organized Crime (AOC); preparation of a comprehensive report on AOC' presentations on AOC to the Police Executive

Intelligence Seminar and Western States Crime Seminar; and representing the CIU and Department of Justice as a co-chairperson to the Ad Hoc Interagency Asian Organized Crime Committee.

Union Ex. No. 6

The summary sheet contained the following overall evaluation of the Grievant's performance:

Ms. BACHMEIER's performance during this rating period was more than satisfactory and her contributions to the CIU are greatly appreciated. Her interest and enthusiasm in her work have been admirable and her skills and knowledge are going to be a valuable asset to law enforcement and the people of the State of Oregon.

Union Ex. No. 6

Soon after the performance appraisal was presented to the Grievant, Mr. Greene began to develop some doubts about the Grievant's integrity and trustworthiness. First, he heard a verbal report on or about November 30, 1992, from one of the Grievant's co-workers, Analyst Bob Williams, that the Grievant had used her state phone to make personal long-distance calls. Williams also reported that the Grievant had used the telephone of co-worker Ed Higgins to make personal long-distance calls. None of those calls had been charged to the Grievant's home phone or personal telephone credit card, alleged Williams.

Second, Greene learned, on or about December 1, 1992, that the Grievant had recorded on her computerized timekeeping program during November a number of hours of overtime work that had not been pre-authorized for exchange time accrual. Timekeeper Lyana Fletcher had reported to Randy Banks that she had discovered about twenty hours of unauthorized overtime postings while

transferring the Grievant's hours from her computerized record onto a monthly payroll sheet. See State Ex. No. 4.

Third, Analyst Bob Williams reported to Greene on or about December 2, 1992, that the Grievant had brought a union representative into her four-person office in the CIU. She had not, according to Williams, checked in advance to make sure her co-workers did not have sensitive material in view at the time of the visit. Greene concluded that the Grievant had failed to protect the security of CIU files and materials by bringing an unauthorized person into her office.

Fourth, Greene learned on or about December 3, 1992, that Investigator Kathy McLaughlin had made a report to Randy Banks that the Grievant had used a state phone on October 20, 1992 to make a personal long-distance call to Bend at State expense. See Union Ex. No. 2. According to McLaughlin's report, the Grievant had first asked McLaughlin what the telephone policy was and whether the call would be permissible. After McLaughlin explained her understanding of the state policy prohibiting personal long-distance calls, the Grievant had gone ahead and made the call on McLaughlin's phone anyway.

Fifth, Greene learned on or about December 14, 1992 that Ms. McLaughlin had made a written report to Banks regarding the Grievant's activities during the execution of the search warrant in Cottage Grove on November 4, 1992. See Union Ex. No. 1. Greene concluded, when he read McLaughlin's report, that the Grievant must have violated his instructions by searching for and

seizing evidence on that earlier date.

Greene was uncertain about what to do next. He had lost confidence in the Grievant's honesty. He did not talk to the Grievant, however. Instead, he reported his concerns to Lee Miller, the Department of Justice Personnel Director, as well as his own supervisor, Randy Banks, and Attorney-in-Charge Chuck Pritchard. He sought their advice on what he should do. He was concerned about a possible need for discipline, but he felt that any disciplinary decisions were out of his hands.

On December 15, 1992, Greene issued an Interoffice Memo to the Grievant advising her that she was not authorized to work overtime without prior approval from her immediate supervisor. In the memo he instructed her to "cease recording ANY time in excess of [her] normal 8-hour shift in the CIU computer network that [was] not authorized by a supervisor." See State Ex. No. 23.

Shortly after December 15, 1992, Greene, Pritchard and Banks submitted information regarding the Grievant to Assistant Attorney General Jack Landau and Marla Rae, Chief Assistant to the Attorney General, Charles Crookham. A pre-dismissal notice was drafted, with the assistance of personnel in the labor law section. Lee Miller, appointing authority, signed the notice on December 29, 1992 and it was presented to the Grievant on the afternoon of the same date. See State Ex. No. 3. She was asked to turn in her keys and State credit card and was suspended, pending a pre-dismissal hearing.

