IN THE MATTER OF THE ARBITRATION Between The United States Department of Labor (Mine Safety and Health Administration) Employer And National Council of Field Labor Locals, AFGE, AFL-CIO Labor Organization	)	Opinion and Award FMCS Case No. 160518-02037-A

Before Arbitrator Burton White

Dates of Hearing: September 13, 14, 15, 18, 2017
September 19, 2017
December 4, 5, 2017

Places of Hearing: Vacaville, California
Fairfield, California
Portland, Oregon

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The parties in this matter are the United States Department of Labor Mine Safety and Health Administration (MSHA) and the National Council of Field Labor Locals (NCFLL), American Federation of Government Employees (AFGE), AFL-CIO (Union). The arbitration was held pursuant to the provisions of the Collective Bargaining Agreement between the parties effective October 1, 2012 through September 30, 2018 (CBA). (Jt. Ex. 1.)

The hearing was held on September 13, 14, 15, 17, and 18, 2017 and December 4 and 5, 2017, in Vacaville and Fairfield, California and Portland, Oregon. Both parties participated in the hearing; each had full opportunity to present evidence, call and cross-examine witnesses, and argue its case.[1] Witnesses were sequestered and testified under oath. Counsel elected to make closing arguments in written briefs and submitted the documents as agreed.

The length of the hearing (complicated by the fact that the seven days of hearing spanned two and a half months) and the amount of submitted documents caused me to notify the parties on the last day of the hearing that I would not be able to comply with the time requirement of the CBA regarding submission of the Arbitrator's Opinion. The parties graciously agreed but alerted me to the connection between this matter and one that followed.[2] (Tr. pp. 1258 ff.)

PRELIMINARY COMMENTS

An Arbitrator's Audience. In my view, in addition to the advocates of the parties to whom an Opinion is submitted, grievants and other employees, supervisors and other management personnel are key parts of the audience for arbitrators' Opinions. One cannot assume that all members of such a wider audience necessarily will have access to the documentary evidence or to the specifics of the testimony presented at a hearing, or that they will be as familiar as are the advocates with other details of the case or with arbitration practices, procedures, and standards. With that larger audience in mind and

[1] A verbatim transcript of the hearing was produced by Alderson Reporting Company.
[2] Subsequent to the hearing, I was informed that this had been put off until October.

where I deem it may be helpful to a reader's understanding, I provide background for my comments.

The Individuals Who Play A Part in This Dispute. Arbitrators' Opinions can become permanent records, at least in the archives of the parties. Arbitrations can deal with very personal and private matters and, during the course of an arbitration, assertions can be made that may not be factual. Moreover, in fulfilling their obligations to the parties, arbitrators are often called upon to make assessments of the credibility and job performance of individuals on each side of a dispute. Whenever I can do so without sacrificing clarity, I compose my Opinions to identify persons by roles rather than by names. Since the parties are aware of the identity of individuals, this device does not place them at a disadvantage, but it does erect a somewhat effective shield against easy identification by persons not directly involved in a case.

ISSUE

The parties agreed upon the following statement of the Issue:

Did management have just and sufficient cause to suspend the Grievant for 3 days for misconduct? Is the Agency's decision otherwise consistent with federal law and the Agreement? If not, what is an appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

I. Article 5 – Rights of Employees

A. Section 1 – General

Each employee of the Department has the right, freely and without fear of penalty or reprisal, to form, join, or assist the NCFLL or to refrain from any such activity. Employees shall be protected in the exercise of this right.

B. Section 2 – Employee Right to Participate

Except as otherwise expressly provided in this Agreement and in Title VII of the Civil Service Reform Act, as amended, the right to assist a labor organization extends to participation in the management of the organization and acting for the organization in the capacity of an organization representative, including presentation of views to officials to the Executive Branch, the Congress, or other appropriate authority.

C. Section 3 – Employee Concerns

Each employee shall have the right to bring matters of personal concern to the attention of appropriate officials of the Department and/or the NCFLL.

D. Section 4 – Employee Right to Grieve

The initiation of a grievance by an employee will not cause any reflection on his/her standing with his/her supervisor or on his/her loyalty or desirability to the Department. Employees and NCFLL Representatives who have relevant information concerning any matter for which remedial relief is available under this Agreement will, in seeking resolution of such matter, be assured freedom from restraint, interference, coercion, discrimination, intimidation, or reprisal. Management will not impose any restraint, interference, coercion, or discrimination against any employee in the exercise of his/her right to designate an NCFLL Representative for the purpose of representing to Management any matter or job related concern or of representing the employee to any Government agency or official of the Department. The extent to which official time is granted to employees and NCFLL Representatives is as provided in Article 8 of this Agreement.

II. *[3]**

III. Article 13 – Disciplinary Actions

Section 1 – General

The objective of discipline is to correct and improve employee behavior so as to promote the efficiency of the service. The concept of progressive discipline will guide managers in making decisions regarding discipline.

A. A disciplinary action, for the purposes of this Article, is defined as an oral admonishment confirmed in writing, a written reprimand, or a suspension for fourteen (14) calendar days or less. In order to ensure a common understanding of how the Department effects disciplinary actions, Regional Labor and Employee Relations staff will be made available to conduct training at NCFLL Stewards training.

B. ***

C. No bargaining unit employee will be the subject of a disciplinary action except for just and sufficient cause and for reasons which will promote the efficiency of the Department.

D. ***

E. A reasonable period of time should elapse between the date of receipt of the decision to suspend and the effective date of the suspension.

Section 2 – Procedures for Suspension

When Management proposes to suspend an employee for fourteen (14) calendar days or less, the following procedures will apply:

A. Management will provide the employee with fifteen (15) calendar days advance written notice of the proposed suspension.

B. The notice must state reasons for the proposed discipline specifically and in detail, in order to allow the employee to respond, and must clearly state the employee's right to make a response to the proposal and his/her right to be represented by the NCFLL. The employee will be given an original and one copy for referral to the Chairperson of the NCFLL Arbitration Committee, at the employee's option.

C. The employee may file a written response and/or make an oral response to the notification prior to the end of the fifteen (15) calendar day notice period.

D. After receipt of the written and/or oral response or the termination of the notice period, management will issue a final written decision to the employee which shall include a statement of the employee's grievance/arbitration rights, including a

[3] A comment on how omissions are indicated in this Opinion: I use ellipses marks (…) within a quotation to indicate an omission of a portion of a sentence. I use three asterisks (***) to indicate omission of words within two consecutive sentences as well as to indicate an omission of a passage consisting of one complete sentence or more.

statement that any appeal is only to arbitration, which may be invoked only by the NCFLL within thirty (30) calendar days from employee receipt of the final written decision, and the name, address, and telephone number of the Chairperson of the NCFLL Arbitration Committee. The employee will be given an original and one copy for referral to the Chairperson of the NCFLL Arbitration Committee, at the employee's option.

Section 3 – Grievance/Arbitration Rights

A. An employee who is dissatisfied with an oral admonishment confirmed in writing or with a written reprimand may file a grievance pursuant to Article 15 of this Agreement.

B. If the final written decision provided for in Section 2 of this Article involves a suspension for fourteen (14) calendar days or less, the matter may be appealed directly to arbitration, in accordance with Article 16 of this Agreement, by notifying management within thirty (30) calendar days from receipt of the final written decision. Such notification shall be sent electronically to the Director, Office of Departmental Labor Relations and Negotiations (ODLRN), with a copy to the appropriate Regional Agency Head.

C. The arbitrator's decision will be in accordance with the provisions of Article 16.

Section 4 – Evidence

A. An employee will, in any disciplinary action, be furnished a copy of all material relied on by Management which formed the basis for the reasons and specifications.

B. If the discipline is based on an investigative report, the employee will be furnished all written documents from the investigation which are disclosable in accordance with applicable law, rule, or regulation.

C. The documentation specified in Subsections A and B above will be attached to the notice of proposed disciplinary action.

D. Evidence which Management is not permitted to divulge to an employee under applicable law, rule, or regulation will not be used against the employee.

Section 5 – Exception to Disciplinary Action Appeals

***

IV. Article 15 – Grievance Procedure

Section 1 – Purpose

The purpose of this Article is to provide a mutually acceptable method for prompt and equitable settlement of grievances. The parties have a mutual interest in resolving grievances at the lowest level in a timely manner. To promote conflict resolution, supervisors, stewards, and employees should deal with the issue(s) and not personalities.

A. ***
B. ***
C. ***
D. ***
E. ***
F. ***

Section 2 – Definition of a Grievance (Coverage and Scope)

A. A grievance by a bargaining unit employee(s), including probationary employees, is a request for personal relief in any matter of concern or dissatisfaction to the employee or group of employees concerning the interpretation, application, and/or violation of this Agreement; or the interpretation or application of Departmental regulations, and the application of Government-wide regulations with respect to personnel policies, practices, and other matters affecting working conditions.

B. Exclusions from the Grievance Procedure
   1. This Article does not apply to:

a. A matter which is subject to a statutory appeal procedure (except as provided in Subsection 2. below) outside the Department under law or regulations including but not limited to the following:

***

b.

2. ***

3. ***

C. Matters Subject to Pending EEO Complaint

***.

D. Matters Subject to Other Statutory Appeals

***

Section 3 – Exclusive Procedure

This shall be the exclusive procedure available to unit employees for the resolution of grievances as defined in Section 7 of this Article and for the Union as defined in Section 7D of this Article. ***.

Section 4 – Representation

A. ***

Section 5 – Who May Initiate Grievance

A. **Employee** – A grievance under this Article may be initiated by unit employees either singly or jointly. Any such grievance must bear the signature(s) of all the aggrieved employee(s).

B. **Union (Institutional/Employee)** – The NCFLL or its designee may initiate a grievance on its own behalf. Any such grievance must bear the signature of the grievant. The NCFLL will provide to the Director, ODLRN, the names of all NCFLL Representatives authorized to file a Union grievance as defined in Section 7, Union Grievances.

C. **Department of Labor** (See Section 7)

Section 6 – Grievance Form

The grievance form is a critical component to the grievance process. It is intended to put the agency on notice of all the issues and the specific allegations of the grievance so that it may resolve the dispute at the lowest possible level.

A. An employee grievance shall be presented on the negotiated standard grievance form. The filing of grievances can be done electronically. It shall be signed by the grievant(s), dated, and to the extent practicable shall contain:

1. Date filed,
2. The names(s) of the grievant(s),
3. The name of the NCFLL Representative, if any,
4. Specification of the Article(s), Section(s), and Subsection(s) of this Agreement or the Department regulations or working conditions which are alleged to have been violated,
5. The nature and facts of the grievance,
6. The remedy desired; and
7. Signature(s) of grievant(s).

B. An appeal of a grievance to a higher Step of this procedure shall include a copy of the grievance form.

C. Except by mutual consent of the parties, no allegations shall be raised in the appeal of a grievance which were not contained in either the Step 2 or institutional grievance procedures.

DOL/NCFLL GRIEVANCE FORM	
Name of Grievant(s):	Region:
	Agency:
Name of NCFLL Representative (If Any):	Date of Alleged Violation:
Alleged Violation(s) – Contract Article(s), Section(s), Subsection(s),	

Regulation(s), or Working Condition(s):	
Nature and Facts of Grievance:	
Remedy Desired:	
Step 1 Grievance – Signature(s) of Grievant(s):	Date:
Step 2 Grievance – Signature(s) of Grievant(s) or NCFLL Official:	Date:

Section 7 – General Procedures
***

Section 8 – Failure to Meet Requirements
***

Section 9 – Modification of Procedures
***

A. Section 10 – Statement of Grievability
***

V. Article 16 – Arbitration

VI. ***

A. Section 6 – Authority of Arbitrator

1. Management and the NCFLL agree that the jurisdiction and authority of the chosen arbitrator and his/her opinions as expressed will be confined exclusively to the interpretation and application of the provision(s) of this Agreement, Departmental regulations and government-wide regulations. However, regulations and decisions of higher authorities may be introduced as evidence regarding the interpretation and application of the provision(s) of this Agreement and/or Departmental and government-wide regulations.
2. The arbitrator will have no authority to add to, subtract from, alter, amend, or modify any provision of this Agreement.
3. The arbitrator will have the authority to make an aggrieved employee whole to the extent such remedy is not prohibited by statute, higher level regulations, decisions of appropriate higher authority, or this Agreement.
4. The arbitrator's decision will be final and binding. However, the parties reserve the right to take exceptions to any award to the Federal Labor Relations Authority in accordance with its rules and regulations or the U.S. Federal Circuit Court, as appropriate.
5. The arbitrator should render and serve the written award on both parties within thirty (30) calendar days of the close of the record.
6. The arbitrator will have no authority to consider new issues, allegations and defenses raised by the grievant or management that had not previously been raised at or before the Step 2 grievance meeting.

B. Section 7 – ***

C. Section 8 – Time Limits

Time limits in this Article may be extended by mutual written consent of the parties.

D. Section 9 – Stipulations of Fact

The parties shall endeavor, wherever possible, to stipulate the facts involved in a case prior to the opening of the arbitration hearing.

The parties may, by mutual agreement, stipulate the facts of the arbitration case and argue their respective positions in briefs without a hearing.

E. Section 10 – Hearing Process

1. Either party may submit a written opening and/or closing statement.
2. Parties are encouraged to submit joint exhibits prior to commencement of the hearing.

3. Either party may file a brief in adverse and disciplinary action arbitrations. The parties and the arbitrator, at the conclusion of the hearing, will determine when such briefs will be due.
4. At the conclusion of the non-adverse and non-disciplinary action arbitrations, the parties and the arbitrator will determine whether briefs will be submitted. The arbitrator will have final say on whether briefs should be submitted and when such briefs will be due.
5. The parties may have observers at the hearing for training purposes only. The number of union observers on official time will not exceed the number of management observers. The NCFLL is responsible for travel expenses for union designated observers.
6. OASAM Labor Relations Officers shall be responsible for communicating with the arbitrator about her/his assignment and the scheduling of the assigned cases.

DISCUSSION

The arbitration record in this case consists of seven days of hearing (1,267 pages of transcript[4]), 72 pages of closing argument text (not counting the number of pages in documents cited in the post-hearing briefs), and uncounted hundreds of pages of documents submitted as evidence. The Issue statement makes clear that the discipline involved is a three-day suspension.

As the preceding paragraph indicates, the parties have dedicated a tremendous amount of effort, material, and resources to this matter and, in the course of this Opinion, I will attempt to respond to that input. However, since there were major procedural problems in the Employer's handling of this matter, problems sufficient to undermine the standards of just cause, I think it best that I address this subject before commenting on the substantive aspects of the case.

Management has raised concerns about two Union submissions, "the grievance filed … at Union Exhibit 3" (br. p. 23) and Union Exhibit 19 (br. p. 25.) I now report my decisions regarding these concerns; *the exhibits are admitted*. I will present the reasoning for the decisions as an appendix to this document.

[4] Admittedly, a bit of exaggeration since the opening and closing pages for each of the seven days of hearing have not been subtracted from the final page number of the transcript.

I. PROCEDURAL CONCERNS

Level of Discipline

At the hearing, I noted that both the Notice of Proposed Suspension (hereinafter "Notice") and the Suspension Notice Decision (hereinafter "Decision") stated that the Grievant had "no prior disciplinary record". (Jt. Ex. 2, p. 6; Jt. Ex. 4, p, 8.) Thus, when the parties had completed their examination of the MSHA official who at the time of the discipline had been the Grievant's immediate supervisor and who had investigated the allegations that led to the discipline, conducted the Weingarten hearings, and proposed a suspension (hereinafter, "Proposing Official"), I asked the witness:

> Q. My understanding from the contract is that discipline, and let me read the language that I'm governed by, because I'm governed by the contract, and help me. Article 13 Section 1:
>
> > The objective of discipline is to correct and improve employee behavior so as to promote the efficiency of the service. The concept of progressive discipline will guide managers in making decisions regarding discipline." And paragraph A then tells us what progressive discipline is: "Oral admonishment, confirmed in writing, written reprimand, or suspension for 14 calendar days or less."
>
> My understanding from the documents was that there was no prior discipline. … [H]elp me understand why you went to the top step of [the] progressive discipline range in disciplining an employee for the first time. (Tr. p. 584, ll. 6-24.)

The Proposing Official responded that there had been verbal counseling in the Grievant's file as well as complaints from persons in the mining industry (tr. p. 584, l, 25-p. 585, l. 5), that the items in the file were too old to be used because they were six months or more "prior to this incident" (tr. p. 586, l. 20-24), and that he had followed HR advice in the matter (tr. p. 587, l. 9-1).

Conclusion: By imposing suspension upon the Grievant, an employee with no prior discipline, the Agency violated Article 13, Section 1, A of the collective bargaining agreement.

I acknowledge that—with respect to major adverse actions—failure of an Agency to abide by contractual language does not necessarily justify a finding that discipline was improper. However; the matter before me is not a major adverse action, it is a three-day suspension.

