

<p>IN THE MATTER OF THE ARBITRATION BETWEEN</p> <p>INTERNATIONAL FEDERATION OF</p> <p>PROFESSIONAL AND TECHNICAL ENGINEERS,</p> <p>LOCAL 17,</p> <p style="padding-left: 100px;">Union,</p> <p>and</p> <p>WASHINGTON STATE DEPARTMENT OF</p> <p>TRANSPORTATION,</p> <p style="padding-left: 100px;">Employer.</p>	<p>) PUBLIC EMPLOYMENT</p> <p>) RELATIONS COMMISSION</p> <p>) NUMBER 23436-P-10-942</p> <p>)</p> <p>)</p> <p>) ARBITRATOR'S</p> <p>) OPINION AND AWARD</p> <p>)</p> <p>) GRIEVANT:</p> <p>) CODY AMMANN</p>
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ARBITRATOR: ANTHONY D. VIVENZIO

AWARD DATE: AUGUST 12, 2011

APPEARANCES FOR THE PARTIES:

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PROCEDURAL HISTORY

The Washington State Department of Transportation is hereinafter referred to as "the Employer," or "WSDOT." The International Federation of Professional and Technical Engineers, Local 17, is hereinafter referred to as "PTE," or "the Union." Collectively, they are hereinafter referred to as "the Parties." This arbitration addresses the Employer's disciplinary action involving the Grievant, Cody Ammann, hereinafter referred to as "the Grievant," noted by letter of August 13, 2009.

The grievance filed by the Union to contest the discharge is based upon the collective bargaining agreement between the Parties, hereinafter the "Agreement" or "Contract," effective for the period July 1, 2009 through June 30, 2011. The Union filed the grievance at Step 2 regarding the disciplinary action on August 18, 2009. The Step 2 grievance was held on February 22, 2010, and was denied by the Employer by letter of March 1, 2010. On March 8, 2010, a Step 3 grievance was filed, which was denied on May 19, 2010. On June 3, 2010, a request for mediation was filed with the Public Employment Relations Commission. The Parties were unable to reach a settlement at the mediation hearing, which was held on August 5, 2010. Following these unsuccessful attempts at resolution, the Union invoked arbitration on August 9, 2010. From a roster supplied to the Parties by the Public Employment Relations Commission, Anthony D. Vivenzio was selected and appointed as Arbitrator. An arbitration hearing was held on the premises of the Employer in Richland, Washington, on March 20, 2011. The Parties stipulated that all prior steps in the grievance process had been completed or waived, and that the grievance and arbitration were timely and properly before the Arbitrator. During the course of the hearing, both Parties were afforded a full opportunity for the presentation of evidence,

examination and cross-examination of witnesses, and oral argument. The evidentiary record was closed on March 28, 2011. The Arbitrator received timely post-hearing briefs from both Parties on or before May 23, 2011. The full record was deemed closed and the matter submitted on May 23, 2011.

STATEMENT OF THE ISSUE BEFORE THE ARBITRATOR

At the hearing, the Parties stipulated the issue before the Arbitrator as:

Did the Employer have just cause to discipline Mr. Ammann with a 5% two-month reduction in salary? If not, what is the appropriate remedy?

BACKGROUND

The Employer, the WSDOT, is the state agency vested with the responsibility for, among other duties, designing, constructing, and maintaining the highways of Washington State. The Union counts among its members Transportation Engineers, including the Grievant, whose duties include, but are not limited to, the design of the various roadways and their features. Following a period of problematic performance evaluations, and after leaving a worksite in Walla Walla, Washington, and traveling to Milton-Freewater in Oregon, the Grievant was charged with two violations of the Employer's work rules, and policies. Charge #1 concerned the Grievant's job performance, and Charge #2 concerned the Grievant's leaving the jobsite, as a violation of department policy. For those infractions, the Employer levied a penalty consisting of a 5% reduction in salary for two months, from September 1, 2009 through October 31, 2009 (reduced after reconsideration from a four month reduction in salary), resulting in the grievance which led to this arbitration.

PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT AND WORK RULES

From the collective bargaining agreement effective July 1, 2009 – June 30, 2011:

29.1 The Employer will not discipline any permanent employee without just cause.

29.2 Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions, and discharges. Oral reprimands will be identified as such.

When disciplining an employee, the Employer will make a reasonable effort to protect the privacy of the employee.

29.5 The Employer has the authority to impose discipline, which is then subject to the grievance procedure set forth in Article 32. The Employer will provide an employee with fifteen (15) calendar days' written notice prior to the effective date of a reduction in pay or demotion. If grieved, the effective date of the discipline will be considered the occurrence giving rise to the grievance. Oral and written reprimands, however, may only be processed through the agency head step of the grievance procedure.

32.3

D. Authority of the Arbitrator

- 1 The arbitrator will:
 - a Have no authority to add to, subtract from, or modify any of the provisions of this Agreement.
 - b Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it.
 - c Not make any decision that would result in the violation of this Agreement.
 - d Not make any award that provides an employee with compensation greater than would have resulted had there been no violation of this Agreement.
 - e Not have the authority to order the Employer to modify his or her staffing levels or to direct staff to work overtime.
2. The arbitrator will hear arguments on and decide issues of arbitrability before the first day of arbitration at a time convenient for the parties, immediately prior to hearing the case on its merits, or as part of the entire hearing and decision-making process. If the issue of arbitrability is argued prior to the first day of arbitration, it may be argued in writing or by telephone at the discretion of the arbitrator. Although the decision may be made orally, it will be put in writing and provided to the parties.
3. The decision of the arbitrator will be final and binding upon the Union, the Employer and the grievant.

Construction Manual M4 1-01.05

A representative of WSDOT should be assigned as a receiver at the delivery site or at the site where the item is to be placed. The receiver should collect the tickets from the carrier upon delivery of the ticketed material, record any required or additional information on the ticket as necessary, and retain the original copy for payment.

POSITIONS OF THE PARTIES

Position of the Employer

Mr. Ammann, the Grievant, was a 10-year employee as a Transportation Engineer 1 when he was disciplined in 2009. In that role he helped design roadways and also dealt with aspects of their construction. In March, 2009, it appeared the Grievant was not meeting performance standards, "Behavioral Competencies" (BC) in a number of areas: Number 5, Communication Effectiveness; Number 11 Results Orientation and Initiative; Number 12, Accountability; and Number 22, Performing Duties within the Proper Scope of the Job. A special Employee Development and Performance Plan was conducted by his then supervisor, Michael Adams. Previous evaluations had noted performance problems in areas 11 and 12, including following direction and accepting guidance. In 2008, the Grievant was able to improve his performance, showing his capacity to improve. Mr. Adams sought to meet with the Grievant weekly for a 60 day period to review the prior week and identify any issues. The Grievant's performance was spotty with some occasional improvement. The supervisor generated minutes of these meetings soliciting any questions or comments from the Grievant. There was never any response. About six weeks into the process, Results Orientation and Accountability still remained problematic. The Grievant was next reassigned to the construction side of the office and was unable to meet with his supervisor. Later in the week, Mr. Adams found the Grievant

sitting in his office reading a magazine at his desk. The supervisor learned that no construction was occurring that day and the Grievant was not needed at the construction site. The Grievant never approached the supervisor to ask for direction or work assignment. The Grievant refused to sign the final performance evaluation. The areas of Results Orientation and Initiative and Accountability remained problematic.

On June 5, 2009, the Grievant was out in the field working construction on a large project in the Walla Walla area. This was a major project over an 8 mile stretch, replacing a whole roadway. The Grievant's job was to collect tickets from the drivers of contractors' trucks bringing in the materials used to build the road. Tickets are used to confirm the delivery of appropriate materials and to base payment to the contractors. Also at the site that day was Mike Heinze, a TE-2, acting as a lead person, monitoring the entire site. At 9:30 a.m. when he went to see how things are going with the Grievant, he found the Grievant absent. Mr. Heinze learned from contractors that the Grievant had left the site in a truck. The Grievant never contacted Mr. Heinze before leaving the site, who then had to take over the important task of collecting the tickets. When the Grievant returned over an hour later, he explained that he needed to go to Oregon so that he could locate the site of a safety meeting that was to occur the following week. At the time of this incident, the Department was under a travel freeze, and only certain employees were allowed to go into other states. Only a few people were on a list of those approved for travel to Oregon, the Grievant not among them. Considering the Grievant's performance issues and this last incident, the Employer submits that the discipline taken in this matter was taken for just cause.

