IN THE MATTER OF ARBITRATION	)	
	)	
	)	
BETWEEN	)	**GRIEVANCE ID: Jane Fisher**
	)	
	)	
SEIU DISTICT 1199	)	**Grievance No. Discharge**
	)	
	)	**Grievance #DRC 2019-03042-12**
AND	)	**BEFORE: ROBERT G. STEIN, NAA**
	)	
	)	**ARBITRATOR**
	)	
OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS, DIVISION OF PAROLE AND COMMUNITY SERVICES	)	

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement ("Agreement" or "CBA") between The State of Ohio ("Employer") and The Service Employees International Union, District 1199 ("Union" or "SEIU"). That Agreement was effective from October 26, 2018, through April 30, 2021, and included the conduct which is the subject of this grievance. The department involved in this matter was the Department of Rehabilitation and Corrections ("DRC"), the Division of Parole and Community Services ("DPCS," "Employer," "Department" "APA") Robert G. Stein was mutually selected by the parties to impartially arbitrate this matter, pursuant to Article 7 of the Agreement. A hearing on this matter was conducted over three (3) days, August 23, 2022, September 29, 2022, and October 6, 2022 and was held virtually. The parties mutually agreed to these hearing dates and that virtual format, and they were each provided with a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing, which was recorded via a written transcript, was subsequently declared closed upon the parties' individual submissions of post-hearing briefs.

No issues of either procedural or jurisdictional arbitrability have been raised, and the parties have stipulated that the instant matter is properly before the arbitrator for a determination on the merits.

Joint Stipulations

Issue: Was the Grievant removed for just cause, and if not, what shall the remedy be?

Classification: Parole Officer

Length of service: 27 years (DOH=08/10/1992 DOR=08/19/2019)

Discipline: Nothing active at time of removal

Training: Grievant was current and had received all training required to complete her duties

2018-2021 Contract between SEIU District 1199 and the State of Ohio

(Employer brief, p. 3)

VIOLATIONS OF RULES/STANDARDS OF EMPLOYEE CONDUCT FOUND BY THE EMPLOYER

(NUMBERED BY ARBITRATOR FOR PURPOSES OF ORGANIZATION ONLY)

The Grievant was removed on August 19, 2019, for violating several rules of the Standards of Employee Conduct (SOEC). The Grievant was found to have:

> **Rule 7**. Failure to follow post orders, administrative regulations, policies, or written or verbal directives.
>
> **Rule 18**. Threatening, intimidating or coercing the public, volunteers, contractors, any individual under the supervision of the Department or fellow employees.
>
> **Rule 22**. Falsifying, altering, or removing any document or record.
>
> **Rule 24**. Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.
>
> **Rule 37**. Any act or failure to act that could compromise or impair the ability of an employee to effectively carry out he/her duties as a public employee to include, but not

limited to, being removed from duty due to having a blood alcohol level at or about .02% and below .04%

Rule 50. Any violation of ORC 124.24-…and for incompetency, inefficiency, unsatisfactory performance, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the Director of Administrative Services or the commission, or any failure to good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

(Pre-disciplinary Meeting Notice, p. 6, 7 Employer Binder (Emphasis Added)

1. Accessed a secure law enforcement resource in improper manners at her home and secondary place of employment.

2. Failed to properly document, staff and address violent and high severity violation behavior of offenders on her caseload. Conducted personal business at her secondary place of employment while being paid by
ODRC.

3. Falsified timesheets by indicating she was working for the ODRC while working at her secondary place of employment.

4. Lied to, failed to fully cooperate with and interfered with investigators' efforts who were conducting two separate administrative investigations into allegations.

I. RELEVANT CONTRACT LANGUAGE

As set forth in the Grievance, the relevant contractual sections identified are:

7.06 Grievance Steps

8.01 Standard

8.02 Progressive Discipline

8.03 Pre-Discipline

8.04 Investigations

(Union Brief, p. 12-14

BACKGROUND

The Grievant, in this matter is Jane Fisher ("Fisher" or "Grievant"), she was terminated from her position as a parole officer with DPCS on 8/29/2019. Fisher, at the time of her removal, had some 27 years of service with the State of Ohio. He previous employment started in 1992 as a payroll clerk for Lebanon Correctional Institution. She then progressed to the level of a case manager, eventually matriculating to the position of parole officer with DRC Adult Parole Authority (APA), a position she had held for some eighteen (18) years. (Tr. 489-500) As previously stated on August 29, 2019, Fisher, was removed from her position of parole officer (PO) with the Department of Rehabilitation and Correction, ("ODRC"), Division of Parole and Community Services ("DPCS", "APA", or "Employer"). According to the Employer, the Grievant was removed for violating the Standards of Employee Conduct (SOEC) Rules 7, 18, 22, 24, 37, and 50, cited above. The charges span a variety and severity of improper conduct. The most egregious of these was charges related to participating in the surveillance of two managerial officials, Tina Patrick, Dayton APA regional director ("Patrick") and Jason Perez, Dayton APA assistant regional administrator ("Perez") through participation in the investigative work of a private investigator. In addition, the Employer in its charges determined the Grievant had violated other rules related to honesty, work time, improper use of the Ohio online law enforcement resource, ("OHLEG") and job performance. In a narrative form that provides somewhat of a more initial explanation the Employer on page 3 of its brief states, the Grievant was found to have:

> Been involved in the hiring of a PI who was instructed to conduct surveillance on two supervisors of the Adult Parole Authority to determine if they were having an extramarital affair. The Grievant provided information to and received information from this PI.

Accessed a secure law enforcement resource in improper manners at her home and secondary place of employment.

Failed to properly document, staff and address violent and high severity violation behavior of offenders on her caseload.

Conducted personal business at her secondary place of employment while being paid by ODRC.

Falsified timesheets by indicating she was working for the ODRC while working at her secondary place of employment.

Lied to, failed to fully cooperate with and interfered with investigators' efforts who were conducting two separate administrative investigations into allegations.

Although the Grievant was initially placed on paid administrative leave on April 3, 2018, she remained as an employee until the completion of the Employer's investigative process culminating in her termination from employment over 15 months later, on August 19, 2019. This case took an exceptionally long time to investigate and a considerable period of time to get to arbitration. On the same day of Fisher's removal, she filed a grievance, and it was processed pursuant to Article 7 of the CBA. The grievance remained unresolved through the steps of the grievance procedure, and it was submitted to final and binding arbitration.by the Union. The parties have stipulated that the matter is properly before the Arbitrator for a determination on the merits.

SUMMARY OF THE EMPLOYER POSITION

The Employer avers that it had just cause to terminate the employment of the Grievant for several offenses, some more serious than others. The most serious of these and the one that this case prominently dealt with was the Grievant's active participation and or role in the

unauthorized engagement of a private investigator (hired by a fellow employee, Jeff Davis ("Davis") to conduct surveillance of management officials to determine whether they were having an affair, coupled with that charge was the Employer's findings that during its investigation of this unauthorized investigation, the Grievant was dishonest about her involvement. (Special Investigation policy, 09-INV-03, and Standards of Employee Conduct, 31-SEM-02 Over the lengthy period of the investigation of this prominent matter, the Employer uncovered other violations of the Standards of Employee Conduct varying in severity including not taking proper action regarding offender violation behavior, improper access of the OHLEG system, as well as in improper use of paid time, work location violations, and working unauthorized overtime. Overall, the Employer argues that the Grievant failed to provide a legitimate defense related to the above charges, other than to declare "Everybody is a liar, but not me." (Employer Brief, p. 32).

The Employer makes several arguments in this case and rather than attempting to summarize them and risk unfairly truncating or distorting their content the undersigned arbitrator in reiterating the Employer's case has chosen to provide a verbatim account of exactly what the Employer's has argued in this case as stated in its brief.

MANAGEMENT'S ARGUMENT:

Surveillance activities and lying

Management has proven the Grievant was involved in and then lied about her involvement in the unauthorized investigation into the personal lives of Tina Patrick and Jason Perez. Management corroborated David Boehm's statements through subpoenaed cell phone records, two (2) separate police reports and emails, as illustrated in Table 1. David Boehm had no hand in obtaining this information, lending credibility to his testimony.