The History of Complaints

Industry complaints against the Grievant is a theme that runs through the Agency's case and that needs unravelling. The complaints fall into three categories: matters that surfaced from the meeting held by MSHA and the California Construction and Industrial Materials Association (CalCIMA)[5] on June 17, 2014, matters that predated the meeting, and matters referenced in the Agency brief as coming in June, July and August of 2014 (br. p. 31). The issues brought up at the June meeting will also be addressed later in this document under the section entitled Substantive Concerns.

Matters that predated the CalCIMA/MSHA meeting fall into two categories—the contents of the Grievant's file and the material that, if admitted, would have become Agency Exhibit 5—and they figure in two ways: use by the Proposing and the Deciding Officials.

The Proposing Official described what was in the Grievant's file:

> … I reviewed documentation that's submitted by field supervisors. Also, in that file, I found complaints made from small mine operators, miner's representative[s], about … [the Grievant's] conduct. I also found that he was counseled for his unprofessional behavior before I was his supervisor.[6] (Tr. p. 584, l. 25-p. 585, l. 5.)

The Proposing Official testified that he did not use the material that he found in the Grievant's file in deciding upon the proposed discipline because it was old (tr. p. 488, ll. 19-21); however, the fact that he cited what he reported was in the file when explaining

[5] From CalCIMA's website (CalCIMA.org):

> CalCIMA is a trade association for the construction and industrial material industries in California, which includes aggregate, industrial mineral, and ready mixed concrete producers. In all, there are about 70 producer member companies that include over 250 production sites in every county of California. Our members also include over 70 supplier and service providers to the industry.

The record suggests that meetings of CalCIMA and MSHA are planned to be held quarterly but that this schedule is not always maintained. As a result, it is unclear whether the meeting on June 17, 2014, was the first or second meeting after the inspection that caused the industry concern. In any case, a full seven months had elapsed between the Grievant's first actions and the industry's complaints. By the time the Notice was issued on December 9, 2014, over a year had elapsed. By the time the Decision was issued (February 4, 2016), over two years had passed.

[6] The record does not state the period during which the Proposing Official served as the Grievant's immediate supervisor, but, according to the following reasoning, it appears that he undertook that role in the middle of 2013. He testified that he had served as the Grievant's supervisor for approximately a year and either 5 or 7 months (tr. p. 483, ll., 4-6) and that he had been in his current (non-supervisorial) position since February 2015 (tr. (p. 471, ll. 14-17).

his recommendation of suspension as the initial discipline strongly suggests that that information had impacted his decision, in spite of its age. Moreover, although this Official testified that he did not use the Grievant's file to determine the level of discipline he proposed, he acknowledged that he had used the file to determine what source was credible, a hearsay complaint from Michael Herges of Granite Rock Company (Jt. Ex. 2, p. 10) or input from the Grievant:

> Q. [Toth] Did you find it credible that … [the Grievant] would display anger about a broken side-view mirror?
> A. I was not there. It could be.
> Q. Okay. Well, how did you determine who was telling the truth if you weren't there?
> A. I relied on most of these -- … [the Grievant's] previous problems at another site. At that time I wasn't inspector, but people tell me different stories. *And when I went to the file* and I found that, a few complaints about his conduct, previous, previous. And I'm talking about back.
> But because you know, you have this person from the small mines operation, from when he was an inspector in Oregon, this other from the Northeast, and from the south, because every year we rotate the inspectors from one area another to another. So this continued. Why didn't we do nothing before? I don't know. (Tr. p. 540, l. 10-p. 541, l. 1; italics added.)

Felicia Branch, the Agency's chief presenter, stated that Employer's proposed Exhibit 5 was the Grievant's "training record and we were saying how it was going to relate to previous counselings that he'd received". Ms. Branch noted the difference between counseling and discipline and pointed out:

> Earlier we were trying to introduce his training record and we were saying how it was going to relate to previous counselings that he'd received, and we talked about the differences between discipline and counseling, and you ruled that out earlier today. (Tr. p. 593, ll. 11-16.)

Ms. Branch explained:

> … [Proposed Exhibit 5] was not relied upon as part of the proposed suspension. This is going to go back to actually rebut some testimony that … [the Grievant] was not disciplined. But we want to show that even though there wasn't discipline, that there was notice regarding management discussing professionalism with him.
> ***
> We're trying to show that it's not discipline. We're trying to show that … [the Grievant] was placed on notice regarding his professionalism even though it was not discipline. Under our contract, it defines what disciplinary action is. So in the letter, we had to say that it was not disciplinary action but we want to place on notice -- we want to show that … [the Grievant] did have knowledge that management was concerned about his professionalism. (Tr. p. 485, l. 17-22; p, 486, ll. 1-9,)

The Union had objected to the admission of this document on the basis that it had not been provided to them (tr. p. 485, l. 13-16). It was not admitted into the record because

the Proposing Official testified that he had not taken it into consideration in making his recommendation of a suspension.[7] (Tr. p. 488, l. 16-p. 489, l. 2.)

As Ms. Branch pointed out, there is a difference between discipline and counseling, but both seek to improve employee performance. Given the fact that the Grievant had no prior discipline, imposing suspension as his first discipline not only is contrary to the language of the CBA, it renders counseling and discipline a distinction without a difference.

In my view, had the proposed exhibit been admitted, it would have served to exacerbate rather than to cure the Agency's lack of adherence to Article 13, Section 1, of the CBA. Ms. Branch indicated that the document would show that the Grievant "did have knowledge that management was concerned about his professionalism". Since the proposed document was not admitted, I do not know what was in it, but given the Agency's argument for its admission (management's concern about the Grievant's professionalism), I do not see where it would differ in that regard from the material the Proposing Official said he found in the Grievant's file that he did not consider because of its age.

The Agency indicates that the documents not allowed into the record (the Grievant's file and the proposed Employer Exhibit 5) would show continuing complaints from the field (including from rank-and-file miners); if so, that would establish that the Agency knew of problematic performance, allowed it to continue without disciplinary intervention, and then imposed suspension as the first act of discipline.

According to the testimony of the Proposing Official, the material that was in the Grievant's file was old when he reviewed it and was not considered by him in proposing

[7] Although my ruling was based upon the witness's testimony that he had not considered the proposed document in recommending the suspension, my reading of Article 13, Section 4 of the CBA is that, as claimed by the Union, it was also inadmissible because it had not been provided to the Union in advance. A further problem: the document proposed as Management's Exhibit 5 was something that the Proposing Official had revealed to the persons representing the Agency only that very morning (tr. p. 485, ll. 3-9). This raises the following questions: Why had such a document not surfaced before? How did the Proposing Official—a person who had ceased being the Grievant's immediate supervisor early in 2015—have access to a document from the Grievant's file to reveal it on September 15, 2017, the third day of the arbitration hearing?

discipline. Accepting Ms. Branch's representation of what the proposed document would show, the facts that the Agency had continuing concerns about the Grievant's professionalism (indicted both by the old material in the Grievant's file and by the proposed employer exhibit), did not initiate discipline in a timely way, but ultimately imposed a 3-day suspension as a first step in discipline raise two problems for the Agency's case:

- For an employer to allow questionable performance to continue without elevating intervention from counseling to discipline would indicate either that the performance had improved or that the employer had come to accept the employee's level of performance.
- Given the Article 13, Section I A contract language and having made the Grievant aware of management's concern about his professionalism, for MSHA to propose a five-day suspension and to impose a three-day suspension as the *first* disciplinary intervention would not only be a violation of Article 13, it would also be an arbitrary management action.

The record makes clear that the suspension under review was triggered by complaints that surfaced at the CalCIMA/MSHA meeting that took place on June 17, 2014. The relevant CalCIMA document states: "We have experienced issues with an MSHA inspector. The specifics of the incident will be forwarded to … [the former ADM]." (Jt. Ex. 2, p. 9.) The documents (emails) that followed (Jt. Exs. 2, pp. 10 -13) refer to inspections by the Grievant that took place on November 13 and December 3 and 4, 2013; that is, events over six months before the June meeting. There is no indication in the complaints at or arising from the CalCIMA/MSHA meeting—or elsewhere in the arbitration record—that the industry had had concerns with the Grievant's conduct prior to the inspections of November and December 2013 or between those inspections and the June meeting. Moreover, in his testimony, Dale Curtis (a member of the industry who participated in the CalCIMA/MSHA session) testified that at each CalCIMA meeting with MSHA "we would always bring to the table … concerns with any … type of inspector." (Tr. p. 209, ll. 11-14.)

If complaints to MSHA from the industry and from individual miners about the Grievant's conduct in the field had been a part of his employment history prior to complaints raised at the June 2014 meeting, they would have been in the file the Proposing Official said was too old to use.

Given this, one wonders why complaints about the Grievant from the industry are not evident prior to June 2014 and why CalCIMA waited until June of 2014 to bring forward allegations about events that had taken place in 2013. The time lapse between the misconduct alleged by CalCIMA (late 2013), the surfacing of the industry complaints (meeting, June 17, 2014 and emailed complaints, July 3, 2014), and the fact that there is nothing in the CalCIMA minutes or in the industry emails that followed that would indicate the industry had voiced prior concerns to the Agency about the Grievant's performance all undermine the contention that the Grievant was the ongoing subject of complaints from the mining industry *prior to the CalCIMA meeting in June of 2014*.

This conclusion is strengthened by the assertion of the former ADM (an assertion adopted by the Agency) that the Grievant was the "leading candidate" for complaints from the mining industry "during my tenure, 2014 until I left, 2017." (Tr. p. 99, ll. 13-16.) In a section of its closing argument, entitled "The Agency Received Multiple Complaints about Grievant Resulting in an Investigation" the Employer paraphrases testimony from the former ADM:

> In June, July, and August of 2014, MSHA received multiple complaints about Grievant's conduct at mine sites throughout California and communications from Grievant himself that suggested misconduct. First, in June 2014, MSHA received complaints during a meeting with mining industry association CalCIMA. The miners assembled complained that Grievant's behavior during inspections at at least three mines left miners feeling uncomfortable, harassed, demeaned, and intimidated.[8] (Br. p. 31.)

The testimony from the former ADM and the portion of the Agency brief that echoes it adds to the muddle. The specifications dealing with alleged conduct at mines for which

[8] The assertion in the brief appears to be based on testimony from the former ADM:

> … [The Grievant] was of the -- was the leading candidate on an ongoing basis in referencing complaints by the mining industry. It wasn't unusual for me to receive complaints literally on a monthly basis concerning the conduct of … [the Grievant] while --*** -- he was out there, either his – his demeaning manner, his offensive manner, his -- the way he treated employees. And interestingly, the very people that we were charged to protect, the miners, several times I had complaints from the miners' reps that called up and said -- and asked if they have a choice not to send … [the Grievant] back out, if they have a choice, which they didn't – *** --but that was their complaint to me. (Tr. p. 95, l. 8-p. 96, l. 1.)

the Grievant was disciplined ended with Reason 1, Specification 5 and the date of June 17, 2014.[9] The following summary shows the dates of matters addressed in Specifications that relate to the Grievant's conduct at mines:

1. "On or about November 13, 2013…." (Specification 1);
2. "On or about December 3 and 4, 2013 …." Specification 2);
3. "On May 28, 2014…." (Specification 3);
4. "On May 29, 2014…." (Specification 4);
5. "From June 10 to 17th, 2014…" and follow-up inspection on June 26. (Specification 5).

Given this, other than Specification 5, the reference by the former ADM to complaints during his tenure and the reference in the Agency brief to complaints in "June, July, and August of 2014" are irrelevant to the charges against the Grievant that I have been asked to review.

The History of Complaints (Part 2)

As noticed above, during the discussion at the arbitration hearing, the Agency spoke of the existence of material that would show that the Grievant "did have knowledge that management was concerned about his professionalism". CalCIMA waited more than six months to notify MSHA of its concerns. As just discussed, the Agency brief speaks of complaints that came in June, July and August of 2014.[10]

All this provides background for the following problem. In the Suspension Notice Decision, the Deciding Official repeatedly rejected the Grievant's responses to items in the Notice of Proposed Discipline by versions of the statement, "… I find your statements of denial … not credible based on collaborative statements made by the miners, and the repetitive nature of complaints received by this agency, in regards to the way you speak to the rank and file miners". Some version of this rejection appears in Reason 1,

[9] I write this having in mind that although Reason 2 deals with the allegation of Failure to Follow Instructions given at the Vacaville Office on July 24, 2014, and refers to an inspection that had taken place on July 27, 2014 (Jt. Ex. 2, p. 5), this charge arose not from reports from miners, but from a report from the Grievant.

[10] The pattern that emerges is a strange one of peaks and valleys. The file (material too old to be used), followed by no complaints until June 17, 2014 when complaints dating back to November of 2013 were raised, and then the allegation of a spate of complaints in June, July and August of 2014.

Specifications 1, 2, 3, and 5. Allusion to "the repetitive nature of complaints received by this agency" is also used with regard to Specification 6. (Jt. Ex. 4, pp. 3-7.)

The Deciding Official did not explain what he meant by the phrases "collaborative statements made by the miners" and "the repetitive nature of complaints received by this agency". I take the first to refer to the allegations upon which the suspension was based and the second to refer to the assertions of a history of complaints transmitted to MSHA.

As noted, the arbitration record indicates three grouping of complaints about the Grievant, the material in the Grievant's file, the complaints that surfaced at the CalCIMA/MSHA meeting, and allegations of complaints that came after that meeting. As will be addressed later in this document, the complaints that surfaced at the CalCIMA/MSHA meeting were largely hearsay and, in the instances in which the sources of the hearsay testified at the hearing, their testimony did not substantiate the hearsay in any significant way.

Article 13, Section 2—Lack of Specificity

Article 13, Section 2, B, of the CBA echoes 5 USC 7053 when it states:

> When Management proposes to suspend an employee for fourteen (14) calendar days or less, the following procedures will apply:
> A. ***
> B. The notice *must* state reasons for the proposed discipline *specifically* and *in detail*, in order to allow the employee to respond …[11]. (Jt. Ex. 1, Article 13, B; italics added.)

A key aspect of the requirement is that the reasons for the proposed discipline must contain enough specificity to allow the employee to respond.

[11] USC 7503 (italics added):
(a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct).
(b) An employee against whom a suspension for 14 days or less is proposed is entitled to—
(1) an advance written notice stating the *specific* reasons for the proposed action;
(2) …;
(3) …; and
(4) a written decision and the *specific* reasons therefor at the earliest practicable date.

Reason 1, Specifications 1, 2, 3 of the Notice and the Decision as well as the Weingarten session questions relating to those Specifications lack the specificity required by the collective bargaining agreement and by law. The following table lists some of the problems in the Decision document:

Specification 1	"… you exhibited irritation when you could not find a violation." "… [Y]ou responded in a harsh manner…." "…[Y]ou displayed anger…."
Specification 2	"You spoke with a tone of arrogance indicating that the personnel … did not know what they were doing."
	You deny that any of your actions constitute misconduct including the arrogant and demeaning attitude you used when addressing the miners.
Specification 4	"You started the inspection without him [Damas] which was viewed as demeaning and disrespectful behavior." "Also during the inspection you were defensive when asked questions about compliance, and informed Mr. Damas that you could write 8 more citations and shut down the plant." "The miners perceived you as arrogant and conveyed to them that your only job was to look for violations …."

Problems Regarding the Weingarten Sessions

Interviews with the Grievant took place on August 14, 2014 (Jt. Ex. 2, pp. 85-94) and on October 10, 2014 (Jt. Ex. 2, pp. 94-97) with regard to the Notice. The first dealt with matters that gave rise to Reason 1, Specifications 1 through 6; the second dealt with matters that gave rise to Reason 2.

There were 10 questions relating to the Granite Rock inspection held on November 13, 2013. Question 5 asked whether the Grievant "admonished" a miner; question 6 asked "did you exhibit irritation", question 10, "did you get confrontational"? There were 8 questions asked about the inspections on December 3 and 4, 2013, at the A.R. Wilson Quarry. Question 6 was "… [D]id you insinuate to mine management that the personnel at A. R. Wilson Quarry did not know what they were doing?" Such questions are based on the subjective conclusions drawn by the few named and many unnamed persons alleged to be the sources of complaints against the Grievant; they are not reports that state specifically and in detail what the Grievant did and said. It is only through credible reports from identified sources that describe what the Grievant said and did that one (be

he Proposing Official, Deciding Official, or Arbitrator) can draw conclusions about the Grievant's conduct.[12]

In my view, the portions of the proposed and the imposed discipline that (to borrow the Union's words) "describe … [the Grievant's] actions in vague and subjective terms, and do not include specific words, expressions, or actions of … [the Grievant] that mine personnel are supposed to have found objectionable," are far from the requirements in both the Office of Personnel Management (5CFR Ch. 1, §Section 75.203) and the CBA (Article 13, Section B) that the notice of proposed action "must state the specific reason(s) for the proposed action…."[13]

Violation of the Due Process Required by the Just Cause Standard

Inadequate Investigation

A key part of due process that is the foundation of just cause is a fair and thorough investigation. One can pick any of the leading works on arbitration of collective bargaining disputes to find a reminder of this fact:[14]

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[12] As the Union states, "Mr. Herges' emails, for the most part, describe … [the Grievant's] actions in vague and subjective terms, and do not include specific words, expressions, or actions of … [the Grievant] that mine personnel are supposed to have found objectionable." (Un. Ex. 3, p. 45.) The Union made this point to Management at least as early as March 5, 2015, when the documents that comprise Union Exhibit 3 were transmitted to Management.