Position of the Union

Mr. Ammann was disciplined based upon two charges: below standard job performance and a violation of department policy. Mr. Ammann testified with explanations showing that neither charge has a just cause basis for discipline. He rebutted all charges. As to below standard job performance, he provided testimony regarding his interaction with his managers and his treatment in the workplace. With regard to the charge of violating department policy, Mr. Ammann testified regarding the incidents on June 4th and 5th which led to the incident, and maintains that his actions did not violate either WSDOT policy or Office of Financial Management guidelines.

DISCUSSION

At the outset, the Arbitrator would like to express his appreciation for the professional manner in which the Parties conducted themselves in the course of the proceedings, rendering vigorous, but courteous, advocacy.

It is well established in labor arbitration that where, as in the present case, an Employer's right to discipline an employee is limited by the requirement that any such action be for "just cause," the Employer has the burden of proving that such discipline of an employee was for just cause. Therefore, the Employer here had the burden of persuading the Arbitrator that its disciplinary salary reduction imposed on the Grievant, Cody Ammann, was for just cause.

"Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the Grievant engaged in the conduct for which he or she was disciplined. The second area of proof concerns the issue of whether the penalty assessed by the Employer should be upheld, mitigated, or otherwise modified. Factors relevant to this issue include a requirement that an employee knows or is

reasonably expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline, the existence of a reasonable relationship between an employee's misconduct and the penalty imposed, and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

These considerations were summarized in what is now a commonplace in labor arbitration, known as the "Seven Tests," by Arbitrator Carroll Dougherty, pronounced in Enterprise Wire Co., 46 LA 359 (1966):

1. Did the employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business and (b) the performance that the Employer might properly expect of the employee?
3. Did the employer, 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 employer'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 employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?
7. Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the employer?

While these standards have been tailored to address different work places and circumstances, they serve as a useful construct, with appropriate tailoring, for considering this case. The Arbitrator has studied the entire record in this matter carefully and has considered the arguments set forth in the Parties' briefs. That a matter has not been discussed in this award does not indicate that it has not been considered by the Arbitrator. The following discussion will center on those factors found to be either controlling or necessary to the Arbitrator's decision.

1. Did the Employer give to the Grievant forewarning or foreknowledge of the possible or probable disciplinary consequences of the Grievant's conduct?

This inquiry is limited to whether or not the Grievant knew or should have known that his conduct could lead to discipline, whether that knowledge is conveyed in written form, by virtue of his experience, or by common knowledge. The Grievant's actual performance is not addressed in this inquiry, only the source and quality of his foreknowledge. The Arbitrator answers this question, "Yes," as to both charges:

Charge #1: Grievant's Job Performance

The Grievant holds a Bachelors of Science Degree in Civil Engineering and has been a WSDOT employee for over 10 years. He has participated in a number of performance evaluations during that period. Evaluations performed circa 2007-2008 showed areas of acceptable performance coupled with some performance requiring improvement. The grievant was able to produce the required improvement at that time, but, into the early part of 2009, his then supervisor began noticing a regression in performance, prompting him to embark on a special 60 day Performance Improvement Plan. The Grievant's critical deficiencies were in the areas of BC11, Results Orientation and Initiative, to wit a reluctance to inform supervisors of his availability for work, for example, being found reading a magazine at his desk when he was between projects, and BC12, Accountability/Follows Direction/Accepts Guidance from Supervisors and Co-Workers, reiterating the Grievant's failure to keep supervisors informed of his actions, substandard productivity, and unnecessarily involving other employees in his work. This "Employee Performance Review" *Jt. Ex. 5, p.24*, under the heading "Job Expectations & Training and Development," states as follows:

If the behavioral competences are not brought up to an acceptable standard in the next 60 days disciplinary actions will be taken.