The document set forth four separate charges with lengthy factual narrative supporting each of the four. The charges were essentially as follows:

(1) That the Grievant had disobeyed Supervisor Greene's instructions during the Cottage Grove search warrant execution, by searching for and seizing evidence;

(2) That the Grievant had used state phones for personal and private business long-distance calls without charging the calls to her personal phone number or personal calling card;

(3) That the Grievant had attempted to obtain pay, or accrued exchange time, for overtime hours that she knew were not authorized; and

(4) That the Grievant had disregarded restrictions protecting the security of the CIU by bringing an unauthorized person into the criminal analysis office which she shared with three other analysts on December 2, 1992. See State Ex. No. 3.

A pre-dismissal hearing was conducted on January 6, 1993. The Grievant appeared and responded to each of the charges. See Jt. Ex. No. 4. On January 8, a notice of dismissal was issued to the Grievant to be effective January 11, 1993. The same four charges were cited in the notice of dismissal as had been set forth in the pre-dismissal notice. Jt. Ex. No. 2.

On January 11, 1993, the Union filed a grievance alleging that the Grievant's dismissal was without just cause and that the principles of progressive discipline had not been followed. Jt. Ex. No. 3. It is that grievance that is the subject of the

instant arbitration.

V. Positions of the Parties:

A. The Employer: The Employer contends it had just cause to dismiss the Grievant. In its brief the Employer asserts that the Grievant had demonstrated defiance of supervisory authority and directives; that she refused to comply with requirements regarding performance of her duties, use of state facilities, work time and CIU security; that she was dishonest; and that she was willing to use deceit toward her employer. The employer asserts in the brief that its charges are all proven, with the exception of the allegation that the Grievant had used Ed Higgins's phone for personal long-distance calls, which the Employer admits was not proven. The Employer contends that, due to the seriousness of the charges, particularly dishonesty and disregard for the security of the CIU, and the short work history of the Grievant with the State, dismissal is the only appropriate remedy. Any lesser form of progressive discipline would not be appropriate under the particular circumstances of this case.

B. The Union: The Union contends the Employer did not have just cause to dismiss the Grievant. Also the Union contends the Employer failed to follow the principles of progressive discipline.

Looking at each of the four charges against the Grievant, in the light of the seven well-known tests of just cause, the Union contends that the Employer failed to meet its burden of proof.

The Grievant did nothing wrong, says the Union. The Employer failed to conduct a fair investigation prior to implementing the discharge. Also, the Employer has tolerated in other employees the same conduct that it alleges to be misconduct for the Grievant without imposing discipline. That is disparate treatment, alleges the Union.

The Union asks the arbitrator to reinstate the Grievant with full back pay and benefits to the date of the discharge. The Union further asks the arbitrator not to consider the Employer's contention that the Grievant would have been laid off effective July 1, 1993 in mitigation of a full reinstatement, because the Grievant's bumping rights under the collective bargaining agreement might be compromised by a limited reinstatement.

VI. Analysis and Decision:

The arbitrator's role is to interpret and apply the parties' collective bargaining agreement. In this case, the pertinent provision is found in Article 20, Discipline and Discharge. That provision requires that progressive discipline be used "where appropriate". It also provides that all forms of discipline shall "be imposed only for just cause". Article 21, Section 6(d) of the contract expressly prohibits the arbitrator from ruling contrary to, amending, adding to, subtracting from, changing or eliminating any of the terms of the agreement.

The principles of "just cause" are widely recognized by labor arbitrators. They are generally defined by means of the

seven tests or questions that were set forth in Enterprise Wire Co., 46 LA 359 (Arb. Daugherty 1966); See generally Koven and Smith, Just Cause: The Seven Tests (2d edition; 1992). Except in unusual circumstances, a "no" answer to any of the seven questions leads to a conclusion that the Employer failed to have "just cause" for the discipline it took in the particular case under advisement. The tests are as follows:

1. Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the Company's investigation conducted fairly and objectively?
5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employee?
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in [her] service with the company?

