

**STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

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In the Matter of the Arbitration

between

PATERSON HOUSING AUTHORITY,

-Employer-

Docket No. AR-2014-506
(Grv: Albert Hodges – 1 Day
Suspension, Terri Dias – 2 Day
Suspension, Jennifer Morales – 1 Day
Suspension)

and

**AFSCME DISTRICT COUNCIL 52,
LOCAL 3880,**

-Union-

***OPINION
AND
AWARD***

Issued: November 6, 2014

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ARBITRATOR:

Joseph Licata, Esq.

HEARING INFORMATION

Date: July 30, 2014
Time: 10:00 a.m.
Location: Paterson Housing Authority
60 Van Houten Street
Paterson, New Jersey

APPEARANCES

FOR THE EMPLOYER

Diane U. Dabulas, Esq.
Ronald Citrenbaum, Esq.
Rogut McCarthy Troy, LLC

FOR THE UNION

Terry Woodrow, AFSCME District Council 52, Local 2299 Staff Representative
Brenda Mickens, AFSCME District Council 52, Local 3880 President

NATURE OF DISPUTE

The Paterson Housing Authority (“Authority”) and AFSCME District Council 52, Local 3880, AFL-CIO (“Union”) are parties to a collective negotiations agreement that is in effect from April 1, 2009 through March 31, 2011.¹ The Union represents approximately twenty-four (24) white-collar employees. On or about December 17, 2013, the Authority suspended three Union members, Terri Dias, HOPE VI Coordinator (2 days); Jennifer Morales, Principal Clerk (1 day); and Albert Hodges, Assistant Store-keeper (1 day). The disciplinary sanctions stem from a December 13, 2013 incident where the three individuals returned late to work from their designated lunch hour and failed to use the “palm machine” to record their time away from work.

On or about December 30, 2013, the Union submitted separate grievances for each of the three affected employees. On each AFSCME Official Grievance Form, a denial of the grievance is noted by Carol Brevard, Personnel Officer (Exhibit J4). On January 28, 2014, the Union submitted a consolidated demand for arbitration to the New Jersey State Public Employment Relations Commission. On March 14, 2014, the Director of Conciliation & Arbitration appointed the undersigned Arbitrator to hear and decide the merit of the Authority’s disciplinary actions under NJPERC Docket No. AR-2014-506 (Grv: Albert Hodges – 1 Day Suspension/ Terri Dias – 2 Day Suspension/ Jennifer Morales – 1 Day Suspension).

¹ An Addendum extended the Agreement from April 1, 2011 through March 31, 2012. Thereafter, the parties negotiated a Memorandum of Agreement that is in effect from April 1, 2012 through March 31, 2014.

On July 20, 2014, I conducted an arbitration hearing at the Office of the Paterson Housing Authority, located at 60 Van Houten Street, Paterson, New Jersey. Testimony was taken from Authority witnesses, Carol Brevard, Personnel Officer, Orthneil Palmer, Personnel Clerk, and Irma Gorham, Executive Director. The Union adduced testimony from each grievant and from Wilfredo Vazquez, Director of Modernization & Development. In addition, the parties introduced in evidence the following exhibits:

JOINT EXHIBITS	
J1	Memorandum of Agreement and attached Collective Negotiations Agreement dated April 1, 2009 through March 31, 2011; and Addendum dated April 1, 2011 through March 31, 2012.
J2	The Housing Authority of the City Paterson Personnel Policy Procedure Handbook.
J3	December 17, 2013 Notices of Minor Disciplinary Action issued to Terri Dias, Jennifer Morales, and Albert Hodges by Irma Gorham, Executive Director, PHA.
J4	AFSCME Official Grievance Form(s) filed on December 30, 2013, on behalf of Terri Dias, Jennifer Morales and Albert Hodges; and 1/28/14 handwritten denial by Carol Brevard, Personnel Officer.
J5	January 28, 2014 Request for Submission of a Panel of Arbitrators submitted by the Union and filed by PERC on February 14, 2014 (Docket No. AR-2014-506).
AUTHORITY EXHIBITS	
A1	Lunch Palming memoranda 6/17/13; 10/2/12; 4/16/12; 8/21/09; 6/18/08; 7/3/01; 6/28/00; and 11/10/99.
A2	7/19/10 Memorandum from Irma Gorham, Executive Director to Terri Dias, Modernization Specialist re: Docking for Lunch; 7/15/10 Memorandum to Irma Gorham, Executive Director and Carol Brevard, Director of Human Resources from Terri Dias, Modernization Specialist re: Docking for Lunch; and July 15, 2009 Memorandum from Irma Gorham, Executive Director to Terri Dias, Modernization Specialist re: Palming Procedures.

UNION EXHIBITS	
U1	12/13/13 – 7/19/14 Lunch Break Details Report for Union Members, Housing Authority of Paterson, printout date July 25, 2014.

The parties' respective representatives elected to submit post-hearing summations in lieu of oral closings. On September 2, 2014, the Authority submitted a post-hearing brief together with the Certification of Orthneil Palmer (in rebuttal to Exhibit U1 and related testimony). On September 6, 2014, the Union submitted a post-hearing brief whereupon the record was closed. At all material times, I note, the parties were expertly represented.

Finally, this Opinion and Award is issued in accordance with the parties' collective negotiations agreement and the rules and regulations of the New Jersey Public Employment Relations Commission.

THE POSITIONS OF THE PARTIES

The Position of the Authority

The Authority submits that it has demonstrated good cause for suspending Terri Dias for two (2) days without pay and Jennifer Morales and Albert Hodges for one (1) day without pay for: (1) failing to comply with the well-established policy requiring employees to palm-out and palm-in with respect to their designated lunch break and (2) for extending their lunch break without permission. On December 13, 2013, at approximately 2:30 p.m., Irma Gorham, Executive Director witnessed Terri Dias and Albert Hodges arriving to the Central Office from lunch. Since the designated lunch hour

ends at 2:00 p.m. for Central Office personnel Ms. Gorham grew suspicious. Upon review of the Authority's palming records for that day, Ms. Gorham discovered that the employees in question had not palmed-out or in with respect to their lunch break. Subsequently, it was learned that Ms. Morales was part of the lunch break crew and she too failed to palm-out or in on the day in question. The Authority reasons that all three employees had received prior notification during their respective careers concerning the obligation to palm-out and in regarding lunch breaks. To corroborate the point, the Authority introduced various memoranda encompassing the period November 10, 1999 through June 17, 2013 concerning the "palming" requirements (Exhibit A1).

