

**IN THE MATTER OF ARBITRATION BETWEEN**

**DEPARTMENT OF LABOR (MINE SAFETY & HEALTH ADMINISTRATION)** ) **FMCS CASE NO. 080616-03485-3**  
)  
**“EMPLOYER”** )  
) **DECISION AND AWARD**  
**And** )  
)  
**NATIONAL COUNCIL OF FIELD LABOR LOCALS** ) **RICHARD R. ANDERSON**  
) **ARBITRATOR**  
)  
)  
**“UNION”** ) **November 6, 2008**

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**JURISDICTION**

The hearing in the above matter was conducted before Arbitrator Richard R. Anderson on October 21, 2008 in Duluth, Minnesota. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced by both parties and received into the record. The hearing closed on October 21, 2008 at which time the record was closed and the matter was then taken under advisement.<sup>1</sup>

This matter is submitted to the undersigned pursuant to the terms of the parties’ collective bargaining agreement, hereinafter the Agreement, that is currently effective from October 1, 2006 through September 30, 2011.<sup>2</sup>

The relevant language in Article 15 of the Agreement [GRIEVANCE PROCEDURE] and Article 16 [ARBITRATION] provides for the filing, processing and arbitration of a grievance

<sup>1</sup> The parties waived post-hearing briefs.

<sup>2</sup> Joint Exhibit No. 1.

including the authority of the arbitrator. The parties stipulated that this matter does not involve contract arbitrability or any other procedural issues; and that it is properly before the undersigned Arbitrator for final and binding decision on the merits of the grievance.

## **APPEARANCES**

### **For the Employer:**

Joseph H. Kiefer, Jr., Regional Labor Relations Officer  
Steve Richetta, North Central District Manager  
Gerald D. Holeman, North Central District Assistant Manager  
Holly Coffey-Flynn, North Central District Human Resource Specialist  
Christopher A Hensler, North Central District Supervisory Mine Safety & Health Inspector

### **For the Union:**

Bill Henson, National Council of Field Locals Vice President  
Dale Hedman, Grievant and Mine Safety & Health Inspector  
Russell Jarvi, Retired North Central District Supervisory Mine Safety & Health Inspector

## **BACKGROUND**

The Mine Safety and Health Administration (MSHA), hereinafter the Employer, is a division of the Department of Labor with the authority to administer the provisions of the Federal Mine Safety and Health Act of 1977 (Mine Act), as amended by the Mine Improvement and New Emergency Response Act of 2006 (MINER Act), and to enforce compliance with mandatory safety and health standards as a means to eliminate fatal accidents; to reduce the frequency and severity of nonfatal accidents; to minimize health hazards; and to promote improved safety and health conditions in the Nation's mines.

Its Metal and Non-metal Mine Safety and Health Division consists of a small headquarters office in Arlington, Virginia, six district offices, 47 field offices and field

duty stations located throughout the United States and Puerto Rico. The North Central District Office, hereinafter the District, is headquartered in Duluth, Minnesota. District Manager Steven Richetta is the highest ranking official in the District followed by Assistant District Manager Gerald Holeman. The District has jurisdiction in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin. The District also has jurisdiction over a field duty station located within its Duluth facility where four Mine Inspectors domicile and a field office located in Hibbing, Minnesota where there are six Inspectors. Both the Hibbing and Duluth based Inspectors are currently supervised by Supervisory Mine Inspector Chris Hensler, who replaced Supervisory Mine Inspector Russell Jarvi who retired on August 31, 2007.

The National Council of Field Labor Locals, hereinafter the Union, represents all of the Department of Labor employees including the Employer's employees throughout the Nation in field duty stations outside the Washington, D.C. metropolitan area including the Mine Inspectors in Duluth and Hibbing.<sup>3</sup>

On October 29, 2007, the Union through representative George Kent filed a grievance on behalf of Grievant Dale Hedman alleging that the Employer violated Article 43 Section 5, Subsections A & B when Holeman improperly rated him as "Meets" in Element 1 and "Needs Improvement" in Element 2 in his October annual appraisal on October 5, 2007 wherein he had been rated "Exceeds and "Meets" in Elements 1 & 2, respectively in past years.<sup>4</sup> This action resulted in the Grievant receiving an overall evaluation rating of "Minimally Unsatisfactory", which in turn denied the Grievant a performance-based cash award.

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<sup>3</sup> Mine Inspectors in Hibbing and Duluth belong to the Union's affiliate organization AFGE Local 2161.

<sup>4</sup> Joint Exhibit No. 2.

The Employer, through Holeman, denied the grievance in a written answer to the Union on November 15, 2007.<sup>5</sup> In his denial Holeman stated that he rated the Grievant on his performance over the past year and he could not take into account the Grievant's prior year work records. Holeman also stated that his rating was based on "*the proper evaluation sources of supervisory observation and substantive feedback from your prior supervisor (Jarvi)*".

On November 21, 2007, Union representative Bill Henson filed a Step 2 appeal of the Grievance.<sup>6</sup> After a Step 2 meeting was held on February 25, 2008 to discuss the issues raised by the grievance, Richetta issued the Employer's Step 2 response on March 13, 2008.<sup>7</sup> In his response Richetta reiterated that the appraisal was properly based on Holeman's observations of the Grievant's performance and on input from the Grievant's previous supervisor (Jarvi). Richetta also mentioned that Holeman also relied on paperwork, statistical reports and data for the entire appraisal year. Finally, Richetta stated that the Grievant "*was afforded guidance for improving your performance and you did so*"; adding that "*an interim appraisal was conducted on January 7, 2008 in which your current supervisor Chris Hensler raised your rating (in Element 2) to meets*".

On April 10, 2008 the Union filed for arbitration with the Office of Employee Labor Management Relations.<sup>8</sup> Thereafter, Regional Labor Relations Officer Joseph H. Kiefer, Jr. notified the undersigned Arbitrator by e-mail on July 31<sup>st</sup> that I had been selected as the neutral arbitrator in this matter.

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<sup>5</sup> Joint Exhibit No. 3.

<sup>6</sup> Joint Exhibit No.4.

<sup>7</sup> Joint Exhibit No. 5

<sup>8</sup> Joint Exhibit No. 6.