The Union contends the answers to questions 1,3,4,5,6 and 7 are uniformly "no" in this case. Therefore, the Union asks the arbitrator to find there was no just cause and set aside the discharge. The arbitrator will consider each of the four charges

separately and will apply the just cause tests to each of the charges.

Charge #1: The search warrant issue

Supervisor Bob Greene testified at the hearing that he gave the Grievant clear instructions "not to search, not to seize and not to make herself a witness" during the execution of the Cottage Grove search warrant. The Grievant's duty, he said, was to document the criminal activity related to the marijuana-growing operation, such as getting names of persons involved, property addresses and phone tolls showing connections with other possible individuals at other locations. She was to proceed on a "strategic basis", not on a "tactical basis". She was to avoid getting herself involved in the chain of evidence that would be seized at the scene.

Greene obtained Kathy McLaughlin's report, approximately one and one-half months after the search warrant had been executed, however, which related that the Grievant had "actively searched" for evidence at the scene. See Union Ex. No. 1. He therefore concluded that she had disobeyed his orders.

A close look at the facts reveals, however, that Greene's instructions were not as clear as he recalled them to be. Also, there was considerable confusion at the scene as to which orders the Grievant was expected to follow and what specific activities actually constituted "searching" or "seizing".

The Grievant had never participated in a search warrant execution prior to November 4, 1992. There is no evidence that she was given any written instructions or advance role-play training, nor was she shown a videotaped example of a warrant procedure. She was given only oral instructions during a brief meeting with Supervisor Greene, approximately five days prior to the warrant execution date.

Greene talked to the Grievant around noon on October 30, 1992. The conversation was only a few minutes long. It took place during an office Halloween celebration. Greene recalled telling the Grievant she was not a sworn officer; therefore, she should not enter the scene until the premises had been secured by the police officers and their dogs. He said her role was not to search, not to seize and not to make herself a witness in the drug search. He said she was to accompany investigator McLaughlin at the scene, staying close to McLaughlin throughout the entire process, pointing things out as they went along that might be important to the organized crime analysis that she was working on.

Greene's instructions were somewhat ambiguous and, subject to misunderstanding by the Grievant. It may well have been clear that the Grievant was not to search for drugs at the scene. She could easily have had the impression, however, that it would be permissible to look for (i.e. search for) documents and records relevant to the analysis issues. Also, she could certainly have assumed that it would be acceptable to follow Kathy McLaughlin's

instructions at the scene.

Greene testified that he told Ms. McLaughlin the Grievant should stay close to her during the execution of the search warrant. He did not tell McLaughlin that the Grievant was prohibited from "searching". He said he "assumed" McLaughlin was aware of the prohibition. Greene had changed the prior policy in May of 1992, whereby analysts had been permitted to search for records and documents during search warrants, just as investigators were. He did not think to tell anyone else about the change, however. Therefore, McLaughlin was not aware of it.

The arbitrator finds this miscommunication to be significant. Regardless of what Mr. Greene might have said to the Grievant during their brief meeting on October 30, it was the guidance and direction of Kathy McLaughlin at the scene that the Grievant followed. Not only was that understandable at the time, but it appears as if that was the intent of Greene when he clothed McLaughlin with quasi-supervisory authority.

McLaughlin complied with Greene's instructions at the scene, to the best of her knowledge and understanding, and the Grievant complied with McLaughlin's instructions appropriately and eagerly. Together they searched through boxes in the residence, looking for papers that contained information relevant to the investigation.

McLaughlin acknowledged that there was some confusion at the scene as to what envelopes and what case numbers the Grievant was expected to use while gathering and recording the data for her

analysis. Someone pointed out that the Grievant was using a DOJ envelope and case number, while the Cottage Grove Police Department was the appropriate agency for identification purposes. McLaughlin also acknowledged that Evidence Officer Zack Williamson had cautioned McLaughlin and the Grievant to avoid "getting ahead of" the rest of the officers involved in the overall operation. McLaughlin stated she believed the errors were due to her own failure to explain things properly to the Grievant. She did not feel the Grievant disobeyed any instructions or violated any policies or practices of which, in McLaughlin's mind at least, the Grievant should have been aware. McLaughlin was not disciplined for her errors in supervising the Grievant, nor was she disciplined for her own error, if any, in "getting ahead" of the work of the police officers at the scene.