It is axiomatic in the law of the workplace that an Employer must have the ability to correct an employee's performance deficiencies, through discipline, if necessary. Beyond that, it must be admitted that the average employee is aware that he may be subject to discipline of some sort if his performance falls below a level acceptable to his employer. Here we have the addition of a written pronouncement producing what the arbitrator finds to be adequate forewarning to the Grievant that unimproved job performance would result in disciplinary action.

Charge #2 Violation of Department Policy/Leaving Job Site

Again, this matter involves the conduct of an employee with considerable education and more than 10 years of experience on the job. The function to which the Grievant was assigned on the relevant date, June 5, 2009, was the collection of "tickets" from truck drivers delivering thousands of tons of construction materials to a large construction project. The collection of the tickets is important for a number of reasons, including assuring the quality of the delivered material, and establishing the basis for paying suppliers/contractors. The importance of this function would be well known to the Grievant as a matter of his general knowledge and experience, as well as being spelled out in the Construction Manual. For the purpose of this inquiry into the forewarning of the Grievant, the explanations offered by the Grievant to the effect that: no one ordered him to leave the job site; Construction Manual M4 1-01.05 *Jt. Ex. 5. p. 54*, uses the word "should" rather than "shall" with regard to the assignment of taking tickets from carriers upon the delivery of ticketed material; having drivers hold tickets is routine, especially over a large project; he was not informed that he was not authorized for travel; he forgot about the travel freeze, and the like, do not overcome the importance of the task the Grievant was assigned to perform and the foreknowledge that he possessed. While the Grievant's stated motivation for taking it upon himself to travel to identify the location of a

future safety meeting may be commendable, and motivated by a concern for the safety of his coworkers, it does not overcome a legitimate expectation that he would not take this action in this work environment without first achieving direct contact with his on-site lead, Mike Heinze, or with other lead or supervisory personnel, to provide notice, achieve coordination, or obtain permission for his intended action. For reasons similar to those announced regarding Charge #1, the Arbitrator finds that the grievant had forewarning that his conduct in leaving the Walla Walla jobsite could result in disciplinary action.

2. Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business and (b) the performance that the Employer might properly expect of the Grievant?

The Arbitrator answers these questions, "Yes," as to both charges.

Charge #1: Grievant's Job Performance

The areas of the Grievant's performance which were of concern to the Employer, for which improvement was sought, and which led to the discipline which is here grieved, included the following: From August 11, 2008 to March 12, 2009: Communications Effectiveness, Results Orientation and Initiative, Accountability/Follows Directions/Accepts Guidance from Superiors and Co-Workers; Performs Duties within Proper Scope. *Jt. Ex. 5, p. 10-12.* During that period it was noted that the Grievant had issues following verbal instructions and keeping on task, moving to tasks not assigned to him; distracting other team members with questions he could answer himself little effort; delegating work to others, and the like. These evaluations are corroborated by e-mails from past evaluators. *Jt. Ex. 5, pp.13-17.* From March 12, 2009 to May 13, 2009: Results Orientation and Initiative and Accountability/Follows Directions/Accepts Guidance from Superiors and Co-Workers remained problematic with some mixed results. *Jt. Ex. 5, pp. 24-25.* Given the nature of the mission and work of this governmental agency, the

WSDOT, the Arbitrator finds that the performance standards maintained by the Employer are reasonably related to the orderly, efficient, and safe operation of the Employer's workplace, and fairly prescribe the performance that the Employer might properly expect of its employees, including the Grievant.

Charge #2 Violation of Department Policy/Leaving Job Site

That an employee should not leave their appointed post at their assigned job at their jobsite without first achieving contact with an agent of the employer, i.e. their lead person, except for a recognized break period permitting leaving the site or for dire emergency, or for other authorized reasons, whether or not there is a "travel freeze" in effect, is a matter of common knowledge. The failure to meet that expectation places the Employer and other employees in a disadvantaged position. The jobsite here is a construction zone, posing questions of safety for the Grievant, his coworkers, and others. In addition, coworkers, tasked with other important duties at the site, must be called upon to cover for the absent employee, disrupting their own work. Further, the job the Grievant departed consisted of collecting tickets, a function related to the quality of materials delivered, (which relates to the quality of the project and the safety of the public), and the general efficiency and cost-effectiveness of the project. The existence of a process for limiting travel to a few selected employees is an additional mechanism to achieve desired savings.

