PERFORMANCE AUDIT
OF THE

EMPLOYEE DISCIPLINE AND GRIEVANCE PROGRAMS

DEPARTMENT OF CORRECTIONS

December 2000

47-614-98

EXECUTIVE DIGEST

EMPLOYEE DISCIPLINE AND GRIEVANCE PROGRAMS

INTRODUCTION

This report, issued in December 2000, contains the results of our performance audit* of the Employee Discipline and Grievance Programs, Department of Corrections (DOC).

AUDIT PURPOSE

This performance audit was conducted as part of the constitutional responsibility of the Office of the Auditor General (OAG). Performance audits are conducted on a priority basis related to the potential for improving effectiveness* and efficiency*.

In addition, the OAG conducted this performance audit to address a legislative concern. This concern resulted from employee complaints of inappropriate and inconsistent treatment by DOC managers and administrators. These employee complaints related to various processes, including promotions, disciplinary actions, grievances, and allegations of disparate treatment and retaliation.

BACKGROUND

DOC has established an employee discipline program to discipline employees who violate established work rules. These work rules are outlined in DOC's Employee Handbook. In June 1996, DOC issued a revised disciplinary grid* to establish uniform penalties for

* *See glossary at end of report for definition.*

violations of work rules. DOC developed this disciplinary grid to provide for the consistent application of disciplinary actions.

DOC also established an employee grievance program* to address and resolve management-employee disputes. The Personnel and Labor Relations Division administers the employee grievance program for DOC.

DOC employed approximately 17,400 employees Statewide in 40 prisons, 14 prison camps, 104 parole and probation offices, and various other work locations as of September 30, 1999.

For the fiscal year ended September 30, 1999, DOC reported that 1,037 disciplinary actions were forwarded to the DOC central office for review and approval, and the DOC Personnel and Labor Relations Division received 1,556 grievances for processing by central office staff.

AUDIT OBJECTIVES AND CONCLUSIONS

Audit Objective: To assess whether DOC has established policies and procedures to administer the employee discipline and grievance programs and is administering these programs in accordance with applicable rules and procedures.

Conclusion: We determined that DOC has established policies and procedures to administer its employee discipline program. We also determined that DOC administers its grievance process based on

** See glossary at end of report for definition.*

Civil Service Commission rules and union contracts. However, we identified one material condition*:

- DOC was not effective in processing Step 3* employee grievances within time frames established by the Civil Service Commission and union contracts (Finding 1).

  DOC informed us that it has taken steps to significantly reduce the number of pending grievances.

Because of the serious scope limitation that is discussed in the audit scope limitation section, we could not review all records pertinent to this audit. Therefore, we could not fully determine whether DOC's discipline and grievance programs were administered in accordance with applicable policies and procedures.

Audit Objective: To assess DOC's effectiveness in implementing the employee discipline and grievance programs.

Conclusion: Because of the serious scope limitation discussed in the audit scope limitation section, we could not fully determine DOC's effectiveness in implementing its employee discipline and grievance programs. However, we identified one material condition:

- DOC did not accumulate information on its discipline and grievance programs necessary for managers

* *See glossary at end of report for definition.*

and administrators to monitor the effectiveness and efficiency of the discipline and grievance programs (Finding 2).

DOC informed us that it has taken steps to develop a comprehensive personnel action tracking system, which it expected to test in July 2000.

Audit Objective: To assess DOC's consistency in implementing its prisoner count process and in applying employee discipline when procedural infractions related to prisoner counts are identified.

Conclusion: Because of the serious scope limitation discussed in the audit scope limitation section, we could not complete our review of DOC's implementation of the employee disciplinary process related to prisoner counts.

AUDIT SCOPE, METHODOLOGY, AND SCOPE LIMITATION, AGENCY POSITION, AND OAG POSITION

Audit Scope: Our audit scope was to examine the program and other records of the employee discipline and grievance programs administered by the Department of Corrections.

Our audit was conducted in accordance with *Government Auditing Standards* issued by the Comptroller General of the United States and, accordingly, included such tests of the records and such other auditing procedures as we considered necessary in the circumstances, subject to the serious scope limitation discussed in the audit scope limitation section.

Audit Methodology: Our audit procedures included examination of DOC central office records of employee disciplinary actions and employee grievance files and employee discipline and grievance records and prisoner

count records maintained by various prisons throughout the State for the period July 1996 through June 1998.

We conducted a preliminary review of DOC's operations, which included discussions with key central office staff regarding their functions and responsibilities. We also reviewed applicable DOC policies and procedures, labor union contracts, and Civil Service Commission rules and documented our understanding of the programs. Based on information gathered during the preliminary review, we developed the audit objectives.

To accomplish our first objective, we reviewed the application of DOC and Civil Service Commission rules relating to employee disciplinary actions and employee grievances for timeliness and consistency. We examined a random sample of employee disciplinary actions for consistent application of discipline, reviewed a random sample of Step 3 grievance actions to assess whether DOC responded in a timely manner, reviewed court judgments and settlements to determine whether DOC disciplined managers and administrators who violated DOC rules, and started to review cases involving alleged retaliation against DOC employees. We suspended the audit when DOC denied us access to records and personnel necessary to complete additional reviews pertinent to accomplishing this audit objective. Because of this serious scope limitation that is discussed more fully in the audit scope limitation section, we could not fully determine whether DOC's discipline and grievance programs were administered in accordance with applicable policies and procedures.

To accomplish our second objective, we requested information on trends in disciplinary actions by disciplinary step and attempted to review the process that DOC

follows for processing disciplinary actions and grievances for efficiency, including consistency in implementation of the disciplinary grid and use of prior grievance actions and arbitration decisions to help manage the current grievance case load. We suspended the audit when DOC denied us access to records and personnel necessary to complete additional reviews pertinent to accomplishing this audit objective. Because of this serious scope limitation that is discussed more fully in the audit scope limitation section, we could not fully determine DOC's effectiveness in implementing its employee discipline and grievance programs.