## **THE ISSUE**

The parties stipulated that the Issue was whether the Employer violated Article 43 of the Agreement when it issued Grievant Dale Hedman's October 2007 performance evaluation, specifically Elements 1 & 2, and if so, what is an appropriate remedy?

## **RELEVANT CONTRACT PROVISIONS**

### **ARTICLE 16 — GRIEVANCE PROCEDURE**

#### **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.*

#### **Section 6 - Authority of Arbitrator**

*A. 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 and/or Departmental 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 regulations.*

*B. The arbitrator will have no authority to add to, subtract from, alter, amend, or modify any provision of this Agreement.*

*C. 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, or decisions of appropriate higher authority, or this Agreement.*

*D. 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.*

*F. In regular (non-expedited) arbitration cases, the arbitrator should render and serve the written award on both parties within thirty (30) calendar days of the close of the record.*

*G. The arbitrator will have no authority to consider new issues, allegations and defenses raised by the grievant that he/she had not previously raised, in writing, at or before the Step 2 grievance meeting. In addition, mere references to an alleged violation of a contract article or to issues, allegations or defenses, without reference*

*to the underlying facts and circumstances supporting the assertion, shall not be arbitrable.*

## **ARTICLE 43 — Performance Management System**

### **Section 1 - Coverage**

*The Article concerns the impact and implementation of the Government-wide regulations on the Performance Management System (PMS), and the DOL regulation DPR 430 dated 5/9/06. These regulations, as appropriate, apply to employees in the NCFLL bargaining unit except as provided herein.*

*The Government-wide regulations and the Department's implementing regulation are applicable to employees in the bargaining unit, except where non-mandatory provisions of the regulations are in conflict with this Article. In such cases, the parties agree that Article 43 is controlling.*

### **Section 2 - Procedures for Developing Elements and Performance Standards**

*A. Consistent with Management's right to assign work, the performance elements should be consistent with the duties and responsibilities contained in an employee's position description.*

*B. In establishing standards, due consideration will be given to employee input.*

*C. Employees are entitled to an explanation of the rationale for their elements and standards.*

*D. Due consideration will be given the employee as to the resources available and the authority delegated necessary to meet the identified standards and elements.*

### **Section 3 - Performance Standards**

*A performance standard will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria related to the job in question for each employee or position under the System.*

*After receiving proposed elements and standards from the supervisor, the employee will have the opportunity to meet and discuss these standards with the supervisor, and to provide his or her written comments.*

*When a performance standard has more than one criterion, employees will be advised as to the relative importance of the criteria contained within the standard.*

*A performance standard may be in the form of meeting less than all the criteria under a performance standard or of meeting all the criteria under a performance standard.*

*Upon request, supervisors will inform employees orally on what is expected in order to exceed a standard. Employees will be provided ongoing feedback from their supervisors on their work performance.*

### **Section 4 - Annual Rating of Record**

*A. Within 30 days after the end of the rating period, each employee shall receive an annual rating of record.*

*B. Each Agency will ensure regular performance feedback is provided to each employee during the appraisal period. As part of this feedback, a progress review must be held at least once during the appraisal period, but no later than 120 days before the*

end of the rating period. This review will include areas of critical competencies requiring improvement and feedback on sustaining positive performance. At a minimum, during this progress review, employees will be informed orally of their performance relative to the elements and standards in their performance plans. The employee's progress review discussion will reflect the necessary information needed to assess progress toward attaining a career ladder promotion as reflected in Article 20, Section 10. The rating official and the employee will certify on the performance appraisal form that the progress review was held. The Department is committed to recognizing desired performance, and to providing opportunities to correct poor performance.

**C.** The rating official must confer with the reviewing official and secure the approval of the reviewing official of the tentative rating for the employee before discussing the tentative rating with the employee. The supervisor will discuss the rating of record with the employee to avoid misunderstandings and possible inaccuracies. The rating official will confer with the employee to review accomplishments, problems, and general performance during the appraisal period and will discuss the tentative conclusions regarding the rating with the employee. The employee's performance rating discussion will reflect the necessary information needed to assess progress toward attaining a career ladder promotion as reflected in Article 20, Section 10. The discussion will be face to face to the extent practicable but may be by telephone.

**D.** The employee will have an opportunity to present his/her assessment of work accomplishments, as well as time to respond in writing to the rating official on the rating. Employees have up to ten working days in which to review, sign, or prepare comments to the rater or reviewing official, as appropriate, on their ratings. Any written comments will be forwarded to the reviewing official(s) along with the tentative rating. After the rating has been reviewed and approved, it will be discussed with the employee by the rating official if any changes have been made in the tentative rating. Such written response is to be considered by the rater or reviewing official, as appropriate, and attached to the performance appraisal and will be maintained in the employee performance file.

### **Section 5 - Improving Unsatisfactory Performance**

**A.** Any employee not meeting the performance standards of one or more critical elements will be promptly notified.

**B.** Informal efforts by the supervisor will include guidance to the employee regarding specific actions which should be taken to improve performance.

### **Section 6 - Performance Improvement Plan**

**A.** When informal efforts made by the supervisor do not result in improved performance when an employee is failing a standard, a Performance Improvement Plan will be developed with the participation of the employee. The Plan will be discussed between the immediate supervisor and the employee and put into writing. This Plan will be geared toward efforts which must be initiated by both employee and immediate supervisor and which are designed to result in overall job performance at the effective level or above.