Based on their respective dates of hire, reasons the Authority, Ms. Dias, a 27-year employee, would have received each and every memo; Ms. Morales, who has been employed since August of 2010, would have received three of the memos; and Mr. Hodges, an employee since November of 2003, would have received five of the eight memos. In addition, both Dias and Hodges had conversations with their superiors about palming violations prior to December 13, 2013. According to the Authority, Dias had been specifically warned or disciplined in the past. Consequently, the Authority asks the Arbitrator to find (1) that it had clearly conveyed the work rule requirement that employees palm-out and in regarding lunch and (2) that, despite such clear notification, on December 13, 2013, Ms. Dias, Ms. Morales, and Mr. Hodges failed to comply with the work rule and impermissibly extended their designated lunch breaks.

The Authority next directs the Arbitrator's attention to the Personnel Policy and Procedure Handbook ("Handbook"), in particular, pages 19-21 prescribing disciplinary

penalties for, among other things, violating Authority rules, policies, procedures or regulations. According to the Authority, the Handbook further notifies employees that discipline may include anything from a verbal reprimand through dismissal from employment without a requirement that the Authority start at any particular step and/or adhere to each and every step. In light of the fact that Ms. Dias has been disciplined in the past for palming violations and had compounded her offense by advising both Ms. Morales and Mr. Hodges not to palm out/in on December 13, 2013, the Authority asserts that it had good cause to suspend Ms. Dias without pay for two (2) days. Additionally, although the Authority acknowledges that Ms. Dias may have influenced the decision-making of both Ms. Morales and Mr. Hodges, the Authority maintains that both employees were, at all times, aware of the Authority's policy on palming and, ultimately, each elected to violate the policy. Accordingly, the Authority submits that it had good cause to suspend Ms. Morales and Mr. Hodges for one (1) day without pay.

Finally the Authority urges the Arbitrator to reject the defenses raised by the Union during the arbitration hearing; namely that the employees were excused from the palming requirement due to a celebratory luncheon and that the Authority failed to discipline other Union members who were late returning from lunch and/or did not palm out and in on the same day (referring to Exhibit U1). The Authority acknowledges that Director Vazquez had taken his staff out for a holiday luncheon on an annual basis. However, the Authority observes that Director Vazquez notified Human Resources that his staff would not be palming out and in on said occasion. Thus, on December 13, 2013, even if Ms. Dias believed that she was acting on behalf of Director Vazquez in his

absence, reasons the Authority she was required to similarly notify Human Resources. She did not. Therefore, the Authority submits that Ms. Dias impermissibly violated Authority policy and procedure by instructing both Ms. Morales and Mr. Hodges not to palm out/ in regarding lunch and by taking an unauthorized extended lunch break. As such, the Authority asks the Arbitrator to reject the Union's reliance on past practice as a defense to the instant disciplinary actions.

With respect to the Union's disparate treatment defense, the Authority relies on the post-hearing Certification submitted by Orthneil Palmer concerning his review of the palming records for four (4) other Union employees who did not palm out/in regarding lunch on December 13, 2013, i.e., Wanda Baugh, Wanda Grier, Marlene Gutierrez, and Vanessa Sifford. Mr. Palmer's review shows that the other employees encompassed by the Union's claim either were excused from a palming requirement on the day in question or the omission was accidental. For instance, notes the Authority, Ms. Baugh's palming requirement was relaxed due to the fact that she spends the majority of her day outside of the office inspecting building conditions. Wanda Grier rarely leaves her desk for lunch and advised that she did not leave the office for lunch on that day. Thus, it was determined that Ms. Grier's failure to palm for lunch on that day was accidental. Both Marlene Gutierrez and Vanessa Sifford were taking a Public Housing Management Exam on December 13, 2013. Consequently, these two employees could not palm for lunch due to the Exam and their failures were excused. In contrast, the Authority contends that the omissions of Ms. Dias, Ms. Morales, and Mr. Hodges were intentional and/or

unexcused. Because the comparator cases are distinguishable on the grounds noted above, the Authority asks the Arbitrator to reject the Union's disparate treatment defense.

Based on the foregoing, the Authority requests that the Arbitrator uphold the discipline issued to Ms. Dias, Ms. Morales, and Mr. Hodges.

The Position of the Union

The Union submits that no disciplinary action was necessary or justifiable with respect to the conduct of Ms. Dias, Ms. Morales, and Mr. Hodges on December 13, 2013. The Union asserts that the three employees participated in an authorized holiday luncheon that traditionally did not require the group to palm out/in. Although Director Wilfredo Vazquez typically led the celebratory luncheon each year, the Union notes that he was on a leave of absence until at least the end of December of 2013. However, before he commenced leave, Director Vazquez advised Ms. Dias to assume the lead role in taking the staff out to lunch in his absence. Indeed, notes the Union, Director Vazquez testified that following his leave of absence he reimbursed Ms. Dias for the costs of the luncheon, including the cost associated with Mr. Hodges' lunch. The Union adds that, although Mr. Hodges was assigned to a different unit, he had been very helpful to the Modernization & Development Department during an emergency project in the month of November and that is why he was asked to join Ms. Dias and Ms. Morales for lunch.

Consistent with Ms. Dias' experience over the past 20+ years, on the day of the holiday luncheon, the palming requirement was relaxed due to the realization that the celebration would likely exceed the designated lunch hour. Since Director Vazquez never informed Ms. Dias that he always notified Human Resources to excuse the palming

requirement and designated lunch hour in the past, Ms. Dias, acting in good faith, advised Ms. Morales, but not Mr. Hodges, that she did not have to palm out/in regarding lunch on December 13, 2013. Thus, the Union reasons that disciplining all three employees for essentially acting in good faith and consistent with past practice, to the best of their knowledge, was both unnecessary and unjust.