To accomplish our third objective, we documented the prisoner count process at two randomly selected prisons. We suspended the audit when DOC denied us access to records and personnel necessary to complete additional reviews pertinent to accomplishing this audit objective. Because of this serious scope limitation that is discussed more fully in the audit scope limitation section, we could not fully determine DOC's consistency in implementing its prisoner count process and in applying employee discipline when procedural infractions related to prisoner counts are identified.

Audit Scope Limitation: DOC has denied the OAG access to the records and personnel necessary to complete our audit objectives. This action results in a serious scope limitation under *Government Auditing Standards*.

Agency Position: DOC asserts that the OAG does not have the constitutional authority to conduct a performance audit of the employee discipline and grievance programs. DOC has initiated a legal challenge to the OAG's authority to conduct this performance audit.

OAG Position: The OAG has no reservations regarding its authority and responsibility to conduct this performance audit of the employee discipline and grievance programs administered by DOC.

AGENCY RESPONSES

Our audit report includes two findings and recommendations. DOC's preliminary response indicated that, although DOC did not believe that the findings were material, DOC agreed with the findings and has taken action to comply with both recommendations.

At DOC's request, we have included its entire response in the agency preliminary responses section of this report. An OAG epilogue follows DOC's preliminary response.

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December 15, 2000

Mr. Bill Martin, Director
Department of Corrections
Grandview Plaza
Lansing, Michigan

Dear Mr. Martin:

This is our report on the performance audit of the Employee Discipline and Grievance Programs, Department of Corrections.

This report contains our executive digest; description of programs; audit purpose, objectives, scope, methodology, and scope limitation, agency position, Office of the Auditor General position, and agency responses; comments, findings, recommendations, and agency preliminary responses; response of the Department of Corrections; Office of the Auditor General epilogue; and a glossary of acronyms and terms.

Our comments, findings, and recommendations are organized by audit objective. The agency preliminary responses were taken from the agency's responses subsequent to our audit fieldwork. The *Michigan Compiled Laws* and administrative procedures require that the audited agency develop a formal response within 60 days after release of the audit report.

Sincerely,

Thomas H. McTavish, C.P.A.
Auditor General

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DEPARTMENT OF CORRECTIONS

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Description of Programs

The Department of Corrections (DOC) has established an employee discipline program and an employee grievance program:

a. Employee Discipline Program

The employee discipline program was established to discipline employees who violate established work rules. These work rules, which are outlined in the Employee Handbook, are designed to ensure the safety of DOC employees and the public and to prevent breaches in security that could result in a prisoner escape.

In June 1996, DOC issued a revised disciplinary grid to establish uniform penalties for violations of work rules. DOC developed this disciplinary grid in response to concerns that there had been a lack of consistent treatment of DOC employees based on disciplinary decisions from different facility administrators. Because of this inconsistent treatment, DOC had sometimes lost in arbitration decisions.

When it is alleged that an employee has violated a work rule, the employee's supervisor initiates an investigation, determines whether a work rule violation occurred, determines whether there are mitigating or aggravating circumstances, and prepares a report informing the facility administrator. The facility administrator then holds a disciplinary hearing, allows the employee to provide evidence, concludes whether a work rule violation occurred, assesses mitigating and aggravating circumstances, and determines a disciplinary penalty in accordance with DOC's disciplinary grid. Except in very limited situations, the facility administrator is required to forward the recommended disciplinary action to central office for review by the special assistant to the director and for final approval of the director, prior to taking formal disciplinary action against the employee.

b. Employee Grievance Program

The employee grievance program was established to address and resolve management-employee disputes. The Personnel and Labor Relations Division administers the employee grievance program for DOC. All employee grievances that are not resolved by local facility administrators are forwarded to the Personnel

and Labor Relations Division where they are assigned to a labor relations specialist.

The employee discipline and grievance programs are implemented by DOC employees based on rules established by the Civil Service Commission.

DOC employed approximately 17,400 employees Statewide in 40 prisons, 14 prison camps, 104 parole and probation offices, and various other work locations as of September 30, 1999.

For the fiscal year ended September 30, 1999, DOC reported that 1,037 disciplinary actions were forwarded to the DOC central office for review and approval, and the DOC Personnel and Labor Relations Division received 1,556 grievances for processing by DOC central office staff.

Audit Purpose, Objectives, Scope, Methodology, and Scope Limitation, Agency Position, Office of the Auditor General Position, and Agency Responses

Audit Purpose

This performance audit was conducted as part of the constitutional responsibility of the Office of the Auditor General (OAG). Performance audits are conducted on a priority basis related to the potential for improving effectiveness and efficiency.

In addition, the OAG conducted this performance audit to address a legislative concern. This concern resulted from employee complaints of inappropriate and inconsistent treatment by Department of Corrections managers and administrators. These employee complaints related to various processes, including promotions, disciplinary actions, grievances, and allegations of disparate treatment and retaliation.

Audit Objectives

Our performance audit of the Employee Discipline and Grievance Programs, Department of Corrections (DOC), had the following objectives:

1. To assess whether DOC has established policies and procedures to administer the employee discipline and grievance programs and is administering these programs in accordance with applicable rules and procedures.

2. To assess DOC's effectiveness in implementing the employee discipline and grievance programs.

3. To assess DOC's consistency in implementing its prisoner count process and in applying employee discipline when procedural infractions related to prisoner counts are identified.

Audit Scope

Our audit scope was to examine the program and other records of the employee discipline and grievance programs administered by the Department of Corrections.

Our audit was conducted in accordance with *Government Auditing Standards* issued by the Comptroller General of the United States and, accordingly, included such tests of

the records and such other auditing procedures as we considered necessary in the circumstances, subject to the serious scope limitation discussed in the audit scope limitation section.

Audit Methodology

Our audit procedures, conducted during April 1998 through September 1998, included examination of DOC central office records of employee disciplinary actions and employee grievance files and employee discipline and grievance records and prisoner count records maintained by various prisons throughout the State for the period July 1996 through June 1998.

We conducted a preliminary review of DOC's operations, which included discussions with key central office staff regarding their functions and responsibilities. We also reviewed applicable DOC policies and procedures, labor union contracts, and Civil Service Commission rules and documented our understanding of the programs. Based on information gathered during the preliminary review, we developed the audit objectives.