At a minimum, this Plan will include the following:

1. An explanation of the elements and the related performance standards in which the employee's performance fails to meet the standard;
2. specific goals in terms of time and results expected for levels of progress against

*each performance standard where performance improvement is needed; also, advice about what the employee must do to bring his or her performance up to the meet level, as well as periodic counseling and reassessment by the supervisor during this period; and*

*3. training, if appropriate.*

*B. No performance-based action (5 CFR 432) will be proposed unless the employee is given at least a 90-day period of time in which to correct any deficiencies noted and a detailed explanation of the work to be accomplished in the 90-day period to correct performance deficiencies. To this end, the Performance Improvement Plan will be utilized.*

### **Section 7 - Special Circumstances**

*Performance appraisals must take into account: authorized absences, including Union representation, during the course of working hours, and factors outside the employee's control.*

### **Section 8 - Initiation of a New Appraisal Period**

*A. After receiving the tentative elements and standards from the supervisor, the employee will have a period not to exceed ten working days within which to examine and consider this material and to meet with the supervisor to discuss these elements and standards. During this period, the employee, upon request, will be granted a reasonable amount of official time to consult with the Union Steward concerning the elements and performance standards.*

*B. At a bargaining unit employee's request, when assigned a new supervisor, the new supervisor will discuss the bargaining unit employee's performance plan.*

### **Section 9 - Removal of "Fail" and "Need to Improve" Performance Information in Personnel Files**

*If because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable ("Meet") for one year from the date of the advance notice, then any entry or other notation with regard to the "Fail" or "Need to Improve" performance for which the action was proposed shall be removed from any Agency record relating to the employee.*

### **Section 10 - Information Sharing**

Management agrees to share Agency prototype elements and standards developed at the regional or national level for similar or common positions within the bargaining unit with the NCFLL in a timely manner. The NCFLL will have a minimum of 30 calendar days to submit comments on standards before their implementation.

"Prototype elements and/or standards" are performance elements and standards that apply to several positions with similar duties, responsibilities and job requirements. Usually they are developed centrally for all positions in a particular mission-critical occupation and grade.

### **Section 11 - Grievability and Arbitrability of Job Elements and Performance Standards**

*Performance Standards may only be grieved when they are applied in a rating of record.*

## **ARTICLE 44 — Performance Awards**

### **Section 1 - General**

**A.** *The current rating of record will be used as a basis for decisions to grant performance-based awards under the Department's Performance Management System 9 (See DPR 430). In addition to performance bonuses based on a rating of record, managers and supervisors are encouraged to utilize all award categories to reward deserving employee performance in a timely manner throughout the rating cycle. Examples of award categories are special act or service award, instant good job award, time off award, honorary award, and non-monetary award. To this end, the parties have agreed that managers can utilize the instant good job award to make awards of up to \$300 net.*

**B.** *Absent budget constraints, Management will fully utilize the awards budget to reward deserving employee performance. The NCFLL will be notified if an awards budget is not fully utilized.*

**C.** *When Management uses bargaining unit employees' special skills, Management is encouraged to reward these employees using all available award categories.*

### **Section 2 - Effect of Summary Ratings**

**A.** *An employee who receives a rating of record of Exemplary must receive a performance award and/or a Quality Step Increase.*

**B.** *An employee who receives a rating of record of Highly Effective should normally receive a performance award.*

**C.** *An employee who receives a rating of record of Effective should be considered for and may receive a performance award.*

**D.** *If an employee has been promoted within the appraisal year, the appropriate manager or supervisor may take this into account in determining the amount of the employee's performance award, and/or whether to grant a Quality Step Increase for an "Exemplary" rating for that year.*

**E.** *Within each performance award unit, awards granted to employees in the same grade with a particular rating should normally be more in terms of dollars (including any Quality Step Increase) than awards received by employees in the same grade with a lower rating.*

**F.** *If an employee does not have a rating of record when performance awards are granted; the employee may be granted an award when he/she is assigned a rating of record.*

**G.** *Management will consider retroactive awards for employees whose ratings change after the distribution of payouts.*

**H.** *It is Management's intention normally to pay out performance awards by the end of the calendar year.*

**I.** *Suggested Amounts of Performance Awards: The following amounts are suggested for consideration in determining performance awards:*

Rating	Suggested Percent Rate of Employee Basic Pay
Exemplary	Up to 10%
Highly Effective	Up to 7%
Effective	Up to 4%

## **APPRAISAL CRITERION**

**Element 1:** *Conducts safety and health inspections/investigations at assigned mines.*

**Performance Standard:** *Employee meets the standard when the following have been accomplished:*

- 1. Inspects assigned mines and/or mills in accordance with regulations/standards, policies, procedures, and within the assigned time frame.*
- 2. Conducts a thorough review of mine file, mine reports, violation history, sampling history, outstanding citations and orders. Identifies inaccurate or inadequate reporting of accidents/illnesses and hours worked.*
- 3. Identifies unsafe conditions and practices in violation of the Mine Act and 30 CFR and their root causes. Communicates the root cause to miners and the mine operator. Conducts follow-up evaluation to determine the effectiveness of the corrective measures initiated by the operator.*
- 4. Inspection notes are clear and concise and accurately describe conditions at the mine as well as action taken by the inspector.*
- 5. Inspection and other required reports are accurate, complete, and timely submitted with minimal errors.*

**Evaluation Sources:** *Performance will be appraised based on: supervisory observation, substantive feedback received; MIS and other statistical reports and data. Inspector's application of the Mine Act, 30 CFR, inspection techniques, policies and guidelines; administrative policies and guidelines; and knowledge of IPAL applications and MIS codes*

**Element 2:** *Issues citations and orders at assigned mines with the intent of preventing and reducing accidents.*

**Performance Standard:** *Employee meets the standard when the following have been accomplished:*

- 1. Identifies unsafe conditions and practices in violation of the Mine Act and 30 CFR at assigned mines and/or mills and clearly and accurately documents the circumstances surrounding the violation.*
- 2. Issues citations and orders that are consistent with policy, procedures, and pertinent Commission decisions, reflecting a clear understanding of the Mine Act, 30 CFR, and MSHA goals with regard to accident reduction and compliance assistance. The inspector fully explains the enforcement action to the operator at the time of issuance.*
- 3. Consults with mine operators and sets reasonable abatement times appropriate to the hazards involved. In consultation with mine operators, the inspector clearly communicates the reason why the condition/practices violates the cited standard and identifies abatement alternatives. These alternatives are consistent with policy and procedures and reflect a good understanding of mine safety and health practices.*

4. *Utilizes proper level of enforcement appropriate for the conditions/practices observed.*

**Evaluation Sources:** *Supervisory observations, substantive feedback received; MIS and other statistical reports and data.*

## **FACTS**

The Grievant has been employed as an Inspector since April 1998. His duty post has been the Duluth Field Duty Station during his entire tenure under the direct supervision of Jarvi until Jarvi retired on August 31, 2007<sup>9</sup>. Jarvi supervised 11 Inspectors who worked out of the Duluth and Hibbing offices. The Inspectors are responsible to conduct safety and health inspections at mines (open-pit and underground), rock and dimension stone quarries, sand and gravel pits, wash and screen plants, dredging operations and crusher operations. The facilities inspected may be portable or fixed.