In addition, the Union maintains that the Authority has not strictly enforced the palming policy in the past. According to the Union, the mere fact that the Authority had to repeatedly issue reminders concerning the palming requirement demonstrates that the policy was not being adhered to by employees. Importantly, notwithstanding such a history of noncompliance, the Authority introduced no evidence showing that it disciplined any other employee. Similarly, on December 13, 2013, observes the Union, the Lunch Break Details Record (Exhibit U1) reveals that the Authority allowed the following lunchtime deviations: Syrenthia Frost palmed in at 2:11 p.m.; Magali Gonzalez palmed in at 2:07 p.m.; Wanda Grier was, by default, recorded as taking a lunch from 2:00 p.m. to 3:00 p.m. (indicating no palm out/in); Marlene Gutierrez was recorded by default as taking lunch from 2:00 p.m. to 3:00 p.m. (indicating no palm out/in); Mary Howard returned from lunch at 2:08 p.m.; Margaret Kahiga returned from lunch at 2:15 p.m.; Lucy Ruiz returned to work at 2:02 p.m.; and Vanessa Sifford is recorded by default as having a 2:00 p.m. to 3:00 p.m. lunch (indicating no palm out/in). Accordingly, the Union reasons that Ms. Dias, Ms. Morales, and Mr. Hodges were disparately disciplined for returning to lunch after 2:00 p.m. and for not palming out/in. Based on the lax and/or uneven enforcement of the lunch break rules in question, the

Union asserts that the Authority did not have good cause to discipline any of the three employees.

Based on the foregoing, the Union urges the Arbitrator to direct the Authority to rescind the disciplinary sanctions and to make whole all three grievants.

FINDINGS

A. Background

According to the PHA website, the Authority provides housing opportunities for Paterson residents eligible for Section 8 Housing Choice Vouchers. The Authority is also responsible for facilitating the revitalization plan regarding the former Alexander Hamilton Development Complex. The revitalization plan is ordained under the heading 2010 HOPE VI-AHD Revitalization. It consists of modernizing 275 units of affordable housing on two sites, a 16,000 square foot community building and a 24,000 square foot Early Childhood Education Center. As established at the arbitration hearing, the Authority employs approximately 67 individuals, 24 of who are represented by AFSCME District Council 52, Local 3880.

Since 2000, Irma Gorham has served as the Executive Director of the Authority.² Dale Jones is the Assistant Executive Director and is believed to be the Director of Leasing & Occupancy. Mr. Jones did not testify at the arbitration hearing. Grievant Albert Hodges, Assistant Storekeeper since 2004, reports to the Director of Leasing & Occupancy. Two other directorship positions exist, Planning & Grants and

² Prior to 2000, Ms. Gorham served as the Deputy Director of Development for the New York City Housing Department.

Modernization & Development. Wilfredo Vazquez is the Director of Modernization & Development. Grievant Terri Dias, a 27-year employee, serves as the Authority's HOPE VI Coordinator under Director Vazquez. Ms. Dias supervises Jennifer Morales, a Keyboard Clerk employed since August of 2010. In December of 2013, two other employees (Chris Rodriguez and "Mildred") were assigned to the Modernization & Development Department. For approximately 27 years, Carol Brevard has served as the Personnel Officer or Director of Personnel. She essentially functions as a human resources officer for the Authority and is in charge of facilitating personnel decisions, including employee discipline.

B. Timekeeping/Payroll Policies, Practice & Employee Notifications

The Authority hired Orthneil Palmer in February of 2012 to serve as Personnel Clerk. Since that time, Mr. Palmer has assumed responsibility over payroll including monitoring the palming procedure that has been in place for at least 15 years (Exhibit A1, November 10, 1999 reminder: "Palm Machine Usage"). All employees, except the Executive Director and Assistant Director (and those employees granted exceptions) are required to use the palm machine four times daily, i.e., upon arrival, out for lunch, in from lunch, and upon departure at the conclusion of the workday (Id.). Over the course of time, the Authority has deemed it necessary or important to issue numerous reminders to Central Office Staff concerning the aforementioned palming requirement and procedure.

For example, on June 28, 2000, a Memorandum was issued to Central Office Staff noting numerous instances where employees were not complying with the palm reader

procedures and warning employees that continued violations would result in pay docking in accordance with a prescribed formula.³ On July 3, 2001, Executive Director Gorham issued an Interoffice Memorandum to all employees concerning, among other things, “Palming/Punching for Lunch Breaks”. In pertinent part, the Memorandum states:

With effect from Monday, July 9, 2001, those employees who fail to punch/palm (out and back in) during their lunch breaks will be docked four (4) hours pay. Those employees who punch/palm once (out but not back in or vice versa) during their lunch break, will also be docked four (4) hours. If we find that an employee has failed to punch/palm for the lunch breaks at least three (3) times in a given month, he/she will be docked and given a one (1) day suspension without pay. If this pattern occurs for at least two months within a six-month period, he/she will be suspended with a view towards termination. This applies to all employees [Exhibit A1].

Out of the three employees disciplined, only Ms. Dias was employed at the time of the 2001 Memorandum.

Approximately seven years later, on June 18, 2008, Director of Personnel Brevard issued a Memorandum to Central Office Staff regarding “palming violations and lunch breaks”. Among other things, the Memorandum reveals that “many employees are failing to palm out and back in from their lunch breaks.” No mention of disciplinary action is contained in the Memorandum. Rather, Ms. Brevard writes: “Be advised that I have been directed to dock those employees who fail to use the palmer during their lunch breaks.” Both Ms. Dias and Mr. Hodges were employed by the Authority at the time of the June 18, 2008 Memorandum.