To accomplish our first objective, we reviewed the application of DOC and Civil Service Commission rules relating to employee disciplinary actions and employee grievances for timeliness and consistency. We examined a random sample of employee disciplinary actions for consistent application of discipline, reviewed a random sample of Step 3 grievance actions to assess whether DOC responded in a timely manner, reviewed court judgments and settlements to determine whether DOC disciplined managers and administrators who violated DOC rules, and started to review cases involving alleged retaliation against DOC employees. We suspended the audit when DOC denied us access to records and personnel necessary to complete additional reviews pertinent to accomplishing this audit objective. Because of this serious scope limitation that is discussed more fully in the audit scope limitation section, we could not fully determine whether DOC's discipline and grievance programs were administered in accordance with applicable policies and procedures.

To accomplish our second objective, we requested information on trends in disciplinary actions by disciplinary step and attempted to review the process that DOC follows for processing disciplinary actions and grievances for efficiency, including consistency in implementation of the disciplinary grid and use of prior grievance actions and arbitration

decisions to help manage the current grievance case load. We suspended the audit when DOC denied us access to records and personnel necessary to complete additional reviews pertinent to accomplishing this audit objective. Because of this serious scope limitation that is discussed more fully in the audit scope limitation section, we could not fully determine DOC's effectiveness in implementing its employee discipline and grievance programs.

To accomplish our third objective, we documented the prisoner count process at two randomly selected prisons. We suspended the audit when DOC denied us access to records and personnel necessary to complete additional reviews pertinent to accomplishing this audit objective. Because of this serious scope limitation that is discussed more fully in the audit scope limitation section, we could not fully determine DOC's consistency in implementing its prisoner count process and in applying employee discipline when procedural infractions related to prisoner counts are identified.

Audit Scope Limitation

DOC has denied the OAG access to the records and personnel necessary to complete our audit objectives. This action results in a serious scope limitation under *Government Auditing Standards*. As a result, it is necessary to issue this audit report to inform the Legislature and the public of this serious scope limitation that has prevented the OAG from completing its review.

The records that DOC has denied the OAG access to include: prison case files related to disciplinary actions taken against DOC employees; prison case files for grievances involving DOC employees; DOC central office disciplinary and grievance case files; and all information contained in court judgment and settlement case files, which may contain documentation of alleged harassment, intimidation, and retaliation against DOC employees.

Agency Position

DOC asserts that the OAG does not have the constitutional authority to conduct a performance audit of the employee discipline and grievance programs. DOC has initiated a legal challenge to the OAG's authority to conduct this performance audit.

Office of the Auditor General Position

The OAG has no reservations regarding its authority and responsibility to conduct this performance audit of employee discipline and grievance programs administered by DOC.

Agency Responses

Our audit report includes two findings and recommendations. DOC's preliminary response indicated that, although DOC did not believe that the findings were material, DOC agreed with the findings and has taken action to comply with both recommendations.

At DOC's request, we have included its entire response in the agency preliminary responses section of this report. An OAG epilogue follows DOC's preliminary response.

Section 18.1462 of the *Michigan Compiled Laws* and Department of Management and Budget Administrative Guide procedure 1280.02 require DOC to develop a formal response to our audit findings and recommendations within 60 days after release of the audit report.

COMMENTS, FINDINGS, RECOMMENDATIONS, AND AGENCY PRELIMINARY RESPONSES

ADMINISTRATION OF DISCIPLINE AND GRIEVANCE PROGRAMS

COMMENT

Audit Objective: To assess whether the Department of Corrections (DOC) has established policies and procedures to administer employee discipline and grievance programs and is administering these programs in accordance with applicable rules and procedures.

Conclusion: We determined that DOC has established policies and procedures to administer its employee discipline program. We also determined that DOC administers its grievance process based on Civil Service Commission rules and union contracts. However, we identified one material condition relating to timely resolution of employee grievances.

Because of the serious scope limitation that is discussed in the audit scope limitation section, we could not review all records pertinent to this audit objective. Therefore, we could not fully determine whether DOC's discipline and grievance programs were administered in accordance with applicable policies and procedures.

FINDING

1. Timely Resolution of Employee Grievances

DOC was not effective in processing Step 3 employee grievances within time frames established by the Civil Service Commission and union contracts.

Civil Service Commission rules and applicable union contracts require DOC to respond to Step 3 grievances within specific time frames:

Employee Representative	Step 3 Response Due
Department of Civil Service, Non-Exclusively Represented Employees (NEREs)	20 weekdays from filing
United Auto Workers* (UAW)	30 weekdays from filing (15 days for meeting + 15 days for written answer)
Michigan Corrections Organization* (MCO)	30 calendar days from filing
Michigan State Employees Association (MSEA)	15 weekdays from receipt of the grievance form
American Federation of State, County, and Municipal Employees* (AFSCME)	30 calendar days if suspension, discharge, or demotion; 45 calendar days for all other cases

If DOC does not respond within the designated number of days (depending on the Civil Service Commission rules or union contract), it is the responsibility of the employee or the employee's union to advance the grievance to the next step. Failure to do so will result in dismissal of the claim because the Step 4 claim was not filed in a timely manner. However, employee unions informed us that there is an unwritten agreement between DOC management and the unions. The agreement provides that the unions will not take action to force grievances into arbitration before a Step 3 response is received from management and that DOC management will not attempt to dismiss claims because the unions did not file a Step 4 claim in a timely manner.