Documentation used to substantiate involvement in surveillance

Document	Significance	Union's Defense
Text Message thread between David Boehm and Grievant, inquiring of interview date and placing GPS on Jason Perez's vehicle. Joint Exhibit p. 140	Contains Grievant's name, telephone number, has both Kettering Hospital information and surveillance activity on it.	David Boehm fabricated this document.
Text message thread between David Boehm and the Grievant, inquiring of interview location, and updates on Tina Patrick's vehicle/departure. Joint Exhibit pp. 142-143	Contains Grievant's name, telephone number, contains exchange of information about Kettering interview and surveillance activity. Grievant made admissions during arbitration to sending text about meeting time. (Tr., p. 582.)	David Boehm fabricated this document.
Text message thread between David Boehm, Grievant and Jeff Davis establishing that a tracking device was placed on Jason Perez's vehicle at the Dayton APA Office. Joint Exhibit pp. 144-145	Dated February 21, 2018. Contains details that the Dayton APA staff were in a meeting, which is supported by Union Exhibit 15 (datebook) Grievant provides information about meeting. Grievant admitted at Arbitration to being on group chat. (Tr., pp. 526, 527.)	David Boehm fabricated this document.
Text message thread between David Boehm and Jeff Davis about placing GPS on Jason Perez's car. Joint Exhibit p. 146	Dated February 21, 2018. Contains information about APA meeting and surveillance obtained from Grievant.	David Boehm fabricated this document.
Text message from Grievant to David Boehm about a residence in a group chat. Joint Exhibit p. 149	Dated March 20, 2018. Grievant has admitted to being in the group chat. (Tr., pp. 526, 527, 600.). Ties to documentation obtained by Mr. Kiser.	David Boehm fabricated this document.
Text Message Records. Joint Exhibit pp. 782-783	Indicates Grievant was texting with David Boehm between March 19 and March 20, proves she sent the text on page 149.	David Boehm fabricated text message associated with these dates/times.
Cell phone records revealing calls from Grievant to Jeff Davis. Joint Exhibit pp. 723-725	Only one of these is an incoming call from Jeff Davis. Does not support Grievant's claim he called her about David Boehm needing a job.	Unwilling to identify what the nature of these conversations were.
Cell phone records revealing calls from the Grievant to David Boehm. Joint Exhibit pp. 725-728	Only one of these calls is an incoming call from David Boehm. Does not support the Grievant's claim that he was the one calling her repeatedly about the job at Kettering.	Unwilling to identify what the nature of these conversations were.
Incident reports authored by the Grievant. Joint Exhibit pp. 136-138	Were authored by the Grievant detailing allegations against Jason Perez. David Boehm's email indicates he received these at 3:14 pm on February 15, 2018. Parties have all testified they were at Jeff Davis' home for	David Boehm is lying, Grievant did not provide these to him.

	20-30 minutes after David Boehm arrived at 3 pm.	
Miamisburg Police Department Report Authored by Patrick McCoy. Joint Exhibit p. 157	Contains several statements that indicate the Grievant was involved with the surveillance being conducted by David Boehm.	Police Officer Patrick McCoy lied in his report, statements were not made by Mr. Davis.
Miamisburg Police Department Report Authored by Officer Tyler Simpson. Joint Exhibit p. 168	Indicates Grievant has issues with Tina Patrick, Grievant was in communication with David Boehm.	Police Officer Tyler Simpson lied in his report, statements were not made by the Grievant.
Email from Jeff Davis to Miamisburg Police Department. Joint Exhibit p.213	Authored by a union witness, implicates the Grievant being involved with Boehm's surveillance activities.	Jeff Davis' attorney told him to lie to the police to support his case against David Boehm.

Table 1

Had the Grievant only been in communication with Mr. Boehm about employment at Kettering hospital, he would not need to seek clarification via text message about which parking lot they were to meet in (Joint Exhibit p. 142) for his Kettering Hospital interview. The fact that Mr. Boehm had to seek clarification about whether they would meet in the APA Parking lot or Kettering Hospital's parking lot proves the Grievant was directing surveillance activities at the APA Office.

The Grievant asserts Mr. Boehm was worried about his interview and called her repeatedly. She further testified Mr. Davis is the one who called her about Mr. Boehm. Records prove it was the Grievant who was making calls to David Boehm and Jeff Davis. Table 2 is a summary of cell phone calls between the Grievant, Jeff Davis and David Boehm. Joint Exhibit (JE) Pages are listed.