Per Employer and Department of Labor policy, employees are evaluated annually regarding their job performance. The appraisal period is from October 1<sup>st</sup> of the past year through September 30<sup>th</sup> of the current year.<sup>10</sup> On October 5<sup>th</sup>, the Grievant received his annual appraisal for the period October 26, 2006 through September 30, 2007 from Holeman, who had been supervising the Grievant since Jarvi's retirement. The Grievant was rated on the five traditional appraisal elements. The elements and element ratings are as follows:<sup>11</sup>

Element 1—Conducts safety and health inspections/investigations at assigned mines. [Meets]

Element 2—Issues citations and orders at assigned mines with the intent of preventing and reducing accidents. [Needs Improvement]

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<sup>9</sup> Hereinafter, all dates are in 2007.

<sup>10</sup> Department of Labor DPR Chapter 430 Subchapter 1 Section 7. Joint Exhibit No. 10.

<sup>11</sup> The ratings highest to lowest are Exceeds, Meets, Needs Improvement and Fail.

Element 3—Promotes safety and health at the Nation’s mines through compliance assistance. [Exceeds]

Element 4—Promotes the achievement of Mine Safety and Health Administration GPRAs goals. [Meets]

Element 5—Utilizes available resource material to prepare and conduct inspections/investigations. [Meets]

As a result of the appraisal, the Grievant was downgraded from his previous evaluation where he had been rated “Exceeds” in Element 1 and “Meets” in Element 2. He was also downgraded on his Rating of Record from “Effective” to “Minimally Satisfactory”. Richetta, who reviewed the appraisal, agreed with Holeman’s ratings. According to the Grievant, this was the lowest evaluation he had received and the first time he had received an Element rating of “Needs to Improve” and a Rating of Record of “Minimally Satisfactory”.

Narratives are required when the employee is rated other than “Meets.” Holeman’s narrative in Element 2 stated,<sup>12</sup>

*Based on reviews of Dale’s inspection work he consistently fails to identify all unsafe conditions effectively, during inspections of assigned mines. His inability to recognize a hazard, condition, practice or to inquire upon the use of particular piece of equipment, to verify compliance with mandatory safety regulations, consequently compromises thorough safety inspections of mines and/or mills. The inability to identify hazards ultimately affects the safety of miners. His performance level is below what is expected of a mine safety and health inspector, with his years of service and experience.*

The Grievant submitted a written response to Holeman’s appraisal on October 14<sup>th</sup> in which he questioned Holeman’s ratings in Elements 1 & 2. The Grievant noted that last year Jarvi gave him an “Exceeds” rating in Element 1 after he successfully completed all of his inspections in his assigned work area. This was precisely what he accomplished this year and should have also been rated “Exceeds”: With respect to Element 2, the Grievant stated Jarvi, who was his supervisor for 11 months and

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<sup>12</sup>No narrative was required for Element 1.

accompanied him on four inspections during that appraisal period, rated him “Meets” last year and gave him no indication that he would be rated otherwise during this time period. He questioned Holeman’s justification for basing his reduction in rating on Holeman accompanying him on two inspections over a one and one half day period.

The Grievant also questioned Holeman’s judgment for doing a full or EO1 inspection at a non-operating facility rather than the appropriate spot-check or E16 inspection, adding that an EO1 full inspection was unfair under the circumstances because it did not give the mine operator a chance to do a pre-check to ensure safety compliance before it started operating. He also questioned the need to prove that citations he was going to issue for faulty lights on a front-end loader and a faulty parking brake on a parked pick-up truck were justified before they could be issued.

The Grievant also questioned whether Holeman had any figures to back up his claim that the Grievant’s citation count was less than desirable, adding that he did not have a taconite plant to inspect as had the other Inspectors; nor was he aware that there was a citation count quota. Finally, the Grievant questioned whether Holeman ever discussed his rating with Jarvi at which time Jarvi allegedly agreed with Holeman’s evaluation of him. He also questioned why he was not informed that he was not working up to standards.

Holeman testified that he rated the Grievant as “Needs Improvement” in Element 1 based upon his observations while he accompanied the Grievant on August 14<sup>th</sup> through 15<sup>th</sup> on inspections at Duluth Redi-Mix operations north of Duluth. Duluth Redi-Mix was operating a portable sand and gravel crusher next to a fixed wash plant where

sand and gravel were being washed. An EO1 full inspection was planned at both operations; however, when they arrived at the crushing operation it was shut down. Two employees were performing maintenance and had removed various safety guards on the crusher equipment in order to perform the maintenance.

Since the crusher was not operating the Grievant determined that an E16 spot inspection was appropriate rather than an EO1 full inspection; and without consulting Holeman, initiated the E16 spot inspection. Early on in the inspection Holeman specifically instructed the Grievant to do an EO1 full inspection, which led to a disagreement between the two. The Grievant questioned Holeman whether conducting an EO1 full inspection was appropriate since the crusher was not running. He wanted to wait until the next day when it would be running so that he could also do an air quality test. The Grievant testified that if he was alone, he would have conducted an E16 spot inspection; however, because Holeman was the boss, he complied with his instructions. The Grievant stated that he never refused to conduct the EO1 inspection when instructed to do so even though he still believed it was not warranted. He felt it would penalize the mine operator who would not have a chance to do a pre-inspection to correct any safety hazard(s) prior to starting operations.

The Grievant testified that it was common practice to do E16 spot inspections when the mine or plant was shut down for maintenance and cited a training session conducted telephonically earlier that year on June 25<sup>th</sup>. During this meeting, the Grievant stated he took notes of Jarvi's comments regarding the subject of E16 spot inspections. The notes stated,<sup>13</sup>

*“Spot Inspections (E16) Do only if plant is not operating and men are*

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<sup>13</sup> Union Exhibit No. 1.