On July 15, 2009, Ms. Gorham issued a Memorandum to Ms. Dias stating that the Human Resources Office polls each of the Palm Recorder machines located at each site

³ For example, the memorandum states that a failure to palm out for lunch would result in pay docking of one hour.

on a daily basis. It was discovered that Ms. Dias was not palming for lunch as required on a daily basis and was reminded (with no threat of consequences) that she is required to use the palm machine when taking a lunch break (Exhibit A2). Other palming violations apparently continued, thereby leading Ms. Gorham to issue yet another Memorandum on August 21, 2009, entitled, “**PALMING PROCEDURES – FINAL WARNING**”. In addition to mentioning pay docking as a potential sanction (in half-hour units for each infraction), Ms. Gorham writes: “Also, if it is found that you are a repeated violator, you will be subject to disciplinary action which could include suspension with-out pay and/or termination.” In bold face font, the Memorandum concludes: “**this memorandum serves as your final warning**” (emphasis in the original).

On July 15, 2010, one year after Ms. Gorham’s “Final Warning” memorandum, Ms. Dias complained in writing to Ms. Gorham and Ms. Brevard that she had been the recipient of pay docking in the amount of \$73.49 over the course of three (3) pay periods. The docking was attributed to her failure to palm out/in regarding lunch. Ms. Dias explained that her failure to palm out/in had to do with inspecting and monitoring work off site, working through her lunch (without requesting overtime) or, occasionally, actually taking lunch but forgetting to palm. Ms. Dias requested the “privilege” of not palming out due to the aforementioned circumstances surrounding her position of employment. In addition, Ms. Dias requested overtime for working through her lunch from June 21, 2010 through July 15, 2010 (Exhibit A2).

In reply to Ms. Dias’ July 15, 2010 Memorandum, on July 19, 2010, Ms. Gorham provided Ms. Dias with a “Destination Sheet” to be completed when she is performing

work in the field and may be unable to readily access a palm machine. Ms. Gorham denied Ms. Dias' request for overtime because the request was not preapproved. In response to Ms. Dias' assertion that the PHA appears to penalize employees for their hard work, Ms. Gorham replied that penalization only takes place when an employee repeatedly and flagrantly violates PHA policy. The reply memorandum concludes: "Finally, if in fact, you consider yourself as someone who works earnestly, you would not have written your memorandum."

On April 16, 2012, Ms. Gorham issued a Memorandum referring to the Time Recorder in connection with a new direct deposit pay system provider, "Paylocity". One of the anticipated benefits of the new pay system was integrating the palm recorder data into the computerized payroll system thereby making automatic adjustments to payroll when necessary, e.g., failure to use the palm machine, late arrivals to work, or extended lunch breaks. The Memorandum also mentions a situation where employees palm out and wait a few minutes to palm back in for their lunch breaks (implying that they are working through lunch). Finally, the Memorandum does not refer to disciplinary sanctions, but states that employees who repeatedly fail to adhere to the procedures set forth concerning the Time Recorder can expect to have their pay docked. As of the April 16, 2012 Memorandum, all three employees, Dias, Hodges and Morales were employed by the Authority.

On October 2, 2012, Ms. Gorham issued a Memorandum reflecting the full installation of Paylocity's Webpay Payroll System, meaning that payroll was now directly tied to the palm reader. Once again, the Memorandum does not refer to

disciplinary action, but states that a failure to meet the four (4) punches during the course of a workday will result in an automatic deduction in pay.

The last Memorandum introduced in evidence concerning the subject of lunch palming is dated June 17, 2013. In it, Ms. Gorham and Assistant Executive Director Jones set forth reminders in accordance with “Personal Policy 3.1, Items 1 and 2”:

(1) Maintenance and Trade employees are entitled to a half-hour lunch, which must be over by 1:00 p.m.

(2) Administrative and Clerical employees are entitled to an hour lunch, which must be over by 2:00 pm.

The Memorandum addresses a far more serious, theft of time situation where an employee is palming out and, shortly thereafter, back in (implying that he or she is working through lunch) but then leaving the building and taking an additional extended lunch hour. The Memorandum states . . . “if the attendance tracking system shows you are on the clock, and you are not in the building or have not informed your supervisor that you are leaving the building, you will be subject to disciplinary action.”

Against this backdrop, Mr. Palmer testified that since his date of hire in February of 2012, he does have the ability to make adjustments in payroll (within the bi-weekly pay period) where an employee forgets to palm out for lunch (or back in). For example, according to Palmer, an employee who palms out at 12:15 p.m. but forgets to palm back in for lunch can receive an adjusted 1:15 p.m. return time by way of an edit to payroll. However, in the event that an employee does not palm out and in regarding the lunch hour, the system automatically records the employee as having a 2:00 p.m. to 3:00 p.m.

lunch hour -- and pay is deducted accordingly. On direct examination, Mr. Palmer testified that where a 2:00 p.m. to 3:00 p.m. lunch is recorded (meaning no palm out or in) he is responsible for reporting employees to their supervisors. Mr. Palmer candidly admitted that he had been “lax” in doing so.

C. The December 13, 2013 Incident and Related Timekeeping Records

The Union introduced as Exhibit U1 a compendium of lunch break details concerning twenty-four (24) Union members covering December 13, 2013 through July 19, 2014. With respect to December 13, 2013, it was noted that seven (7) unionized employees did not palm out (or in) for lunch including Ms. Dias, Ms. Morales, Mr. Hodges, Wanda Baugh, Wanda Grier, Marlene Gutierrez, and Vanessa Sifford. In Mr. Palmer’s post-hearing Certification, he notes that palming requirements were relaxed for Ms. Baugh because she spent the majority of her day outside of the office as a housing inspector. With respect to Wanda Grier, Palmer’s review reveals that Ms. Grier did not leave her desk for lunch on December 13, 2013, but she forgot to palm out and quickly back in. Both Ms. Gutierrez and Ms. Sifford were taking a Public Housing and Management Examination on December 13, 2013 and, therefore, neither employee was able to palm for lunch due to the exam.