Summary of Cell Phone Calls

Date	Time	Originator	Destination	Duration	JE Page
02/02/2018	6:55 pm	Grievant	Jeff Davis	2 minutes	723
02/05/2018	12:12 pm	Grievant	Jeff Davis	1 minute	723
02/05/2018	1:15 pm	Grievant	Jeff Davis	12 minutes	723
02/07/2018	10:02 am	Grievant	Jeff Davis	2 minutes	724
02/07/2018	2:11 pm	Grievant	Jeff Davis	20 minutes	724
02/14/2018	2:28 pm	Grievant	Jeff Davis	1 minutes	725
02/14/2018	2:28 pm	Grievant	Jeff Davis	7 minutes	725
02/14/2018	4:03 pm	Jeff Davis	Grievant	6 minutes	725
02/15/2018-Date of meeting at Jeff Davis' Home					
02/16/2018	2:18 pm	Grievant	David Boehm	23 minutes	725
02/16/2018	2:41 pm	Jeff Davis	Grievant	11 minutes	725

02/19/2018	12:27 pm	Grievant	David Boehm	1 minutes	726
02/20/2018	8:20 am	Grievant	David Boehm	31 minutes	726
02/20/2018	7:20 pm	David Boehm	Grievant	15 minutes	726
02/21/2018	11:51 am	Grievant	David Boehm	3 minutes	728

Table 2

The Union and its witnesses have made a point that the Grievant's name is not located on a contract with David Boehm for services, therefore, she is not a client and could not be involved. The Grievant was involved in Mr. Boehm's surveillance as evidenced in Table 1. The absence of her signature on a document is not proof she did not participate. The Grievant did participate. The Grievant did lie about her participation during investigatory interviews with Mr. Kiser and Ms. Dillon. Joint Exhibit pages 272, 277, 327 and 331 are investigatory interview notices that admonish the Grievant at the onset of each of four (4) interviews she is to tell the truth and answer questions fully. Honesty in ODRC has been long held as a critical piece of employment. There are prior arbitration rulings supporting removal of dishonest employees of varying classifications specifically from ODRC.

Arbitrator Thomas Nowell held in Grievance 27-27-20220606-0026-02-11 (Callahan, attached):

> Once honesty is violated, trust is completely lost. Like cases in law enforcement, dishonesty on the part of a mental health professional in a prison setting in certain circumstances is fatal. The Grievant violated Rule 24 when she was dishonest when questioned regarding the use of her personal cell phone. This violation is fatal, and the termination of employment of the Grievant is sustained.

(OCB Award 2161 pp 11-12).

Arbitrator Stein ruled in grievance number 27-32-020717-0512-01-03 (West, Attached):

> Moreover, it is why Correction Officers must display conduct, that is above reproach. At the heart of such conduct is honesty and trustworthiness. What is egregious is the act of lying during the conduct of official inquires, particularly regarding conduct that matter greatly to the security of a correctional facility. The use of force against inmates is a cardinal principle for which correctional officers receive extensive training. When a Correctional Officer chooses to be dishonest and deceptive about this important matter, he places his employment at great peril.

(OCB Award 1680 p. 9)

<u>OHLEG Violations</u>

The Grievant repeatedly improperly accessed a secure online law enforcement resource called OHLEG. The significance of this violation cannot be overstated. Documents detailed in Table 3, coupled with admissions from the Grievant (Tr., p. 536) prove she routinely violated OHLEG rules and regulations, as well as ODRC policies. OHLEG violations are a felony level offense (Joint Exhibit p. 444) and must be addressed as serious violations by the ODRC.

<u>OHLEG Access Documentation</u>

Date	OHLEG Report pp. 423-543	Kettering Timecards	FOT Shows	KRONOS (ODRC Timecard)

				pp. 554-581
03/23/2018	Kettering 11:07 am-1:14 pm pp. 460-462	Present 5:58 am-2:00 pm p. 487	Blank p. 529	Off p. 559
12/18/2017	Home 9:17 am pp. 464, 465	N/A	Field/Vacation Field 7am-1pm, vacation 1pm-5pm p. 530	Worked Mirrors FOT p. 568
12/13/2017	Home 6:22 pm p. 465	N/A	Field 12:15 pm-7:15 pm p. 532	Worked Mirrors FOT p. 568
10/17/2017	Home 9:52 am-10:07 pm p. 468	N/A	Blank p. 533	Off p. 575
09/22/2017	Kettering 9:11am-9:46a p. 471	Present 555am-2p p. 492	Field-just took Telephone Call p. 534	Off p. 577
09/18/2017	Home 8:51am p. 472	N/A	Field 7am-5pm p. 535	Worked 7am-5pm p. 577
07/29/2017	Kettering 1:07pm-4:51pm p. 476	Present 555am-10:00p p. 495	Off p. 536	Off p. 580

Table 3

Ms. Dillon testified OHLEG policies and ODRC policies do not permit staff to access this resource at home or secondary place of employment. This resource is to be accessed by State of Ohio devices, on State of Ohio internet connections. Period. (Tr., pp. 342-344.)