[13] From Joseph R. Nolan and Jacqueline M. Nolan-Haley. Black's Law Dictionary, Abridged Sixth Edition. St. Paul: West Publishing Co., 1991:

> Specific. Precisely formulated or restricted; definitive; explicit; of an exact or particular nature. Having a certain form or designation; observing a certain form; particular; precise; tending to specify, or make particular, definite, limited or precise.

[14] In order of citation, the bibliographic references are

- Kenneth May, Editor-in-Chief, Elkouri & Elkouri, How Arbitration Works, 8th ed., Editor-In Chief Kenneth May, Committee on ADR in Labor & Employment Law, American Bar Association Section of Labor and Employment Law; Bloomberg BNA, Arlington, Virginia, 2016. Hereinafter cited as Elkouri.
- Norman Brand and Melissa H. Biren, Editors-in-Chief. Discipline and Discharge in Arbitration, 3rd ed., Committee on ADR in Labor and Employment Law Section of Labor and Employment Law, American Bar Association; Washington: The Bureau of National Affairs, 2015. Hereinafter cited as Brand
- Adolph M. Koven and Susan L. Smith, Just Cause: The Seven Tests, 3rd edition revised by Kenneth May, Washington, D.C.: The Bureau of National Affairs. 2006, Hereinafter cited as Koven.
- Peter Broida, Principles of Federal Sector Arbitration Law, Arlington, Virginia, Dewey Publications, Inc., 5th edition, 2017. Hereinafter cited as Broida.

How Arbitration Works (Ch. 15, p. 49):

> Industrial due process also requires management to conduct a reasonable inquiry or investigation before assessing punishment.

Discipline and Discharge in Arbitration (Ch. 2, pp.14-15.):

> Many arbitrators maintain that an employer should conduct "a careful and unbiased investigation of the charge" that leads to "the conclusion that sufficiently sound reasons exist to discipline the employee before taking disciplinary action." What constitutes an adequate investigation is fact specific, although common elements may include whether (a) the employer investigated prior to taking disciplinary action … (d) the employer interviewed witnesses to the alleged misconduct…. ***Arbitrators do not require that the investigation be exhaustive in order to find that the employee was afforded due process. *** When, however, an investigation is found to be inadequate, many arbitrators conclude that the just cause standard has not been met. (Internal citations omitted)

Just Cause: The Seven Tests (pp. 266-267):

> For an investigation to be successful from the point of view of both proof and due process it must be objective. An employer must be certain that as much available evidence as possible is collected and carefully reviewed from the perspective of a disinterested third party. The supervisor who has produced evidence against an employee may be too caught up in defending a position, even in saving face in some cases, to be the best judge.

Principles of Federal Sector Arbitration Law (p. 225):

> Arbitrators take disciplinary cases seriously, and they expect management to do so. Management is expected to properly investigate the matter before taking disciplinary action to ensure that the employee is not put to the travail of defending a disciplinary case unless there is good cause to believe that the employee committed misconduct worthy of substantial discipline.
>
> Finally, an essential element of assessing discipline is a requirement that management, before administering discipline to an employee particularly when the penalty of loss of wages is being imposed, should try to discover whether the Grievant did in fact violate a rule or order of management. This requirement is really no more than what is known in our society as procedural due process. In this case, the Department of Veterans Affairs did not adhere to the procedural due process rule. It relied strictly on hearsay evidence. While I recognize that hearsay evidence is permissible in some instances in arbitration, it must be clear and convincing evidence. In this case, the hearsay evidence against the Grievant was not clear and convincing, but was hazy and inconclusive. Therefore, the grievance is sustained. *AFGE, Local 1667 and VA*, 100 FLRR 2-1034 (1999 Brown, H.)

As already noted, the disciplinary action addressed in this arbitration came as a result of complaints from mining management voiced at a meeting of CalCIMA with MSHA and subsequent input from industry management. Among that input were two emails that alleged certain conduct on the part of the Grievant and cited the sources of the allegations by name (e.g., Jt. Ex. 2, pp. 10, 12), but there was no input in the investigation from the named sources themselves. During his cross-examination The Proposing Official was asked:

> Q. … I wanted to ask you about the first specification.
> A. Yes.
> Q. Who did you consult about that specification?
> A. I spoke to Mr. Michael Herges, and he sent me an e-mail.

Q. Did you speak to the actual miners who made a complaint to Mr. Herges?
A. No, I did not.
Q. Why not?
A. I think I didn't have the time to do it. (Tr. p. 535, ll. 12-22.)

As will be discussed in more detail in the portion of this document that deals with the substantive aspects of the discipline, few persons named in the Specifications appeared as witnesses and, of those who did appear, their sworn accounts seldom confirmed what industry management had asserted and what Agency management had accepted as having been said. In short, for a significant part, the discipline was based upon hearsay that was not clear and convincing.

Questionable Objectivity

Koven summarizes what constitutes an objective investigation as follows:

- For an investigation to be successful (from the point of both proof and due process), it must be objective.
- For it to be objective, someone from management must make sure that as much available evidence as possible is collected and that evidence gets a careful look, not from a partisan, management-oriented perspective but from the perspective of a disinterested third party.
- For a disinterested evaluation to be conducted, some management official other than the supervisor who imposed discipline is usually required. (Pp. 266-267.)

My concern in this matter is heightened by factors already noted: the MSHA official who at the time of the discipline had been the Grievant's immediate supervisor was the official who investigated the allegations that led to the discipline, conducted the Weingarten hearing, and proposed a five-day suspension. He also testified as follows:

Q. [Toth] Did … [the Grievant]. Have anything to do with why you're no longer a supervisory employee?
A. In a way, yes.
Q. Can you clarify?
A. Yes, it's hard to deal with him. Any time you to do something, whenever change --
Q. I'm sorry?
A. Any time that the district or the supervisor tries to do something to get more information or to improve, he always have [*sic*]something to say that he needs to approve that thing, you know. So any other thing, he just -- oh, the inspector doesn't have authority, but he always have [*sic*] a problem for something. So -- and then when he requests [a] document, he takes more documents, more documents, more documents, takes so much time, you know, to deal with him. (Tr. 579, ll. 17-580, l. 7.)

The arbitration record makes clear that the Grievant can be difficult. To use his own words, "I can be a stickler, and that can be irritating or annoying" (Tr. 382, ll. 18-19). While that characteristic cannot, by itself, be justification for discipline, I am concerned

that a person who found him difficult to work with had so many roles in the development of the Grievant's discipline.

Summary of Concerns About Due Process

As the above discussion explains, I have found that the Agency violated Article 13 of the collective bargaining agreement by ignoring progressive discipline and by imposing a suspension as the first instance of discipline. Moreover, the investigation was neither fair (the investigator was not a disinterested party) nor was it thorough (one glaring example: with regard to Reason 1, Specification 1, the investigator accepted hearsay and did not take the time to speak to the alleged sources of that hearsay); questions in the disciplinary interviews of the Grievant were based on subjective conclusions by third parties rather than specifics about what the Grievant was alleged to have said or done. These procedural violations were many and were severe and are sufficient to rule that management did not have just and sufficient cause to suspend the Grievant for 3 days for misconduct.

II. SUBSTANTIVE CONCERNS

The CBA requires that discipline be based on "just and sufficient cause" (Article 13, Section 1C. Moreover, in its first sentence, the Issue Statement agreed to by the parties assigned me the task of determining, "Did management have just and sufficient cause to suspend the Grievant for three days for misconduct?

For a federal agency to prevail before an arbitrator in the matter of discipline, the agency (1) must prove by a preponderance of the evidence that the conduct occurred; (2) the agency must establish a nexus between the misconduct and the efficiency of the service (3) the agency must demonstrate that the penalty imposed is reasonable. (*Pope v. U.S. Postal Service,* 114 F.3d at 1147).

The Agency states

> … [T]he Agency suspended Grievant for just and sufficient cause and for reasons promoting the efficiency of the service. The governing regulations at 5 CFR 752.202(a) allow the Agency to suspend an employee for less than 14 days for reasons including those described at 5 USC 7503, which include "discourteous conduct to the public

> confirmed [by] an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct." See 5 USC 7503. This language is consistent with Article 13, Section 1.C [of] the National Agreement between the U.S. Department of Labor and the National Council of Field Local Labor Locals, AFGE, AFL-CIO (i.e. the CBA), which allows the Agency to suspend a bargaining unit employee "for just and sufficient cause and for reasons which will promote the efficiency of the service." (JE 1-20).
>
> The Agency's investigation, which included speaking with several of the mine employees and mine operators who also provided testimony during the hearing, found that mine managers and mine employees from five different mines in various parts of California were subjected to Grievant's unprofessional conduct over a nine-month period. The Agency's receipt of these repeated complaints, which were consistent across time and across different mines, were investigated and found to be credible by … [the Proposing Official], his former immediate supervisor. (Br. pp. 33-34.)

Reason 1, Specification 6

Given the extensive record and continuing problems the author of this Opinion and Award has found with the way MSHA has dealt with procedure (detailed above) and with substance in this case—a point I will now address in some detail—I am of the view that a helpful way to communicate my concerns is to start this part of my Opinion with an analysis of Reason 1, Specification 6, because it is the one area of the proposed and imposed discipline for which the essential elements of the Specification are undisputed and are parts of the arbitration record. By this reality, I am able to present relevant portions of documents that relate to the Specification: the Grievant's letter to the Union upon which the charges based, the related text from the Notice, a portion of the Grievant's response, and the related text from the Decision.

This portion of the dispute deals with sequence of events that started on June 23, 2014. The basic outline follows:

1. On June 23, 2014, the Grievant had received a report of a safety violation in a mine in the California Sierras and was seeking a way to proceed without revealing the identity of the source.[15]

[15] A subsidiary, and to my mind inconsequential, controversy arose during the hearing when the person identified as having made the safety alert denied having done so. (Tr. p. 831, ll. 16-18 and p. 834, ll. 19-21.) It is inconsequential primarily because the denial on the 6th day of the arbitration hearing (December 4, 2017) had nothing to do with the established facts of what had happened at MSHA's Vacaville offices on June 23 and 24, 2014, and, secondarily, because, given the testimonial agreement from both Grievant and former ADM that the alert applied to a mine in a geographic area where miners tended to be highly distrustful of (even hostile to) government, it was not surprising that a person who reported a concern to a

Footnote continues.

2. The former ADM (at that time, the actual ADM) intervened and required "Grievant to disclose the name of the alleged complainant". (Er. Br. p. 16.)
3. The Grievant complied.
4. On June 24th, the Grievant wrote to Union officials expressing concern and seeking advice. (Details below.)
5. At the Union's suggestion, the Grievant forwarded forward his message to the District Manager.
6. Reason 1, Specification 6 is based upon that message.

There is no question that the former ADM had authority to order the Grievant to disclose the identity of the complainant to him and no question that the Grievant complied. While the Grievant and the Union raise questions as to the wisdom and the motive of the former ADM, in my mind the issue for me to consider is whether the Specification articulates a valid basis for discipline.

The following is from the Notice and presents the text of that document's statement about Reason 1, Specification 6:

> On June 24, 2014, you sent an email to the following employees: Robert Sax, Bob Garcia, Aliyah Levins [*sic*], and … [the District Manager] asking for advice regarding filing a particularized needs statement to, "Establish the gap in … [former ADM's] MSHA training while he was at war for the military." … [Former ADM] did not discuss his personal leave with you nor has he discussed his military operations with you. Making comments about … [former ADM's] personal leave is inappropriate, and insinuating that because he was called up to serve his country, he forgot how to perform the basic functions of his job, created a hostile work environment due to a discriminatory comment based upon … [former ADM's] military status. Your inappropriate comment regarding an MSHA employees' [*sic*] military service is an invasion of personal privacy, and will not be tolerated. (Jt. Ex. 2, p. 3.)

The following is the substance of the email the Grievant sent to Union officials:

> **From:** … [Grievant] - MSHA
> **Sent:** Tuesday, June 24, 2014 9:38 AM **To:** Sax, Robert J (Rob) - OASAM
> **Cc:** Garcia, Bob - BLS; Levin, Aliyah F - OFCCP
> **Subject:** Damage done, but...an unconventional MSHA grievance
>
> Rob, Bob, Aliyah:
>
> Something unusual & disturbing happened yesterday, and although the damage is apparently already done, I'm trying to figure out how to fix the problem so it doesn't happen again.

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federal agency would be reluctant to acknowledge having done so in a way that could be communicated to persons in his community to the reporter's detriment.

I received information from a complainant by email, regarding an impassable secondary escapeway at an underground mine. It's important to know that this is a mining district of small operations & small communities, all high-grade gold mines, with a history of non-compliance and substantial discrimination against miners' rights (as defined by the Mine Act of 1977.)[16] In fact, it's my understanding that the mine subject to this complaint has a history of miner discrimination complaints, or at least one significant settlement agreement in lieu of trial.

As I was in the process of informing my Acting Supervisor (and the assigned inspector, who had recently inspected this mine,) of the complaint and filling out the Form 7000-33 (Hazard Complaint Form,) and entering the complaint in to the MSIS HCC tracking system (all in accordance with existing Law, Regulations, Policy, Handbooks, and past practices,) … [former ADM] came in to my office & ordered me to disclose the identity of the complainant & the original email to him. I complied, reluctantly: the complainant asked me to keep the information & source confidential. (I've actually never been forced by any supervisor to disclose this information. Once, it came close, but when I explained to then-ADM Hirsch my concerns regarding the professional & personal safety of the complainant in that case, he conceded that the protection of the miner-complainant was of primary importance.)

I was told that the inspector was originally instructed (by the Acting Supervisor,) to open an E-16 (spot inspection,) in order to investigate the complaint without disclosing the existence of the complaint. This is in accordance with the Handbooks, ***and*** with past practice, as the very act of disclosing the ***existence*** of a complaint would have a tendency to identify the complainant or otherwise result in discrimination &/or retaliation, especially in a mine and a mining district such as this.

However, I have received information that … [former ADM] then directly ordered that an E-04 (anonymous complaint inspection,) be opened to investigate the complaint. Because of the risk to the complainant & other miners, this is not in accordance with the Handbook ***or*** with past practice, and will certainly result in finger-pointing (at least,) and discrimination (surely,) at that mine, in that mining district, and in that county. Not only will the miners at the mine - and the complainant, wherever they may or may not be - get burned, my professional credibility gets burned in the process. This miner trusted me to protect him the same as I always have for all complaints coming from this mining district. So, yes, one of the casualties here is my professional reputation. More importantly, this episode will further the past trend of discrimination & non-compliance in Sierra County, and will contribute to the occurrence of the next fatality in the area.

The damage is done.

However, going forward, I'd like to make sure this doesn't happen again. Do you have any information that might support my efforts at correcting this problem? … [Former ADM] came at this situation with an inordinate amount of aggression, resulting in procedural errors which will undoubtedly cause collateral damage.

Does the Union have experience with grieving MSHA Policy, procedures, & Handbooks? ***

Finally, what's my best course forward? Should I file a particularized information request to establish the gap in … [former ADM's] MSHA training while he was at war for the military?

[16] Throughout the document, the Grievant places punctuation inside rather than outside a closing parenthesis. To avoid a distracting number of "[*sic*]" notations, I have chosen this footnote method of noting that the practice was not introduced in my presentation of the text.

> Your support and advice is [*sic*] greatly appreciated…. (Jt. Ex. 2, pp. 68-69; emphases as in original.)[17]

The following is the text of the statement in the Decision regarding Reason 1, Specification 6;

> In regards to Specification 6, you sent an email to the following employees: Robert Sax, Bob Garcia, Aliyah Levin, and … [the District Manager] asking for advice regarding filing a particularized needs statement to, "Establish the gap in … [former ADM's] MSHA training while he was at war for the military," insinuating that because he was called up to serve his country, he forgot how to perform the basic functions of his job. You deny any misconduct in your email.
>
> In sustaining Specification 6, I took into consideration that in your written reply to the Notice you indicate that your email was taken out of context and you have a right to raise your concerns to appropriate personnel. You reference Article 5 - Rights of Employees, Section 3 - Employee Concerns, of the CBA. You further indicate that you were concerned that … [former ADM's] interpretation and your interpretation of how to handle hazards complaints were different; therefore you questioned how his extended absence from MSHA impacted his training. I also took into consideration that the email you sent to the union representative and then forwarded to me, inferred that because … [former ADM] was called up to active military duty, he forgot how to promote safe and healthful workplaces for the Nation's miners which is why MSHA was created. Your email was demeaning and arrogant and inferred that you knew more about how to handle hazard complaints than … [former ADM]. In sustaining Specification 6, I find your statements of denial not credible based upon the email you sent to the union and me. Further, I find your assumption that because you were instructed to disclose the name of the complainant by … [former ADM] that he would contribute to the next fatality in Sierra County, offensive and comparable to the repetitive nature of complaints received by this agency, in regards to the arrogant way you speak and interact with the rank and file miners. (Jt. Ex. 4, p. 6.)