* *See glossary at end of report for definition.*

Our review of the status, as of June 17, 1998, of 652 grievances filed during the three-month period ended November 30, 1997 disclosed that DOC routinely did not address Step 3 grievances on a timely basis:

Action Taken	Cases	Percentage
Within 30 days	63	9.7%
From 31 to 60 days	88	13.5%
From 61 to 120 days	147	22.5%
121 or more days	77	11.8%
Date not documented	11	1.7%
No action taken	174	26.7%
To Step 4 or withdrawn	92	14.1%
Total	652	100.0%

We identified the following issues that appeared to have a negative impact on DOC addressing Step 3 grievances in a timely manner:

a. Change in Disciplinary Process

DOC made significant changes to its disciplinary process which were effective in January 1997. These changes have resulted in an increase in disciplinary actions. The increase in disciplinary actions has resulted in an increase in grievances filed by employee unions. Changes to the disciplinary process included more stringent penalties, standardization of disciplinary penalties, and more aggressive enforcement of DOC rules. These changes have resulted in routine three-day suspensions for employees who make errors in the prisoner count process. An employee union has routinely grieved these actions, resulting in a significant number of additional grievances.

b. Focus on Step 4* Grievance Actions

DOC reported to us that it must prioritize Step 4 grievance actions because arbitration decisions are final. Preparing for these arbitration hearings has reduced resources available to address Step 3 grievances.

* *See glossary at end of report for definition.*

c. Cost of Arbitration

Union officials informed us that because of the large increase in grievances, the unions have limited financial resources to take grievances to arbitration. Therefore, if DOC chooses not to address Step 3 grievances, the unions generally do not force grievances to Step 4 because of the cost of arbitration.

d. Inefficiencies of the Grievance Process

We did not observe evidence that DOC used decisions made in previous similar grievance resolutions and arbitration decisions to resolve similar disciplinary actions. Rather than applying prior arbitration decisions to similar cases, DOC handled each grievance action on a case-by-case basis. Potential efficiencies could be realized by applying grievance decisions and arbitrator rulings to similar grievance cases. For example, resolution of the prisoner count error disciplinary action against one employee has not been used to resolve the many other similar pending disciplinary actions that have ultimately been resolved in the same manner.

RECOMMENDATION

We recommend that DOC establish an effective process to address Step 3 employee grievances within time frames established by the Civil Service Commission and union contracts.

AGENCY PRELIMINARY RESPONSE

The agency preliminary response is included in its entirety in the agency preliminary responses section of this report.

EFFECTIVE IMPLEMENTATION OF DISCIPLINE AND GRIEVANCE PROGRAMS

COMMENT

Audit Objective: To assess DOC's effectiveness in implementing the employee discipline and grievance programs.

Conclusion: Because of the serious scope limitation discussed in the audit scope limitation section, we could not fully determine DOC's effectiveness in implementing its employee discipline and grievance programs. However, we identified one material condition relating to the lack of an effective management information system for tracking the results of DOC's discipline and grievance programs.

FINDING

2. Management Information System

DOC did not accumulate information on its discipline and grievance programs necessary for managers and administrators to monitor the effectiveness and efficiency of the employee discipline and grievance programs.

DOC revised its employee disciplinary policies and procedures, Employee Handbook, and disciplinary grid in June 1996. These significant changes were made to address concerns that the previous system did not prevent inconsistent treatment of employees at various work locations, which resulted in arbitrators overturning disciplinary actions during the grievance process.

DOC's central office processed 1,037 individual disciplinary actions in the fiscal year ended September 30, 1999. Also, DOC's Personnel and Labor Relations Division received 1,556 Step 3 grievances.

Central office staff maintained database files to track disciplinary actions and grievances received and processed. However, these database files did not contain sufficient information for managers and administrators to determine the outcomes of either the employee discipline program or the employee grievance program. Information could help DOC identify potential problem areas in which staff need training and areas in which managers and administrators may need training in the proper application of discipline. This information would include the number of employees disciplined for a certain rule violation, proposed and actual penalties imposed, disciplines that were overturned at Step 3 and Step 4, and disciplines that were overturned because of inconsistent application of discipline.

For example, our analysis of information contained in DOC's disciplinary and grievance databases disclosed a wide variance in the number of disciplinary actions reported to central office by the prisons, ranging from 17 at Hiawatha

Temporary Facility to 175 at G. Robert Cotton Correctional Facility during the fiscal year ended September 30, 1999. Also, our analysis of Step 3 grievances for MSEA disclosed that central office staff routinely did not respond to MSEA grievances until at least 120 days had passed.

Accumulating and analyzing information related to the employee discipline and grievance programs could help DOC identify potential problem areas and identify program areas that are operating effectively.

RECOMMENDATION

We recommend that DOC accumulate information on its discipline and grievance programs necessary for managers and administrators to monitor the effectiveness and efficiency of the employee discipline and grievance programs.

AGENCY PRELIMINARY RESPONSE

The agency preliminary response is included in its entirety in the agency preliminary responses section of this report.

CONSISTENCY IN IMPLEMENTATION OF DISCIPLINE FOR PRISONER COUNT ERRORS

COMMENT

Audit Objective: To assess DOC's consistency in implementing its prisoner count process and in applying employee discipline when procedural infractions related to prisoner counts are identified.

Conclusion: Because of the serious scope limitation discussed in the audit scope limitation section, we could not complete our review of DOC's implementation of the employee disciplinary process related to prisoner counts.

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AGENCY PRELIMINARY RESPONSES

State of Michigan

John Engler, *Governor*

Department of Corrections

Grandview Plaza Building, P.O. Box 30003
Lansing, Michigan 48909
Bill Martin, *Director*

July 5, 2000

Mr. Thomas H. McTavish, C.P.A.
Auditor General
201 N. Washington Square
Lansing, MI 48913

Dear Mr. McTavish:

Attached is our preliminary response to the following audit:

Performance Audit
of the
Employee Discipline and Grievance Programs
Department of Corrections

We request that you append our entire response to the report.

Sincerely,

Bill Martin
Director

MB/20/cm
Attachments

c: J. Baumann
M. Foresman
T. Lopez
G. Manns
C. MacKenzie

Response of the Department of Corrections

On or about January 5, 1998, the Office of the Auditor General (OAG) informed the Department of Corrections (DOC) that it was starting an audit of certain personnel and management practices at selected prisons based on complaints from several DOC employees. The DOC immediately expressed concern regarding the appropriateness of an audit involving employment disputes between a State agency and its employees. In a February 20, 1998 entrance meeting, the DOC informed the OAG that employment disputes are resolved through the oversight of unions, arbitrators, the Department of Civil Service, the Department of Civil Rights, and the courts. The OAG responded that it needed more information to determine what role, if any, its office should play in resolving the issues.

