In the Matter of the Arbitration

between United Food and Commercial Workers ("UFCW" or "Union") on behalf of grievant Richard Furman,

and

The State of Washington, Liquor Control Board ("Agency" or "LCB").

Case Numbers:	American Arbitration Association case No. 75 390 L00210 07, Arbitrator's case No. I69.
Representing UFCW:	Mark E. Brennan and Robblee Brennan & Detwiler, P.L.L.P., 1100 Olive Way, Suite 1620, Seattle, WA 98101-7959.
Representing the Board:	Morgan B. Damerow, Asst. Attorney General, Labor & Personnel Division, P.O. Box 40145, Olympia, WA 98504-0145
Arbitrator:	Howell L. Lankford, P.O. Box 22331, Milwaukie, OR 97269-0331.
Hearing held:	In the Board's offices in Olympia, Washington, on March 6, 2008.
Witnesses for UFCW:	Denise Rocker and Richard Furman.
Witness for the Board:	Eddie Cantu, Doug Kroll, and Pat Kohler.
Post-hearing argument received:	From the Board by email on April 11 and from UFCW on April 14, timely postmarked on April 11, 2008.
Date of this award:	April 29, 2008.

The Union challenges Mr. Furman's demotion from Assistant Manager of a retail store to clerk. The LCB argued that the grievance was not substantively arbitrable; and I overruled that objection in a separate, preliminary hearing and award. There are no remaining issues of substantive or procedural arbitrability, and the parties agree that the issue in this proceeding is whether Mr. Furman was demoted for just cause and, if not, what would be the appropriate remedy. They also agree that the burden of proof is on the LCB to establish just cause for the demotion. The hearing was orderly. Each party had the opportunity to present evidence, to call and to cross examine witnesses, and to argue the case. The parties filed timely post-hearing briefs.

FACTS

The employer and the audit. The Washington Liquor Control Board operates retail liquor stores throughout the State. (It also contracts with others to operate such stores, but those contract stores are not involved in this case.) Each store is staffed by a Manager, one or more Assistant Managers, and Clerks. The Clerks and Assistant Managers are in the bargaining unit represented by UFCW; and the Managers are in a separate bargaining unit represented by WPEA. Stores are organized into Districts, and the District Managers are responsible for day to day personnel decisions within their districts. Their disciplinary authority ends with written warnings and counselings. More serious discipline is determined by the Administrative Director, who supervises the District Managers and is the Agency's appointing authority.

In January of 2006 the Administrative Director instructed each District Manager to do a complete audit of every store for one month. Among many other considerations, the audit was to include a comparison of payroll/work schedules and alarm records, i.e. the computer records of when each store's alarm system was disarmed each morning and armed at the end of each workday. District Manager Cantu did the audit of the store at which Mr. Furman was Assistant Manager. Mr. Cantu looked at the records for December, 2005. He had many stores to examine, and it took until mid-March to complete the audit of the December records. That audit disclosed some discrepancies between Mr. Furman's morning sign-in times and the disarm times from the alarm system; and the Administrative Director told Mr. Cantu to see if Mr. Furman had an explanation for those discrepancies.

The store. The store in question here, #68, is located in a small shopping center in Lakewood, Washington. The Board apparently leases the space, and the landlord is responsible for some of the features of the facilities, including, in particular, the control of employee parking and shopping center's exterior cleanliness. There is no dispute that at some time before the events at issue in this case the landlord sent a memo to tenants requiring that all employees park behind the stores, rather than parking in the customer lot in front of the stores. The landlord granted an exception to LCD employees because the back entrance of Store #68 has been replaced by the store's loading dock, so there is no

longer a keyed rear entrance. The landlord had once employed a service to pick up trash in the customer lot in front of the stores, but that service had been discontinued sometime before December, 2005, leaving the tenants to deal with trash, etc. around their stores.

How the grievance arose. Mr. Furman began working for the Board as a part-time Clerk in one of the Olympia retail stores in about 1995; and he promoted to Assistant Manager in Silverdale in about 1998. As an Assistant Manager (I or II) he worked in stores in Shelton and Lakewood; and he was Acting Manager of a Tacoma store (#122) from April to October, 2006, after which he returned to Lakewood.

On April 7, 2006, a Friday, District Manager Cantu—who was not the District Manager for Acting Store Manager Furman's Tacoma store—approached Mr. Furman at about 5:00 p.m. and asked him to step into the store's office. Mr. Cantu presented Mr. Furman with a list of nine dates from the prior December and told him that his sign-in time on those dates at the Lakewood store was substantially earlier than the time that the store alarm had been deactivated. The sheet listed the relevant times for each date but did not show their days of the week. Mr. Cantu asked for Mr. Furman's explanation of those discrepancies for dates which were three to four months in the past.