Agency Argument:

- The former ADM supervised the Hazard Complaint Program and had extensive experience in the Sierras.
- Agency policy guards the complainant's name from the public, not agency management.

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[17] The following is that portion of the Grievant's response to the Notice of Proposed Suspension providing his explanation of why he wrote the letter to the Union and why he forwarded it to the District Manager:

> What actually occurred was this: a conversation with … [the former ADM] left me thinking that he and I had been trained to handle hazard complaints in radically different fashions, and perhaps under different versions of the Hazardous Condition Complaint Procedures Handbook (most recently updated in June of 2015 as PH15-I-08.] I knew he had been gone from the Agency for some time, because he was not with the Agency when I joined the Western District in the summer of 2009, and because I learned from more senior employees that he had been with the Agency prior to that time. I remember when he got re-hired in the spring of 2012. The exact dates of his absence would be contained within the Agency's response to our documents request (under 5 USC 7114(b)(4), filed on 01/23/2015,) had the Agency not unilaterally broken off that interactive process.
> Because of his extended absence from MSHA, I had a question whether his training was up-to-date. I raised this as a matter of concern to the Union, in the email that was forwarded to you when I tried, on the advice of Local President Rob Sax, to schedule a meeting with you to discuss the topic. Both writing about my concern to the Union, and asking you for a meeting to discuss this matter were activities covered by Article 5 (Rights of Employees,) Section 3 (Employee Concerns,) of the National Agreement between the United States Department of Labor and the National Council of Field Labor Locals (NCFLL,) AFGE, AFL-CIO, which states: "Each employee shall have the right to bring matters of personal concern to the attention of appropriate officials of the Department and/or the NCFLL." (Jt. Ex. 3, p. 16.)

- Grievant fired off an arrogant and demeaning email suggesting that the former ADM did not know how to do his job.

Union Argument:

- This stipulation shows a causal connection between a protected activity and the discipline imposed upon the Grievant.
- Under relevant statutes, an employee cannot create a hostile work environment.
  - The Grievant's letter was protected by Article 5 of the CBA and federal law so that even under less legalistic standards, the Grievant did not create a hostile work environment.
- There is no MSHA rule forbidding discussion of a colleague's military service.
  - The military service of the former ADM was known due to that person's discussion of the matter.
- The Grievant's email was a protected disclosure based on reasonable belief
  - of a violation of Agency rule and practice
  - gross mismanagement and abuse of authority
  - danger to public health and safety

A relative minor point: both the Proposing and the Deciding documents assert, "On June 24, 2014, you sent an email to the following employees". The list of "employees" included the name of the District Manager. This mischaracterization of the Grievant's email is mentioned only as one of the indications of lack of care taken by the authors of those discipline related documents.[18] A more serious reading error by the Deciding Official occurred with regard to Reason 2 and will be addressed further when I address that portion of the discipline. (See page 49 ff.)

In a moment, I will address my conclusion that the above statements from the recommending and the deciding documents are based upon a misreading of the Grievant's email; however, even if the readings were correct, the facts are that the email was a plea for help from the Grievant written to Union officials and that management

[18] While the Grievant's email was sent to the Union officials and forwarded to the District Manager on June 24, 2014, it is misleading to imply that the District Manager was one of the original addressees. Of more importance, the original message was to Union officials:

> MS. BRANCH *** So the initial e-mail sent June 24th was sent to Robert Sax, with a copy to Bob Garcia and Aliyah Levin. The subsequent e-mail was sent -- was a return e-mail from Robert Sax, and then the top -- the top of the e-mail chain, the e-mail was sent from … [the Grievant] to … [the District Manager], Robert Sax, Bob Garcia and Aliyah Levin.
> ***
> MS. BRANCH: … [Name given] is the district manager for the Western district. And Robert Sax, Bob Garcia and Aliyah Levin are -- and, well, Robert Sax is the Local – president of Local Union 2391. ***
> MS. BRANCH: All three are Union officials, and then I will leave it up to.
> THE ARBITRATOR: Okay.
> MS. BRANCH: Jason to clarify specifically.
> ***
> MR. CARLS: At the time, Robert Sax was national vice president and executive vice president of the Local. Bob Garcia was the president.
> (Tr. p. 86; l. 23-p. 87, l. 4; p. 87, ll. 7-10; p. 87, ll. 16-19.)

obtained a copy of the email because, based on a recommendation from the Union, it was forwarded by the Grievant to the District Manager seeking discussion with him. In short, it was an internal communication from a member of the bargaining unit (and a Union steward) to his union.[19] In short, the letter was an internal Union communication. It was passed on to the District Manager by the Grievant at the suggestion of the Union in pursuit of a discussion about the Grievant's concerns. The Grievant did not circulate the letter beyond this.

The Agency argues:

> Grievant's email was arrogant because he assumed that simply because he saw an issue different from … [the former ADM] that his knowledge about how to investigate hazard complaints was superior, without considering … [the former ADM's] decades of experience and familiarity with Agency procedures. (Br. p. 17.)

The Grievant is a Mine Safety and Health Inspector, GS-1822-12; he started off as a trainee (Grade 7) and worked his way up to Grade 12. (Tr. p. 325, l. 25-p. 326, l. 14.) As such, he is knowledgeable about MSHA standards and procedures.[20] The fact that an employee disagrees with a management official about a matter in which both persons have expertise does not justify a conclusion that the employee is arrogant, no matter the length of the management official's service, even if the employee characterizes the manager's view as wrong. The question that is of concern here is whether, given a substantial hiatus in the official's employment by MSHA, it was valid to wonder whether or not the official was back to speed when he acted on June 23, 2014.

The fact is that the former ADM had been away from MSHA between 2004 and 2012, a period of eight years.[21] The Grievant's comment that formed the basis of Reason

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[19] In the first Weingarten session, the Grievant cited Article 5 of the CBA. (Jt. Ex. 2, p. 92.) I note that Section 3 of the Article states, "Each employee shall have the right to bring matters of personal concern to the attention of appropriate officials of the Department and/or the NCFLL."

[20] A recommendation dated December 16, 2014, from "the Counsel for MSHA in the Office of the Solicitor of Labor in Seattle, Washington" praised the Grievant's knowledge. The following is one statement of several:

> I have found him to be an extremely thorough inspector and excellent trial witness. He has an encyclopedic knowledge of Mine Safety and Health standards. (Un. Ex. 21.)

[21] When the former ADM, a member of the military reserves, was called to active duty in 2004, he retired from MSHA (tr. p. 70, ll. 10-19). He returned to civilian life in 2005, ran a consulting service to the mining industry for some two years, returned to active military service, retiring in 2011 (tr. p. 70, line 20-p. 71, l. 11.) In 2012, he rejoined MSHA as a mine safety and health inspector (tr. p. 72, ll. 1-4). In 2014, he

Footnote continues.

1, Specification 6, must be read with the former ADM's eight-year absence from MSHA in mind. The Grievant put the following question to the President of his Local and copied other Union officials: "Finally, what's my best course forward? Should I file a particularized information request to establish the gap in … [former ADM's] MSHA training while he was at war for the military?"

It is clear, as stated in the Decision that the Grievant was "concerned that … [former ADM's] interpretation and your interpretation of how to handle hazards complaints were different". (Jt. Ex. 4, p. 6.) There is no impropriety in such a concern. It is also clear that the Grievant thought that the former ADM's extended absence from MSHA could have impacted his understanding of current procedures. However, the Deciding Official's statement that the Grievant's email to the Union "inferred that because … [former ADM] was called up to active military duty, he forgot how to promote safe and healthful workplaces for the Nation's miners which is why MSHA was created" is a patent misreading of what the Grievant wrote.[22] The clear meaning of the Grievant's message centered on the extended absence from MSHA service, not the reason for that absence.

The Deciding Official's statement, "Your email was demeaning and arrogant and inferred that you knew more about how to handle hazard complaints than … [former ADM]". While the email does indicate that the Grievant was concerned about the Former ADM's intervention and about his method of responding to the miner's alert, the concerns were based upon the fact of an eight-year hiatus in MSHA service and upon a disagreement about which of two procedures was the best to use given the facts under consideration. In my view, the Deciding Official's implication that, by definition, a manager would know more than an inspector is itself demeaning and arrogant.[23]

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became a MSHA assistant district manager (tr. p. 73, ll. 14-16), and retired in April of 2017 (tr. p. 75, l. 10).

[22] It is ironic that the Deciding Official uses the word "inferred" rather than "implied" since it is he who is drawing inferences from what the Grievant wrote.

[23] An example of MSHA managerial culture at Vacaville regarding hierarchy appears in the testimony from the Former ADM about his exchange with the Grievant when he demanded the Grievant provide him with the complaint:

> A. Well, … [the Grievant] was obviously sensitive as to that, uhm, was hesitant to give it to me. Asked me why, and I said, because I'm the ADM. (Pg. 88, ll. 23-25.)

Conclusions: (1) Reason 1, Specification 6, is based upon a misreading of the Grievant's message to his Union. The concern voiced in the message was whether, given the former ADM's extended absence from MSHA service, he was up to date on MSHA standards. (2) Because the message to the Union was both a statement of concern and a request for advice, it was a privileged communication. (3) Reason 1, Specification 6 is not a valid basis for discipline.

Reason 1, Specifications 1 and 2

Information that resulted in Reason 1, Specifications 1 and 2, came up at the meeting of CalCIMA with management and Safety personnel from MSHA held on June 17, 2014 (Jt. Ex. 2, p. 9.) Subsequent to that meeting, on July 3, 2014, two emails relating to facilities owned by Granite Rock were sent to the Proposing Official, who was, at that time, the Grievant's immediate supervisor. One addressed Southside Sand and Gravel (Jt. Ex. 2, p. 10), the second, A.R. Wilson Quarry (Jt. Ex. 2, p. 12). The author of both emails, Michael Herges, Director of Safety and Health Services for Granite Rock Company, appeared as an Agency witness on the third day of the arbitration hearing. (Tr. p. 275, l. 13-p. 301, l. 4.)

The two emails that became the basis of Reason 1, Specifications 1 and 2 of the Notice (Jt. Ex. 2, pp. 1-2) refer to inspections by the Grievant that had taken place on November 13, 2013 (Southside Sand and Gravel) and on December 3, 4, and 9, 2013 (A. R. Wilson Quarry). At the close of Herges' testimony, I asked the following question with reference to the emails:

> Q. *** In both documents, the statements you write are assertions. It is my understanding that they didn't come from what you yourself heard or experienced, but what you were told.
> THE WITNESS: Correct. (Tr. p. 300, l. 25-p. 301, l. 4.)

In short, the emails referred to inspections by the Grievant held over a half year earlier and contained hearsay allegations. As noted in Section I of this Opinion, the investigating official did not "have time" to speak to the identified sources of the allegations.

Reason 1, Specification 1

The Decision presented the following three allegations as the specifics regarding "Reason 1, Specification 1, at Granite Rock Company, Southside Sand and Gravel":

> [1.] "… [A]ccording to one of the miners[,] during the course of the inspection you exhibited irritation when you could not find a violation.
> [2.] "… [W]hen you were telling the miners about a citation you wrote for not chocking their personal vehicles, you responded in a harsh manner that you would be out to investigate future incidents if a truck rolled and hit something, not a miner's insurance company.
> [3.] "Another miner indicated that during the closeout conference, you displayed anger toward him when you admonished him…."
> (Jt. Ex. 4, p. 3.)

Summary of Management arguments:

- Grievant was arrogant with Miner Ron Keisling and rude to other Southside employees.

Summary of Union arguments:

- The source of the Specification was hearsay.
- Since fewer citation mean less work, "It's not credible that … [the Grievant] would have expressed irritation for not having found a violation…." (Br. p. 27.)
- "… [A]ny negative perception of … [the Grievant] appears to have been a function of the adversarial process inherent to his line of work." (Br. p. 28.)

Of the five persons named in the two emails as having had interactions with the Grievant, one (miner Ron Keisling) testified at the arbitration. (Tr. p. 316, l. 6-p. 322, l. 25.) He was from Southside. This witness addressed two aspects of his discussion with the Grievant regarding the chocking of tires on personal vehicles parked at the site. One was a difference of understanding about whether chocking was required (tr. p. 318, l. 11-p. 319, l. 3); the second was a discussion about responsibility for an accident on site involving a private vehicle.

In its post-hearing brief, the Agency asserts:

> Equipment Operator Ron Keisling …testified … that Grievant's behavior during an exchange about whether MSHA would investigate a collision involving a private vehicle was harsh, rude, arrogant, and defensive, especially when … [he] asked Grievant to explain why he issued a citation. (Br. p. 3.)

In support of this summary of Keisling's testimony, the Agency's brief provided citations that identified the following testimony:

> A. Well, he went through the plant. Then he was in our break room, said we needed to block our tires on our personal vehicles.
> Q. And what was your response to that?
> A. I says that's the first out of 17 years I've -- or 15 years I've been here, whatever it was, I said, "We've never heard of it." I said, "It's not in our guidebook." And I showed him. I gave him our guidebook, and he said it was in his. And I said, "I'd like to see it because it's the first time that we've ever seen it, ever heard of it."

Q. And when you requested to see out of … [the Grievant's] book --
A. Couldn't find it. [24] (Tr. p. 318, ll. 11-24.)

As noted in footnote 24, there is conflict between what is in this portion of the transcript and the one immediately following in which the witness is reported to have testified that his response was to go out and chock the tires. However, even if the actual exchange on this point had ended with "Couldn't find it", there is nothing in this passage that merits *any* of the terms used by the Agency: "harsh, rude, arrogant, and defensive". This same assessment also applies to the other testimony by this witness, including those portions cited in the brief. The transcript that relates to one of the citations follows:

Q. Okay. During this inspection, do you recall another conversation with … [the Grievant]?
A. About our vehicles being in an accident, that he would investigate it.
Q. Okay. And can you go into a little bit more detail about that.
A. Well, I told him, I said, "Look, if my truck is in any kind of accident, that's my responsibility. It's my personal truck, and I have insurance for that."
Q. Can you describe the tone in which the conversation between you and … [the Grievant] took place?
A. It wasn't bad, but kind of arrogant towards us, I thought.[25] (Tr. p. 319, ll. 4-16.)

The Agency brief provides another citation in support of its characterization of the Grievant's conduct at Southside, namely the testimony of Safety and Health Services Manager Herges (tr. pp. 282-283) The following is Herges' hearsay testimony about what he had heard from Keisling shortly after the inspection:

… I did have a conversation with Ron Keisling and … [he] recanted [*sic*] what his experience with … [the Grievant] was and found him to be rather unyielding in the discussions. And basically as Ron tried to -- to show that this is something that they weren't aware of and that they were going to remedy the situation had they known, it was sort of like, well, you know, this is something that you have to do.
I remember Ron telling me, "Can you show it says that we have to do this?" And he was no, and basically he indicated that he felt like was pretty rude to him at the time. (Tr. p. 283, ll. 3-14.)

[24] The transcript is confusing and my memory of the described discussion provides no clarity. With regard to the first specific, the transcript indicates that the Grievant couldn't find the requirement in his "book" (p. 318, ll., 22-24), but the transcript reports the witness's next statement to be, "And so I said, 'If that's the way it is,' I went out and chocked all three of our trucks or put blocks underneath the tires." (P. 319, ll. 1-3.) This comment by Keisling suggests that the Grievant's view prevailed.

[25] The third of the Brief's three citations given to back up its summary of Keisling's testimony was to documents that predate the arbitration hearing and thus could not provide support for the Agency's summary of testimony. I make this observation fully aware that given the length and complexity of this record, such errors are to be expected. I anticipate that similar slips may be found in this document.

Arguing in its post-hearing brief that the Grievant was rude to other Southside employees, the Agency noted,

> Herges testified that although these employees confided in him, these employees' fear of retaliation by the Grievant resulted in their unwillingness to provide written statements. (Br. p. 4; citing tr. p. 278, l. 25-p. 279, l. 4.)

(The Agency makes a similar argument with regard to Specification 2.[26] Because the following analysis also applies to that argument, it will not be repeated in this document.) Miners' fear of retaliation was alleged in the minutes of the discussion at the CalCIMA/MSHA meeting on June 17, 2014(Jt. Ex. 2, p. 9.), but without explaining why retaliation was a reasonable fear. That allegation, like the Herges testimony about retaliation, does not persuade.

Neither the brief nor the record makes clear how the Grievant could retaliate against employees, but if retaliation from the Grievant was truly feared, the fact is that in his 2014 emails (Jt. Ex. 2, p. 10; see also Jt. Ex. 2, p. 11) and in his 2017 testimony, Herges named the employees who criticized the Grievant. (Tr. p. 279, ll. 10-16.) Thus, the employees were not protected from retaliation by anonymity. However, the failure of direct testimony from the named sources of complaints against the Grievant means that the record lacks first hand testimony that would support the hearsay, the Union is deprived of the opportunity to cross-examine the named accusers, and the Arbitrator has no opportunity to assess the credibility of the sources.