Arbitrator Stein held in DRC-2020-04521-03 (Gabbard, attached):

> The only circumstances under which a penalty imposed by Management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious conduct are proved—in other words, where there has been an abuse of discretion. The arbitrator should not substitute his judgment for that of Management unless he finds that the penalty is excessive or unreasonable, or that Management has abused its discretion.

Operating Eng'rs. Local Union No. 3 and Grace Pac. Corp., 01-2 Lab. Arb. Awards (CCH) P 3971 (Najita 2001).

The Union attempted to prove Management is applying discipline for OHLEG violations in a capricious and abusive manner in this case. The Union would have you believe no disciplines have been issued for OHLEG violations. This is a blatant lie. Ms. Cynthia Mauser testified she has authorized the

issuance of Removals and Last Chance Agreements (LCA) during her tenure for OHLEG violations (Tr., pp. 363-365.) The Union requested and received these documents as part of their records request(s).

The issue for the Union is LCAs have language that prohibits them from being introduced in proceedings such as Arbitrations. The Union knew they would not be able to introduce these LCAs due to this language. Instead of remaining silent on the matter or admitting discipline for OHLEG violations is a common practice, Josh Norris provided inaccurate statements no disciplines for violations of OHLEG policies had been issued.

The Grievant violated additional Departmental policies by accessing OHLEG at her residence. These policies include 35-PAY- 04 Time Keeping (Joint Exhibit p. 621) and 35-PAY-09 Teleworking (Joint Exhibit p. 635). When asked about her permission to work at home (i.e.-accessing OHLEG), the Grievant lied to Ms. Dillon by stating all three of her supervisors gave her permission to do so. All three supervisors' statements to Ms. Dillon were in line with policy which indicated telework was not approved. (Tr. pp. 279-285.)

Conducting Business at Secondary Employer/Falsification of Documents

The Grievant conducted personal business and worked at her secondary place of employment on no less than three (3) separate occasions while being paid by the ODRC. Documentation from ODRC and Kettering Hospital identified in Table 4 prove this misconduct. By submitting documentation indicating she was working for ODRC while she was present at Kettering, the Grievant falsified documentation.

Conducting Business at Secondary Place of Employment/Falsification

Date	Kettering Timecards Shows	KRONOS Shows
03/07/2018 Date of interview with David Boehm	n/a	Field work p. 559
05/30/2018 (AL)	Present for 2 hrs p. 484	AL all day p. 506
09/05/2018 (AL)	Present 1324-1527 p. 481	AL all day p. 501

Table 4

As it relates to the Grievant's presence at Kettering for David Boehm's interview: If the Grievant is to be believed that she was present for the interview on February 21, 2018, instead of March 7, 2018, she has still violated the Agency policy on outside employment. Any argument the Grievant was present at Kettering during a contractual break, or that she was somehow permitted to be there because it was "in her jurisdiction" is false. Policy 31-SEM-10 (Outside Employment) strictly prohibits conducting secondary business while on the clock. (Joint Exhibit p. 642) Contractual breaks are paid breaks. The Grievant was not meeting with offenders and had zero ODRC business purpose to be at Kettering Hospital.

As it relates to her attending a meeting on May 30, 2018, while on Administrative Leave (AL), a similar argument is to be made. The Union's argument about the Agency calling or not calling the Grievant to work on short notice is irrelevant. The Union's argument about the Agency giving her work to do, or not giving her work to do is irrelevant. The Grievant was being paid by the Agency to be in a work ready status. She was put on notice she could not participate in outside employment during her normal work hours. She engaged in work with and was paid by her outside employer while being paid by the ODRC at the same time.