Without further communication with the DOC, the OAG contacted the DOC on April 1, 1998, and requested access to the building and informed the DOC that the auditors expected to be on site for approximately 6 months. At this time, the OAG began a preliminary review of several DOC processes involving employee grievances, employee discipline, harassment, sexual harassment, and hiring/promotion.

On July 20, 1998, the OAG informed the DOC of its three audit objectives which did not include DOC's processes involving harassment, sexual harassment, and hiring/promotion. The OAG explained that the latter three areas would not be pursued in their audit because the hiring/promotion process had been recently reviewed by the OAG and the processes involving harassment and sexual harassment did not warrant further review based on their preliminary survey. The DOC requested that the OAG acknowledge this in their report. However, this acknowledgment was not made.

On or about September 10, 1998, DOC executive management learned that the OAG was using open grievance and associated discipline files to satisfy the objectives of the audit. The DOC became concerned that the OAG would be unable to protect the confidentiality of the information that it obtained from the files and from staff on open cases should it be challenged. Furthermore, the OAG insisted that information provided by DOC staff be provided in writing. Protection of confidentiality is of utmost importance to the State's best interest in cases where the employee's time limits have not run out or where an arbitrator has not yet issued a decision. Should a grievant gain an unfair

advantage in learning the State's basis for its action(s) prior to closure of the case, the outcome of the case could result in harm to the State.

In addition, DOC executive management learned that the OAG had obtained attorney-client privileged information and was also using the information that it learned from the attorney-client communications to fulfill its audit objectives. The DOC became greatly concerned as it is aware that confidentiality afforded by attorney-client privilege is waived once the information is shared with anyone other than the client or the attorney. Disclosure of attorney-client privileged information could also result in harm to the State.

The DOC discussed these issues with the Office of the State Employer (OSE), the Public Employment and Election Division of the Attorney General's Office (AG), and the Corrections Division of the AG. The OSE and AG also became greatly concerned regarding the OAG's ability to maintain confidentiality of the information should it be challenged. As a result, the AG advised the DOC that it was appropriate to, at least temporarily, refrain from providing and discussing attorney-client privileged information and open grievance and associated discipline files.

Therefore on September 14, 1998, the DOC advised the OAG that the DOC would not further provide any open grievance and related discipline files and also asked for the return of any such files that they had in their possession. DOC further advised the OAG that a file is not considered closed until either an employee's time limits had run out or an arbitrator has issued a decision.

On September 21, 1998, a meeting was held which was attended by the DOC, OAG, AG, and the Governor's Office. The meeting ended with an agreement that the AG's office would research the legal issues and advise the OAG and DOC of their findings. On September 21, 1998, the DOC also requested the return of any copies of correspondence between DOC and its attorneys along with any attorney work product.

Various divisions of the AG researched the issues, however, the various divisions had differing views as to the constitutional and statutory authority of the OAG to conduct a performance audit as was being suggested by the OAG. As a result, the DOC, OAG, and the AG met on or about April 28, 1999 to discuss the audit. At the meeting, the OAG agreed to evaluate whether the objectives of the audit could be performed on only closed files. The OAG obtained and analyzed the DOC's database of discipline cases. On June 11, 1999, the OAG provided the DOC with a list of 190 cases for determination

of whether the files were open or closed. On or about August 9, 1999, the DOC provided the status of the 190 files.

On December 13, 1999, the OAG advised the DOC that it was in the process of finalizing an Interim Audit Report on the Employee Disciplinary and Grievance Programs and needed some information for the report. The requested information was provided on December 16, 1999. Government Auditing Standards state that auditors should consider interim reporting, during the audit, of significant matters to appropriate officials. The standards further state that such communication is not a substitute for a final report, but it does alert officials to matters needing immediate attention and permits them to correct them before the final report is completed. The DOC did not receive an interim audit report, nor was the preliminary analysis document identified as an interim audit report.

In a May 17, 2000 letter, the OAG advised the DOC that it considered inaccessibility to 12 (6%) of the 190 case files to be a scope limitation "sufficient to impair the audit". However, the audit report attached to the letter described this scope limitation as a "serious scope limitation that has prevented the OAG from completing our (its) review". It referred to this "serious" scope limitation eleven times within its audit report. The audit report does not mention that the OAG apparently decided not to complete the audit objectives based on the fact that 12 of 190 files were unavailable for review and discussion on August 9, 1999. Instead, the OAG reported that the DOC had denied access to the records and personnel necessary to complete their audit objectives.

Had the auditors inquired, they would have learned that one of the 12 files was closed by the end of August 1999, one was closed in September 1999, three were closed in October 1999, two were closed in November 1999, one was closed in December 1999, two were closed in January 2000, and one was closed in March 2000. One additional file reported to the auditors as open on August 9, 1999 was actually found to be closed in December 1998. To date, the auditors have not communicated what percentage of case files they needed available in order to complete the audit objectives with or without an impairment disclosure.

In addition, the OAG did not disclose what percentage of the case files relating to prisoner count were unavailable. Yet, it reported that it could not complete its audit objective relating to prisoner count because the DOC denied the OAG access to the necessary records and personnel.

In the May 17, 2000 letter, the OAG additionally advised the DOC that the existence of a discriminate and time consuming decision process for determining the status of case files, and the absence of related criteria, reinforced their position that access to all records (open and closed) was necessary to fulfill the constitutional responsibility of the OAG. Apparently, the OAG is referring to the approximate two month period that it took the DOC to research the status of 190 files. This does not seem excessive given that it took the OAG approximately nine months to decide on its course of action following receipt of the status information. The criteria which the OAG claims was absent was provided on September 14, 1998. The criteria was further clarified in a meeting held on September 21, 1998. No further requests for information regarding DOC's criteria for determining whether a file is open or closed were made by the OAG.