In any case, the direct testimony (Keisling) and the hearsay (Herges) present subjective conclusions drawn by persons about the Grievant's conduct but no specifics about what the Grievant said or did that would allow a third party—the Proposing or Deciding Officials or this Arbitrator—properly to assess the validity of those conclusions. Moreover, Keisling from Southside—the one miner who testified on this subject—did not provide specific information that would justify the terms used in the Agency brief

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[26] Referring to Reason 1, Specification 2, that applied to A.R. Wilson, the Agency wrote:

> … Michael Herges testified … that his employees reported to him that they found Grievant harsh and rude--but were reluctant to submit written statements because they feared retaliation from Grievant. (Br. p. 5, citing TR Herges 278:25-279:4).

Strictly speaking, the testimony cited in the brief relates to employees at Southside, not A. R. Wilson.

("arrogant", "rude"). What he said about the Grievant's tone was, "It wasn't bad, but kind of arrogant towards us, I thought."

The Deciding Official testified on the fourth day of the hearing and was asked about the complaints filed by Herges that formed the basis for Reason 1 Stipulations 1 and 2. His testimony indicates that he took Herges' hearsay allegations as proven truth.

Because of the significance I find in the way the Deciding Official evaluated input in this matter, I pause to summarize key factors with regard to Reason 1, Specifications 1 and 2 before I address that evaluation as expressed by the Deciding Official.

1. On June 17,2014, CalCIMA first raised with MSHA concerns about the Grievant's inspections that had taken place "on or about November 13, 2013" and "on or about December 3 and 4, 2014". CalCIMA did not cite any earlier concerns with the Grievant's performance.
2. Although Michael Herges named the mine personnel who he identified as the sources of the concerns voiced in the specifications, the Grievant's then supervisor, who had been charged by MSHA to investigate the complaints, did not speak to the named sources.
3. Of the persons named by Herges, only one testified. In my view, his testimony was not sufficient to back up the industry's allegations about the Grievant's conduct.

The following presents the text of the complaint from Herges that led to Reason 1, Stipulation 1 and the Deciding Official's testimony regarding those allegations:

> 1) During the course of the inspection, … [the Grievant] pointed out a crack in the driver's side mirror of a parked Granite rock pickup. Later, during the closeout meeting, he displayed "anger" when he took Gary Andrade back to the pickup and admonished him for not recording the defect on the daily inspection form. He then went to extremes to point out how a miner could be injured by cutting a finger on the crack.
> 2) During the entire inspection, Brad Riechers observed … [the Grievant] exhibit irritation when he could not find a violation in various areas of the mine. An example of this was … [the Grievant's] disgusted tone of speech when he entered the MCC room and found it to be exceptionally clean.
> 3) When … [the Grievant] told the crew he was going to write a citation because they were not chocking their personal vehicles, Ron Keisling told him he didn't have to write the citation. They didn't know they were supposed to chock their wheels and that if his truck rolled into something his insurance would take care of it. … [The Grievant] responded in a very harsh tone that he would be out to investigate if something like that happened, not Mr. Keisling's insurance company.
> These are examples of … [the Grievant's] the [*sic*] behavior and unprofessionalism displayed during his inspection. Please let me know if I can be of further assistance in this matter. (J.E. 2, p.10.)

In his direct testimony, the Deciding Official was asked "Why … is this document [Jt. Ex. 2, p. 10] important? His answer follows:

> A. This was one of the examples of the unprofessional conduct that a miner made, an hourly miner, mechanic, equipment operator, stated that … [the Grievant] was abusive, that he talked to him like he didn't know what he was doing, like this is an obvious

> condition. And the miner was intimidated.
> Q. And how did you use this information in order to make a determination that the allegation of -- how did you use this information in your deliberations as to whether or not … [the Grievant] exhibited unprofessional conduct?
> A. Well, the fact that an hourly miner or a miner's representative made the complaint is -- is something that we take very seriously. Typically, hourly employees don't complain about an inspector's conduct. It's very seldom that we ever get an hourly employee or a miner's rep that will come forward and make complaints. It just doesn't happen because under the Mine Act, this is the group that we're obligated to protect. That's what the Mine Act stands for. And when hourly miners come forward, there's a problem, and we have to look into it. (Tr. p. 604, l. 23-p. 605 l. 20.)

In other words, the Deciding Official accepted as truth hearsay that was neither clear nor convincing.

In light of this and the actual testimony of the one worker who participated in the hearing, I conclude that the Agency did not prove its charges against the Grievant expressed in Reason 1, Stipulation 1.

Summary and Conclusion: At the arbitration hearing, the Agency offered the following in support of Reason 1, Specifications 1 and 2: the hearsay complaints from Herges upon which the discipline was based, the testimony from Keisling, the one person who had participated in the inspection who testified at the arbitration hearing, and the testimony from Herges about what he had been told shortly after the inspection. No part of this input provides the specifics that would support the Deciding Official's determination to the Grievant that he "did not present yourself in a professional manner as expected by [*sic*] all Federal Employees [*sic*]. (Jt. Ex. 4, p. 3.)

As noted in my concerns about procedure in this matter, prior to the arbitration hearing *all* input from the mining industry that was used to discipline the Grievant had been based on hearsay. I also noted that during his investigation while he was at Southside, the Agency's investigator did not speak to the mine workers who were the named sources of the allegations. (Tr. p. 535, ll. 12-22)

Reason 1, Specification 2

Other conclusions about the Grievant's conduct that were expressed in the Decision with regard to Reason 1, Specification 2 follow:

1) "… [Y]ou extended and modified citation number 8699484's gravity
   a) from unlikely, to reasonably likely,

b) from non-serious and substantial (S&S [*sic*]) to serious and substantial (S&S) and

c) you did not give the miners an opportunity to discuss the reason(s) why you elevated the citations [*sic*] gravity."[27]

2) "… [Y]ou spoke with a tone of arrogance indicating that the personnel at A.R. Wilson Quarry did not know what they were doing.

(Jt. Ex. 4, p. 3.)

There is potential for confusion in the back and forth of the MSHA forms related to Citation No. 869948, the related arguments of the parties (Agency Brief, pp. 6-7; Union Brief, pp. 28-29) and the related cross-examination of the Grievant (tr. p. 993, l. 25-p. 998, l. 17) and so I report the following understanding to the parties.[28]

- The Grievant visited Granite Rock Company's A. R. Wilson Quarry on December 3, 2013, in follow up to citation No. 8699484 (Jt. Ex. 2-16) and its continuations (Jt. Ex. 2, pp. 17 and 18 (No. 8699484—01)) issued by an MSHA Inspector other than the Grievant. The Grievant's documents are No. 8699484–02 (Jt. Ex. 2, p. 19), No. 8699484–03 (Jt. Ex. 2, p. 20), and No. 8699484–04 (Jt. Ex. 2, p. 21).
    - No. 8699484–02 shows that on December 3, 2013, the Grievant modified the form's number 10, Gravity, Section A. "Injury or Illness" indication from "Unlikely" to "Reasonably Likely".
    - On December 4, 2013, in No. 8699484–03 the Grievant noted the termination of the citation because the concern voiced by the other Inspector had been addressed (Jt. Ex. 2, p. 20).
    - On December 9, 2013, the Grievant issued No. 8699484–04 changing the 10.C indication as to whether the matter was "Significant and Substantial" from "No" to "Yes".

Summary of Management arguments

With respect to conclusion 1:

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[27] The typo regarding Reason 1, Specification 2 (omission of apostrophe in the phrase "elevated the citations gravity") obscures whether the Deciding Official had one or two modifications in mind. Since the Grievant made two modifications, one of substance and the other more "secretarial", I assume that the phrase should read "citations' gravity". The discussion in the main body of this document addresses this matter further.

[28] I add the following message to the parties out of frustration because the exhibits were not coordinated. The resulting confusion and consumption of time caused by this and other indications that the parties did not make things clear for an arbitrator who is learning everything on the fly from persons who have lived with the controversy for days, weeks, and, more likely, months, is of concern. A few examples: (1) the same document appears in several places among the exhibits; (2) references in the briefs are to different locations for the same document; (3) Union exhibits frequently consist of dozens of pages without pagination.

The trigger that gave rise to this footnote: The Union brief refers to a document as the Grievant's notes from the 12/3/13 follow-up and identifies it as Union Exhibit 4, p. 13. Exhibit 4 is one of the Union's unpaginated exhibits. By my count, page 13 of the exhibit is a Photo Mounting Worksheet. Page 12 of the exhibit is a Mine Citation Order by the Grievant bearing a date of 12/3/13, but it is Number 8699478-02, not No. 8699484. The brief states, the "notes from the 12/3/13 follow-up indicate that 'significant progress' has been made correcting the issue." The page in Union Exhibit 4 does not reflect this summary, but Joint Exhibit 2, p. 19, does. Both documents are on MSHA Form 4000-3a, both are by the Grievant, both apply to the same facility, and both bear the same date.

> "A close-out conference is required at the 'conclusion' of 'any enforcement-related inspection or investigation". ***
> "Grievant concedes he last inspected AR Wilson on December 4 and that he modified Citation No. 869948 both on December 4 [should be December 3] and five [six] days later, on December 9. On the afternoon of December 4, Grievant's notes show that there was no discussion about Citation No. 8699484. (Union 4 at 3 ("12/4/203. . [*sic*] "no salient comments or questions" about No. 8699484)). Five days later, on December 9, Grievant again modified citation No. 8699484, without either visiting the mine or calling the mine first. (TR Grievant 995:22-996:17). Grievant did not discuss the citation at the end of the inspection, nor after the end of the inspection, but nevertheless modified the citation five days after he left. The Agency has shown that the mine never had an opportunity to discuss why Grievant modified the citation.
> ***
> "Because Grievant modified a citation five days after he last communicated with the mine, the Agency has shown that Grievant modified the citation without giving the mine an opportunity to discuss it." (Br. pp. 6-7.)

Summary of Union arguments:

- U. E. 4, p. 3 [same document at Joint Exhibit 2, p. 15: Event No. 6598932] indicates that a closeout conference took place with regard to Citation 8699484.
- The modification that took place on December 9th "was made only to correct a failure to check a box" that reflected a matter that had been discussed at the December 3rd closeout (Br. pp. 28 &29, citing U.E. 4, p. 41. [The exhibit refers to Event No. 8699484-04.])

As I read the exhibits, the Grievant made modifications on December 3 (Jt. Ex. 2, p. 19; Event No. 8699484-02) and on December 9 (Jt. Ex. 2, p. 21; Event No. 8699484-04). The form that was filled out on December 4 (Jt. Ex. 2, p. 20; Event No. 8699484-03) was to indicate that the matter was terminated because repair had been done. The Grievant also modified the record on December 9 (Jt. Ex. 2, p. 21) "In order to reflect the modification of Section II, Item 10A (Gravity,) in subsequent action 8699484-02". In other words, on December 3, the Grievant made one modification to Section 10 of the form (Gravity): he changed 10A (Injury or Illness) but neglected to make a corresponding entry on 10C to change "Significant and Substantial" from "No" to "Yes". During cross-examination, the Grievant owned up to the error:

> Q. [Kasameyer] Okay. So December 4, you don't move the box that says "significant and substantial," correct?
> A. Yeah, I dropped the ball. It should have done that -- I should have done that at that time. I screwed it up. (Tr. p. 995, l. 22-p. 996, l. 2.)

I now return to the Agency's argument; specifically, the following assertions:

1. "A close-out conference is required at the 'conclusion' of 'any enforcement-related inspection or investigation' because at that time 'inspectors shall discuss their general findings and each violation issued during the activity with the mine operation and, if applicable, with contractors and/or miner's representatives.'"
2. "On the afternoon of December 4, Grievant's notes show that there was no discussion about Citation No. 8699484. …."no salient comments or questions" about No. 8699484)).

i) Five days later, on December 9, Grievant again modified citation No. 8699484, without either visiting the mine or calling the mine first. (TR Grievant pp. 995:22-996:17)

As noted, as I read the documents, the first modification took place on December 3 (No. 8699484-02), not on December 4 (No. 8699484–03), but be that as it may, the Grievant's notes indicate that at both visits (December 3 and December 4), there had been an opportunity for input from mine personnel: Jt. Ex. 2, p. 15 (No. 6598932), a Miscellaneous Inspection Information form, is specific about what mine personnel were present and what was discussed. Because of the difference in references to the relevant documents and the significance of the entries to this Specification, I present the full text of the Grievant's entries. The emphases are added.

> Attendees Plant Manager Peter Lemon, Production Engineer Stephanie Lovell, "Team Leader" Jeremy Hunzie, Truck Shop (lead) Morgan.
>
> 12/03/2013: *Discussed each issuance in as much detail as those present wished both at the location of the cited condition, as we1l as at delivery prior to departure.*
>
> 86994 77-02 - Discussed Best Practices regarding Area Guards, hazards & protective actions associated with belt presses. Plant Manager Lemon stated that the belt presses were slated to be replaced in the near future. No other salient comments or questions.
>
> 8699478-02 - Discussed Best Practices regarding railing and toeboard systems, maintenance of steel structures in corrosive environments, brainstormed solutions. *Discussed modification of the issuance to reflect additional condition observed.* No other salient comments or questions.
>
> 8699481-02 - No salient comments or questions.
>
> 8699484-02 - Discussed maintenance of steel structures in corrosive environments, brainstormed solutions. *Discussed modification of the issuance to reflect information observed while inspecting for the determination of compliance*, Plant Manager Lemon stated that the handrails on the walkway on the right side of the conveyor were worse than those on the left side of the conveyor, and agreed that an inadvertent fall was possible. Discussed actions necessary to complete termination, No other salient comments or questions.
>
> 12/04/2013: Returned to terminate # 8699484, accompanied by Plant Manager Peter Lemon. Subsequent action # 8699484-03 was delivered by email for time savings purposes. Mr. Lemon had no salient comments or questions prior to my departure.
>
> This company is well acquainted with multiple formal and informal procedures fur conferencing and contesting issuances.
>
> Notified of possible special assessment? ["N/A" box checked.]
>
> Notified of possible knowing/willful violation? ["N/A" box checked.]
>
> Notified operator they can request safety & health conference? ["Yes" box checked.]
>
> Best practices reviewed? ["Yes" box checked.]
>
> (Emphases added.)

I respectfully disagree with the implication of the Agency brief that "no salient comment" implies that a close-out conference did not occur; rather, I read it as indicating that that no relevant or noteworthy comments were made about the modifications. Of

more importance to my decision are the indications in the Grievant's notes that close-out conferences took place.

It is true that on December 9, 2013, the Grievant issued Citation/Order Number 8699484-04 without providing the mine an opportunity to comment. Indeed, this document was created on a day when the Grievant was not at the mine; thus, there was no inspection on that day. The revision stemmed from what had taken place on December 3, and was, what appears to me to be what might be called a secretarial adjustment. The significant modification, the change in judgement that "Injury or Illness" was "Unlikely" to was "Reasonably Likely" had taken place on December 3, had been reflected on Citation/Order Number 8699484-02, and had been subject to a close-out conference. The adjustment made on December 9th was merely to bring entry #10 "Gravity" item C. "Significant and Substantial" from "No" to "Yes". In other words, to do a catch up so that a federal form correctly reflected that a change made on a MSHA form on December 3rd also required that the checkmark in 10. C "Significant and Substantial" be moved from "No" to "Yes". In my view, failure move the checkmark on December 3rd was a slip-up, but not a reasonable basis upon which to justify discipline.

Summary:

Regarding first conclusion of Decision regarding Reason 1, Specification 2:

Based on the above discussion I conclude from the arbitration record that

1) On December 3, 2013, the Grievant modified Citation 8699484 form item 10 A from "Unlikely" to "Reasonably Likely" (Jt. Ex. 2, p. 19.) As indicated on Jt. Ex. 15, a close-out conference took place in which the modification was addressed. Consequently, I find this aspect of the Specification to be without merit.
2) On December 9, 2013, a further modification of the Citation was made in which the check mark in form item 10 C "Significant and Substantial" was moved from the "No" box to the "Yes" box. The Grievant did not visit the mine on this date, the change was transmitted to the mine by electronic means. Since there was no inspection on December 9th, since the basis for the

December 9th edit had been addressed in a close-out conference on December 3, I find no reason to conclude that this edit merits disciplinary action.

Regarding second conclusion of Decision regarding Reason 1, Specification 2:

The Agency argues:

> During the hearing, miners confirmed that Grievant was rude, unprofessional, arrogant, and demeaning during the inspection. For example, Safety and Health Services Manager/ Director of Safety and Health Services Michael Herges testified that he found Grievant nitpicky and that his employees reported to him that they found Grievant harsh and rude--but were reluctant to submit written statements because they feared retaliation from Grievant. Mr. Herges also reported that his staff perceived that Grievant believed the mine staff did not know how to do their jobs. Grievant denies that he was rude, but Mr. Herges' testimony is supported by the reports AR Wilson made to the Agency in 2014, the statement AR Wilson staff made at the 2014 CalCIMA meeting, and Mr. Herges' report of the same concerns to … [Recommending Official] during the investigation of this matter. (Br. p. 5; internal references omitted.)