There was much testimony at the hearing about an incident that occurred towards the end of the search warrant operation, when the Grievant rummaged through some bags of garbage outside the residence where the warrant had been executed. McLaughlin testified that the Grievant had asked her, before the rummaging occurred, if it would be appropriate to "go through the bags of garbage". McLaughlin said she responded "yes". In fact, she said she told the Grievant it would be important to do so, as garbage containers often contain records or receipts or other papers that are helpful in a criminal analysis.

Later that day, it appeared to both McLaughlin and the Grievant that no other officer was interested in checking through

the garbage bags. The Grievant asked McLaughlin if they should go ahead and do so. McLaughlin agreed. While going through the garbage, they found a number of items that turned out to be helpful to the Grievant's data analysis. They also found some baby clothes that had been discarded but looked brand-new. The Grievant asked if it might be possible to donate the clothes to the Goodwill or other charity. She asked the question in a group setting, as several officers were present at the time. She was told that it would not be proper to remove anything from the scene. She promptly put the clothes back where she had found them.

A day or so after the warrant was completed, the Grievant spoke with Supervisor Greene on the telephone about the overall operation and her role in obtaining data. The Grievant told Greene that she and McLaughlin had looked around on their own and had found more evidence than they had expected to find. Greene did not tell the Grievant during that phone conversation that she had violated his instructions by her conduct. Also, he did not contact McLaughlin for more information. Instead, he reported to the Grievant that Dean Finnerty of the Cottage Grove Police Department had complimented her work, saying she and McLaughlin had done an "outstanding job". He appeared to consider the matter closed.

The arbitrator is persuaded that the Grievant followed the instructions of Supervisor Greene and Investigator McLaughlin to the best of her understanding. Greene's instructions on October

30, 1992 were at best ambiguous. His instructions to McLaughlin were inconsistent with what he had told the Grievant. The Grievant, believing that McLaughlin was her "on-site supervisor", followed the directions and guidance of McLaughlin at the scene in a reasonable fashion.

It is clear from the evidence that the Grievant never did "search" for drugs at the scene. The most she did was go through some boxes, drawers and garbage bags looking for papers. She did so with the approval of Ms. McLaughlin.

Regarding the use of DOJ envelopes and case numbers, there is no evidence that either Greene or McLaughlin told the Grievant prior to the search that only Cottage Grove Police Department case numbers should be used. McLaughlin testified that she felt "responsible" for the Grievant's error with regard to the paperwork issue. As soon as the Grievant was advised as to the proper identification system to use, she complied with the instructions.

As for the taking of the baby clothes, that was at worst an example of naivete on the part of the Grievant. She probably should have realized that removal of any goods from the crime scene was likely to be prohibited, even discarded items in the garbage that were unrelated to the criminal drug-related operation that the search warrant was about. It is significant to the arbitrator, however, that the Grievant did not simply take the baby clothes without asking anyone first. She inquired in a group setting whether it would be proper. When told it would not

be proper, she immediately put the clothing back. This can hardly be construed as a "seizure" that intentionally violated any instructions of Supervisor Greene.

There was one additional comment in the Grievant's dismissal notice with respect to the November 4 warrant execution. The Grievant allegedly complained to Bob Greene during the phone conversation on the day after the warrant execution that Paul Smith, Sr., the other DOJ investigator who was at the search location, had "just [sat] around smoking cigarettes all day." That statement was alleged to be "untrue" in the notice of charges and was, therefore, a basis for calling the Grievant dishonest and deceitful.