The April 7 meeting was very brief. Mr. Furman was extremely frustrated at the timing of the inquiry, i.e. 5:00 on a busy Friday evening, and he was offended at the apparent suggestion that he had been stealing time. His only immediate response was to suggest that the office clocks might not match the alarm system time. After Mr. Cantu left, Mr. Furman immediately called his own District Manager to complain of the apparent insinuation that he had been stealing time and to object to the horrible timing of Mr. Cantu's visit. Mr. Furman then wrote a letter to the Retail Operations Manager making those same objections and pointing out that the timing of Mr. Cantu's visit had undermined his efforts to establish good managerial relations with the staff of the Tacoma store. There was never any response to that letter.

Meanwhile, the Administrative Director told Mr. Cantu to take a look at the data for January and February. That examination was completed and emailed to the Administrative Director on April 21; it disclosed sign-in discrepancies similar to December's. LCD calculates the total pay discrepancy at three hours of straight time pay and 2.2 hours of overtime. (Post-Hearing Brief at 8.)

Mr. Furman was not asked to explain those further discrepancies for seven months, until he received the Agency's predisciplinary letter dated October 4, 2006. That letter—which went on for almost 70 pages—advised Mr. Furman that the Agency was considering his discipline or discharge because it appeared that he "falsified work schedules and payroll records resulting in [his] being paid for time that [he] did not actually work." Mr. Furman and his Union representative appeared and contested the charges, and several co-workers wrote letters on his behalf, but the Agency demoted him to Clerk effective February 8, 2007. The Union grieved the demotion.

DISCUSSION

The parties' collective bargaining agreement requires just cause for discipline. Many learned volumes have been written on the notion of just cause in American labor arbitration. In the end, however, just cause is simply a distillation of our shared response to some of the common, occasional shortcomings of employee discipline. Most of the issues arising under the just cause standard divide into three classes: It is not just to discipline an employee for misbehavior that he or she did not actually commit. It is not just to exact a disciplinary penalty which the employee could not have known to be a possible consequence of such misbehavior. And it is not just to administer the disciplinary process in fundamentally unfair and irregular ways. In the case at hand, the Union points particularly to what it characterizes as the delay in bringing the Agency's allegations to Mr. Furman's attention.

Was the discipline process fair and regular? The wall-to-wall audit that gave rise to this case was labor-intensive and lengthy. Although the audit was ordered in January—and addressed the most recently completed month, December, 2005—it was not completed until mid-March; and it was not until April that Mr. Furman was first asked about how he had started the day three to four months ago, in December. When the Agency decided to take a look at January and February, too, it neglected to bring the resulting part of the charges to Mr. Furman's attention until October. Who could possibly feel that Mr. Furman had a fair opportunity to respond to the charges against him in the face of such delay?

The conclusion of unfairness here has two, somewhat separate legal bases. The first is Constitutional: A non-probationary public employee has a property interest in his or her employment and may be deprived of that employment only through the appropriate process. As part of that "due process" requirement, an agency must give an employee an opportunity to respond to disciplinary charges before the disciplinary decision is made. Washington cases commonly refer to that requirement by the case names that establish it in Federal and State law, the *Loudermill/Danielson* rule. Washington case law makes it particularly clear that the whole point of that opportunity is that the employee be allowed to contest the *factual* basis of the proposed discipline:

> [A] pretermination hearing is not meant to resolve all of the issues, but merely to give the employee an opportunity to respond to the facts upon which a charge is based... *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 130, 1993.[1]

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1. The Washington Court of Appeals had held (63 Wn.App. 422 (1992)) that the employee must also be given an opportunity to respond to the proposed *theory* of the contemplated disciplinary action; and the Supreme Court overruled that decision, making it clear that the whole point of the rule is the potential response to the *factual* allegations.

It seems elementary that an "opportunity to respond to the facts upon which a charge is based" requires some reasonable dispatch in bringing the charge to the attention of the employee.

The second legal basis for the promptness requirement rests on common sense. Even in the private sector, where the *Loudermill/Danielson* rule does not apply, most mainline American labor arbitrators insist that the employee be given a meaningful opportunity *at some point* to contest disciplinary charges. When charges are not brought to his or her attention for an inordinately long time, memory fades, witnesses vanish and any meaningful opportunity to contest the factual allegations is lost for good.