Based upon the foregoing, the Arbitrator finds that the Employer's performance standards and its policies requiring an employee to remain at a jobsite unless actual notice to their lead or other supervisory personnel has been achieved, and permission granted, are reasonably related to the orderly, efficient, and safe operation of the Employer's business and the performance that the Employer might properly expect of its employees, including the Grievant.

3. Did the Employer, before administering discipline to the Grievant, make an effort to discover whether the Grievant did in fact violate or disobey a rule or order of management?

The Arbitrator answers this question, “Yes,” as to both charges.

Charge #1: Grievant’s Job Performance

The record is replete with observations of the Grievant’s performance, raising issues of below standard performance for a substantial period prior to the incident of June 5, 2009. When areas of improvement were seen for a given period, this was noted as well. The record consists of prior performance evaluations referencing issues corroborated by emails citing specific examples of problematic performance. The round of evaluations pursuant to the Performance Improvement Plan instituted by Supervisor Michael Adams in March of 2009 was accompanied by notes of those meetings and requests for comments and input from the Grievant. Mr. Adams’ superiors also participated in and reviewed the evaluation process. *Jt. Ex. 5, pp. 1-17, 24-62.*

Charge #2 Violation of Department Policy/Leaving Job Site

The record contains the Grievant’s own account of leaving the worksite, as well as the testimony of the employee who served as his lead on June 5, 2009, Mike Heinze. That the Grievant was not available to collect tickets during his absence for over an hour, requiring Mr. Heinze to take over the job of ticket collection is corroborated by ticket collection records contained in Employer Exhibit 3. The Employer considered the Grievant’s explanations of not knowing he couldn’t leave the site, forgetting about the travel freeze, and believing that safety concerns required him to attend a safety meeting at the request of a contractor in the course of its deliberations. *Jt. Ex. 5, pp 4,5.*

Based on the foregoing, the Arbitrator finds that the Employer, before administering discipline to the Grievant, made an effort to discover whether he did in fact fail to meet reasonable performance standards and violate department policy.

4. Was the Employer's investigation conducted fairly and objectively?

The Arbitrator's answer to this question is, "Yes," as to both charges.

Charge #1: Grievant's Job Performance

With regard to the basis for discipline related to the Grievant's performance, a review of the record reveals a number of evaluation sessions conducted over a substantial period of time, applying reasonable descriptions and standards of performance communicated to the Grievant, often on a weekly basis, acknowledging good performance where appropriate, and noting substandard performance where appropriate, thus describing a credible, good faith system of employee evaluation, with a goal toward motivating improvement before consideration of discipline. Such steps were, on occasion, met with improvement by the Grievant, showing his capacity for initiative. However, such progress was also followed by regression, as meetings with his supervisor were closed with comments like, "Are we done yet?" and refusals to sign written summaries of such conferences.

Charge #2 Violation of Department Policy/Leaving Job Site

With regard to the basis for discipline related to the Grievant's leaving his worksite for out of state travel, Witness testimony from the Grievant's on-site supervisor, exhibits produced confirming the absence from the worksite and its duration and impact, and testimony from higher management concerning their contact with the matter, reveal a process whereby management elicited first hand information from all available reliable sources. A review of the investigatory steps and methods followed by the Employer in discovering the Grievant's involvement in the

acts leading to his termination, including interviews relating to both charges in which Grievant was accompanied by a Union representative, reveals a fair and objective process, developing the core facts at issue, confirmed by the Grievant's own testimony.

5. At the investigation, did the Employer obtain substantial evidence or proof that the Grievant had exhibited the conduct that led to his discipline?

The Arbitrator's answer to this question is, "Yes," as to both charges.