The arbitrator is persuaded that the Grievant did make the quoted statement about Paul Smith, Sr. The evidence shows that the statement was an untrue exaggeration. Smith admitted in his testimony that he had smoked a number of cigarettes at various times during the day. He and other witnesses established, however, that he remained actively involved in the marijuana search at the scene and that he worked alongside the local police officers in the performance of his duties. He did not sit around smoking cigarettes all day.

Since the Grievant was in a different room from Smith much of the day, she may not have observed the work he was doing. She did observe the smoking incidents because he went past her to the outdoors in order to smoke.

Smith and the Grievant did not like each other. Smith had done the required background investigation on the Grievant soon after she was hired. The Grievant was unhappy with Smith's behavior and complained to Mr. Banks about several things Smith had done during the investigation that she felt were inappropriate. She probably made the exaggerated remark about Smith's smoking in Cottage Grove because of her long-standing negative feelings about Smith.

The Grievant's statement did not constitute "dishonesty" or "deceit", however, that would justify disciplinary action in this case. It was at worst an example of spiteful backbiting about a co-worker. While the arbitrator does not condone such behavior, she finds that it was similar to other employees' behavior in the unit and that those other employees were not disciplined for their spiteful exaggerations.

Bob Williams, for example, reported that the Grievant had used Ed Higgins' phone for personal long-distance calls in order to avoid paying for them. He apparently did so in a written report as well as an oral one. Yet, at the hearing, neither Mr. Higgins nor Mr. Williams confirmed under oath that the Grievant had made such calls. Mr. Williams' report was not offered in evidence either. The arbitrator concludes that his reports were not accurate, but were examples of backbiting.

Williams also admitted at the hearing that he, Higgins and Smith had all complained to Greene during the summer of 1992 that the Grievant was accumulating an "inordinate amount of exchange

time". As a result of their report, Greene decided to implement the "goldenrod" system for preauthorization of exchange time. The arbitrator is persuaded by the evidence, however, that the exchange time accumulation of the Grievant in the summer months of 1992 was not substantially different from that of her accusers. See Union Ex. No. 13. Their reports had been inaccurate and exaggerated backbiting.

It does not appear that the Grievant's fellow analysts were disciplined for dishonesty when their exaggerated accusations about the Grievant's behavior were revealed. Therefore, it would be unfair to discipline the Grievant for the exaggerated remark she made about Paul Smith's smoking at the search warrant scene.

The Employer failed to persuade the arbitrator that Charge Number One was proven, according to just cause principles. The Grievant did not merit discipline for her activities related to the Cottage Grove search warrant execution.

Charge #2: Personal long-distance:

Witness Kathy McLaughlin testified that on or about October 20, 1992, the Grievant made a long-distance telephone call on McLaughlin's office telephone. The call was placed to a locksmith in Bend so that the Grievant could discuss changing the locks on her Sunriver rental house. Before making the call, The Grievant had asked McLaughlin what the telephone policy was. McLaughlin had told her that she should not make such a call without charging it to her home phone or a calling card. See

also Union Ex. No. 2.

State employees are prohibited from making personal long-distance calls on State phones at State expense. See State Ex. Nos. 17 and 18. The rule is reasonable. State phone use, being an expense of the taxpayers of Oregon, should be limited to State business. Employees should pay for their own personal calls. Employees who violate the rule intentionally are, in effect, stealing from their Employer.

Credible evidence establishes, however, that there was some inconsistency in the Criminal Justice Division regarding enforcement of the telephone rule. McLaughlin herself admitted that it was common for employees to make occasional personal long-distance calls at State expense. She was fairly certain she might have charged a personal long-distance call to the state herself on occasion.

Analyst Suzanne Porter testified that, while returning from a meeting in Washington County with Banks and Greene on August 13, 1992, the three of them had discussed the making of personal long-distance calls on State SPAN-line telephones. Porter recalled saying she always charged her calls to her personal phone card. Banks, however, had said he felt it was okay if people made personal calls without charging them on occasion. At the hearing, Banks categorically denied making the comment, but said he did not recall the August 13, 1992 ride with Sue Porter at all. Banks admitted, however, that it is acceptable for employees to call home at state expense while they are on the

road. The calls must be short and limited to one every other day.

