FEDERAL MEDIATION AND CONCILIATION SERVICE

Proceedings before

James M. Paulson, Arbitrator

In the matter of: **BREMERTON METAL TRADES COUNCIL,** and **PUGET SOUND NAVAL SHIPYARD**	Case No. E/G 00358-H Employee Grievance

DECISION

PRELIMINARY STATEMENT

Ernest Martsching, Chief Steward, represented the Bremerton Metal Trades Council.

Christopher L. Hilgenfeld, Assistant General Counsel, appeared on behalf of the Puget Sound Naval Shipyard.

The Puget Sound Naval Shipyard, hereinafter the "Navy" or the "Employer", and the Bremerton Metal Trades Council, hereinafter the "Union", are parties to a collective bargaining agreement[1], hereinafter the "Agreement", which provides for the arbitration of unresolved grievances. The grievance[2] in this matter involves the five day suspension and the permanent removal of nuclear qualifications of Physical Science Technician Ed Employee. The parties agreed that James M. Paulson was selected to arbitrate the matter and his decision would be final and binding as described in the Agreement.

On May 18, 2006, a hearing was held at the Jackson Park Community Center in

[1] Joint Exhibit No. 1.
[2] Joint Exhibit No. 2.

Bremerton, Washington. At the hearing the parties were each permitted to present testimony and documentary evidence. The Navy called as its witnesses Tom Malley, Division Head and Director of Radiation Health; John Blair, Retired Division Head and Supervisor, Physical Science Technician; and Tim Baltz, Director and Supervisor, Nuclear Engineering. The Union called as its witness Ron Buford, Supervisor Physical Science Technician.

At the close of the hearing the Arbitrator ruled that the parties' briefs were to be postmarked on or before Friday, June 16, 2006. Extensions were granted to the parties and the Arbitrator received the briefs of both parties on June 28, 2006 and will issue his Decision and Award by postmark on or before July 28, 2006.

STATEMENT OF THE ISSUES

The parties stipulated to the following statement of the issues:

"1. Is the grievance barred by the Collective Bargaining Agreement's time limitation provision for grievances?

"2. If the grievance is timely, did the Employer violate the Collective Bargaining Agreement by (a) suspending the Grievant for five (5) days and (b) removing the Grievant's nuclear qualifications; if so, what is the appropriate remedy?"

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 – RIGHTS OF THE EMPLOYER

0201. Management Rights.

The right, functions, and authority to manage Shipyard operations, personnel and resources are vested in the Employer by the Act. The Act provides that all management officials of the Employer retain the right and authority to:

* * *

b. In accordance with applicable laws and regulations;

1. Hire, assign, direct, lay off, and retain Employees in the Shipyard, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such Employees;
2. Assign work, . . ., determine the personnel by which the Employer's operations shall be conducted; * * *

ARTICLE 27 – DISCIPLINARY ACTIONS

2701. Definition and Policy

a. **Definition.** Disciplinary actions are defined as: Letters of Reprimand and Suspensions of fourteen (14) days or less.
b. **Policy.** Discipline should be applied in an objective and timely fashion. Discipline that is imposed will be that which may reasonably be expected to correct the Employee and maintain discipline and morale. Disciplinary actions will only be taken for just cause.

2702. Investigation and Employee Rights.

a. The appropriate supervisor, in making a determination as to whether disciplinary action is warranted, will take into consideration such things as: The nature of the offense, the employee's past disciplinary record, the Employee's work record and general attitude, other extenuating circumstances and the results of any preliminary investigation. * * *

ARTICLE 30 – GRIEVANCE PROCEDURE

3001. Purpose

b. **Definition.** For the purpose of this article, a grievance is defined as: Any complaint – (except those identified in Section 3001.d)

1. By any Employee concerning any matter relating to the employment of the Employee; or
2. By the Council concerning any matter relating to the employment of any Employee; or * * *

3002. Submission of Grievances.

a. **Time Limits.**

*** * ***

3. All other grievances must be initiated within fifteen (15) working days from the occurrence of the matter out of which the grievance arose or the time the aggrieved party or Employee became aware of, or should reasonably have been aware of , being aggrieved. An extension may be mutually agreed upon to provide for unusual cases. However, the parties agree that unfamiliarity with the specific provisions of this Agreement shall not constitute a basis for an extension of the time limits. * * *

3008. Processing Time Limits.

Failure of the Employee or representative (when acting on behalf of an Employee) to meet the time limits prescribed in Sections 3002 and 3003 will be construed by the Employer to mean that the Employee and/or Council desires not to proceed with the grievance.