In this case, the charges first brought to Mr. Furman's attention in October would have required him to recall how had begun his work day, day by day, seven to nine months in the past. That delay deprived him of any reasonable opportunity, as the Washington Supreme Court put it, " to respond to the facts upon which [the] charge [was] based." The Agency's only explanation for the six month delay—from April to October—is that "it would have been improper for the LCB to deny Mr. Furman of his opportunity [to serve as an Acting Manager] when there had been no findings of misconduct." (Post-Hearing Brief at 18-19.) I assume that Mr. Furman's performance of a difficult assignment as Acting Manager over that six month period really was the Agency's reason for not proceeding with his discipline; but whether a case arises under the *Loudermill/Danielson* rule or under the private sector common sense rule, even if an employer's reason for delay is genuinely compelling, such a delay deprives the employee of any meaningful opportunity to respond to the charges and is unacceptable under any just cause standard.

Did Mr. Furman do what he was disciplined for? When the Agency finally brought these charges to Mr. Furman's attention, he offered three different sorts of general responses to them. First—in April and again in October—he suggested that the store clock and the alarm system clock might have been out of sync. The Agency is certainly correct in pointing out that that explanation does not match the facts: if the clocks had been out of sync, the same offset would have been found at the end of the day as at the beginning, and it would probably have been exhibited in prior and subsequent days.

Second, according to Mr. Furman's own account, his initial response included a substantial amount of dismay that, in light of all the extra time he put in for the Agency off the clock, the Agency would quibble about a few minutes at the beginning of a few shifts. I do not take that response as an admission by Mr. Furman: there is no real dispute, on the record before me, that Mr. Furman and his Store Manager disagreed about whether Mr. Furman should claim time he spent in the Store's interest in a variety of situations (such as taking equipment from one store to another in a pinch). Mr. Furman ignored his Manager's instruction to show those activities as time worked. Even as an *Assistant* Manager, Mr. Furman should have known better. First, an employer that

knowingly allows an employee to work "off-the-clock" is still legally liable for that compensation. (In the words of the FLSA, work time is work time whether the employer "caused" or "suffered" the employee's activities on its behalf.) Second, employees who are allowed to put in time off the clock are all too likely to see only a fairness in taking time off to balance the scales. That sort of informal comp time cannot be tolerated by any reasonably well-run large employer. The fact that Mr. Furman had not claimed all his work hours would not be either an explanation or an excuse for late starts.

Finally, we come to Mr. Furman's attempts at substantive explanation of the time discrepancies.[2] In a nutshell, he explained that it was not uncommon for him to do things outside the store in the morning before coming in and disarming the alarm. He did not claim to have any particular recollection of a specific outside activity on any specific day; and that is entirely understandable in light of the delay in bringing the charges to his attention. Instead, he offered explanations in terms of his occasional or habitual morning activities, which is all that can reasonably be expected of him at such a late date. For example, he claimed that it was his practice to park in back, particularly on Tuesdays, when there was an early morning delivery, and to help the driver unship the delivery ramp before walking around to the front to enter the store and disarm the alarm.[3] Five of the 13 January-February dates in question were on Tuesdays. The record does not show whether the Tuesday morning delivery drivers were LCB employees or not. But the record does not suggest that the Agency made any attempt at all to check this part of Mr. Furman's explanation with the drivers.[4] Would it have been difficult to track down the drivers, and

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2. The Agency argues (Post-Hearing Brief at 10) that it was not reasonable for Mr. Furman to offer only the mis-matched clocks excuse in the brief meeting on April 7, if his habitual morning behaviors were the real reason for the discrepancies: "this means that it was a regular occurrence for him to do these things yet when asked in a non-accusatory tone by Mr. Cantu all he can explain is that the clocks must have been off." From an employer's point of view, one of the advantages of a preliminary opportunity for an employee to explain apparent misconduct is that it nails down that employee's explanation and prevents after-the-fact creativity. But both Mr. Furman and Mr. Cantu agree that the April meeting was *very* brief; and the testimony and Mr. Furman's subsequent call to his District Manager and written objection to the Director make it clear that Mr. Cantu's choice of time and place were not reasonably chosen to get Mr. Furman's serious response to the charges.

3. The Agency points out that Mr. Furman parked out back "for personal gain," i.e. because the Store Manager had agreed to let him put his trash in the dumpster. But that reinforces, rather than detracts from, the claim that he frequently parked in back.