The Union provided a text message between the Grievant and her supervisor, Chris Gibson, dated September 5, 2018. The text indicated the Grievant needed time off; however, the Grievant never submitted the leave request through the official time-keeping system KRONOS. The Grievant testified this was an oversight; however, this is not in line with statements made to Ms. Dillon. During her administrative investigation with Ms. Dillon, the Grievant was adamant she submitted leave for the day and her supervisor failed to process it. The Grievant did not submit leave submission for this date and was paid by ODRC while she was working at her secondary place of employment.

The Grievant falsified her FOT documentation by documenting she was in the field, when she was actually conducting work at her residence. Please recall the Grievant's testimony that "Home" was not an option in her timekeeping applications. This is because working at home was not permitted (Tr., p. 566.)

Supervision of Offenders

The Grievant failed to supervise at least four (4) offenders on her caseload in the months before being placed on Administrative Leave. Her failure to supervise these offenders coincides with her fixation to discredit Tina Patrick and Jason Perez. Table 5 illustrates policies in place to guide Parole Officers in supervision of offenders. Table 6 provides a guide to documentation which shows the Grievant's failures to address high severity violation behavior of her offenders.

Supervision Policies

Policy Number	Policy Name	Direction provided to staff
100-APA-05 Joint Exhibit p. 648	Search/Arrest	Dictates under what circumstances an offender should be arrested, how to monitor those in custody.
100-APA-14 Joint Exhibit p. 659	APA Sanctions	Dictates what offender actions warrant a mandatory in-custody hearing, the need for independent investigations and proper sanctions.
100-APA-23 Joint Exhibit p. 677	FOT/File Policy	Dictates security of Parole Officer devices (FOT), mandates accurate and up to date notes on interactions with offenders.

Table 5

Documentation for Improper Supervision of Offenders

Offender	Charge/Conviction and date	When/How Notified	FOT Notes	Actions Taken per NOTEC
Jerry Sanner p. 351	Felonious Assault 01/24/2018	01/23/18 via email p. 362	Notified 01/23/2018 p. 359	Notified Deardurff, but should have done more to investigate p. 356
Jose Rio p. 375	Solicitation/Loitering 09/29/2017 arrest. Conviction 11/09/17	Email 10/02/2017 p. 386 Justice Web 10/01/2017 p. 389	Nothing noted pp. 384-385	Nothing noted p. 382

James Farr p. 397	Attempted Assault (Taco Bell incident) Cited 11/14/2017 conviction 01/22/2018	Justice Web on 11/16/2017 p. 409	Nothing noted p. 405	Nothing noted p. 402
Jese Workman p. 416	Unlawful Discharge, Aggravated Menacing, dv (F3) 05/24/2017 Victim called Grievant and made threats from the jail.	Notified 05/24/2017- staffed initial arrest with Ms. Deardurff p. 421	Indicates knowledge pp. 429-430	No indication of continued threats from jail Sanction- p. 417 Staffed p. 421

Table 6

The Grievant's inactions placed the community and victims at risk. Ms. Mauser testified that keeping the community safe is a primary function of Parole Officers. (Tr., pp. 354-355.) This fundamental duty has been addressed before at Arbitration. In the award for DRC-2020-03236-12 (Hill) case, Arbitrator Stein held:

> But what becomes inexplicable is simply not performing her job in light of the core mission of the job of Parole officer involve serious unsettling errors of judgment involving three (3) different offenders that not only reflected negatively upon the Grievant's competency, and the Employer's potential liability/reputation, but also could have had a negative impact on public safety. In a significant way they exemplify evidence of the Grievant's disengagement from her core duties and responsibilities of the position of Parole officer, misjudgment and irresponsible execution of duties are another matter (compared to late entries), particularly when public safety is involved.

(OCB Award 03236, p. 25.)

The Grievant continues to deflect responsibility for addressing violation behavior to this day. During the Arbitration, she blamed her supervisor and clerical staff for missing the arrests of Offenders Sanner and Rios, despite being notified directly via SlateChecks and Justice Web. (Tr., pp. 552, 554).