ARTICLE 31 – ARBITRATION

* * *

3107. Decision.

The arbitrator will be requested to render a decision within thirty (30) days of the conclusion of the hearing, unless the parties otherwise agree. The arbitrator shall not change, modify, alter or delete, or add to the provisions of the Agreement, ... * * * The arbitrator will have the authority to interpret this Agreement to apply it to the particular case under consideration; to modify penalties imposed as disciplinary/adverse action; and to award reinstatement of back pay and benefits consistent with the provisions of law and regulation.

STATEMENT OF FACTS[3]

On July 29, 2005, Physical Science Technician[4] Ed Employee was assigned to a control point to monitor, *inter alia*, the transport of radioactive materials through that point. Two production workers contacted Radioactive Material Control to escort radioactive material through the control point to a new location. When the escort arrived, the radioactive material was not properly packaged for transportation. The production workers were instructed to properly package the material and contact the escort when this was accomplished. This occurred around lunch time and the grievant gave the production workers permission leave the radioactive material in a locked storage room until the escort returned. The storage room was not designated as an area where radioactive material could be stored.

Also on July 29th, the grievant's supervisor was informed of the situation and the radioactive material was removed from the storage area. As a result of this situation, the Grievant's "A" nuclear qualifications were temporarily removed this date. This disqualification was made permanent in the August 12, 2005 incident report by John Blair, Head, Radiological Monitoring Division. The incident further triggered a nuclear critique. The purpose of a critique "is to quickly determine the facts and root causes of the event that has triggered the inquiry." By

[3] The following recitation is intended to describe undisputed facts giving rise to the grievance in an abbreviated fashion. Disputed facts and legal issues will be discussed, as may be necessary, later in this Decision.

[4] This position is also commonly referred to as a Radiological Controls Technician or RCT.

Shipyard policy the critique is completely separate from any disciplinary proceedings. While participation in a critique does not "immunize" participants from discipline, "any discipline that may occur over related matters may only be supported by a completely separate investigation conducted by an individual independent of the critique disclosures." [5] On August 1, 2005 the nuclear critique occurred. The matter was later reported to Naval Sea Systems Command as a nuclear incident.

On August 8, 2005 a pre-investigation report[6] was conducted by Michelle Ferguson, Supervisor, Physical Science Technicians, in which Mr. Employee was interviewed as to his role in the matter. On August 12, 2005 a proposed action letter was prepared by Tom Malley, Supervisory Health Physicist and Division Head. This letter[7] proposed suspending Mr. Employee ten days for his role in the incident. By letter[8] dated August 18, 2005, the grievant protested the proposed ten day suspension and argued that his actions were permitted by and consistent with applicable Navy regulations. On August 22, 2005, Mr. Employee, and his union representative Ernie Martsching, met with Mr. Blair to verbally appeal the proposed suspension. By letter dated September 23, 2005, Mr. Blair mitigated the suspension to five days but did not accept Mr. Employee's position that he had acted in compliance with appropriate procedures.

On October 28, 2005 the Union secured an extension of time[9] to file a grievance regarding the "5 day suspension." On November 18, 2005, the Union filed a grievance protesting the grievant's five day suspension as well as the permanent de-qualification of Mr. Employee to deal with radio active material. On November 29, 2005 the Employer denied the grievance on the basis that it was "untimely."[10]

CONTENTIONS OF THE PARTIES

Employer Contentions[11]

Removal of Qualifications

The Employer first contends that the Union did not file a timely grievance challenging the de-qualification. The de-qualification was made permanent on August 12, 2005. The Union acknowledged that it became aware of the de-qualification on August 19, 2005. The grievance was filed on November 18, 2005 and the collective bargaining agreement requires that grievances be filed within fifteen days of the occurrence of the event giving rise to the grievance

[5] Joint Exhibit No. 11, p. 1-2.
[6] Joint Exhibit No. 3.
[7] Joint Exhibit No. 4.
[8] Joint Exhibit No. 5.
[9] Union Exhibit No. 1.
[10] Joint Exhibit No. 2.
[11] This summary of the Employer's contentions is taken from its Post-Hearing Brief and not from positions taken by the Employer in pre-hearing motions or during the hearing.

or when the Union first learned of the event. The Employer also notes that the October 28, 2005 extension of time to file the grievance given by the Administrative Officer only related to the "5 day suspension" and not to the de-qualification.

The Employer next argues its action in de-qualifying is not a matter which may be the subject of arbitration. Reference is made to federal statutes and case decisions indicating that a qualification determination is classified as a management right to assign work and therefore is not arbitrable.