In the audit report, the OAG stated that the DOC asserted that the OAG does not have the constitutional authority to conduct a performance audit of the employee discipline and grievance programs. The OAG further stated that the DOC initiated a legal challenge to the OAG's authority to conduct this performance audit. The DOC did not take any legal action. Rather, the DOC was concerned as to the constitutional and statutory authority of the OAG to conduct a performance audit as was being suggested by the OAG. **The DOC consulted with its attorneys and subsequently advised the OAG that it would not further provide any open grievance and related discipline files and requested the return of any copies of attorney-client privileged documents.**

In the audit report, the OAG stated that DOC has denied the OAG access to include: case files related to disciplinary actions taken against DOC employees; case files for grievances involving DOC employees, DOC disciplinary and grievance case files; and court judgment and settlement case files, which may contain documentation of alleged harassment, intimidation, and retaliation against DOC employees. The DOC only objected to providing information related to open grievance and associated discipline case files and to attorney-client privileged documents contained in any files. The DOC did not deny access to any court judgment or settlement case files.

Although the DOC does not agree that finding 1 is material, the DOC took steps prior to the issuance of the preliminary analysis document which have significantly reduced the number of pending grievances. As of June 1998, there were 1155 pending grievances. As of May 2000, there were 291 pending grievances. The DOC will continue to strive to respond as timely as possible so that the number of pending grievances can be further reduced.

In finding 1, the OAG reported that there is an unwritten agreement between the DOC management and the unions regarding advancement of grievances and dismissal of claims. The DOC is unaware of any unwritten agreement between the DOC management and the unions regarding advancement of grievances and dismissal of claims. Civil Service rules and the various collective bargaining agreements have specific provisions in their respective grievance and appeals procedure regarding what is to occur if a grievance is not responded to timely.

In addition, the OAG reported in finding 1 that it did not observe that the DOC used decisions made in previous similar grievance resolutions and arbitration decisions to resolve similar disciplinary actions. It further concluded that potential efficiencies could be realized by applying grievance decisions and arbitrator rulings to similar grievance cases. The OAG has not recognized that elementary labor law treats discipline on a case-by-case basis. The DOC resolves grievances on a case-by-case basis by considering aggravating and mitigating circumstances. For contract interpretation issues, the DOC does look at other settlements or decisions to determine if there is precedent. In addition, the DOC does look at precedent when evaluating a specific grievance.

Although the DOC does not agree that finding 2 is material, the DOC took steps prior to the issuance of the preliminary analysis document to develop a comprehensive personnel action tracking system. In January 2000, the DOC commenced development of a management information system that will include information on cases relating to arbitration, civil rights, disability management, discipline, equal opportunity and affirmative action, grievances, internal affairs, and litigation. A pilot is scheduled for July 2000 which will be followed by Statewide implementation. This system will allow tracking of grievances and disciplines from the time they are initiated.

Regarding objective 3, the DOC has resolved disciplines and grievances related to prisoner count through established labor/management meetings held pursuant to the applicable collective bargaining unit agreement.

The DOC apologizes for the length of this response, however, the lengthy response is necessary because the OAG did not afford the DOC the normal due process that it provides on other audits. Normally, prior to the issuance of the preliminary analysis document and prior to the audit conference, the OAG meets with the agency and presents an unofficial draft report to the agency to discuss the findings and related concerns and to offer the agency the opportunity to correct errors, misstatements, etc.

An opportunity to meet and discuss an unofficial draft report was not provided to the DOC for this audit. Instead, the OAG issued the preliminary analysis document and notified the DOC that it was proceeding immediately to an audit conference. The OAG indicated that any suggested changes or concerns about the information, conclusions drawn, recommendations, supporting data, presentation, etc. contained in the preliminary analysis document needed to be communicated in writing five business days prior to the audit conference. In addition, the OAG did not provide the DOC with an opportunity to submit noteworthy accomplishments related to the audited programs. The DOC does this on all other performance audits.

Office of the Auditor General Epilogue

Request for Audit

This audit was initiated by the Office of the Auditor General (OAG) at the request of two legislators. Responding to requests of interested legislators is customary and appropriate to the constitutional responsibility and mission of the OAG.

Pre-Audit Communication

In a letter dated January 2, 1998, the Department of Corrections (DOC) director described current and planned actions and responses to address and resolve issues related to employee complaints brought forth by the two legislators that were a potential focus of OAG performance audit efforts. The director also expressed concern regarding the necessity and appropriateness of the OAG's plan to audit DOC's personnel practices related to the complaints.

Based on this letter, we concluded that more information was needed to determine what role, if any, the OAG should play in resolving the issues. The Auditor General scheduled a February 20, 1998 meeting with the director to gain a better understanding of the issues, DOC's efforts in addressing the issues, and the level of involvement by other relevant agencies. In this meeting, we informed the director that we planned to perform a preliminary review of DOC's applied practices in relation to established policies and procedures and then provide audit objectives and proposed methodologies for DOC's review.

Subsequent to this meeting, we scheduled an April 1, 1998 entrance meeting with DOC. In the entrance meeting, we reiterated our preliminary review process and our plan to begin the audit no later than April 6, 1998.

Reporting Conclusions

On July 16, 1998, we met with DOC to discuss our audit objectives and proposed methodology. We did not include three areas (sexual harassment, harassment, and the hiring/promotional process) in the scope of this audit for reasons that included relative audit risk and efficiency factors. Because we did not audit these areas, *Government Auditing Standards,* issued by the Comptroller General of the United States, prevented us from developing or presenting conclusions as requested by DOC.

Knowledge of Records Access

The DOC personnel director and special assistant to the DOC director were directly involved in providing access to databases and discipline and grievance case files throughout the period April 1, 1998 through September 14, 1998, with full knowledge that these were open and active case files. However, it is noteworthy that on or about September 10, 1998, based on our review of court judgment and settlement case files, we began asking questions regarding possible inconsistencies in applying employee discipline among members of DOC management. It was at this time that DOC denied access to records and employees necessary to complete the audit.

Responding to OAG Inquiries

During the course of the audit, OAG staff encountered increasing confrontation and uncooperativeness in meetings with certain members of DOC's management staff. As a result, we began submitting written requests for information, including requests that DOC responses be in writing. This was done to document our efforts to obtain audit evidence and DOC's level of cooperation.

Access to Confidential Records

The OAG's authority to access confidential information of State agencies is well founded in the State Constitution and statutes, authority that has consistently been upheld by the Attorney General.