In contrast, the Authority considered the failure of Ms. Dias, Ms. Morales, and Mr. Hodges to palm out and in for lunch on December 13, 2013 to be neither accidental nor excused. On that day, Ms. Gorham noticed Dias and Mr. Hodges returning to the Central Office building after 2:30 p.m. (or more than one-half hour after the designated lunch hour). For some reason, Ms. Gorham did not observe Ms. Morales who (based on

testimony) was walking side-by-side with Ms. Dias and Mr. Hodges. Ms. Gorham asked Ms. Brevard to check the time detail lunch records for Ms. Dias and Mr. Hodges. Ms. Brevard discovered that there was no lunchtime palming activity recorded for either employee.

Subsequently, in speaking to Ms. Dias, Ms. Gorham learned that Ms. Dias had taken Mr. Hodges and Ms. Morales out for lunch allegedly for a holiday celebration. Ms. Gorham was skeptical about the excuse because the department director was absent, another employee of the unit, “Mildred” was not at the luncheon and an employee from a different unit, Albert Hodges was at the luncheon.⁴ Ms. Gorham testified that in speaking to Ms. Dias, she learned that Ms. Dias had allegedly informed both Ms. Morales and Mr. Hodges that they did not have to palm out/in with respect to lunch that day.

Ms. Dias explained to Ms. Gorham that she was authorized by Director Vazquez, in his absence, to take members of the unit out for an annual holiday luncheon as had been done in the past for numerous years. Ms. Dias testified that on December 13, 2013, she took Ms. Morales and Mr. Hodges to Red Lobster and that she and Ms. Morales left the office at approximately 12:50 p.m. and returned after 2:00 p.m. According to Ms. Morales, she estimated that the group left for lunch at 12:45 p.m. and returned no later than 2:15 p.m. Ms. Gorham testified that she observed Ms. Dias and Mr. Hodges returning to the building after 2:30 p.m. The Authority’s Lunch Break Details report reflects a default entry of 2:00 p.m. to 3:00 p.m. for each of the three employees.

⁴ The testimony of Ms. Gorham and Ms. Dias differ as to whether Ms. Dias informed Ms. Gorham that “Mildred” was covering the office during the luncheon. Ms. Gorham testified that she did. Ms. Dias testified that she did not.

Director Vazquez testified that, prior to taking his leave of absence, he did ask Ms. Dias to take the staff out for lunch and he acknowledged reimbursing Ms. Dias upon returning from his leave of absence for the full costs of the December 13, 2013 luncheon (including the costs of Hodges' lunch).⁵ On cross-examination, Director Vazquez acknowledged that he gave "Terri supervisory responsibility" in his absence because she was the most senior staff member. Ms. Dias testified that she believed she was acting consistent with past practice under Director Vazquez by taking Ms. Morales out for an extended lunch. Ms. Dias explained that for twenty (20) years under the direction of Director Vazquez, the staff was treated to a holiday lunch and not required to palm out/in. Of significant importance, Ms. Dias did not know that Director Vazquez had always notified Human Resources (1) that he was taking the group out to lunch and (2) that they would not be using the palming machine on the day of the luncheon.⁶

Ms. Dias further explained that she invited Mr. Hodges to lunch due to his services to the unit concerning an emergent project that entailed restoring electricity to a building in time for Thanksgiving. Ms. Dias admits that she failed to palm out/in and that she advised Ms. Morales, when asked by her, that she did not have to adhere to the palming procedure. Both Ms. Dias and Mr. Hodges testified that Hodges did not receive a similar directive from Ms. Dias. Rather, he acted independently. Ms. Morales testified that

⁵ Director Vazquez was not scheduled to return to work until late December or early January due to surgery.

⁶ Since it may be expected that this type of luncheon may exceed the normal designated lunch hour, I infer that Director Vazquez did not wish for his subordinates to experience pay docking in conjunction with the annual holiday luncheon.

since her date of hire in 2010, she did not have to palm out/in with respect to the annual holiday luncheon.

D. The Determination to Discipline Employees Dias, Morales & Hodges

Ms. Gorham made a decision to take disciplinary action against the three employees. Ms. Gorham explained that the Housing Authority is a recipient of Section 8 funding and is audited by the funding agency, i.e., the United States Department of Housing and Urban Development. The results of an audit impact future funding. Therefore, it is imperative for the Authority to be able to account for actual working time and corresponding pay. Since Ms. Gorham considers strict adherence to the palming procedure a “critical” component of maintaining accurate financial records, she believed that the December 13, 2013 violations should be met with disciplinary action.

On cross-examination, Ms. Gorham acknowledged that Article XVI, Section C of the parties’ Agreement contains a mutual acknowledgement concerning the principal of progressive discipline. Ms. Gorham explained that she had “several conversations” with Ms. Dias and she referred to a prior discussion with Mr. Hodges concerning the palming procedure. Mr. Hodges denied having a prior discussion with Ms. Gorham regarding the palming procedure. In addition, Ms. Gorham testified that the Authority had sent “so many memos” in the past that, this time, disciplinary action was called for. Ms. Gorham testified that she did not necessarily believe Ms. Dias’ holiday luncheon defense at the time it was offered. Ms. Gorham considered the palming violations to be intentional and/or unexcused. Ms. Gorham believed that Ms. Dias instructed both Ms. Morales and Mr. Hodges to bypass the palming requirement on December 13, 2013. Given Ms. Dias’

alleged prior disciplinary record for failing to palm out/in regarding her lunch hour, Ms. Gorham decided to impose a two (2) day suspension without pay on Ms. Dias. On the other hand, citing a comparatively cleaner prior record regarding palming, Ms. Gorham decided to impose a one (1) day suspension without pay on Mr. Hodges and Ms. Morales.

The verbiage of the Notice of Minor Disciplinary Action issued to Ms. Dias, Ms. Morales and Mr. Hodges commonly states:

On 12/13/13, you were out during lunchtime and did not palm out, nor did you palm back in upon your return to the office. In the past, several notices have been distributed to each staff member regarding the usage of the palm machine. Additionally, on that same day, you returned to the office after 2:00 p.m. when lunch breaks are to be over by that time unless prior authorization had been given.

The second sentence attendant to Ms. Dias' Notice of Minor Disciplinary Action states: "You have been warned in the past about your failure to use the palm machine during your lunch breaks, yet you continue to be in violation." The Dias Notice concludes: "As a result of your continued disregard of policy, you are being suspended without pay for a period of two (2) days."