The Grievant testified at some length that she had been informed by Office Manager Mary Gorman, soon after her initial hire, in February of 1992, that it was acceptable to put money in the copy machine cash box to pay for personal long-distance calls. She said she used that method for paying for personal long-distance calls when she did not have her personal phone credit card with her.

She said Mary had told her about that option again in November of 1992, when she had wanted to make a call to Eugene to report an incident which she felt obliged to report to school authorities there. A student who had been taking the SAT exam the previous Saturday, under the Grievant's supervision, had exhibited suicidal tendencies. The Grievant had been unable to reach school counselors from her home phone before or after work and wanted to call from her Salem office phone. While Mary Gorman could not recall telling the Grievant it was acceptable to pay for the call by putting money in the cash box, she did recall the conversation about the suicidal student in Eugene. She also said she "might have" approved the cash box payment method.

Apparently the cash box payment process had been used in the past by at least one other employee. Analyst Tom Hamilton testified that Mary Gorman had authorized that payment method for one call he had made in the past to his wife in California.

The Grievant testified under oath that she paid for the October 20, 1992 call to Bend by putting money in the copy machine cash box. Since Management did not persuade the arbitrator that such a payment method was prohibited, the arbitrator finds that the Grievant did not violate the State policy regarding paying for personal long-distance calls, when she paid for the call in that fashion.

The arbitrator is somewhat concerned, however, that the Grievant appeared less than candid about why she used that payment system. It does seem questionable that the Grievant carried change in her wallet to pay for long-distance calls, but did not carry her personal phone card out of fear of losing it. Nevertheless, the arbitrator is not persuaded that the Grievant was lying in her testimony. It would hardly be reasonable for her to go to the trouble of asking Kathy McLaughlin what the phone policy was, listen to her answer, and still make a personal long-distance call on McLaughlin's phone without paying for it in some fashion.

Charge No. 2 also references "several personal long-distance calls" allegedly made by the Grievant on Ed Higgins' phone on November 27, 1992. The State concedes in its brief that those calls were not proven.

The arbitrator notes that the Grievant produced evidence showing she had charged one long-distance call to her home phone number on November 27. See Union Ex. No. 16. She admitted in her testimony that she had made one call that same day on Ed

Higgins' phone. She said it was a local call, however. She said she had used Higgins' phone so that she would not tie up her own line from receiving an incoming call that she was expecting.

The Employer bears the burden of proof in a discharge case. The arbitrator finds that the charge regarding improper personal use of state phones for long-distance calls was not proven.

Charge #3: The "exchange time" issue:

It is undisputed that the Grievant recorded more overtime work hours on her computerized time-keeping system in November of 1992 than had been pre-authorized by her supervisors through the use of goldenrod forms. The issue here is whether she intended to deceive her employer, as alleged in the notice of dismissal, by recording the extra hours and seeking exchange time for those hours.

Four of the hours the Grievant posted were for work done on Saturday, November 7. She had requested advance approval for those hours on a goldenrod form, but Randy Banks had denied the request. The Grievant knew that. She reported to Bob Greene during the week after November 7, however, that she had worked on Saturday, November 7, in spite of Banks' disapproval of her exchange time request. She said she had worked on the preparation of a presentation that was scheduled for November 13. The Grievant told Greene she preferred to work on the presentation at home, but that she did not expect to be paid for the time. Greene later reported to Randy Banks that the Grievant

had worked on November 7 and that she did not expect to be compensated.

In addition to the November 7 hours, the evidence establishes that the Grievant recorded in her computerized time record that she had worked all day on Thanksgiving Day, as well as some other hours that had not been pre-authorized. She did not, however, report working any hours for November 13, which had been a regular workday.