*doing repairs or fixing. Do a spot check on their practices e.g.: welding, changing guards, screens. If plant is visibly not ready, do the spot only on what they are repairing, otherwise leave plant alone.”*

During the course of the inspection Holeman stated that the Grievant correctly issued citations on five hazards: The hazards included an unsecured propane tank; an inappropriate steel cover on an electrical switch box that had been replaced by a fabricated rubber cover; two power switches were not labeled to distinguish which units they controlled; the open back end of a generator trailer did not have a safety chain nor bar across the opening to prevent an employee from falling to the ground from the trailer; and the self-cleaning tail pulley for a stacker was not guarded along either the left or right side.

However, Holeman testified that he had to tell the Grievant to issue citations on an additional violation that was observed during the inspection tour. The Grievant failed to recognize that a safety guard was warranted on a head pulley at the end of a conveyor belt because the distance from the ground to moving parts was less than the required seven feet.

The Grievant testified that he initially did not cite the lack of a guard on the head pulley because when he measured the distance between the ground and the pinch point of the head pulley in Holeman's presence, the distance was greater than seven feet; therefore, a citation was not appropriate. Later Holeman testified that there was an area under the head pulley that had obviously been dug out. If this area filled up with spilled gravel, which in all probability would happen during normal operations, the "distance" would be less than the required seven feet.

Holeman further testified that the Grievant also failed to inspect a red pick-up truck at the crusher site next to a generator trailer. The Grievant testified that there was no

reason to believe that the pick-up was used in the crusher operation; however, during cross-examination the Grievant said that it was possible that the pick-up could be used to transport employees.

Holeman also testified that the Grievant failed to inspect the pit and pit face where the sand and gravel were being mined to determine if any safety hazards existed. The Grievant testified that there was no reason to inspect the pit area and pit face because there was no activity in the pit at the time of the inspection. When the pit and pit face were ultimately inspected, no citations resulted. Holeman later testified that an inspection of the pit area and the pit face were required in an EO1 full inspection whether or not the pit was in operation in order to determine the existence of any safety hazard

According to Holeman, the Grievant also failed to document the work practices and habits of the two individuals working at the crusher site as required in an EO1 full inspection. The Grievant testified that there was no reason to document work habits and practices because one individual was performing maintenance and the other, a foreman, was accompanying them on the inspection. They were not engaged in their normal job duties; therefore, no assessment was required. In later testimony, Holeman disputed this reasoning; and stated that work habits and practices should be covered whether it is an EO1 full or E16 spot inspection since most accidents happen during maintenance periods.

Holeman also cited the Grievant's failure to review (verify) the mine ID Number with the mine operator during the course of the inspection. The Grievant testified that he had checked the mine ID Number in the mine's field file at the office prior to embarking

on the inspection. Holeman later testified that this is insufficient and that an Inspector must verify the ID Number with the mine operator at the mine site to ensure it was correct.

The Grievant, accompanied by Holeman, then visited the adjacent Duluth Redi-Mix sand & gravel wash plant that was in full operation when they arrived. As planned, an EO1 full inspection commenced. During the course of the inspection, six citations were issued. According to Holeman, the Grievant correctly issued citations for a non-functioning horn on a front-end loader and for unguarded pulleys on the wash plant conveyer system.

The Grievant also issued a citation for lights that were not functional on a front-end loader, which Holeman questioned as being appropriate. It was the Grievant's position that if a vehicle had lights, the lights had to be fully functional whether or not they were needed in the operation of the equipment. Moreover, the Grievant testified that it was clear that lights would be needed during adverse conditions such as in inclement or foggy weather and dusty conditions. It was Holeman's testimony that equipment with non-functioning lights is not a per se violation. According to Holeman, a citation would not stand up in court unless it could be proven that the equipment was operated when lights were actually needed. In this case, the Grievant failed to establish that the loader would be operating at a time or place that required lights.

In another situation, the Grievant wrote a citation on a service truck because the parking brake was not functional. Holeman also questioned this citation, stating he should have inquired with the mine operator whether the truck was going to be used where a parking brake was necessary before issuing the citation. According to the

Grievant, it was clear that the service truck was used in the operations of the plant and thus should have had a functional parking brake. Moreover, as with the lights on the front-end loader, any piece of equipment must have all safety equipment functional, whether the safety equipment is needed or not needed in the operation of that equipment. Again Holeman disputed this testimony, stating that there is nothing in MSHA regulations governing this alleged policy. Citing legal sufficiency, Holeman testified that it was incumbent on the Inspector to establish that non-functioning safety components had to be used during the operation of the equipment.

The Grievant testified that he had issued a citation for the lack of a non-smoking sign on a trailer that housed flammable material. According to the Grievant, Holeman pulled him aside and told him that before he could issue a citation he had to inquire as to when the sign was on there. The Grievant stated that he did not have to prove anything, that the sign was not on there and that, therefore, a citation was appropriate. In addition the foreman supported his citation for the lack of the sign.

Holeman testified that he had to direct the Grievant to issue a citation for a lack of an audible warning device on the overland conveyer whenever the conveyer was started up in order that a warning could be heard in areas beyond the visual range of the operator. In this situation, the operator was using canned air to operate a hand held horn; however, all of the cans were empty. The Grievant felt that a citation was not appropriate since the mine operator would have had time to replace the empty cans before the operation of the conveyer was halted and restarted.

Holeman also cited the Grievant's failure again to verify the mine ID Number with the operator during the course of this inspection. Once again, the Grievant testified that he

had checked the mine ID Number at the office prior to going out on the inspection. Finally, Holeman testified that the Grievant failed again to document the work habits and practices of the employees working at the wash plant.

The Grievant acknowledged during the course of his testimony that in the past he had performed EO1 inspections on shut down operations especially if they had been in operation the day before. With respect to the idle crusher situation, he questioned where he would start to inspect, since a number of guards had been removed for maintenance. The Grievant also acknowledged that it would be appropriate to inspect the pit face, the red pick-up and the hand held air horn to see if there was sufficient air to operate it in a regular EO1 inspection.

The Grievant further testified that he was taken back by the negative manner in which Holeman brought his alleged inspection errors to his attention during the course of the inspection. Holeman criticized him in front of the foreman accompanying them on the inspection in what the Grievant thought was a demeaning manner. In fact, according to the Grievant, this foreman made a statement to wit, "Dale, is he on your side or is he on mine?"