I refer the parties to pages 31 and following of this document where I provide discussion of Mr. Herges' hearsay reports and testimony and his report of employees' fear of retaliation with regard to Southside Sand and Gravel and point out that the same analysis applies here.

Reason 1, Specifications 3 and 4

I combine Specifications 3 and 4 of Reason 1 of the Decision because both contain MSHA concerns about the timing and the consequences of that timing of the Grievant's inspection of Santa Fe Aggregates, Inc., Waterford Pit and Mill that took place on May 28 (Specification 3) and May 29, 2014 (Specification 4). Specification 4 expresses other concerns that will also be addressed.

Concerns about the Grievant's timing that were expressed in the Decision follow.

With regard to Reason 1, Specification 3:

1. "You arrived at the mine at approximately 10:45 a.m. on March 28, 2014, which was close to the miners [*sic*] lunch break…
2. "[Y]ou left at 14:55 which is 25 minutes past the miner's end of working shift." (Jt. Ex. 4, p. 4.)

With regard to Reason 1, Specification 4:

1. "You arrived to [*sic*] the mine operation at approximately 11:00 a.m. Larry Damas, the person in charge of operations, was on his lunch break. You started the inspection without him which was viewed as demeaning and disrespectful behavior."
2. "You left the mine site at 15:20, which was 50 minutes past the end of the normal mine shift. Mr. Damas had to work unplanned overtime, which interfered with his personal life."

Summary of Management Arguments

With regard to timing:

1) Mine Inspectors are on a "First 40" work schedule.[29]
   a) "Agency Policy Requires Inspectors to Accommodate Mine Operating Hours."
   b) The hours of the mine were 6:00 a.m. to 2:30 p.m.
   c) On May 28th, the Grievant arrived at 10:45 a.m. and left at 2:55 p.m. (Specification 3). The parties stipulated that on May 29th, the Grievant arrived at approximately 11:00 a.m. and left about 3:20 p.m.
      i) His late arrivals caused his late departure.
2) The late arrivals were avoidable.
   a) Grievant's hotel was about a 25 minutes drive from the mine.
   b) "Although Grievant claims he was sick, he admits he did not report or request any sick time the morning of May 28. (Tr. Grievant 708:9-10)." (Br, p, 8.)
   c) "… [H]e contends he arrived late because he was ill the morning of May 29. But Grievant did not seek or record any sick time of May 29." (Br. p. 10.)

Summary of Union Arguments

1. The Proposing Official cited MSHA "practice" of arriving "close to the start of the shift", but
   a) The "practice" is not addressed in any "policy, procedure, handbook, regulation or law" and since an MSHA inspector may perform more than one inspection a day, the "practice" is contrary to workplace reality.
   b) Inspectors are expected to be in the field even on days when MSHA holds a staff meeting and this also rebuts the Proposing Officer's unsupported claim of an existing practice.
   c) The matter was not raised by the Agency in the Weingarten meetings and so the Grievant was "unable to provide necessary context to defend himself from the charge."

   (Br. p 30.)

I find the Union's arguments regarding "practice" persuasive in light of the following considerations:

- there is no substantiation in the arbitration record of the claimed practice,
- the realities of an Inspector's work day (e.g., MSHA meetings, more than one inspection a day.)

From the Decision with regard to behavior (Specification 4):

1. "… [D]uring the inspection you were defensive when asked questions about compliance, and informed Mr. Damas that you could write 8 more citations and shut down the plant."
2. The miners perceived you as arrogant, and indicated that your attitude conveyed to them that your only job was to look for violations and write as many citations as you could possibly find."

[29] From MSHA Administrative Policy and Procedures Manual, Volume 14, Chapter 300:
331 Purpose. Because certain employees must visit mine sites to perform their duties, their work schedules must be adjusted as necessary to accommodate the schedules of the mining industry at large, including such things as the requirement to make second-or third-shift inspections. Therefore, the First 40-Hour Workweek will be used as appropriate to accommodate the industry.

3. "… [T]here were serious discrepancies regarding MSHA's General Inspection Handbook PH13-IV-1, which establishes procedures and practices for appropriate close out conferences. Deviation from MSHA's Closeout Conference procedures is not acceptable."

(Jt. Ex. 4, p. 4.)

Summary of Management arguments:

i) "The Grievant's conduct was unbecoming toward Rhonda Murray." (Br. p. 9.)
   (a) From Murray: "… [H]e was there to make our life hell". (Br., p. 9.) "… [S]he perceived that Grievant was "a show, he had power, and he was going to make it shown, and we were going to do whatever he chose us to do". (Br. p. 10.)
   (b) He was "very unfriendly". (Br. p. 10.)
   (c) From the brief: "…Murray …saw that he searched for places to find fault, even trying to 'antagonize' issues." (Br, p. 10.)

ii) "Grievant's conduct was unbecoming toward Larry Damas." (Br. p. 10.)
   (a) Arrived when Damas was at lunch, went to the bathroom and began inspection on the way back. This caused Damas to "hustle after Grievant", while still eating.
   (b) "Damas remarked … Grievant was 'very demanding: and even 'intimidating'."
      (i) "For example, Damas … felt Grievant was watching him, waiting for Damas to make a mistake so that Grievant could write a citation."
         1. "Grievant confirmed that he cited Damas for failure to use a parking break [*sic*]…."
   (c) "The unprofessional manner in which the Grievant conducted the inspection was strongly supported by Damas's testimony."

   (Br. p. 11.)

iii) "When Damas asked Grievant why he was issuing particular citations, Grievant became so defensive that he threatened to shut the mine down."
   (a) Grievant now claims that he was just trying to brainstorm solutions with Damas because Damas had confided in him that mine management … would not provide him with the materials to conduct the correction. However[,] this is the same explanation Grievant provided in response to allegations of conduct unbecoming at the Calaveras planet, leaving one to doubt that two different inspectors [*sic*] at two different mines would provide the same explanation when the Grievant stated that he'd write citations." (Br. p. 12.)

Summary of Union arguments:

i) "Murray… has credibility issues."
ii) The Grievant honored Damas's request to finish his lunch, went to the restroom and en route took notes in accord with General Inspections Procedure Handbook provision that tells personnel to "utilize time efficiently and effectively".
iii) Based on Damas's input that "management would not provide materials to correct the situation", the Grievant suggested solutions.
iv) Grievant cited the Mine Act to make the point that failure to comply could result in shut down of the mine.
v) Damas's view that the Grievant had discretion whether or not to cite and that issuing citations "constituted a lack of compassion" suggests Damas's view "was based on false assumptions" about an inspector's job.

(Br. p. 31.)

vi) Damas never mentioned a need to leave early.
vii) A substantial delay was caused by meeting the mine's "insistence on an accurate" road measurement.

(Br. p. 32.)

The "Mystery" of Rhonda Murray

In his notes regarding his July 3, 2014 investigatory visit to the Santa Fe Aggregates mine, the Proposing Official addressed an inspection the Grievant conducted at that site on May 29, 2014. (Jt. Ex. 2, pp. 22-4.) The notes indicate a conversation with Santa Fe Administrative Assistant Rhonda Murray. The notes indicate that Murray expressed the following concerns:

- The Grievant found that a form for the inspection held on a Friday (May 23, 2014), was missing.[30] Murray said that was because Monday was a holiday they did not complete the paperwork.
    - In her testimony, Murray elaborated that "we" left early on Friday because of the Monday holiday. (Tr. p. 43, l. 12-15.)
- "Murray stated that … [the Grievant] said, 'I could or couldn't write you the citation, but I will do it". *** Murray also stated that … [the Grievant] was arrogant and with the attitude[,] 'I could shut you down if you don't comply."

Murray's testimony was different. "I explained that [the holiday] to him and he said, … [']I have to write it up because I've already seen it[’], rather than saying, [']okay[’], you know, I understand that. And – but I put the holiday part in there.[’] And he—so it was just kind of a, oh, I could let this go, but I'm not going to let it go because I've already seen it, and this is what it is going to be[’]." (Tr. p. 43, ll., 16-22.)

In my view, the one piece of information that this witness gave that might have come from the Grievant rather than the witness's subjective interpretation of the Grievant's communications is the statement, "I have to write it up because I've already seen it". If such a statement had been made by the Grievant, it could mean nothing more than, "If I see a violation, I have to report it". As noted, the Grievant is a stickler.

Murray testified that she thought that the Grievant had written some 25 citations (Tr. p. 45, ll. 14-16). Damas indicated it was 6 or 7. (Tr. p. 399, ll. 13-20.) Even if Murray's number was a mere guess rather than purposeful exaggeration, her report was an

[30] During cross-examination, Murray stated, "This –that paperwork that he … asked for was prior months before … he had come to the plant." (Tr. p. 50, ll. 23-15.)

additional factor that undermined the value of her testimony. She also testified that the Grievant had "addressed [things] that had never, ever been brought up in all the years of this mine, and wrote us up for it." (Tr. p. 45, ll. 20-22.) Assuming the truth of this assertion, unless it was shown that such write-ups were undeserved (and it was not so shown), the testimony could well indicate quality in the Grievant's work.

Rhonda Murray was not named in either disciplinary document. No questions about the Grievant's interactions with her were raised in the Weingarten interviews. Therefore, the Grievant was given no opportunity to know of or respond to her allegations in advance of her appearance as a witness.[31]

Conclusion: For the above stated reasons, Agency's witness Murray's testimony had no probative value.

The "Mystery" of Hans Wittstrom

Contractor Hans Wittstrom testified about an interchange with the Grievant on the second day of the Santa Fe inspection. As he described the interchange, the Grievant's mood changed from very nice (tr. p. 173, ll. 7-9) to angry and confrontational during which the Grievant used the term "bullshit" (tr. p. 174, l. 12.)

Union Exhibit 16 is a decision from the Federal Mine Safety and Health Review Commission in which ALJ Margaret J. Miller upheld the Grievant's citation regarding Wittstrom's presence at the mine without appropriate training. (Docket No. WEST 2015055; A.C. No. 04-04119-361451.) The background of the interchange addressed in Willstrom's testimony and in the ALJ's decision was the same. Essentially, it involved the Grievant's inquiry into Wittstrom's presence at the mine, his function there, and his related training.

In his testimony, Wittstrom made clear that he thought both the Grievant and the ALJ were in error.

[31] Murray testified that other than her input near the dates of the inspections, she had no further input into the matter, but that she had been contacted recently by a "Teresa" from the Department of Labor who asked her "what my thoughts and what happened". (Tr. p. 46, l. 13-p. 47, l. 6.)

In its brief, the Agency mentions Wittstrom only as backup to its view that the Proposing Official investigated the charges against the Grievant, pointing out that the investigator spoke to Wittstrom. This perplexes me since Wittstrom was not named in the CalCIMA complaints or in the Notice of Proposed Suspension; nevertheless, the Proposing Official who took time to speak to Wittstrom (and Murray), did not have time to speak to the miners named by Herges.

Conclusion: Given the above discussion, I adopt the following analysis from the Union brief:

> The Agency's witness from the Clark Mine appears to have major credibility problems, further undermining the Agency's case. Hans Wittstrom testified that he believed that … [the Grievant] "seemed to have a vendetta or a bee in his bonnet," after he had come out to the pit to locate a certification sticker for a piece of heavy equipment. T, 172-73. Wittstrom told … [the Grievant] that he had come out to the pit approximately four times that year. *Id.* However, in a decision in which the Administrative Law Judge credited … [the Grievant] having gone out to the pit mine on 7/23/14, the judge determined that Wittstrom had been to the Clark mine 12 days in June of 2014 alone. UE 16, p. 2, 3. Therefore, Wittstrom's testimony suggesting … [the Grievant] being "confrontational" or in any way inappropriate should not be given much credence. (P. 13.)

Lawrence Damas

Lawrence Damas testified. Much of his input suffered from shortcomings similar to those that undermined much of the Agency's case: he offered evaluative conclusions rather than details of what took place: The Grievant was "defensive" (tr. p. 392, l. 7) and "intimidating" (tr. p. 396, l. 8). His explanation of "intimidating" (minus the subjectivity) might well describe a conscientious safety inspector:

> A. It's like he was looking for the next citation. Not really wanting to say, "Hey, guys, this is how we can do things better." It's like he was just always looking for something. Going over you with a fine-tooth comb. Very demanding. Like leading by intimidation. (Tr. p. 397, ll. 10-15.)

Subjectivity also undermines Damas' testimony about how he joined the Grievant on the inspection addressed in Reason 1, Specification 4. In his response to the charge in the Notice, the Grievant noted that he was told Damas wanted to finish lunch and then wrote:

> My recollection is that I got out of his way so he could do so. In taking a bathroom break, I had to travel … approximately 100 yards. I took notes of what I saw in walking to and from the restroom…. (Jt. Ex. 3, p, 7.)

Damas's perception:

> A. I was hoping to finish up lunch, but I was told that he had already started the inspection. He was out walking around by the -- by the bathrooms and over to the --
> Q. Could you repeat that, please.

> A. Walking to the -- on the way -- in front of the bathrooms, on the way to the parked vans.
> Q. Thank you. And were you able to complete your lunch?
> A. I went ahead and did not, no. I went ahead and left. I didn't want him walking around there by himself.
> (Tr. p. 389, l. 15-p. 390, l. 1.)

The Matter of Sick Leave

The arguments of the Agency regarding "sick leave" are not persuasive. I note that in his statements as to why he sustained Specification 3, the Deciding Official wrote:

> I took into consideration … that your notes indicate … that you were not feeling well. However[,] there is no indication that you communicated you were not feeling well to your supervisor, and no indication you were not feeling well so that you could concentrate on your health, therefore[,] it appears you are referencing your notes indicating you are not feeling well, as a justification for your misconduct. (Jt. Ex. 4, p. 3.)

The Deciding Official presented a similar comment with regard to the sustaining of Specification 4. (Jt. Ex. 4, p. 4.)

First 40 and Sick Leave. As the Agency points out, the Grievant and other mine inspectors are on the "First 40" work schedule. My understanding, formed by Joint Exhibit 2, pp. 57-59, is that a mine inspector's 40-hour work week has no set days, shifts or hours, but consists of "The first 40 hours of duty performed within a period of not more than 6 days of the administrative workweek" and that during the workweek, an inspector provides work related services to accommodate the industry. (J.E. 2, pp. 57-58, ¶s 331 and 334.)

There is nothing in the arbitration record that provides specific guidance as to how sick leave has to be requested or reported if it is *not* used in place of actual work. For example, if an inspector on the First 40 schedule is ill on day 3 of a planned work week of 5 consecutive days in the field, does sick leave have to be reported/approved if the inspector is able to adjust the week so that a full workweek is completed on days 1-2 and 4-6? In such a situation, has there even been a use of sick leave? More to the point, if sickness at the start of a work day delays the start of the day's work, but the time is made up so that a full 40-hour week of work is completed, is the matter of sick leave a relevant factor?

The above two paragraphs are to give insight to my reaction to the points made by the Deciding Official in the Decision and by the Agency on pages 8 and 10 of its brief that although the Grievant claimed that he started work late on May 28 and 29 because he did not feel well, he did not request or record sick time. Would a sick leave report be required from an inspector who started a day's work later than usual because of illness, still worked during the day, and still put in a full week of work? In the absence of work rules or citations to the contrary, my answer is "No'.

The Grievant's worksheet (MSHA Form 7000-38) shows that he worked 40 hours in the week of May 25-31, 2014. (Jt. Ex. 2, p. 44.)

The parties dispute whether the Grievant kept mine personnel beyond the end of their work days. Rather than attempt to resolve this disagreement, I take the following short cut: even if the management contention is correct, there is no indication in the record that the Grievant had created such a problem on other inspections and so, in my view, it would merit counseling, not inclusion as a justification for a suspension.

Conclusion: For the above stated reasons, Specification 4 does not justify discipline.

Same Response at Two Mines. As the following portion of its brief indicates, the Agency questions a response that the Grievant used to explain his behavior at two different mines: one in Specification 4 and another in Specification 5. As I end my comments on Specification 4 and am about to turn to a discussion of Specification 5, I write the following to provide insight into my thinking about this "bridge issue" concern:

> Grievant now claims he was just trying to brainstorm solutions with Damas because Damas had confided in him that mine management would not believe that it was a violation and would not provide him with the materials to correct the situation. However this is the same explanation that Grievant provided in response to allegations of conduct at the Calaveras Plant, leading one to doubt that two different … [mine representatives] at two different mines would provide the same explanation when the Grievant said that he'd write citations." (Br. p. 12, internal citations omitted.)

I do not share the doubt voiced by the Agency. The arbitration record makes clear that action to correct safety problems revealed through MSHA inspections can be costly both in money and in loss of productivity time. The record also reports that the industry is aware of this reality—as it should be; thus, it does not surprise me that there could be

reluctance on the part of mine ownership at more than one mine to incur such expenses. In short, the testimony by the Grievant of two parallel incidents of this sort does not undermine the credibility of the testimony.