An office worker in the Grievant's unit, Lyana Fletcher, testified that she discovered the irregularities when she transferred the Grievant's time record to a payroll sheet on December 1, 1992. Fletcher went to the Grievant and pointed out that there must have been some errors, specifically with regard to Thanksgiving Day and November 13. The Grievant told Fletcher she had in fact worked on November 13 all day, but had gotten up late on Thanksgiving Day and had only worked four hours that day, rather than eight. She offered to make those corrections in her computer.

Fletcher then continued with her review, matching the Grievant's goldenrod slips for November with the time record as "corrected" by the Grievant. She found that the Grievant had reported more than twenty hours of overtime for the month of November. The goldenrods showed only five hours of approved exchange time, however. See State Ex. No. 8. She went to Randy Banks with the information and Banks asked her to check with the Grievant for an explanation.

The Grievant's explanation was that she did not expect to be compensated for the unauthorized overtime. She said she merely recorded all her time on the computerized program for her own personal record. She asked Fletcher to go over her time records at the end of each month to sort out the unpaid "personal" time from the approved overtime hours. See State Ex. No. 4. Fletcher did not like being asked to do that, however. She felt it was the Grievant's duty to submit only authorized time via her computer program.

The computer program was instituted in the summer of 1992, to replace the former hand-written monthly time sheets. See State Ex. 24, 21. Designed by analyst Scott Partridge, the program was intended to produce a more detailed summary of the time analysts were spending in order to better track the work done in the unit and the amount of time spent on each task. Instructions were given as to the codes to be used for the various tasks. See Union Ex. No. 4. It is not at all clear that analysts were ever informed as to whether they were restricted to posting only authorized time in the computer. It is also unclear whether analysts were informed the computerized program would be used for payroll accounting purposes.

Several witnesses testified about their understanding of the purpose of the computerized time-keeping system and its relation to the exchange time approval process, as of the fall of 1992. Bob Williams testified that he understood it would be permissible to work overtime, even if the overtime had not been approved on a

goldenrod, but the time would be considered "personal time". Exchange time would not be awarded for it. He said that in November of 1992, as well as at the time of the hearing, he recorded such "personal time" on his personal pocket calendar. He only recorded approved time on his computer, he said.

Paul Smith, Jr. testified to a somewhat different practice, however. He said he understood he was supposed to record all his work hours on the computerized program in the same manner as he had under the earlier paper recording system. He said he understood that exchange time would only be paid for overtime hours if those hours had been pre-approved by the use of goldenrods. In other words, his understanding seemed to match the Grievant's.

A study done by the Union, shows that Smith recorded 8.5 hours of unauthorized overtime in October. See Union Ex. Nos. 11, 12, 13. Similarly, Tom Hamilton reported 4.5 hours of unauthorized overtime in October and 5.5 hours in November. See Union Ex. No. 13.

Ed Higgins testified that he understood it was acceptable to request a "blanket" authorization for a certain number of hours of exchange time per day. Since it would be difficult to determine in advance how many hours would be needed for a particular project, he chose to submit an open-ended request for "five hours per week until further notice" on August 19, 1992. Then, relying on that request, he posted 22.5 hours of overtime in September and 32.5 hours in October, both of which were

considerably in excess of five hours per week. See Union Ex. Nos. 7, 13.

Supervisor Greene was aware during November that the Grievant was putting in overtime at home for which she had not obtained approval on goldenrod slips. The Grievant told Greene during the week after November 7 that she had prepared her Asian Crime presentation at home even though Banks had denied her exchange time request. She expressly had told Greene she did not expect to be paid for the time. Her statement to Fletcher on December 1 was consistent with that earlier statement. She told Fletcher she merely recorded her overtime hours for her own benefit, but she did not expect to be paid for any unauthorized overtime hours.

The Employer failed to persuade the arbitrator that the Grievant intended to deceive her Employer or that she had sought payment for unauthorized overtime in November. To the contrary, it appears she understood that she would only be paid for approved hours. She apparently did not understand, however, that she was only supposed to record approved time in her computerized time record. As a result, she recorded about twenty hours of overtime that had not been approved.