With respect to the Notice of Minor Disciplinary Action issued to Ms. Morales and Mr. Hodges, the second sentence reads: "This is in violation of PHA Palming Procedures." The concluding sentence attached to the Notice of Minor Disciplinary Action for both Ms. Morales and Mr. Hodges states: "As a result of your violation of policy, you are being suspended without pay for a period of one (1) day."

Ms. Dias stated to both Ms. Gorham initially and later during the grievance process that she would accept responsibility for the incident if the discipline imposed on

Ms. Morales and Mr. Hodges was rescinded. Ms. Brevard testified that during the grievance process, the Authority proposed to rescind the discipline issued to Ms. Morales. No settlement was reached and, hence, the instant proceeding ensued.

RELEVANT CONTRACT LANGUAGE

ARTICLE I

RECOGNITION

The Employer recognizes the Union as the sole and exclusive bargaining agent for the purpose of collective bargaining concerning wages, hours and working conditions and the administration of grievances arising there under for the terms of the agreement for all white collar employees, employed by the Housing Authority of the City of Paterson but excluding: managerial executives, confidential employees and supervisors within the meaning of the act: craft employees, professional employees, police employees, casual employees, all maintenance employees including assistant maintenance superintendent, executive assistant, executive director, assistant executive director, Senior accounting, chief modernization operations, tenant selection supervisor, and all executive staff employed by the Housing Authority of the City of Paterson.

ARTICLE XV

GRIEVANCE PROCEDURE

Step 3. Arbitration/Merit Board

In the event a grievance has not been resolved at Step 3 the Union, but not the employee, may within thirty (30) days submit the grievance to arbitration. Failure to so submit the grievance shall be deemed a conclusive waiver of the right to arbitration. An arbitrator shall be selected pursuant to the rules and regulations of the Public Employment Relations Commission.

The decision of the Arbitrator shall be final and binding on the parties. However, the arbitrator shall have no power to add to, detract from or change in any way the terms of this Agreement and he shall be limited to consideration of only the terms expressed therein.

The expenses of arbitration shall be shared equally by the parties. The parties shall cooperate to schedule a prompt hearing. The employee also has the

right to file an appeal with the Merit System Board and have the matter adjudicated in that forum in lieu of proceeding with arbitration.

ARTICLE XVI

DISCIPLINE AND DISCHARGE

- A. Disciplinary action or measures shall include Verbal Warnings, Oral Reprimand, Written Reprimand, Suspension, Demotion and Discharge, and for Civil Service Employees will only be taken in accordance with N.J.A.C. 4A:2-2.1, et al.
- B. Written Notification of Disciplinary Charges
1. When any action or measure is imposed upon or is pending against an employee then the Employer shall notify the employee, the Union President, the Union Steward, and Union Council Representative, in writing of the specific reasons for such disciplinary action being imposed and the proposed penalty.
 2. The written notification shall contain a detailed description of the charges, which shall include dates, times, and places. The written notification shall indicate that one (1) copy has been sent to the appropriate Union Steward, one (1) copy to the Union President and one (1) copy to the Union Council Representative. Notification to the Union shall be done within twenty-four (24) hours of notice given to the employee.
- C. The Employer, Employee and Union recognizes the principal of Progressive Discipline.

RELEVANT PROVISIONS OF THE PHA PERSONNEL POLICY & PROCEDURE HANDBOOK

2.16 Employee Discipline Policy

An employee may be subject to discipline for any of the following reasons:

- Violating any Authority rules or policies.
- Violation of Authority policies, procedures and regulations.

Major disciplinary action includes termination, disciplinary demotion or suspension or fine exceeding five working days. Minor discipline includes a formal written reprimand or a suspension or fine of five working days or less. Employees who object to the terms or conditions of the major disciplinary action are entitled to a hearing

under the applicable grievance procedure (and Civil Service procedure). The Executive Director or Assistant Executive Director has authorization to appoint an independent Hearing Officer for disciplinary cases. In every case involving employee discipline, employees will be provided with an opportunity to respond to charges either verbally or in writing.

In cases of employee misconduct, the Authority believes in corrective action for the purpose of correcting undesirable behavior and preventing a recurrence of that behavior. The corrective action taken will be related to the gravity of the situation, the number and kind of previous infractions and other circumstances. In every case, employees will be given an opportunity to state the situation from their point of view.

In order to correct undesirable behavior, supervisors and managers may utilize the following corrective tools: verbal reprimand; Executive Director review; written reprimand; suspension; fines, and, dismissal. At the discretion of the Authority, action may begin at any step, and/or certain steps may be repeated or by-passed depending on the severity and nature of the infraction and the employee's workplace/disciplinary record.

3.0 WORKPLACE POLICIES

3.1 Regular Pay: Hours of Work

A workweek is measured from 12:01 A.M. Monday through 12:00 P.M. the following Sunday.

1. The working hours for administrative and clerical employees shall be from 8:30 AM to 4:30 PM, exclusive of one hour for lunch, unless employee is on a pre-approved flex-time schedule. Lunch breaks for Administrative and Clerical employees must be over by 2:00PM.
4. The office of the Housing Manager will remain open to the public during the course of the workday.

Any employee arriving more than five (5) minutes after his/her scheduled starting time shall be considered late and will have time deducted from their pay in thirty (30) minute units for every thirty (30) minute infraction or portion thereof.

The Authority will, at all times, at a minimum, be open to the general public between 8:30AM and 4:30PM, Monday through Friday.

3.4 Breaks

Administrative personnel are entitled to a one (1) hour lunch break that is to be arranged by the supervisor so that offices continue to function. Maintenance employees are entitled to a half-hour (1/2) hour lunch break, which will be scheduled by the supervisor. Maintenance employees are also entitled to a fifteen (15) minute break in the morning at 10:00am and a fifteen (15) minute break at the end of the working day to wash and put tools away.

DISCUSSION

This case brings to mind famed Economist, Milton Friedman's oft-quoted phrase, "There's no such thing as a free lunch."