The Grievant acknowledged that during the beginning of this appraisal year, as in past years, Jarvi gave him the performance standards that he was expected to meet during the course of the upcoming appraisal year. He also received a mid-term progress review from Jarvi on April 2<sup>nd</sup> and was never informed that he "needed to improve" his safety hazard recognition or increase his citations. In fact, Jarvi had informed him throughout the year that he was doing a good job and to keep doing what he had been doing. The Grievant testified that when he received his negative appraisal

on October 5<sup>th</sup>, he had no indication that he was going to be downgraded. He stated that neither Jarvi nor Holeman ever indicated to him that he “needs to improve” nor was he ever told that he needed additional hazard recognition training.

In rebuttal, Holeman testified that he discussed the Grievant’s inspection deficiencies during the course of the inspections at the Duluth Redi-Mix operations and during a meeting with the Grievant on September 10<sup>th</sup>. During this meeting, Holeman testified that he went over his Field Activity Review Report of the Grievant’s Duluth Redi-Mix inspections with the Grievant where again he pointed out his inspection deficiencies.<sup>14</sup>

The Grievant testified that during the aforementioned appraisal meeting he questioned Holeman about citation numbers. Holeman indicated to him that he was not the lowest in terms of citation numbers nor was he the highest. The Grievant further testified that Holeman never told him that he needed to increase his citation total. Later, in his testimony, Holeman stated that the Grievant was the lowest in terms of number of citations issued. Documents offered at the hearing through the Grievant show that the Grievant issued 73 citations during his 2005-2006 appraisal period and 83 during the 2006-2007 period.<sup>15</sup> The Grievant also testified that he completed all of his assigned inspections. He also assisted other Inspectors in order to complete all of the required Agency inspections in the 2006-2007 appraisal period, as he had in past years.

Holeman testified the Grievant was a GS-12 journeyman Inspector who was expected to operate with little or no supervision. Based upon his observations of the Grievant during the two mid-August inspections, the Grievant failed to identify a number

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<sup>14</sup> Employer Exhibit Nos. 3 &4.

<sup>15</sup> It is not known how many citations other Inspectors issued during the same periods.

of safety hazards resulting in Holeman assigning the “Needs to Improve” rating In Element 2. He assigned a “Meets” rating in Element 1 because the Grievant failed to carry out proper inspections. Holeman also based his ratings in Elements 1 and 2 on discussions with Jarvi about the Grievant’s ratings. Holeman testified that after he returned from his observations of the Grievant’s inspections in August, he relayed his concerns about the Grievant inspections with Jarvi. Holeman further testified that he also had a phone conversation with Jarvi on September 10<sup>th</sup>, wherein Jarvi agreed when Holeman informed him that he was considering rating the Grievant “Needs to Improve” in his upcoming appraisal.

During the course of the hearing, the Union proffered through the Grievant a written statement by Jarvi.<sup>16</sup> According to Jarvi’s statement, Holeman never discussed the Grievant’s rating with him. During his actual testimony, Jarvi could not recall a phone conversation with Holeman or that he ever discussed the Grievant’s performance rating with Holeman.<sup>17</sup>

Also, during the week prior to Jarvi’s retirement, Holeman testified that he asked Jarvi to come into the office to discuss the performance evaluations of the Inspectors supervised by Jarvi. Jarvi never came in, however, after his retirement Jarvi finally sent in a document wherein Jarvi rated his former employees.<sup>18</sup> There are eleven entries on the document where names have been redacted followed by a list of the number of Elements exceeded. Seven employees exceeded four Elements, one exceeded three,

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<sup>16</sup> Union Exhibit No. 5.

<sup>17</sup> Jarvi testified by telephone at the undersigned’s direction.

<sup>18</sup> Employer Exhibit No. 1.

two exceeded two and one individual exceeded none.<sup>19</sup> In follow-up phone testimony, Jarvi acknowledged sending in this document.

Holeman testified that this document was indicative of Jarvi's lack of interest in providing constructive information on employee performance appraisals and Jarvi had to be constantly prodded to furnish performance information. Holeman stated that he also had issues with Jarvi as a supervisor because of a lack of documentation and follow through. Holeman said that paper work was not Jarvi's forte, and that he was more of a hands on supervisor who trusted employees to do their jobs rather than rely on documentation. Richetta also testified that he had less confidence in Jarvi's assessment of employees, which was a primary reason that he supported Holeman's assessment of the Grievant's work rather than Jarvi's.

As stated earlier, Hensler became the Grievant's supervisor after the 2006-2007 appraisal was issued.<sup>20</sup> After Hensler became the Grievant's supervisor, the Grievant was given additional hazard recognition training by Hensler. Thereafter, Hensler issued an Interim appraisal covering Element 2, which the Grievant signed on January 7, 2008. In this Interim appraisal, the Grievant was raised to "Meets". Thereafter, Hensler again evaluated the Grievant during his 2007-2008 annual performance review. In the appraisal, which was issued on October 23, 2008, Hensler rated the Grievant "Exceeds" in Element 1 and "Meets" in Element 2, which were the same ratings the Grievant received in his 2005-2006 appraisal period.

Finally, during the course of his testimony, the Grievant stated that Jarvi had told him on a number of occasions (dates unknown) that Holeman and Richetta "*had the scope*

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<sup>19</sup> It is not known which specific Elements were exceeded nor were the employees identified during this testimony or subsequently during Jarvi's testimony.

*on you and you better watch out*". The Grievant stated that Jarvi implied it was because he was the Union steward and he should contact other stewards in the District to see if they were being hassled. When he did, a few (unnamed individuals) said they had to walk on eggshells because they were stewards. In his testimony, Holeman denied that he had any animosity toward or took any action detrimental to the Grievant. Jarvi was not queried about his alleged statement during his testimony nor was any testimony solicited regarding union animus directed at the Grievant or other employees. Jarvi stated that he only told the Grievant that Holeman was watching him, adding that he felt Holeman was a "*sneaky character*".

### **POSITION OF THE EMPLOYER**

The Employer's position is that the Union has failed in its burden to establish that the Employer violated Article 43 when it gave the Grievant ratings of "Meets" and "Needs to Improve" in Elements 1 and 2, respectively, in his 2006-2007 appraisal. It is clear from the testimony that the Grievant deserved a "Meets" rating in Element 1 and "Needs to Improve" rating in Element 2. The Employer argues that the Grievant failed to identify a number of safety hazards and failed to conduct appropriate inspections at two Duluth Redi-Mix sites in mid-August 2007.