Five Day Suspension

In defending the appropriateness of the five day suspension, the Employer first notes that there is no dispute as to the Grievant's role in the incident causing his discipline. All witnesses testified as to the same understanding of the facts. The Employer also notes that Mr. Employee declined the opportunity to testify and to thereby challenge management's understanding of the facts.

The Employer then anticipates that the Union will argue that certain management individuals who participated in the critique process also played a role in the appeal of the disciplinary process so as to potentially violate the Shipyard Memorandum. Initially, the Employer contends that the Memorandum has no effect on the de-qualification of Mr. Employee because de-qualification is not discipline.

The Employer then goes on to note that there was no evidence that it used any information it became aware of in the critique process in order to determine whether or not to discipline the grievant. It was stipulated that Michelle Ferguson, who conducted the Pre-Action Investigation, was not part of the critique process. The Employer concedes that Tom Murphy was at the critique process and was the Proposing Official, but contends that there is no evidence that he used any information learned at the critique in determining what to place in his proposed letter of discipline. Additionally, the Employer notes that the Memorandum is a unilaterally generated document and not of contractual significance so as to diminish its ability to discipline employees.

Union Contentions[12]

Arbitrability[13]

[12] The Union, in addition to its Post-Hearing Brief, filed a Motion to Dismiss the Employer's Pre-Hearing Motions in Limine and Motion to Bifurcate the Hearing. The Union's Motion to Dismiss deals with the Employer's timeliness argument on the grievances. To the extent that these matters have not already been ruled on by the Arbitrator at the hearing, the Union's contentions on the open issues will be summarized.

[13] At the hearing, this Arbitrator ruled that the grievance, to the extent it challenged the five day suspension, was arbitrable. To the extent that the grievance challenged the de-

In its contention on arbitrability, the Union argues that the contract requires the Employer to raise the timeliness of a grievance when the grievance is first heard in the grievance procedure and that it failed to properly do so. More specifically, the Union argues that Article 3007(a) precludes the Employer from raising arbitrability for the first time at the hearing.

Propriety of Disciplinary Action

The Union's overall position is that the discipline against Mr. Employee must be rescinded because management persons deciding whether or not to discipline him also learned information about the incident in the critique of the incident in violation of the Shipyard Memorandum on the relationship of critiques to disciplinary action. Specifically, the Union points out that Tom Murphy both participated in the critique as well as created the letter on proposed disciplinary action and that Mr. Blair also had knowledge of the information in the critique.

The Union also argues that Mr. Employee did nothing wrong; that is, he followed a portion of the regulations which indicate that it is proper for a qualified individual (in this case the grievant) to "guard" radio active material as was done in this situation. The Union further argues that the initial claim of the Employer that Mr. Employee allowed unqualified persons to transport radio active material was false—one of the production employees, as later conceded by the Employer, moving the material was qualified to do so.

FINDINGS

Arbitrability

Although less formal than in civil court litigation or employment arbitration[14], the moving party generally has the burden of proof in labor arbitration. This burden is described as one which requires a party to prove its case by a preponderance of the evidence; that is, the party must establish that the material facts are more likely than not as it claims. Here, the Employer is asserting that the grievance is not arbitrable since it was not timely filed; accordingly, it has the burden of proof on arbitrability.

It must first be noted that this grievance, in fact, complains about two different Employer actions: Mr. Employee's five day suspension and the removal of his nuclear qualifications. These actions were taken by different management persons at different times. At the arbitration hearing, the Arbitrator ruled that the aspect of the grievance relating to the five day suspension

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qualification of Mr. Employee, the Arbitrator took the matter under advisement for ruling when this Decision was issued. Additionally, the Employer's Motion in Limine to exclude evidence was effectively granted in part and denied in part at the hearing.

[14]*See*, *The Common Law of the Workplace* §1.93, (St. Antoine ed., BNA, 2nd Ed. 2005), p. 54; Elkouri & Elkouri, *How Arbitration Works*, (BNA 6th Ed. 2003), 422-424.

was timely because an extension of time was granted[15] as to that portion of the grievance.

On its face, the grievance of Mr. Employee as to his de-qualification does not appear to be timely filed. The collective bargaining agreement requires grievances of this sort to be filed within fifteen days. The Grievant's removal of his nuclear qualifications became permanent on August 12, 2005 with the issuance of the incident report. The Union representative acknowledged that he became aware of this action on August, 19, 2005. The grievance was filed on November 18, 2005. The Employer has met its *prima facie* burden of showing that the grievance was not arbitrable.