Joint Exhibit 2, p. 66, a document from Calaveras, provides the following insight into a relevant part of the Grievant's methodology. In a passage following the Grievant's observation that lighting in a tunnel had not been repaired, the miners' representative stated (the emphases are by the representative):

> I told him that we were working on the most important violations first, … [the Grievant] said, "I see that you're short staffed," and that he was going to help me get help. "***I'll make them*** (management) fit [*sic*] it." **That's my way** of helping you Ramie"[.]

Reason 1, Specification 5

The conclusions about the Grievant's conduct at Calaveras Materials, Inc., Hughson Pit and Mill, that were expressed in the Decision with regard to Reason 1, Specification 5 follow:

1. In a follow-up inspection regarding "a citation for insufficient illumination at the Railcar Storage Room" "you made a statement" to Ramie Stone, the miner who accompanied you, "to the effect of, 'Are you kidding me? This is unacceptable. This is not lit up enough' and 'I want this room lit up like the coliseum.'"
2. "… Mr. Stone asked you why you didn't show up on June 18, 2014[,] as that was the date set for the termination and you responded that you are a busy man, and that you didn't have to justify your time with him, and that it was none of his business."
3. "Mr. Stone was concerned that you were angry enough to assault him verbally or physically, and was worried for his safety."

(Jt. Ex. 4, pp. 4-5.)

The Decision was taken from the Proposal (Jt. Ex. 2, p. 3). The Proposing Official based his conclusions about the Grievant's conduct on an undated and unsigned document written on Calaveras stationery (J. E. 2, pp. 66-7). "I considered these letters [*sic*] for the notice of suspension." (Tr. p. 530, l. 25-p. 531, l. 1.) The Calaveras document addresses an inspection conducted on June 11 and 12, 2014, but also addresses the Grievant's presence at the facility on June 26, 2014. It identifies the participants as Plant Manager George Lefler, Miners [*sic*] Rep Ramie Stone, and the Grievant. Internal cues (the pronoun "I" and the name voiced in quotes attributed to the Grievant) identify the author as Ramie Stone.

Stone appeared as a witness and, in his testimony, he indicated that he agreed with the Grievant's initial citations. When he joined the inspection,

> … I introduced myself. And he said, "Let's see what we got for previous" -- he was -- "I've already written you up for a couple of citations, and I'll take you over real quick." And we went and looked at the citations. And, uhm, I agreed upon most of them for -- there's no way I could argue with him because it was citeable, you know - - (Tr. p. 145, ll. 2-9.)

Later in his testimony, Stone addressed an aspect of the inspection that took place regarding lighting in the Railcar Storage Room:

> We opened it up and it was dark in there, and he asked me to light it up and I did. I tried to. I hit the switch, and it didn't come on. Took the flashlight out, looked around, and there was some -- there was -- the walkway wasn't perfectly clear, uhm, so he wrote the citation -- *** -- which, you know, was a citation that we earned it. (Tr. p. 145, l. 20-p. 146, l. 3.)

The final point made in the Decision on this Specification was that because of a change in the Grievant's demeanor, Stone became worried for his safety. This apparently comes from the following portion of the Calaveras document:

> I then asked … [the Grievant] why he didn't show up on 6/18/14 as that was the date set for termination. In **a very angry voice … [he] responded that he is a busy man, and that he did not have to justify his time with me, and it was none of my business.** For a moment ***I thought he was angry enough to assault me verbally or physically, I was a little worried.*** A few moments went by and … [he] said "This conversation is going the wrong way." Then he started to act calm later. (Jt. Ex. 2, p. 66; emphasis as in source.)

In part, Stone's testimony parallels his written statement, but, it deviates from it in two significant ways: he backs away from the charge that he feared physical assault and he provides support to an argument made by the Union, namely that the industry's problem with the Grievant was that his citations undercut profitability.

In his letter Stone states, "For a moment ***I thought he was angry enough to assault me verbally or physically, I was a little worried***. Early in his testimony, Stone addressed the same situation, but with a significant modification:

> I felt -- I felt that it was a -- going to be a verbal confrontation or maybe even a physical. Now, grant you, I'm 6'6" and 20 years ago, not many people would have scared me.[32] And *I'm not scared or wasn't scared of … [the Grievant] physically, but I was scared of my job*. I was scared how the inspection went and how the inspection is going. I was afraid for my job, that this was going to get to a point where potentially I could lose my job. (Tr. p. 150. l. 22-p. 151, l. 5; Arbitrator's italics.)

[32] In Joint Exhibit 2, p. 67, Stone reports that he weighs 285 pounds.

When Union counsel Toth first asked, "… [W]hy were you concerned about losing your job", Stone responded that "it looks bad" when a plant goes from few to many citations because it is "the miner's responsibility to keep the plant in working order". (Tr. p. 154, ll. 7-25.) When Toth put a similar question to him later in the cross-examination, Stone indicated that the profit margin is slim in the family-owned industry and that the cost of correcting the citations could undermine job security. (See tr. p. 161, l. 13-p. 163, l. 3.)

Both disciplinary documents were based on Stone's letter; as just discussed, Stone's testimony deviated from the letter. One significant deviation undercut the assertion in the Decision, "Mr. Stone was … worried for his safety." (Jt. Ex. 4, p. 5.) Stone's acknowledgement of the relationship between cost of correction and job security provides support to the Grievant's position as expressed in his response to the Notice of Proposed Suspension.

> My recollection is that Foreman Stone was having trouble getting support from his manager, Mr. Leffler, in order to fix a problem [the lighting in the Railcar Storage Room] he knew existed and had wanted to repair even before any citations were issued. I extended this citation twice to permit additional time to fix this relatively simple condition, because I appreciated how difficult it was for Mr. Stone to get what he needed from his management.
> ***
> … [F]oreman Stone told me that he was concerned that the company would rather shut the mine down than fix it, and he was worried about his job due to those financial constraints. Numerous examples of reported but uncorrected issued may be found in the … [closeout conference, mine citation/order, citation/order documentation, photo mounting worksheets]. (Jt. Ex. 3, pp. 14 & 15.)

Summary: When the assertions Stone made in writing were subjected to cross-examination, Stone modified his assertions in significant ways, adding additional commentary that moved his narrative closer to what the Grievant said in response to the Notice of Proposed Discipline.

Conclusion: Stone's written allegation about the Grievant's anger evolved under cross-examination to a point where it undercut both the witness's credibility and the Deciding Official's finding. Specification 4 is not a valid basis for discipline.

Reason 2, Specification 1

My understanding of the instruction that led to the charge of failure to follow instructions differs from what is expressed in the Agency brief. The brief speaks only to "failure to follow instructions regarding an alleged physical assault". As I understand the matter, the Notice, while confusing, actually charged the Grievant only with not providing a requested memorandum. One can read the confusing text as implying that the Grievant did not follow a rule instructing an employee not to return to a site where that employee had been assaulted [33]

The Decision states, "I am sustaining Reason 2, Specifications [*sic*] 1 as you did not follow the instructions of your supervisor and you did not follow MSHA instructions to report an alleged assault." However, as the Decision continues, the Deciding Official cites (1) delay in providing the requested memorandum, (2) going back to Wm. J. Clark Trucking Service, Inc., Clark Pit three times, *after* being instructed not to return to the mine…." (Jt. Ex. 4, p. 7; italics added.) The brief lists only one failure: that an alleged assault was not reported immediately. (Br. p. 19 ff.) The brief, however, is not the source of the confusion. There is lack of clarity in the proposing document and a serious misreading in the Decision. Because of these flaws, I offer the following arbitrator's exegesis of the texts.

The following presents those portions of Reason 2, Specification 1 of the Notice that address "instructions" to the Grievant:

The first instruction

> On Thursday, July 24, 2014, at around 4:00 p.m., I saw you in the area close to the photocopy machine. … I asked you how your week was going. During your conversation you mentioned that during your inspection at Clark Pit, the owner, Mr. Will Clark told you if he can put a tag to MSHA inspectors, he would have your head mounted on the wall. You were laughing about the comment, and indicated that you did not feel intimidated and that was not a big deal. After you said that, **I asked you to write a memorandum** about the conversation with Mr. Clark and his comments. You did not

[33] The Notice speaks of the requested memorandum and notes that in the memorandum when it was submitted, the Grievant claimed that he had been assaulted by the mine's owner. The Notice then asserts that on *August 12, 2014*, the Proposing Official instructed the Grievant not to return to the mine and that the Grievant had returned to the mine on *July 23 and 30 and August 7*.

provide a memo regarding the incident until Wednesday, August 6, which was five days after you were notified of a mandatory Weingarten meeting scheduled to discuss allegations of inappropriate behavior exhibited by you, while conducting mine inspections, and thirteen (13) days after my original request for you to draft a memo regarding the comments made at the mine.

The second instruction

To my surprise, in the memo you alleged that you were assaulted by Mr. Clark. After my return to the Field Office and on your first day of work for that week, Tuesday, August 12, 2014, I asked you if there were any outstanding violations at Clark Pit, and your response was that five were outstanding. **I instructed you not to return to that mine operation**, and that I will assign another inspector to take care of the outstanding violations. During my review of the inspection report, I found that after your alleged incident on July 22, 2014, you returned back to the mine the next day on July 23. Then on the next week, July 30, 2014, you went back to the mine operation and completed the inspection

A third matter?

In addition, on August 6, the day that you e-mail [*sic*] me the memorandum, you scheduled a follow-up inspection for the next day, August 7, 2014 at Clark Pit. On August 7, you returned back to the mine and conducted the scheduled follow-up inspection in which you issued one citation, terminated two and extended two citations. This was alarming to me, considering your Augusts [*sic*] 6 memorandum where you alleged that you were assaulted by Mr. Clark, yet you scheduled and went back to Clark Pit on August 7, 2014.

In your memorandum you wrote: "When I returned to the office, I reported this assault to you (at approximately 1500 PDT on Thursday, 07 /24/2014,) and you suggested I draft a memorandum in case the operator complained. That was not the response that I expected from my supervisor." This information is inaccurate. *** *If the alleged assault occurred*, **then you failed to follow MSHA procedures that require the inspector to leave the scene** where a confrontation appears to be developing. The procedure also requires that if an inspector believes that he/ she may be subject to physical harm or assault, the inspector should leave the property immediately and promptly notify his/her supervisor. You failed to comply with these procedures.

As an appendix to its brief with regard to the charge of Failure to Follow Instructions, the Agency provided the texts of *Ellis A. Archeda v. Department of Defense* (121 MSPE 314), *James M. Hamilton v. U.S. Postal Service* (71 MSPR 547), and *Jerry W. Blevins v. Department of the Army* (26 MSPR 101). Quoting *Hamilton* (at 546 [p. 5 in the attached text]), *Archeda* states:

> To prove a charge of failure to follow instructions, an agency much establish that (1) the employee was given proper instructions, and (2) the employee failed to follow the instructions, without regard to whether the failure was intentional or unintentional. (Attachment, p. 4[34].)

[34]Page references herein to the cited cases are to the page numbers in the attachments to the brief.

Archeda notes that the instructions in that case were "the appellant was returned to full duty with no restrictions based on an agreement that he would provide the disability report for his new VA rating to the physician assistant". He failed to do so. Later that same month, "the clinic requested that the appellant provide a copy of the [relevant] medical documentation." He did not do so, was further instructed to do so, failed to comply, and was suspended for 14 days for failure to follow this last request. Later, the agency issued yet another request. (*Archeda,* p. 2.) This adds up to 1 agreement and 2 instructions that were not honored before a suspension and yet another ignored instruction before removal. In *Blevins*, disciplinary action came after Blevins did not follow a series of orders—including a written deadline—to turn in ID cards for overstamping. Although Blevins thought the orders were improper, he "was obligated to obey the agency's order while taking whatever necessary steps he thought appropriate to challenge the ultimate validity of the order and policy". (*Blevins*, p. 2.)

The conclusions about the Grievant's conduct in the case before me that were expressed in the Decision with regard to Reason 2, Specification 2 follow:

1. "… [Y]ou did not follow the instructions of your supervisor…."
    a. "… [The Proposing Official] requested you to write a memorandum about the conversation with Mr. Clark" in which he "told you if he can put a tag to MSHA inspectors he would have your head mounted on the wall".
        i. "You did not provide a memo regarding the incident until Wednesday, August 6, which was five (5) days after you were notified of a mandatory Weingarten meeting… and thirteen (13) days after … [the] request for you to draft a memo regarding the comments at the mine."
    b. "You were instructed not to return to Wm. J. Clark Trucking Service, Inc., Clark Pit until the incident had been investigated. You went back to the mine three (3) times, after having been instructed not to return to the mine, [*sic*] until the alleged incident had been investigated."
2. "… [Y]ou did not follow MSHA instructions to report an alleged assault."
    a. You allege in your memo that "you were assaulted by Mr. Clark."
    b. "If the alleged assault occurred, then you failed to follow MSHA procedures that
        i. "require the inspector to leave the scene where a confrontation appears to be developing.
        ii. "The procedure also requires that if an inspector believes that the/she may be subject to physical harm or assault, the inspector should leave the property immediately and promptly notify his/her supervisor."

(J.E. 4, pp. 6-7.)

The contrasts between the case before me and *Archeda* and *Blevins* are striking. The federal employees in the cited cases did not comply with any of the several orders given; the Grievant in this case complied. The Grievant did submit the memorandum. His "sin" was that his compliance came thirteen days after the request. I note that the official who requested the memorandum did not establish any guidance as to when the response should be submitted. What the Agency terms "Failure to Follow Instructions" was compliance within 13 days.

The linkage made in the two disciplining documents that the Grievant's compliance came after he received notice of the Weingarten session has no persuasive force. At best, if the notice motivated the Grievant to comply, it would be analogous to a reminder of a request. While it appears that the linkage was placed in the documents to buttress the charge of "Failure to Follow Instructions", the facts are (1) no deadline was given for the instruction to be followed and (2) the instruction was followed. Even assuming that the "request" met the first part of the *Hamilton* test ("the employee was given proper instructions"), the fact is that the Grievant in the case before me followed the instructions. The Agency failed to prove this aspect of the charge of failure to follow instructions.

The assertion in the Decision that the Grievant "went back to the mine three (3) times, after having been instructed not to return to the mine" is based upon a misreading of what the Notice states. According to the Notice, the instruction not to return to the mine took place on *August 12, 2014*. The Notice also asserts that *after July 22, 2014* (the date the Grievant claims to have been assaulted), the Grievant went back to the "mine operation" on three occasions. According to the Notice the last of the three visits was on *August 7, 2014.* The Deciding Official misread the record and conflated two separate allegations.

The third charge, "If the alleged assault occurred, you failed to follow MSHA procedures that require the inspector to leave the scene … and promptly notify his/her supervisor." Input from the Grievant that was not controverted established that he did leave the scene. He also testified that he told his Supervisor of the assault on the very next day—his first day back at the Vacaville office.

In his Notice of Proposed Suspension, the Proposing Official placed his being informed when he read the Grievant's Memorandum: "To my surprise, in the memo you alleged that you were assaulted by Mr. Clark." (Jt. Ex. 3, p. 4.) During his appearance at the arbitration, the following exchange took place:

> Q. [Branch] Did Mr. … [the Grievant] report the incident to you?
> A. In writing?
> Q. Did he report the incident to you?
> A. Well, I recall that during that week, after I saw Mr. … [the Grievant], I think it was on Thursday afternoon, I asked, "how was your week?" Oh, everything was good. He mentioned that he had interaction with Mr. Clark. He mentioned that if he can "put a tag on that inspector's head, he would be hanging his head on the wall."
> THE ARBITRATOR: So I think -- I appreciate the detail. But the strict answer to the question was, did he report it to you? What I understand from your answer was yes, he did.
> MS. BRANCH: Then I was going to ask what specifically did he report to him, and I think … [the witness] has provided that response.
> (Tr. p. 513, p. 515, l. 13-p. 516, l. 3.)

While the passage is not as clear as it could be—perhaps because of my interjection—my understanding is that it supports the Grievant's contention that on his first day back at the office, he told his supervisor (the Proposing Official) that he had been assaulted. First, I note that when the witness was asked if a report was made, rather than responding "Yes" or "No", he asked, "In writing?" This strongly suggests that the witness was aware of two reports (one in person on July 24th and one in the memorandum) and was trying to steer the exchange to his assertion in the Notice of Proposed Discipline rather than to provide a response that would confirm the Grievant's version. This impression is strengthened by the witness's continuation with details about what both he and the Grievant discussed on that first day back at the office. Such a torrent of unresponsive details undermines credibility.

For the above stated reasons, the record has convinced me that it was more probable than not that the Grievant reported that he was assaulted by Clark on July 24, 2014, his first day back at the Vacaville office.

In his response to the proposed discipline, the Grievant made the following points:

- The assault took place on July 22, 2014, in the office of the mine's owner, some five miles from the mine. (Jt. Ex. 3, p. 17.)

- On July 23, 2014, the Grievant saw a dust cloud over the mine. Because he was under the impression that all miners were to be in training, he went to check. He did not expect to see the owner at the mine since he had been told by the mine's foreman that the owner seldom visited the site. (Jt. Ex. 3, pp. 18-l9.)