Charge #1: Grievant's Job Performance

The record, in testimonial evidence and in exhibits, including joint exhibits, supports a finding and that the Grievant was performing below standards in at least two areas of legitimate concern to the Employer prior to the Employer's imposition of discipline. Employer Performance Reviews dating from mid-2007 through late 2008 show consistent ratings of "meets standard of performance expectations" in all areas of the competencies legitimately expected by the Employer, including one "above standards." Even among the items noted as "meets standards," notes were made of instances where some conduct indicated improvement was necessary. *Emp. Ex. 5, 6, 7.* The Grievant's difficulties began to surface with the special evaluation conducted covering the period August 1, 2008 to March 12, 2009. For that period, below standard performance was noted in competency areas 5, Communications Effectiveness; 11, Results Orientation and Initiative; 12, Accountability/Follows Directions/Accepts Guidance from Superiors and Co-Workers; and, 22, Performs Duties within Proper Scope. The Grievant's supervisor, Michael Adams, testified that employees in the design team discussed with him the Grievant's talking with and distracting them from their work, sometimes work related talk, but often in a different direction from what was appropriate. Initiative was also a concern, where the Grievant would be inactive unless some task was given to him, and not seek work or see what he

could do to help the design team. As to competency 12, the Grievant would tend to ask numerous questions and shift work from himself to other employees instead of taking the work on himself, rather than follow the supervisor's directions to complete a task. Often tasks were not completed on time, even for an entry-level TE-1. *Tr. p. 33-35.* From this baseline, the witness proceeded with a plan of correction based upon a 60 day Employee Performance Review. *Jt. Ex. 5, p. 24.* It should be noted that this document/process is alternatively known as a "60 day Performance Improvement Evaluation," and is sometimes referred to as a "plan." The plan, known to the Grievant, was to meet with the Grievant on a weekly basis, and discuss the various areas of performance expected by the Employer, noting where the Grievant was improving and performing well, and where the Grievant needed to improve his performance. A significant goal of this process was to achieve dialogue, an exchange of information with input from the Grievant, to help guide the process. *Tr. pp. 35-43.* This was not to be, as the Grievant did not tend to have comments or questions for his supervisor, ending at least one meeting with the comment, "Well, are we done yet?" During the early stages of the process the Grievant's behavior was spotty, with improvement in some areas, such as communication, but some habits persisted. For example, he would talk to other employees, such as one who was not in the design section but in the office engineer section, about a matter that could have been taken up with his supervisor. On another occasion, the Grievant held a meeting with that same employee that continued beyond the end of break time without notifying his supervisor. During this period, the Grievant was responsible for working on the "Burbank Project," which involved a laying out of guideposts. This is work the supervisor had done himself in the past, in the field, without computer assistance, on a much larger project. The Grievant took many times longer to complete the same sort of work in the office with computer assistance. *Tr. pp. 46-49.* The habit

of not going to his supervisor with questions continued, despite the supervisor's practice of holding regular meetings with staff and maintaining an open door policy. This habit included asking others questions for which the Grievant knew, or could have easily researched the answer, resulting in distraction from that employee's work and train of thought. *Tr. pp. 50-54.* He also continued to "assign" away work that had been initially assigned to him, as to a CAD operator, while the team was short on operators. The Grievant's attitude toward meetings with his supervisor, displayed as comments like, "Are we done?" continued into May of 2009. Finally, on May 1, the Grievant was sitting in his office at 7:30 a.m. when Mr. Adams noticed him reading a magazine. The Grievant had been assigned to work a construction site under the supervision of Mr. Munro. Mr. Munro had shut down the site due to weather, and told the Grievant to return to the office and check with Mr. Adams to see if there was any design work. The Grievant did not check for work with Mr. Adams:

- Q. I went up to Cody and I asked him, you know, what he was doing.
And he said, "I'm not doing anything."
And I said, "What have you been working on?"
And he said, "nothing."
Q. And was your understanding since you'd come in that morning he had done nothing?
A. Yeah. He told me-I asked him, "what have you been doing this morning?"
And he said, "Nothing."
So, for two hours he was just sitting there reading his magazine.