The Union initially contended at the hearing that the extension granted by the Employer regarding the five day suspension action also covered the removal of nuclear qualifications. The language granting the extension clearly covered only the five day suspension. In its post-hearing Brief, the Union has made no claim that the extension covered the removal of nuclear qualifications. This Arbitrator concludes that the extension of time granted to file a grievance on the five day suspension did not also grant an extension of time to file a grievance on the de-qualification.

In its post-hearing response to the Employer's position that the grievance was untimely filed, the union relies on the language in Article 3007 (a) which effectively states that when the Employer raises the issue of timeliness, its answer on the grievance form "*may* be limited to a statement . . . that the matter is not grievable/not timely." (emphasis added). The Union contends that this language amounts to a requirement that timeliness must be raised the Employer's answer to the grievance. Whether or not this argument has merit, a problem for the Union arises where the Employer's answer at the first step twice denied the grievance based on "untimeliness." While the first reference to "untimeliness" may have been meant to reference the failure of the grievant to attend the meeting, the second use of the word "untimeliness" appears to be a general reference to the timeliness of the filing. Based on the language used by the Employer in its first response to the grievance, this Arbitrator concludes that it did not waive its right to raise the timeliness defense to that portion of the grievance related to the de-qualification of Mr. Employee.

The Union next argues that the Employer should not have continued to process the grievance on the merits if it wanted to continue to raise the issue of timeliness at arbitration. The difficulty with this argument is that the contract language uses the word "may" in giving the Employer the option of first having only the timeliness issue go to arbitration. Here the Employer retroactively granted an extension as to the five day suspension so as to eliminate the timeliness defense at arbitration as to that action. It was permitted, however, to maintain the timeliness defense as to the de-qualification action at arbitration because the Union request for the extension only referenced the action of the five day suspension.

Based on the foregoing, the Arbitrator concludes that the action of the Employer in de-

[15] Union Exhibit No. 1.

qualifying Mr. Employee was not the subject of a timely grievance and, therefore, it is not arbitrable.

The Five Day Suspension

Just Cause and Discipline Cases

It is well established that an employer has the burden of proof in a discipline case. In essence there are two proof issues. The first is to prove the existence of the misconduct providing just cause[16] for discipline. The second, assuming that the first is established, is to prove that the penalty handed out was warranted.

As to the appropriateness of a particular level of discipline, there must be reasonable proportionality between the offense and the penalty; that is, the level of discipline must include consideration of several factors, including the "nature and consequences of the employee's offense", the "clarity of the rules" allegedly violated, and the "length and quality of the employee's work record[17]

Credibility and Weight of the Evidence

As the fact finder, an Arbitrator has the authority to credit or not credit or to give whatever weight to any testimony or evidence in his judgment is appropriate. To the extent a particular case can be decided without making credibility judgments, this Arbitrator will do so. Arbitrators have expressed many different approaches to resolving matters of credibility.[18] This Arbitrator makes the assumption that all witnesses are truthful and documentary evidence is credible until there is reason to believe otherwise. Factors such as consistency with other evidence, interest in the outcome of the proceedings, clarity of memory, and first hand knowledge of events affect credibility assessments.

Relevant Facts and the Proper Rule

As contended by the Employer, the essential facts of what the Grievant did in this matter are undisputed. These facts have been recited earlier. Essentially, the Employer issued the five day suspension for failing to follow its regulations in allowing radio active material to be stored in an area not designated for the storage of such material.

The Union has contended that the Employer applied the wrong portion of the regulations to judge whether or not Mr. Employee acted properly. Essentially, the Union notes that one section of the regulations allows radio active material to be guarded or watched by a qualified

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[16] "Disciplinary actions will only be taken for just cause." Joint Exhibit No. 1, Article 2701(b).

[17] *The Common Law of the Workplace*, §6.7, p. 184.

[18] See generally, Elkouri & Elkouri, *supra*, pp. 413-417.

person even if it is not stored in a properly marked area. The Employer responds to this argument by stating, without evidentiary rebuttal from the Union, the rule referenced by the Union relates to the handling of radio active material when it is being worked on and not when it is being stored. Specifically, Mr. Malley testified that the regulation referenced by the Union applies only at a "work site" and not in a storage area. Employer witnesses John Blair and Tim Balz stated unequivocally that Mr. Employee was trained in the difference between the two sections of the regulations. The Union did not challenge the credibility of any management witness. Significantly, *the Grievant did not testify to challenge Employer testimony.* Accordingly, this Arbitrator must conclude that the Grievant knew or should have known that his action in allowing the storage of radio active material in an undesignated storage area violated the regulations. The Employer has carried its burden of proving that Mr. Employee engaged in conduct in violation of applicable regulations.