The Attorney General has declared on several occasions that State departments may not restrict the Auditor General's access to confidential information. OAG 1993-1994, No 6749, p 9 (February 18, 1993) (the Michigan Employment Security Commission [MESC] may not restrict the Auditor General's access to confidential employer files even when sought for performing an audit of a State agency other than MESC itself); Letter Opinion of the Attorney General (Auditor General Albert Lee, March 13, 1978) (MCL 21.46; MSA 3.596 empowers the Auditor General to examine all books and papers of all State institutions, including personally identifiable student information subject to the confidentiality provisions of the Federal Family Educational Rights and Privacy Act); Letter Opinion of the Attorney General (Commissioner, Financial Institutions Bureau, Robert P. Briggs, February 18, 1972) (the Auditor General has the "constitutionally conferred legal right to review any and all records of the Bureau of Financial Institutions, including reports of examinations of banking institutions" made confidential under the Banking Code of 1969); Letter Opinion of the Attorney General (Director, Department of Mental Health, Dr. E.G. Yudashkin, October 6, 1971) (the Auditor General constitutionally has a legal right of access to medical records made confidential under

the Mental Health Code and does not require patient permission to access these records).

Attorney General interpretations have made it clear that a State officer's duty to produce agency records under MCL 21.46; MSA 3.596 "extends to information which would otherwise be deemed confidential." OAG 1993-1994, No 6749, p 9 (February 18, 1993).

In a September 15, 1998 letter, the Auditor General communicated to the Director that the OAG would not disclose information that DOC considers to be confidential. It is well understood and recognized by the Attorney General that OAG access to confidential information does not alter its confidential status.

Attorney-Client Privileged Information

The attorney-client privilege does not prevent the Auditor General from examining DOC files. We are unaware of any Michigan law that allows DOC to obstruct an Auditor General audit by concealing information and hiding behind the veil of the attorney-client privilege.

To the extent that DOC relies on any generic common law privilege to shield its records from the Auditor General, that privilege is outweighed by the plain meaning of Const 1963, art 4, §53 ("The auditor general shall conduct post audits of financial transactions and accounts of the state and of all branches, departments, offices, boards, commissions, agencies, authorities and institutions of the state established by this constitution or by law, and performance post audits thereof.") and the specific provisions of MCL 21.46; MSA 3.596 ("Upon demand of the auditor general . . . it shall be the duty of any and all officers of the state . . . to produce, for examination, the books of account and papers of their respective departments . . . ."). These words are clear and unambiguous.

DOC seeks to contradict the unambiguous sweep of MCL 21.46; MSA 3.596 by suggesting a limitation where the Legislature has not seen fit to include one. Because the purpose of this statute is to permit the Auditor General to receive complete and accurate information to fulfill his constitutionally established audit function, such a limitation must not be read into the statute.

Access to "Open" or "Active" Case Files

Complete and unfettered access to all government records is necessary to the constitutional responsibility of the Auditor General. In denying access to open or active

case files, DOC challenges the constitutional authority and responsibility of the Auditor General.

To provide timely, relevant information to the executive branch, the Legislature, and the public, audits by the Auditor General evaluate performance based on the most current enabling legislation, rules, regulations, and department policies and procedures. Frequently, significant changes to the relevant laws, rules, policies, or procedures affecting those audits have occurred. Auditing only older, closed cases would result in conclusions and findings that do not reflect the current state of the program and recommendations that may be untimely or irrelevant to the program as it exists when the audit report is issued.

For example, under DOC's definition of a "closed" file, the Auditor General could not review an employee discipline file until all rights of appeal have expired. This right of appeal alone could take from 3 to 5 years (considering the right to file a grievance and the right to file suit in circuit court). DOC revised its discipline process and policy and established a disciplinary grid in June 1996. To audit files pertaining to discipline and grievances that took place prior to this change in policy would result in audit findings and recommendations that are untimely or irrelevant to the current process.

Virtually every audit completed by the Auditor General has required access to open and active files in order to provide timely and meaningful audit reports.

DOC Proposal That the OAG Audit Only Closed Case Files

In April 1999, DOC proposed that the OAG review a sample of closed case files for the purpose of making a determination as to whether a performance audit could be conducted without having to review open or active case files. We agreed to select a sample of case files from DOC's case file database; to request DOC to determine each file's status as being open, active, or closed; and to assess whether this process would provide for a sufficient review of case files necessary to draw conclusions relative to the audit objectives, in accordance with *Government Auditing Standards*.

We submitted our sample to DOC with our request that DOC determine each file's status as being open, active, or closed and that DOC identify the criteria under which it decided whether a case file was open or active. DOC reported that 12 (6%) of 190 case files would not be made available for audit. Also, DOC did not provide the criteria used in deciding whether a case file was open or active.

We concluded that DOC's denial of access to approximately 6% of the case files, its inability to define the criteria used to screen files, and its insistence on prescreening each file before granting access do not provide the genesis for an objective audit. These conditions create impediments that bias the sampling process and compromise the integrity of the audit. They amount to a scope limitation that is required to be reported in accordance with *Government Auditing Standards* issued by the Comptroller General of the United States.

Access to Records Summary

The Michigan Constitution provides for a system of checks and balances between the branches of State government. Accordingly, the Constitution established and authorized the Auditor General to audit all branches, departments, offices, boards, commissions, agencies, authorities, and institutions of the State. Providing one of the few legislative checks over the executive branch of State government, financial and performance audits conducted by the OAG provide the Legislature and the public with an independent assessment of government programs. The Constitution has not exempted any State programs or records from the authority and responsibility of the Auditor General.

Our audits provide a mechanism for the Legislature to obtain objective feedback on the operation of programs that are delegated to the executive and judicial branches of government. In order to provide objective feedback to the Legislature and in the best interests of government operations, it is critical that the Auditor General have the ability to gather and review documentation pertinent to the programs being examined. The Legislature and Michigan citizens have a right to fair and accurate information pertaining to all government-operated programs. The inability to access program data limits the OAG's ability to identify program strengths and weaknesses and recommend improvements.