The testimony established that the Grievant failed to recognize the need to do an EO1 inspection at the crusher site even though it was shut down for the day. When he was told to conduct an EO1 full inspection rather than an E16 spot inspection, he failed to inspect the pit or pit face or inspect a red pick-up that was required in a full

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<sup>20</sup> Exact date unknown, but probably in late October or early November at the latest.

inspection. He was also instructed to issue a citation for an unguarded head pulley at the crusher site, which he failed to recognize.

At the wash plant, the Grievant had to be instructed to issue a citation due to the lack of propellant necessary to operate a safety air horn on the conveyer system. He also failed to check the mine ID Number and to document work practices and habits at this site as well as at the crusher site. Finally, the Grievant failed to inquire whether non-functional safety equipment was needed on a front-end loader at the wash plant and a service truck at the crusher site while they were in operation before he issued citations.

The Employer further argues that the ability of an Inspector to cite safety hazards in order to reduce accidents is the core of an Inspector's job. The Grievant is at the top level grade for Inspectors and is required to act independently without "hand holding". It is clear, from the two aforementioned inspections, that he needed supervision and "hand holding". It was also clear from Holeman's observation that the Grievant had hazard recognition issues and needed to improve. The Grievant was subsequently given direction and training; and in fact did improve, which resulted in him receiving a "Meets" rating in Element 2 in a January 2008 Interim appraisal.

The Employer also argues that the Grievant received a justified "Meets" rating in Element 1. Holeman's recitation of the Grievant's problems with inspections, procedures and documentation clearly shows an "Exceeds" rating is not justified. His problems with hazard recognition in Element 2 also impacted this Element. Finally, a narrative is required when an employee is rated "Exceeds" or higher. It would be very

difficult for a rater to pen a narrative to justify a rating of “Exceeds” based upon the Grievant’s performance.

It is also clear from the testimony of Holeman and Richetta that Jarvi had little regard for the Employer’s appraisal system and had documentation issues. Jarvi also had personal animosity toward District management, especially toward Holeman. It was for these reasons that Richetta, who was the reviewing official, gave more weight to Holeman’s assessment of the Grievant’s performance than to Jarvi’s input.

Finally, the Employer argues that this Arbitrator must find that management has not applied the established standards or has applied them in violation of law, regulation, or a provision of the parties’ collective bargaining agreement in order to sustain the Union’s grievance. If that finding is made, this Arbitrator may cancel the Grievant’s performance appraisal or rating. If this Arbitrator is able to determine, based on the record, what the performance appraisal or rating would have been had management applied the correct standard or if the violation had not occurred; then this Arbitrator may order management to grant that appraisal or rating. If this Arbitrator is unable to determine what the Grievant’s rating would have been, he must remand the case to the Employer for reevaluation.

### **POSITION OF THE UNION**

The Union’s position is that the Employer violated Article 43 of the Agreement when it issued the Grievant his ratings in Elements 1 and 2 in his October 2007 annual Appraisal. The Union argues that the testimony of the Grievant clearly establishes that he should have received a rating of “Exceeds” in Element 1 and “Meets” in Element 2. These are the same ratings that he received in past evaluation periods.

The Union further argues that the ratings that the Grievant received were not applied fairly. The Grievant provided evidence that supports his grievance. During the course of his testimony, the Grievant established that an E16 inspection was appropriate at the crusher site and he correctly issued citations at both the crusher and the wash plant. The Grievant justifiably did not need to inspect the pit or pit face because there was no activity in the pit nor did he need to cite the lack of a guard on the head pulley because the pinch point was more than seven feet from the ground. He also correctly issued a citation because the service truck had a faulty parking brake. Also, there was no need to do employee work practice and habit assessments since there were only two employees present, one doing maintenance and the other accompanying him on the inspection. Finally, he did verify the mine ID Numbers at both inspection sites while at the office prior to going on the inspections.

The Grievant also correctly issued a citation for faulty lights on the front-end loader at the wash plant. He did not issue a citation for the lack of a propellant for the safety air horn because the operator could have secured more canned air before the conveyer system was restarted at the plant. He also did not inspect the red pick-up because there was no evidence that it was being used in the wash plant operation.

The Grievant also cited the unfairness of Holeman doing his rating based on two inspections rather than accepting Jarvi's work assessment in his testimony. Jarvi had been his supervisor for eleven months and consistently told him that he was doing a good job; and neither he, nor Holeman, ever informed him that he needed to improve in his inspections.

The Union also argues that the Grievant has proven that he is an effective and efficient Inspector who has a good working relationship with his peers. He also is well respected by mine operators with whom the Grievant has a professional relationship.

Finally, the Union argues that in addition to having his ratings changed in Elements 1 and 2, the Grievant should receive a performance award based on what similarly ranked Inspectors received for that period.

### **OPINION**

The Issue before the undersigned Arbitrator is whether the Employer violated Article 43 of the Agreement when it issued the Grievant appraisal ratings of “Meets” in Element 1 and “Needs to Improve” in Element 2. The Union contended in its grievance that the Employer specifically violated Section 5 (Improving Unsatisfactory Performance) Subsection A and B. Section A states, *“Any employee not meeting the performance standards of one or more critical elements will be promptly notified”*. Section B states, *“Informal efforts by the supervisor will include guidance to the employee regarding specific actions which should be taken to improve performance”*. The undersigned Arbitrator is charged with the responsibility to determine if the Employer violated the Agreement; and if so, if the violation impacted the Grievant’s 2006-2007 annual appraisal to the extent that Elements 1 and 2 should be revised.

The evidence clearly shows that the Grievant encountered safety hazard recognition deficiencies during the Grievant’s inspections during mid-August 2007 at the Duluth Redi-Mix crusher and wash plant sites while the Grievant was accompanied by Holeman. He failed to conduct safety inspections in several areas, failed to issue a number of citations until directed to do so by Holeman, failed to inquire whether safety

equipment was actually used during production before issuing citations, failed to adequately check mine ID Numbers and failed to document the work habits and practices of employees.