The Grievant's response to this event was that he wasn't the first in the office to read a magazine. *Jt. Ex. 5. p. 3.* The final upshot of this 60 day evaluation period was that the Grievant remained deficient in areas 11, Results Orientation and Initiative; and 12, Accountability/Follows Directions/Accepts Guidance from Superiors and Co-Workers. The Grievant refused to sign the evaluation. The Employer's remaining supervisory witnesses offered credible testimony corroborating the above. The Union's direct case consisted solely of the Grievant's testimony. Some of the Grievant's testimony bore a ring of plausibility, for example

with regard to the Burbank Project requiring backup and "cutting the sheets," *Tr. pp. 191-197*, but many of his answers lacked corroboration that might have been provided by other witnesses, or were contradictory or confusing in light of other witness testimony and exhibits including joint exhibits. In making his assessment of the Grievant's testimony, the Arbitrator is not insensitive to the Grievant's comments during the course of his evaluation meetings, or of his given reason for not responding to his supervisor's requests for comments or questions:

"I didn't respond because it wouldn't make a difference in his mind. He's gonna nail me about talking to co-workers regardless of whether I'm talking at work or not." Based upon the foregoing, the Arbitrator finds that the Employer had substantial evidence sustaining its burden of proof that the Grievant maintained the substandard performance basing its discipline of the Grievant.

Charge #2 Violation of Department Policy/Leaving Job Site

The Grievant was charged with leaving his post at the Walla Walla road construction project on June 5, 2009, where he was assigned to collect "tickets" from drivers delivering road materials, and getting into a contractor's truck and traveling over the Oregon border to Milton-Freewater, without first contacting supervision, and at a time when such travel was also prohibited by a travel freeze. This charge was established through credible witness testimony, notably that of Mike Heinze, the Grievant's "lead" (a TE-2, above the Grievant's TE-1 grade) at the site. The Grievant himself did not deny leaving the worksite on June 5, 2009, at approximately 9:15 a.m. for over an hour. The Grievant had a number of explanations for his conduct, ranging from concern over safety conditions at the worksite following an incident whereby he was endangered by a contractor's driver the day before, prompting him to agree to attend a safety meeting to occur just across the border in Oregon the following week, to voicing

confusion over the applicability of the travel freeze, to claiming that he had forgotten about the travel freeze. Credible testimony established his assignment to the post, the importance of that assignment to the Employer's mission, and the impact of his abandonment of that post. Again, the Arbitrator is not insensitive to comments made by the Grievant in the course of the Employer's investigation into this matter: "I wouldn't have crossed the state line if I knew someone wanted my job... I'll write you a check for an hour of my time."

The Employer introduced evidence confirming the policy requiring presence at the jobsite, *Jt. Ex. 5, p. 54*, and the travel freeze that was in effect at the time the Grievant left the job site in Walla Walla and traveled to Milton-Freewater, Oregon, as well as credible testimony establishing that management personnel had communicated restrictions applicable to the Grievant in the course of meetings. *Jt. Ex. 5., p.55, Er. Ex.8, Tr. 137-139*. The Arbitrator notes that even were there not a travel freeze in effect, the Grievant's actions in leaving his post on June 5, without achieving contact with his lead, Mr. Heinze, or other supervisory personnel, would constitute conduct for which discipline could be imposed.

Based upon the foregoing, the Arbitrator finds that the Employer had substantial evidence sustaining its burden of proof that the Grievant committed the acts leading to its discipline of the Grievant.

6. Has the Employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

The Arbitrator answers this question, "Yes," as to both charges. An Employer's failure to administer discipline in a nondiscriminatory fashion, that is, to engage in disparate treatment of employees, is an affirmative defense that must be proved by the Union by a preponderance of the evidence. Here, the Union presented no evidence tending to prove that the discipline

imposed on the Grievant was disproportionate to discipline imposed by the Employer on similarly situated employees for like conduct, or was otherwise manifestly unfair. The conduct basing the discipline imposed here consisted of a pattern of unacceptable job performance despite attempts by the Employer to correct such performance shy of discipline over a protracted period, and conduct whereby the Grievant left a construction job site characterized by heavy equipment continually dumping road materials, and traveled in a contractor's truck across state lines without first achieving direct contact with management personnel.