Management Participation in Nuclear Critique as well as Discipline

The essence of the Union's argument is that some of the Employer representatives who participated in the disciplinary process also participated in the nuclear critique as prohibited by the Employer's own Memorandum[19]. Accordingly, the Union contends, the discipline handed out to Mr. Employee was tainted by this fact and should be over turned. For several reasons, the Arbitrator does not agree with this argument.

While, under certain circumstances, the Employer could unilaterally bind itself[20] by establishing a procedure for separating the investigation of a nuclear incident from a disciplinary investigation, the evidence does not show that the procedure set forth in the Memorandum was violated. The following sentences in the Memorandum set forth the key language applicable to the instant case:

> "A factor that supports that disclosure is the confidence of the participants that information *they provide* in that forum will not be subsequently used to support disciplinary action against them. * * *
>
> "The Shipyard and IMF shall ensure that *an employee's statements* during a critique shall not be used in any disciplinary action investigation. * * *
>
> "Supervisory and managerial observers in such critiques or fact-finding meetings will not subsequently conduct *'pre-action' investigations* concerning the events covered in such meetings." (emphasis added.)

[19]Joint Exhibit No. 11.

[20]If Mr. Employee had participated in the nuclear critique and made admissions only in that forum and not in a disciplinary investigation which admissions the Employer in turn relied on in assessing whether there was improper conduct, it would be estopped (prohibited) from doing so. By virtue of the representations in the Memorandum, Mr. Employee would have relied to his detriment on the Employer's unilateral protections against self-incrimination.

First, there is no evidence that any statement that Mr. Employee made during the critique was used against him at any disciplinary proceeding or in any disciplinary decision. The Union makes no such contention. Indeed, it appears that the Grievant spoke openly in the pre-action investigation as well as later in the disciplinary process about his role in the incident as well as why he acted as he did.

Second, participation by managers in disciplinary proceedings is limited only by a restriction in participating in a pre-action investigation. There is no restriction in the Memorandum regarding managers aware of the disclosures in the critique from doing anything in the disciplinary process other than participating in the pre-action investigation or using statements made in the critique against an employee. The parties stipulated that the pre-action investigation was conducted by Michelle Ferguson. Notwithstanding the Union's complaints about the role of Mr. Murphy and Mr. Blair in the critique and the disciplinary process, there is simply no evidence that their conduct ran afoul of the Memorandum.

Appropriateness of Five Day Suspension

The final matter for review is whether the five day suspension was an appropriate penalty for the Grievant's failure to follow the proper procedure in allowing radio active material to be stored in an undesignated area.

From one perspective, the penalty may seem harsh as there was no danger to the public or other employees by the Grievant's failure to follow proper procedure. With the permanent removal of the Grievant's nuclear qualifications, he can never work in his previous position. While he suffered no loss in pay, there is certainly a loss in status as his current job does not require the responsibility that the old position required. Additionally, if the purpose of the suspension was to "correct" poor performance, the loss of his old job effectively removes the possibility of his repeating the same mistake in the future.

On the other hand, management witnesses testified that at least 50% of the Physical Science Technician job was to be diligent about enforcing rules regarding the handling of radio active material precisely as described in the manual. No deviation is allowed. This fact raises seriously the gravity of his mistake. Additionally and most importantly, the other individuals involved in the incident also each received a five day suspension.[21] Accordingly, the Employer treated employees engaging in similar misconduct in the same fashion as the Grievant. Evenhanded treatment is a key aspect in gauging the appropriateness of a penalty.

Based on the foregoing analysis, the Arbitrator finds that a five day suspension was an appropriate penalty to the infraction committed by Mr. Employee.

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[21] This fact not only shows evenhanded treatment, but it also shows how seriously the Employer takes an infraction of this type. In circumstances such as the present one, Arbitrators frequently defer to an Employer's judgment. See, Elkouri & Elkouri, *supra*, pp. 963, n. 188.

CONCLUSION

For the reasons set forth above the Arbitrator finds that: (1) the permanent removal of Mr. Employee's nuclear qualifications is not arbitrable because it was not the subject of a timely filed grievance; and (2) the Employer did not violate the collective bargaining agreement by issuing a five day suspension to the Grievant for violating the Naval Sea Systems Command Manual in allowing the improper storage of radio active material. The grievance is denied.

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James M. Paulson, Arbitrator

July 24, 2006