4. The Store Manager made two written statements, and the second claimed that Mr. Furman started parking in back only after the charges were made in October. The Store Manager's first written statement had been entirely supportive of Mr. Furman. The Administrative Director pointedly asked him whether he had allowed Mr. Furman to work off the clock, and the Store Manager sharply reversed his statement, after appearing with his

would it have been difficult for them to remember, after so long? The whole point of requiring the employer to bear the burden of proof in disciplinary cases is that such difficulties are the employer's problem, and the employer may not shift that burden to the employee when the difficulty has been caused by the employer's delay. That leaves a record on which Mr. Furman was the *only* witness to his actions, and I cannot avoid the conclusion that Mr. Furman's general explanations—of such distant past events—adequately account for the fact that he signed in before he turned off the alarm. Similarly, Mr. Furman explained that he commonly picked up trash and broken bottles in the parking lot before entering to disarm the alarm, and that he sometimes removed shopping carts from the front of the store and returned them to other stores. Because, once again, Mr. Furman opened alone, the Agency had no substantial evidence to the contrary; and neither do I. Did he occasionally encounter any other merchant at 8:00 in the morning as he did those chores? The Agency's delay eliminated any realistic possibility of his providing such corroboration. But the burden of proof is on the Agency, and there is no particular reason to disbelieve Mr. Furman's several general explanations for why his sign-in time would have been earlier than the disarm time.

The Agency's really excellent Post-Hearing Brief (at 12-13) offers a detailed analysis of the days and amounts of time discrepancies over the December-February period. There are two problems with that analysis: First, neither the demotion letter (nor the disciplinary warning) nor the Administrative Director's testimony suggest that any such detailed analysis of the data played a part in the disciplinary decision. All in all, the tone of the demotion letter makes it clear that the Director found the bare fact of the discrepancies compelling, particularly when coupled with what she viewed as Mr. Furman's inadequate explanations.[5] Second, to repeat, it is not just for an employer to so delay notice of possible disciplinary action that the employee has no realistic opportunity to develop a record in his own defense and to then justify discipline by analysis of the resulting, one-sided record before it.

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own union representative. *Falsus in unum, falsus in omnibus.* There are times when a witness entirely reverses directions, explaining that his or her earlier statement was the product of coercion or intimidation; and under those circumstances it may make sense to give substantial value to the second statement. This is not such a case. The Store Manager's use of his union representative shows that he understood that his own discipline was reasonably at issue after his first statement; and I give no substantial weight to the second statement, given under such circumstances.

5. The Union objects to the Agency's conclusion that Mr. Furman lied in his eventual *Laudermill/Danielson* hearing and its use of that conclusion as part of the basis for this discipline. The Union points out that Mr. Furman never had a predisciplinary opportunity to respond to that charge. In light of the disposition of this case, it is not appropriate to address that somewhat creative argument.

Should Mr. Furman have known the possible disciplinary consequences of such misbehavior? The Union does not argue that an Assistant Manager could claim to be surprised at his or her demotion as the result of an extended and systematic record of signing in before he or she was actually at work, which is fundamentally the charge against Mr. Furman.[6]

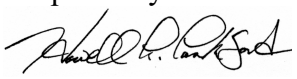
In short, the *Loudermill/Danielson* rule, the rule of common sense, and Section 15.3 of the parties' collective bargaining agreement all required the LCB to give Mr. Furman a *meaningful* opportunity to respond to the charges against him. The April 7 meeting with Mr. Cantu—which was already three to four months after the December dates at issue—was not reasonably designed to get Mr. Furman's possible explanation of the time discrepancies. Mr. Furman reasonably understood that the matter was no longer at issue after his Division Manager said he would take care of it and after Mr. Furman's expostulation to the Administrative Director. The subsequent six-month delay in letting him know that the issue was not closed and that January and February dates were also at issue deprived him of any meaningful opportunity to explain the clock discrepancies with any particularity. Moreover, once he did offer general explanations, the Agency had no good reason to disbelieve those accounts, considering that it failed to develop any witnesses or compelling evidence to the contrary. Mr. Furman was not demoted for just cause and must be reinstated and made whole.

AWARD

The LCB did not have just cause for the demotion of Richard Furman on February 7, 2007. The LCB shall reinstate him to his prior classification and shall return him to his prior position (or to a position mutually agreed by the parties); and the LCB shall make Mr. Furman whole for all pay and benefits lost as a result of his improper demotion.

By stipulation of the parties, I retain jurisdiction for the limited purpose of resolving issues that might arise under the terms of this Award. That jurisdiction shall expire 60 days after the date of this Award unless extended for good cause shown.

Respectfully submitted,



Howell L. Lankford
Arbitrator

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6. Some industries commonly count "theft of time" as a single-offense grounds for discharge. (The Teamsters master delivery trucking agreement has long listed "theft of time" as one of the parties' agreed "deadly sins," and I have sustained discharges on that basis.) There is no such bargain between these parties; but in this case the penalty is less—demotion—and the allegation is far more serious than a single incident.