There was discussion to the effect that the Employer was “out to get” the Grievant. The Union would be expected to bear the burden of proof of such a claim beyond that bald statement, and would be expected to present evidence that similarly situated employees were either not faced with charges despite similar conduct, or, if charged, faced lesser or no penalty. Evidence to support such a claim might include personnel, performance, and disciplinary records involving other employees, and testimony tending to show retaliation for protected conduct, action motivated by discrimination towards the Grievant as a member of a protected class, or actual practices within the workplace culture at odds with the official picture presented by the Employer. As it was, the testimony of the Grievant was the sole evidence presented by the Union. The Arbitrator finds no evidence in the record sufficient to sustain a claim of discriminatory or disparate treatment by the Employer in its discipline of the Grievant, or a claim that the Employer’s termination of the Grievant was disproportionate to discipline administered to other of its employees in comparable circumstances.

7. Was the degree of discipline administered by the Employer reasonably related to (a) the seriousness of the Grievant's proven offense and (b) the record of the Grievant in his service with the Employer?

The Arbitrator answers these questions, "Yes," as to both charges.

The Employer has presented evidence sufficient to satisfy the Arbitrator that the Grievant's actions violated reasonable Employment performance standards and policies in a manner that violated the requirements and expectations of an employee in the Grievant's position as a Transportation Engineer 1. For purposes of resolving this case in this workplace, the Arbitrator tends towards Arbitrator McCoy's view expressed in the earliest years of reported labor arbitration decisions in Stockham Pipe Fittings Co., 1 LA 160 (1945). As that respected neutral noted:

The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious or arbitrary action are proved – in other words, when there has been an abuse of discretion.

The Grievant is a college educated, 10 year employee of the WSDOT, in the position of a Technical Engineer 1. The Arbitrator finds that the Grievant knew, or should have known, that his conduct with regard to the aforementioned performance issues, and leaving a worksite to travel out of state, during a travel freeze, without making contact with supervisors, would likely result in discipline. The Arbitrator further finds a reasonable relationship between the Grievant's misconduct and the penalty imposed: the Grievant had shown his ability to conform his behavior to the Employer's expectations in the past; his conduct and responses to his supervisor's actions showed no ownership of his responsibility, and no acknowledgement of the impact of his conduct upon himself and his work, upon his coworkers, and upon his Employer. The Arbitrator finds that the Grievant's behavior warranted discipline. The Arbitrator further finds no abuse of

discretion on the part of the Employer in imposing the penalty it did, since the penalty selected was in keeping with the seriousness of the Grievant's conduct, and the record of the Grievant during his tenure with the Employer. As noted above, there is insufficient evidence of record upon which to find that discipline was administered other than even-handedly.

Upon consideration of the whole record, the requirements of the Grievant's position and duties, and the nature of the mission of the Employer, by any standard that could be applied, the Arbitrator finds that the Employer has met its burden of proof in this matter and that the discipline of the Grievant, as imposed, was with just cause.

CONCLUSION

Based upon all of the evidence surrounding the conduct of the Grievant, Cody Amman, the accepted tests of just cause for discipline, and the record as a whole, the Arbitrator finds that a 5% reduction of salary for a two month period was not too harsh a penalty under the circumstances of the charges herein, and was imposed for just cause. The Arbitrator will enter an award consistent with the above analysis and conclusions.

<p>IN THE MATTER OF THE ARBITRATION BETWEEN</p> <p>INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 17,</p> <p style="text-align: center;">Union,</p> <p>and</p> <p>WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,</p> <p style="text-align: center;">Employer.</p>	<p>) PUBLIC EMPLOYMENT</p> <p>) RELATIONS COMMISSION</p> <p>) NUMBER 23436-P-10-942</p> <p>)</p> <p>) ARBITRATOR'S</p> <p>) OPINION AND AWARD</p> <p>)</p> <p>) GRIEVANT:</p> <p>) CODY AMMANN</p>
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Having heard or read and carefully reviewed the evidence and arguments in this case, and in light of the above discussions, Grievance Number 23436-P-10-942 is denied:

The Employer had just cause to reduce the salary of the Grievant by 5% for a period of two months consistent with Article 29.1 of the collective bargaining agreement between the Parties and associated work rules.

RESPECTFULLY SUBMITTED this 12th day of August, 2011.


 Anthony D. Vivenzio, Arbitrator