While the Grievant rationalized a number of reasons for his actions, they fail to overcome the Employer's assertions. The Grievant admitted that he would normally inspect the pit area and pit face during an EO1 full inspection. He also admitted that it was possible that the red pick-up could be used to transport employees at the mine site; and if it was, he should have inspected it. During the course of inspecting the front-end loader and the service truck, the Grievant disputed Holeman's inquiry into the appropriateness of him issuing citations without evidence that the equipment was operated when the non-functioning safety components were needed. His position, contrary to Holeman's, was that non-functional safety equipment in and of itself is a safety violation. The Grievant failed, however, to rebut Holeman's testimony that MSHA policy did not support his position or proffer any corroborative evidence to support his position, e.g. other mine inspector or supervisor testimony.

The Grievant also failed to issue a citation for the empty air canisters used to operate the warning device (horn) on the wash plant conveyer until directed by Holeman. His argument that the operator should have been given time to do a pre-shift check to see if there was sufficient air to operate the horn in the event the conveyer was stopped and restarted is disingenuous under the circumstances.

According to Holeman, the Grievant failed to issue a citation for the lack of a safety guard on a head pulley at the crusher until directed to by him. Holeman acknowledged that the distance was more than the required seven feet; however, he contended that

during the course of production, the distance could be reduced to less than seven feet. Since Holeman's position is speculative at best, it appears that the Grievant's argument has merit. This is especially true when Holeman criticized the Grievant for not inquiring further when he issued citations on the front-end loader and service truck.

While the Grievant may have checked mine ID Numbers at the office before embarking on the inspections, he failed to verify the ID Numbers at the mine sites as Holeman contended was required. Once again no corroborative evidence was proffered to support the Grievant's position.

The Grievant contended that he did not document employee work practices and habits at the crusher because the crusher was shut down and employees were not engaged in normal production activities. He did not explain why he did not perform this documentation at the wash plant. He did, however, acknowledge that such inquiries were relevant during EO1 full inspections.

Finally, the Grievant questioned Holeman's decision to conduct an EO1 full inspection at the crusher site as they had originally planned, rather than an E16 spot inspection after they discovered that it had not been operating that day because of the maintenance shut down. The Grievant did acknowledge during his testimony that he had conducted EO1 full inspections in the past while maintenance was being performed during shut down periods. Nevertheless, the Grievant acknowledged Holeman's authority, and performed the EO1 full inspection in spite of his convictions.

Based on the foregoing, it appears that the Employer had a basis to question the Grievant's inspection practices. The Employer has established that the Grievant had safety hazard and inspection short comings that needed improvement.

Knowing that the Grievant had inspection deficiencies, and therefore needed to “improve” the quality of his inspections, did Holeman promptly notify the Grievant of these deficiencies; and advise him that he was not meeting performance standards? It is clear that Jarvi never informed the Grievant that he was not meeting performance standards and “needed to improve”; in fact, all evidence supports the Grievant’s contention that Jarvi informed him that he was performing at the same level as he had in the 2005-2006 appraisal period.<sup>21</sup> It is also clear that prior to receiving his annual appraisal, he was not specifically informed by Holeman that he was not meeting performance standards and “needed to improve”. The evidence established, however, that Holeman was not satisfied with the quality of the Grievant’s inspections and conveyed these sentiments to the Grievant during the course of the Duluth Redi-Mix inspections. These deficiencies were also brought to the Grievant’s attention during the September 10<sup>th</sup> meeting where Holeman went over them with him. It was not until the Grievant received his annual appraisal on October 5<sup>th</sup> that he was officially notified that had not met the performance standards for Element 2 and did not exceed the performance stands for Element 1.

Thus, although Holeman never spoke the specific words that the Grievant was “*not meeting the performance standards of one or more critical elements*”, his counseling during the course of the mid-August inspections and at the September 10<sup>th</sup> inspection review meeting clearly put the Grievant on notice that he “needed to improve” his safety hazard recognition and mine inspection performance, criteria that impacted on the performance standards of Element 1 and 2.

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<sup>21</sup> His mid-term progress review and Jarvi’s positive statements to him.

Even assuming *arguendo* that the Employer violated Section 5-A, nothing in this Subsection's language expressly prohibits the Employer from using what it deems improper work performance to rate an employee in a subsequent appraisal.<sup>22</sup> Moreover, there was no evidence proffered to establish that the intent of the language was other than what was expressly set forth in this Subsection. If the parties had intended this action, they should have included it in this provision or elsewhere in the Agreement. Thus, the Union failed to establish that if the Employer failed to notify an employee that he/she needed improvement in a performance standard, the deficiencies that gave rise to the "need to improve" could not be used in the employee's appraisal

The language in Section 5-B states, "*Informal efforts by the supervisor will include guidance to the employee regarding specific actions which should be taken to improve performance*". It is clear from the evidence that the Employer, through Hensler gave the Grievant additional hazard recognition and mine inspection guidance to improve his performance, which ultimately resulted in the Grievant's rating in Element 2 being raised. While, it could be argued that this training or guidance was not immediate, there are extenuating reasons that support this short delay in the Employer's actions. The Grievant's deficiencies surfaced late in his appraisal period, a period in which Holeman was performing double job duty as the Assistant District Manager and supervisor of the Hibbing-Duluth based Inspectors. Thus, it was not unreasonable for him to wait until a permanent full-time supervisor was on board, who would be supervising the Grievant from then on, to do the guidance and training. When Hensler became the supervisor in late October or early November, the Grievant did receive additional guidance and

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<sup>22</sup> This is especially true here where the alleged deficiencies occurred at the end of the Grievant's appraisal period affording him little opportunity to correct any deficiency before the appraisal period ended.

training, which resulted in the Grievant being upgraded in a subsequent Interim appraisal.

Finally, although alleged during the hearing, there is no evidence to support the allegation raised during the course of the hearing by the Union that the Grievant received reduced ratings because of his Union activities as a steward.

In view of the foregoing, I find no basis to determine that the Employer violated Article 43 including Sections 5A & B of the Agreement. I will, therefore, dismiss the grievance in its entirety.

### **AWARD**

It is hereby ordered that the grievance be and hereby is dismissed in its entirety.

**Dated: November 6, 2008**

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**Richard R. Anderson, Arbitrator**