Greene apparently realized the Grievant had misunderstood the proper recording procedure. He issued a memo to her on December 15, 1992 expressly advising her to cease recording any time in excess of her normal eight-hour shift, that was not authorized by a supervisor. See State Ex. No. 23. That notice

was sufficient to correct the Grievant's confusion on the issue.

Since the appropriate corrective action had been taken on December 15, by the issuance of Greene's interoffice memo, the Employer did not have just cause to rely on the November time-keeping errors as one of the bases for the discharge on December 29. Charge No. 3 is not proven under just cause principles.

Charge # 4: Breach of Security

It is undisputed that the Grievant brought a union representative, Irene Zimmerman, into her four-person office during the noon hour on December 2, 1992. Two of the Grievant's co-workers, Smith and Williams, were in the office at the time. The Employer contends that, by bringing an unauthorized person into the office without notifying Greene or Banks first, or at least warning her co-workers so that they could sanitize the area of any confidential materials, she violated the strict security of the CIU. Bob Greene testified that he had expressly informed the Grievant and other analysts that visitors were not allowed in the CIU without advance notice. The arbitrator finds his testimony credible and unambiguous on that point.

It appears Greene's instruction about visitors came about, at least in part, because of a complaint by the Grievant herself that too many janitors and repair people were wandering through the unit. The Grievant had been concerned about the security issue as early as February of 1992.

Nevertheless, the Union offered considerable evidence showing that the Grievant was not the only analyst who had brought unauthorized persons into the sensitive areas of the CIU office after Greene issued his instruction. Scott Partridge stated he had brought his own brother, wife and daughter to the area in November of 1992 without checking with anyone first. He stated the majority of employees and supervisors had brought family members into the area also, citing Bob Williams specifically.

The Grievant stated she recalled Ed Higgins bringing his wife to the door of the office and introducing his wife to the Grievant. Higgins acknowledged that his wife had, in fact, been introduced to the Grievant in that fashion. The Grievant also testified that Paul Smith's nineteen-year old daughter had come into the office once unannounced. Smith acknowledged that his daughter had, in fact, come in once.

The arbitrator is persuaded that the Grievant was very careless on the day she invited her union representative into the office. She should have been aware of the potential security breach and she should have notified either her supervisor or her co-workers in advance.

However, her carelessness was no worse than that of her co-workers, several of whom had brought unauthorized persons into the sensitive CIU office areas in the past without being disciplined for their conduct. Therefore, the Grievant should not have been disciplined for her error either.

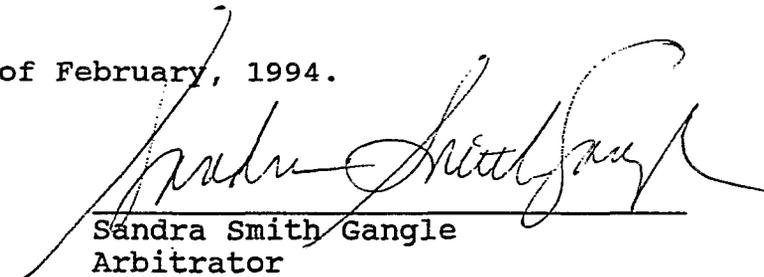
AWARD

The Employer failed to persuade the arbitrator that it had just cause to terminate the Grievant. For the reasons stated in the foregoing analysis and decision, the grievance is granted. The Grievant shall be reinstated to her position as Research Analyst 3, and shall be made whole with full backpay and benefits. If the Grievant's position would have been affected by a layoff sometime between January 11, 1993 and the date of this reinstatement, the Employer and the Union shall work together to determine what options would have been available to the Grievant at the time of layoff and the Grievant shall be permitted to exercise her option as part of the make-whole remedy.

Pursuant to Article 21(6)(e) of the collective bargaining agreement, the arbitrator does not find that either party is the clear loser in this case. Therefore, the parties shall share equally in the arbitrator's fees and costs.

The arbitrator hereby retains jurisdiction for sixty (60) days to assist the parties with the implementation of the make-whole remedy.

DATED this 14th day of February, 1994.



Sandra Smith Gangle
Arbitrator