The Michigan Constitution provides for and requires the Auditor General to have access to all DOC records without exception as to status of being "open" or "active" or as to assertion of attorney-client privilege. Such open access is a vital requisite in conducting timely and objective audits in an unfettered manner. By denying access to records and enjoining employees from discussions with OAG auditors, DOC has interfered with the constitutional authority and responsibility of the Auditor General and has imposed a serious scope limitation for this audit.

Interim Reporting

In drafting the audit report, we considered interim reporting of the scope limitation imposed by DOC.

The full text of Section 7.8 of *Government Auditing Standards* provides:

> The auditors should consider interim reporting, during the audit, of significant matters to appropriate officials. Such communication, which may be oral or written, is not a substitute for a final report, but it does alert officials to matters needing immediate attention and permits them to correct them before the final report is completed.

Considering that the scope limitation was initiated by the DOC director and significant communications have taken place in debating this issue, reporting the scope limitation to DOC management under interim reporting would have served no useful purpose but to further protract the issuance of the final audit report.

Reporting the Scope Limitation

Reporting the scope limitation is necessary, appropriate, and consistent with Section 7.14 of *Government Auditing Standards*, which provides that auditors should report significant constraints imposed on the audit approach by data limitations or scope impairments.

Legal Challenge

DOC has initiated a legal challenge to the Auditor General's authority to conduct this performance audit.

In denying the OAG access to records and employees necessary to complete the audit, DOC has challenged the clear and unambiguous words of the Michigan Constitution, Const 1963, art 4, §53 ("The auditor general shall conduct post audits of financial transactions and accounts of the state and of all branches, departments, offices, boards, commissions, agencies, authorities and institutions of the state established by this constitution or by law, and performance post audits thereof.") and the specific provisions of MCL 21.46; MSA 3.596 ("Upon demand of the auditor general . . . it shall be the duty of any and all officers of the state . . . to produce, for examination, the books of account and papers of their respective departments . . . .").

Access to Court Judgment and Settlement Case Files

DOC has stipulated that, before providing any court judgment and settlement case files, it would screen the files and pull documents it deemed to be protected under the attorney-client privilege.

This stipulation effectually denies access to court judgment or settlement case files. Shielding records that DOC declares to be attorney-client privileged can subvert the audit process to the extent that the auditor has no access to the records for which the privilege is claimed and, thus, does not have a practical vehicle for challenging the appropriateness of an attorney-client privilege designation when asserted.

Use of Similar Grievance Resolutions and Arbitration Decisions

The Department of Civil Service (DCS) encourages State departments to use existing arbitration decisions and DCS hearings results to resolve pending grievances. DCS has trained personnel and labor relations staff on how to access decisions on the Internet. With 28% of the classified employees, DOC utilizes approximately 50% of the hearings officers. DCS staff have encouraged DOC to revise its discipline and grievance process to reduce the number of hearings and arbitration actions.

Due Process

In receiving a draft copy of the report, in exercising its right to an exit conference, and in having its entire response presented in the audit report, DOC has been afforded an appropriate level of due process in finalizing this audit report.

Noteworthy Accomplishments

Section 7.44 of *Government Auditing Standards* provides that noteworthy management accomplishments identified during the audit, which were within the scope of the audit, should be included in the audit report along with deficiencies.

Auditors must be able to test the accuracy of any management assertions related to noteworthy accomplishments. Had DOC submitted noteworthy accomplishments, as it states it does on all other performance audits, we could not have tested the accuracy of any assertions because DOC denied access to records and employees.

Glossary of Acronyms and Terms

AG	Attorney General's Office [Department of Attorney General].
American Federation of State, County, and Municipal Employees (AFSCME)	Council 25 of this AFL-CIO-affiliated union represents DOC employees.
Disciplinary grid	A table listing each work rule violation with the corresponding required disciplinary penalty to be imposed. DOC managers are expected to take into consideration aggravating and mitigating circumstances when determining a disciplinary penalty.
DCS	Department of Civil Service.
DOC	Department of Corrections.
effectiveness	Program success in achieving mission and goals.
efficiency	Achieving the most outputs and outcomes practical for the amount of resources applied or minimizing the amount of resources required to attain a certain level of outputs or outcomes.
employee grievance program	A process established by the Department of Civil Service to resolve employee grievances in an equitable and timely manner without fear of reprisal. The following are the common grievance steps outlined by the Department of Civil Service: Step 1 - An employee who has a grievable complaint shall orally discuss it with his or her immediate

supervisor within 10 weekdays of becoming aware of the cause of the complaint. The supervisor must respond verbally within 2 weekdays.

Step 2 - If not satisfied with the Step 1 grievance decision, the employee shall explain the grievance in writing and shall file with his or her supervisor within 5 days of receiving the oral answer in Step 1. The supervisor must respond verbally within 10 weekdays.

Step 3 - If not satisfied with the Step 2 grievance decision, the employee shall, within 5 weekdays, return the grievance to the Step 2 supervisor with a signed notice of appeal. The Step 3 grievance is forwarded to the department director or designated personnel representative, who has 20 weekdays to hold a conference and issue a written decision.

Step 4 - If not satisfied with the Step 3 grievance decision, the employee shall, within 15 weekdays, request either a Department of Civil Service hearing or an arbitration (depending on union contract provisions).

material condition A serious reportable condition which could impair the ability of management to operate a program in an effective and efficient manner and/or could adversely affect the opinion of an interested person concerning the effectiveness and efficiency of the program.

Michigan Corrections Organization (MCO) Local 526 of the Service Employees International Union (SEIU), an AFL-CIO-affiliated union that represents corrections officers.

MESC Michigan Employment Security Commission.

MSEA	Michigan State Employees Association.
NEREs	non-exclusively represented employees.
OAG	Office of the Auditor General.
OSE	Office of the State Employer.
performance audit	An economy and efficiency audit or a program audit that is designed to provide an independent assessment of the performance of a governmental entity, program, activity, or function to improve public accountability and to facilitate decision making by parties responsible for overseeing or initiating corrective action.
United Auto Workers (UAW)	Local 6000 of this union represents DOC employees.