In the matter before me, the Authority has demonstrated that, contrary to Authority policy and procedure, Employees Terri Dias, Jennifer Morales, and Albert Hodges each failed to palm out/in regarding their extended group luncheon at Red Lobster on December 13, 2013. These basic findings are not disputed. Rather, the Union has raised certain defenses to the issuance of any discipline to the group and, alternatively, has raised defenses with respect to the level of discipline imposed on each individual. I address both parties' competing positions concerning the propriety of the disciplinary sanctions imposed in greater detail below.

As a preliminary matter, I note that in evaluating the propriety of management's imposition of discipline, arbitrators traditionally examine factors, such as, the gravity of the offense, the employee's past disciplinary record, the employer's adherence to principles of progressive discipline, where applicable, the employee's length of service, proper notice of both the rules and penalties for violating rules, lax or disparate enforcement of the operative rules at issue, and management's contribution, if any, to the

employee's violation of a work rule. See, Elkouri and Elkouri, How Arbitration Works, 5th Edition, pages 930, et. seq. After carefully considering the above factors, I find and conclude that (1) the discipline issued to Jennifer Morales must be rescinded; (2) the discipline issued to Albert Hodges must be reduced to a documented verbal warning; and (3) the discipline issued to Terri Dias must be reduced to a written reprimand.

1. Jennifer Morales

With respect to Jennifer Morales, I find that Ms. Morales has raised a compelling defense to excuse her failure to palm out/in regarding the celebratory luncheon on December 13, 2013. Since Ms. Morales' date of hire in 2010, Director Vazquez did not require Ms. Morales to palm out/in regarding the annual holiday luncheon. In the ordinary course of business, Ms. Dias, Hope VI Coordinator directs the work of Ms. Morales, a Keyboard Principal Clerk. Although this record does not clearly depict Ms. Dias as a "supervisor", at least not as that term is commonly understood in the field of labor relations, on the day in question, Ms. Dias was undoubtedly serving as an acting supervisor. Director Vazquez testified that due to his leave of absence, Ms. Dias, the most senior staff member, had increased supervisory responsibility. Vazquez's testimony was not refuted.

In light of the foregoing, I find that after being directed that she did not have to palm out/in by her supervisor for that day, Ms. Morales merely complied with the instruction and likely took additional comfort knowing that she was similarly excused from the palming requirement in 2010, 2011, and 2012. The same reasoning applies to excuse Ms. Morales for taking an extended lunch hour (by 15-30 minutes) on December

13, 2013. Under these unique circumstances, I find and conclude that the Authority did not have good cause to discipline Ms. Morales regarding her failure to palm out/in, or for extending her lunch hour on December 13, 2013.

Based on the foregoing, I direct the Authority to return one day of pay to Ms. Morales within two pay periods from the date hereof and to expunge her personnel file(s) of the Notice of Minor Disciplinary Action issued to her on December 17, 2013.

2. Albert Hodges

In the case of Albert Hodges, I do find that Hodges -- acting independent of Ms. Dias -- elected not to palm out/in and extended his lunch without permission on December 13, 2013. I further find that since his date of hire in 2004 the Authority had issued several memos regarding the palming requirement. I add that no countervailing evidence suggests that Mr. Hodges was confused as to either his basic duty to palm out/in for lunch or as to the permissible duration of his lunch. Due to his failure to palm, Mr. Hodges' lunch hour was automatically captured as 2:00 p.m. to 3:00 p.m. on December 13, 2013 (Exhibit U1). Ms. Dias and Ms. Morales testified that their lunch hour was extended by 15-30 minutes. As such, Mr. Hodges did violate the palming requirement and did impermissibly extend his lunch hour by 15-30 minutes on the day in question. Therefore, I find and conclude that Mr. Hodges did violate Authority policy and procedure without a viable excuse.

Having said this, however, in determining that a suspension without pay is not supported by "good cause", both the Agreement and the Handbook express acknowledgements regarding adherence to principles of progressive discipline. Article

XVI, Section A more specifically defines or delineates the disciplinary progression as “verbal warnings, oral reprimand, written reprimand, suspension demotion and discharge” (Exhibit J1). The Handbook reflects a similar progression but notes that, at the discretion of the Authority, action may begin at any step, and/or certain steps may be repeated or by-passed depending on the severity and nature of the infraction and the employee’s workplace/disciplinary record (Exhibit J2). A failure to palm out/in regarding lunch with no intent to steal time is the type of offense that is tailor-made for progressive discipline under the parties’ Agreement.⁷ It is axiomatic that in the event of a conflict between the parties’ Agreement and the Handbook, the negotiated document must prevail.

Although Ms. Gorham and Mr. Hodges differ in opinion as to whether or not Ms. Gorham had discussed Hodges’ alleged palming failures in the past, the burden of proof, I note, is on the Authority to demonstrate that prior action (non-disciplinary or disciplinary) was taken. While the Authority has produced corroboration of what may be considered a documented verbal counseling issued to Ms. Dias on July 15, 2009 and the non-disciplinary docking of Ms. Dias’ pay in June and July of 2010 (Exhibit A2), no similar documentation was produced concerning Mr. Hodges. Accordingly, for the purpose of this proceeding, I find that Hodges’ December 13, 2013 violation was a first proven offense of the palming/lunch hour work rule in question and, plainly, the Agreement speaks of verbal warnings or an oral reprimand as an entry-level penalty for

⁷ The three employees in question were not charged with theft of time. In contrast to the December 13, 2013 incident, the theft of time scenario described by the Authority’s June 17, 2013 Memorandum (Exhibit A1) is a far more serious offense.

an entry-level offense. Therefore, the imposition of a one (1) day suspension without pay on Hodges was plainly excessive insofar as the negotiated Agreement is concerned.