In short, the exchange with Clark took place at Clark's office which was 5 miles from Clark Pit, the site specified in the order.

Conclusions: The Grievant supplied the requested memorandum. It is more likely than not that the Grievant reported the assault he alleged on his first day back at the office, which was on the day after the event. The Grievant did not return to the site of the event; he did return to the mine site, some five miles away.

Reason 2, Specification 1 was not substantiated.

Summary: The Agency charged the Grievant with Reason 1, Specification 1-6 and Reason 2, Specification 1.

As the above discussion reports, it is my determination from the arbitration record that the Agency failed to prove that the charged conduct occurred.

III. THE MATTER OF A ULP

Summary of Findings

1. The Grievant who had no prior discipline received a three-day suspension; a violation of the CBA, Article 13, Section 1 A.
2. Prior counselings, reported to be in Grievant's file were too old to be considered as discipline was contemplated. (Six months or more in the past.)
   a) If the file contained continuing complaints of the nature claimed by the Agency, the fact that the complaints were not elevated to discipline would indicate either that the Agency had come to accept the Grievant's level of performance or that the Grievant's performance had reformed to a level that was acceptable to the Agency.
   b) Evidence indicates the file was used by both Proposing and Deciding Officials in determining credibility.
3. In large part, the Specifications lack the specificity and detail required by Article 13, B of the CBA and by federal requirements.
4. The investigation was inadequate.
   a) Named sources of the hearsay complaints from CalCIMA were not interviewed.
   b) The investigator was not objective.
5. Reason 1, Specification 1 was not proven.

a) Other than the one miner who testified, all other information was hearsay.
b) The one miner's testimony did not substantiate the Specification.

6. Reason 1, Specification 2 was not proven.
   a) Facts established during the arbitration hearing indicate that a closeout conference took place after the Grievant modified citation # 8699484's gravity.
   b) No closeout took place on December 9, 2013, but the editorial modification made on citation # 8699484 on that date was a check-mark correction that had been overlooked when the substantive closeout took place on December 3rd.
7. Reason 1, Specifications 3 and 4 were not proven.
   a) Agency policy requires inspectors to accommodate mine hours, but the Agency implication that MSHA inspectors are to conform their schedules to the start and stop time of the miners is not supported by the record.
      (1) Uncontested testimony from the Grievant established that his illness on May 28 and May 29, 2014, caused his late work start on those days.
      (2) The Grievant was subject to the "First 40" rule. Since he performed 40 hours of work on the week involved, and in the absence of any evidence to the contrary, it was not necessary for him to request sick leave for late starts on May 28 and 29, 2014.
   b) Rhonda Murray was not cited in the Proposing document or addressed in the Weingarten meetings; therefore, her use as an Agency witness was to address matters the Grievant had had no opportunity to answer.
      (1) Given her obvious animus to the Grievant and her exaggerated testimony, she was not a credible witness.
   c) William Wittstrom was not a credible witness.
8. Reason 1, Specification 5 was not proven.
   a) Specification 5 was based upon a written communication from Ramie Stone. In his appearance as a witness, Stone modified his input upon which Specification 5 was based to the extent that it no longer undercut the Grievant's defense. Moreover, the modifications undermined Stone's credibility and this served to undercut his reports about the conversation in the Railcar Storage Room.
9. Reason 1, Specification 6 did not provide a basis upon which to impose discipline.
   a) The Specification was based upon a patent misreading of an email the Grievant wrote to his union, seeking advice and help.
   b) The email was a protected communication from a union member (and union steward) to his Union. The Agency obtained a copy of the document because, on the advice of the Union, the Grievant sent it to the District Manager seeking discussion of his concerns.
   c) Agency arguments that question the right of an expert Mine Safety and Health Inspector to have a view about MSHA work that differs from an inspection expert who happens to be a member of management confuse expertise and authority.
10. Reason 2, Specification 1 is contrary to the facts established at the arbitration.
    a) A memorandum was requested. The Grievant provided the memorandum.
    b) It is more probable than not that the Grievant reported the incident with mine owner Clark on the day after the occurrence, the first day the Grievant was back at the Vacaville office.
    c) The specifics in the Suspension Notice Decision regarding the charge of returning to the mine after being instructed not to do so are in error: the dates of "return" came before the instruction was given.
    d) The assault took place five miles away from the mine to which the Grievant went; thus no violation of an Agency rule was proven.

The Agency did not prove its case.

I have presented this extensive outline of my findings up to this point because, in my view, my response to the Union's contentions regarding the Agency's motives for disciplining the Grievant and the Agency's rebuttals to those contentions can only be formed by the totality of what was revealed during the seven days of hearing. The Union contends:

> … [T]he Agency's primary aim in bringing this disciplinary action was to silence an outspoken employee and Union representative from making clearly protected workplace complaints, including substantial union activity and a whistleblower complaint involving members of management who were involved with the disciplinary action against … [the Grievant]. The Agency's inability to demonstrate just and sufficient cause for the various specifications means that it cannot substantiate the disciplinary action…. (Br. p. 1.)

Just as the purpose of an investigation into charges against an employee is to make a fair study of what happened, the purpose of the agent of the employer who makes decisions about discipline is to consider the charges and their support and the defense and its support fairly and to come to conclusions about what happened that are based upon that fair consideration. I have already expressed my view that the investigation was inadequate. Of even greater concern is my conclusion from the total record that the Suspension Notice Decision is seriously flawed.

Specifically, I find the Decision to be flawed in the following ways. 1. A reading of the document reveals that the thoughtful analysis of the Notice of Proposed Discipline provided to the Agency by Union official Holly Thomas, the Grievant's primary Union representative, was not considered. (Union Exhibit 3; see, Appendix to this Opinion.) 2. The Decision's repetitive rejection of the Grievant's response to the Notice by a recitation of some version of "I find your denials … not credible based upon collaborative statements made by the miners, and the repetitive nature of complaints received by this agency …" without any analysis that would justify rejection leads me to the conclusion that the Decision was written without any consideration of statements made by the Union and by the Grievant and without weighing the facts, but rather to justify action against the Grievant. As such these flaws violate basic fairness, just cause and 5 CFR 752.203 (e) that provides:

> In arriving at its decision, the agency <u>will consider</u> only the reasons specified in the notice of proposed action and <u>any answer of the employee or his or her representative, or both</u>, made to a designated official. (Arbitrator's underlining.)

I have discussed the Agency's references to prior complaints from miners earlier in this document (see pages 9 ff.). I summarize the key points here.

1. At the time of the Notice of Proposed Suspension, items in the Grievant's file were too old to use.
2. The June 17, 2014, complaints from CalCIMA were based on inspections that had taken place on November 13, 2013, and December 3, 4, and 9, 2013.
3. The only specific claim in testimony and in the Agency brief of continuous complaints against the Grievant were for June, July and August of 2014. (Br. p. 31.)

In short, in his Decision, the Deciding Official dismissed the Grievant's defense citing prior complaints against him, almost as a refrain. The Official provides no identification of what complaints he had in mind, no analysis of how the complaints undermined the Grievant's detailed responses, and no proof that there were complaints as referenced in the refrain. Moreover; if such a record of complaints existed, the Agency does not explain why the suspension currently under review was the first discipline imposed on the Grievant.[35]

The record makes clear that that management officials in the Vacaville office of MSHA considered the Grievant to be a bothersome employee because of his practice of questioning management. Two quick references: the testimony of the Proposing Official

[35] The Agency argues "Through testimony about all the actions described above, the Agency has demonstrated Grievant was rude and demeaning to at least 13 of miners and/or mine employees at several mining companies throughout California." (Br. p. 19.) The Agency does not mention the personnel it has in mind, but the following witnesses (listed in the order in which they appeared) were called by the Agency. (Strictly speaking, one was a contractor rather than an employee, but that is not my point here.)

Agency witness	Arbitrator's assessment (in brief)
Rhonda Murray	Testimony had no probative value.
Dale Curtis	Referred to complaints raised at the CalCIMA/MSHA meeting on June 17, 2014, but offered no other specifics.
Scott Ross	Testimony was about close-out conference, not Grievant's conduct.
Ramie Stone	In testimony, he significantly modified what was implied in his written complaint
Hans Wittstrom	Not credible. Contested the Grievant's citation; the citation was upheld by an ALJ.
Michael Herges	His testimony about conduct was all hearsay. Named 7 mine personnel; only one (Keisling) testified. Input allegedly from others was unsubstantiated hearsay.
Ron Keisling	Testimony did not back up allegation
Lawrence Damas	Testimony colored by subjectivity. In essence, testimony corroborated Grievant's testimony about how the inspection started, rather than Agency's assessment that it was "demeaning and disrespectful".

about the Grievant's contribution to his decision to leave supervisory ranks (see page 49), the misreading of the Grievant's email regarding the former ADM (see pages 49 ff.). It is also clear that this tendency to question infused his performance as a Union Shop Steward. The discussion about the Grievant by mine managements at the CalCIMA meeting on June 17, 2014, and the subsequent input from the industry make clear that his stickler methodology and his propensity to issue citations was of great concern to the industry.

As the analysis of the allegations expressed in this Opinion shows, both the industry and the Agency failed to make a credible case against the Grievant.

The arbitration record, taken in its totality, convinces me of the correctness of the following contentions by the Union:

1. "… [T]he agency's disciplinary action is a clear infringement on protected union and individual workplace grievance rights protected under both the parties' agreement and under federal law."
2. "…[T]he Agency's primary aim in bringing this disciplinary action was to silence an outspoken employee and Union representative from making clearly protected workplace complaints…."

(Br. p. 1.)

In light of the Agency's failure to substantiate its claim of complaints from miners and miners' representatives, the following exchange between Union Counsel Toth and the District Manager is significant:

> MR. TOTH: Q. Did you consider that the mining operators might be trying to get rid of or to get into trouble a mining inspector, … [the Grievant] in particular, who had a tendency to cite?
> A. If the hourly people and miners' reps had not complained, then that would be a consideration. (Tr. p. 648, ll. 18-23.)

AWARD

Upon review of the evidence and arguments presented by the parties, and pursuant to the reasoning, considerations, and conclusions presented in the foregoing discussion, it is my determination that management did not have just and sufficient cause to suspend the Grievant for 3 days for misconduct. The agency's decision was not consistent with federal law and the parties' agreement.

I also find that the disciplinary action infringed on protected union and individual workplace grievance rights protected under both the parties' agreement and under federal law.

In remedy thereof, the Agency shall remove the suspension from all records pertaining to the Grievant and shall make him whole. It is the intent of this make whole remedy that with regard to work record, wages, benefits, seniority and all other terms and conditions of his employment, the Grievant shall become as he would have been had the suspension not taken place.

I retain jurisdiction to assist the parties in the understanding and application of this remedy and, as requested by the Union, to determine the appropriateness of attorneys' fees.

Respectfully submitted on this, the 31st day of July, 2018, by

Burton White
Arbitrator

Appendix

Reasoning Regarding Admission of Union Exhibits 3, 19 (and 20)

Union Exhibit 3.

Management offers two arguments for not considering Union Exhibit 3.

Management first argues, "The Union's Grievance, at Un. Ex. 3, should not be considered because the CBA contemplates that discipline will be resolved through the process of Art. 13, sections 2-3 of the CBA." The Agency correctly points out that under the CBA, the steps in handling a suspension of 14 days or less is notice, right to respond, and appeal to arbitration. (Br. p. 23.) In short, a grievance was not needed to move to arbitration a dispute such as the suspension that is addressed in this case. However, the matter does not end with this observation.

In resolving this concern, I think it helpful to have before us a relevant portion of Article 13, Section 2, Subsection B:

> The notice [of proposed suspension] … must clearly state the employee's right to make a response to the proposal and his/her right to be represented by the NCFLL.

The Notice of Proposed Suspension ("Notice") stated that the Grievant had "the right to reply … either with or without the assistance of a representative." That is a fair paraphrase of the provision in the CBA; however, the Notice went on to state, "You must designate your representative, if any … in writing." (Jt. Ex. 2, pp. 6-7.) I find no such requirement in the CBA and neither party apprised me of any such requirement.[36]

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[36] Article 15, Section 4 uses the term "designated" in Subsections A, C, and D, but this language refers to disputes processed through Article 15, not those processed through Article 13, as is the matter before me. Article 13 states that the notice of proposed suspension "must clearly state the employee's right … to be represented by the NCFLL"; it does not state, "You must designate your representative, if any … in writing."
Early in the hearing, I made the following assertion to the parties:

> …[I]t's my responsibility in the federal case to be guided by relevant statutes, rules, and regulations, as well as the collective bargaining agreement. But I -- it is, in my view, the responsibility of the parties to bring to my attention any of these aspects that I should consider rather than my responsibility to research it. (Tr. p. 29, l. 25-p. 30, l. 7.)

In any case, I note that Union Exhibit 3, a document with attachments, was sent on March 6, 2015, to the Deciding Official and to the Regional Labor Relations Officer who was then assigned to this case. On its face, this document applied to more than the suspension. The submission addresses the suspension that is covered by Article 13 of the CBA and it also addresses Articles 5 (Rights of Employees) and 35 (Harassing Conduct and Workplace Violence) of the CBA as well as 5 U.S.C. 2302 (prohibited personnel practices) and 5 CFR 752.202 ("b. An agency may not take a suspension against an employee on the basis of any reason prohibited by 5 U.S.C. 2302.")

What is important is what the Union communicated to the Agency through documents that are included in this exhibit. *Of particular importance is the 22-page critique by Holly Thomas who has been the Grievant's prime Union representative in this matter.* (Tr. p. 419, ll. 12-17.) This document clearly indicated that it related to the "notice of proposed suspension to … [Grievant]". Throughout her document, Ms. Thomas pointed out what I, as Arbitrator, agree are serious flaws in the Notice. In my view, management would have been well advised to have considered Ms. Thomas's document before proceeding with the disciplinary suspension at all, or, at least, without consideration of Ms. Thomas's critique before it proceeded. This is particularly true in light of how closely the Decision followed the Notice without any indication that the Grievant's defense (Ms. Thomas's document, the Grievant's Weingarten responses, and the Grievant's written response to the Notice) had been taken into consideration.

Management "furthermore objects to consideration of the grievance at Union Exhibit 3 because the [U]nion has used the bare language therein about "hostility toward" the Grievant as a Trojan horse to enter voluminous proof which has needlessly prolonged these proceedings. (See Union Exhibit 3 at 8, 16.)" (Br. p. 23.) Management argues that the "Grievant's retaliation defense is not credible" and that "Grievant's claims of anti-union animus are unfounded". (Br. pp. 23 & 24). As the Opinion indicates, I have found that the record supports the Grievant's retaliation defense.

Ruling: Union Exhibit 3 is admitted.

Union Exhibit 19 (and 20).

First, I present insight into my understanding of what the Agency refers to as Union Exhibit 19. In my papers from the hearing, Exhibit 19 is a nineteen-page document from the Grievant. In addition, there was a submission of several hundred pages that was presented during the hearing.[37] To distinguish these two, I refer to them separately as Union Exhibits 19 and 20.

I confess to being confused about the first Management objection in its post-hearing brief to admission of Union Exhibit 19:

> Management's objections include that consideration of Union 19 is contrary to the CBA, Article 16, section 6, which states that the Arbitrator lacks "authority to consider new issues, allegations, and defenses raised by the grievant or management that have not been previously raised at or before the Step 2 grievance meeting." Union Exhibit 19 is composed almost *entirely* of new issues, allegations, and defenses which were not raised before the arbitration." (Br. p. 25.)

This matter was discussed during the hearing. (See tr. p. 248, l. 7-250, l.7.) The Agency had helped me to understand that under the CBA, a dispute such as the 3-day suspension before me did not go through the grievance procedure; it was directly referred to arbitration. In short, this matter got to arbitration under Article 13, not under Article 16. The Article 13 process does not have a Step 2 grievance meeting.

In the discussion during the hearing that related to this question, Management acknowledged that the CBA was not perfectly written, but still argued that Article 16, Section 6, should prevail with regard to Union Exhibit 19 (and 20) even though the Article 16 language applied to a grievance while the suspension got to arbitration through Article 13 where a grievance was not required. In the end, I ruled, "… based upon the reasoning I've just articulated, that Article 16, Section 6F, limitations on the arbitrator's authority, do not apply to me in this case". (Tr. p. 250, ll. 4-7.)

The parties that placed the restriction in Article 16 could have, if they had so desired, placed a similar restriction in Article 13. They did not do so.

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[37] My estimate (by weight) is that there are just over 700 pages in the submission. This agrees with the Agency's report of 700 pages.

Perhaps, of more importance, as noted above with regard to the admission into the record of Union Exhibit 3, the Union's response to the Notice of Proposed Suspension, referenced Articles 5 (Rights of Employees) and 35 (Harassing Conduct and Workplace Violence) of the CBA as well as 5 U.S.C. 2302 (prohibited personnel practices) and 5 CFR 752.202 b.

Based upon my readings of the difference in language between Articles 13 and 16 of the CBA and the fact that the Union had advised the Agency of its view that the dispute went beyond a contractual grievance, Union Exhibits 19 and 20 are admitted.