In addition, I observe that the record before me fails to reflect a clear and consistent message from the Authority concerning the discipline, if any, to be imposed for violating the rules in question, especially for a first offense unaccompanied by proof of intent to steal time. The palming rules are not contained in either the Agreement or the Handbook. Moreover, this record persuasively reveals a confused posture on the part of management that has been transferred to the workforce concerning the discipline, if any, to be imposed for violations of the palming rule, i.e., no discipline mentioned (November 10, 1999 Memorandum); pay docking only (October 2, 2012, April 16, 2012, April 21, 2009, June 18, 2008, July 3, 2001 and June 28, 2000 memoranda); discipline in the form of excess pay docking for a violation, a suspension for one day where an employee fails to punch/palm at least three (3) times in a given month, or a suspension with “a view toward termination” if the aforementioned triple monthly violation occurs at least two (2) times within a six (6) month period (July 3, 2001 Memorandum); discipline if an employee is found to be a “repeated violator” which “could include suspension without pay and/or termination”(August 21, 2009 Memorandum); and “disciplinary action” for palming out and quickly back in and then taking an extended lunch hour (June 17, 2013 Memorandum). In the absence of a consistent position expressed by management over time concerning the disciplinary consequences attendant to a palming violation with no intent to steal time, I conclude that the Authority has failed to satisfy due process and

may not impose significant discipline on any employee, until and unless it remediates the confusing message that it has imparted to the workforce.

In light of the confusing or uncertain message regarding disciplinary consequences created in writing, I observe, the Authority has added to the confusion or uncertainty by way of lax enforcement of the palming rule, as evidenced by (1) repetitively issued memos without any corresponding, anecdotal evidence of disciplinary action; (2) Mr. Palmer's admission that he had been "lax" in reporting to supervisors those employees whose lunch hour is recorded by default as 2:00 p.m. to 3:00 p.m.; and (3) the Authority's failure to discipline Ms. Dias for failing to palm out/in regarding lunch in June and July of 2010, despite receiving a documented counseling in July of 2009, and despite Ms. Gorham's "Final Warning" memorandum of August 21, 2009. Thus, put simply, the Authority's lack of imparting clear notice to employees regarding palming violation consequences and the lax enforcement history mentioned above support a conclusion that an entry-level penalty, at most, is called for in the case of Mr. Hodges.

Finally, it did not go unnoticed that Mr. Hodges has served the Authority for nine (9) or ten (10) years without any evidence of prior discipline.

Based on the foregoing, I will direct the Authority to modify the disciplinary penalty issued to Albert Hodges from a one (1) day suspension without pay to a documented verbal warning. I further direct the Authority to return one day of pay to Mr. Hodges within two pay periods from the date hereof and to adjust his personnel file(s) accordingly.

3. Terri Dias

The first issue presented by the Union in defense of Ms. Dias has to do with the past practice of excusing the palming requirement on the day of the holiday luncheon. Ms. Dias asserts that she acted with the approval of Director Vazquez, who was out on a leave of absence on December 13, 2013. Although I acknowledge and understand the basis for Ms. Gorham's initial skepticism, ultimately, I credit the testimony of Director Vazquez that he did authorize Ms. Dias to take the staff out for the annual holiday luncheon and he did reimburse Ms. Dias for the costs associated with the December 13, 2013 luncheon, including the costs associated with Mr. Hodges' lunch.

Frankly, Ms. Dias' mistake was not asking Director Vazquez whether she had to notify anyone in his absence about taking an extended lunch and forgoing the palming requirement. As it turns out, Director Vazquez had always notified someone in Human Resources on the day of the luncheon that he would be taking his staff out to lunch and that they would not be palming out/in. Ms. Dias credibly testified that she was unaware that Director Vazquez had been observing this additional procedure. Nonetheless, it was incumbent upon Ms. Dias to follow the same rules as Director Vazquez did in order to obtain an exception to the lunch hour and palming requirements. Her failure to do so, in my opinion, resulted in a negligent, double violation of the work rule in question inasmuch as she advised Ms. Morales that she did not have to palm out/in either.

Finally, as to the appropriateness of the penalty imposed on Ms. Dias, I credit Ms. Dias' long-term employment (27 years) and I incorporate by reference my findings set forth above concerning both the Authority's failure to clearly notify employees of

palming rule violation consequences and the Authority's longstanding lax enforcement of the work rule. Perhaps more importantly, the Authority's regressive treatment of Ms. Dias' June and July of 2010 palming violations (i.e., pro rata pay docking) subsequent to both the documented verbal warning that she received on July 15, 2009 and Ms. Gorham's "Final Warning" memorandum of August 21, 2009 must be factored into a determination of penalty. Therefore, after taking into account the mitigating factors noted above, especially the regression, I will direct the Authority to modify the disciplinary penalty from a suspension without pay of two (2) days to a written reprimand, the next penalty in progression from a documented verbal warning or oral reprimand under Article XVI, Section A of the parties' Agreement. I further direct the Authority to return two (2) days of pay to Ms. Dias within two pay periods from the date hereof and to adjust her personnel file accordingly.

AWARD

For the reasons more thoroughly set forth herein, I find and conclude that the Employer, Paterson Housing Authority did not have good cause to discipline Jennifer Morales. The Employer is hereby directed to return one (1) day of pay to Ms. Morales within two (2) pay periods from the date hereof and to adjust her personnel records accordingly. The Employer did not have good cause to suspend Albert Hodges for one (1) day without pay. The penalty is hereby modified to a documented verbal warning. The Employer is directed to return one (1) day of pay to Mr. Hodges within two (2) pay periods from the date hereof and to adjust his personnel records accordingly. The Employer did not have good cause to suspend Terri Dias for two (2) days without pay. The penalty is hereby modified to a written reprimand. The Employer is directed to return two (2) days of pay to Ms. Dias within two (2) pay periods from the date hereof and to adjust her personnel records accordingly.

Respectfully submitted,



Joseph Licata

Dated: November 6, 2014

State of New Jersey)
):SS
County of Bergen)

On the 6th day of November, 2014, before me personally came and appeared Joseph Licata, to me known and known to me to be the person described herein who executed the foregoing instrument and he acknowledged to me that he executed the same.



Notary Public

Tracy Leigh McKenna
NOTARY PUBLIC
STATE OF NEW JERSEY
ID # 2312581
MY COMMISSION EXPIRES MARCH 26, 2019