The Grievant falsely testified she properly notified her supervisor that Offender Workman was making continued threats from the jail. (Tr., p. 557, 615-16.) The Grievant notified her supervisor the offender made threats at the time of the initial arrest, but never mentioned continued threats from the jail months later. Management directs the Arbitrator to language in Policy 100-APA-14 (Joint Exhibit p. 659) that requires sanctions to be staffed before issuance. (Joint Exhibit pp. 661-662.) The sanction for Offender Workman was issued on September 25, 2017 (JE p. 417). The Grievant notified Ms. Deardurff afterwards what she did on September 28, 2017 (JE p. 420). Ms. Deardurff was unaware the offender had been making continued threats from the jail and stated she never would have approved the sanction or release if she knew the entire story (Tr., pp. 237-238)

We ask the Arbitrator to consider the Grievant's testimony relating to case load sizes. The Grievant demonstrated she had a large caseload (149 according to Justice Web). She testified all the

Parole Officers in her unit had same/similar case load sizes. The Grievant further testified her supervisor, Wanda Deardurff supervised 10-12 Parole Officers. (Tr., pp. 546, 613-614.) This means Ms. Deardurff was expected to provide work direction anywhere between 1500 and 1800 offenders.

A Unit Supervisor cannot be expected to recall staffing notes from several months prior on a given offender. Unit Supervisors rely on the Parole Officer to provide up to date and accurate information to guide decision making. Ms. Deardurff was not provided up to date and accurate information on these cases by the Grievant. Ms. Deardurff cannot be the scapegoat for the Grievant's shortcomings.

Management Discussion of Union Documentation

Management objected to the manner in which the Union submitted documentation for this hearing. These objections were made because the Grievant had not brought any of her claims or documentation to light until the Arbitration began. Management has the burden of proof. However, an employee undergoing administrative investigations and hearings has a voice in these processes.

The SEIU 1199 contract with the State of Ohio also identifies employee responsibilities. Article 8.03 states: "Prior to the imposition of a suspension or fine of more than three (3) days, or a termination, the employee shall be afforded an opportunity to be confronted with the charges against him/her and to offer his/her side of the story." Joint Exhibit page 13 is part of the Grievant's Pre-Disciplinary packet. This page admonished the Grievant the hearing is for her to "present an explanation, mitigating circumstances and documents". Joint Exhibit pages, 272, 277, 327 and 331 are all notice of rights during Administrative Investigatory Interviews for the Grievant. These documents admonished the Grievant that she had an opportunity to present information and evidence to defend herself during the investigatory interviews. An expectation for an employee under investigation to offer some form of defense at the onset of the disciplinary process is not an unreasonable one. Simply "letting Management do what it wants," as Mr. Norris testified, is not a logical defense. (Tr., pp. 657-658.)

The Grievant had ample opportunity to share her side of the story, to include providing documents prior to the Arbitration. If the items she had were supportive of truths, she should have no delay in providing them in her defense. The timing of, and nature of the Grievant's documentation submission paints a picture of continued attempts to deceive and cloud the truth.

Union Exhibits 3, 4, 5, 6, 9

This collection of exhibits was merely introduced in an attempt to discredit David Bohem.

Union Exhibit 3 was not thoroughly identified or discussed. This appears to be David Bohem's PI registration. David Boehm's status as a PI is irrelevant to this case.

Union Exhibit 4 is a hearing notice dated March 26, 2018, to David Boehm, notifying him of potential disciplinary action for violations of Chapter 4749, ORC. The charges against Mr. Boehm indicate he was aware individuals were conducting Private Investigative services without being properly licensed. Mr. Boehm testified he brought the actions of the Grievant and Jeff Davis to light because they were planning to continue conducting surveillance activities. Union Exhibit 4 supports Mr. Boehm's claims he did not want to get in trouble for permitting the Grievant and Jeff Davis to continue surveillance of Tina Patrick and Jason Perez.

Union Exhibit 5 is an adjudication order dated May 15, 2018. This document is irrelevant to these proceedings.

Union Exhibit 6 is an email from David Boehm indicating he is closing his business dated December 6, 2018. This document is irrelevant to these proceedings.

Union Exhibit 9 is Chapter 4749, ORC, referenced in Union Exhibit 4 (Hearing Notice). This law placed Mr. Boehm in an ethical and legal dilemma. If he did not report the Grievant's actions, he could be charged (again) with permitting surveillance by unlicensed individuals. If he did speak up, he could be charged with releasing information obtained for his clients. He made the decision to protect employees of the APA despite the possibility of additional charges being brought against him.

Union Exhibit 7

Union Exhibit 7 is Jeff Davis' EHOC report. This report illustrates Mr. Davis resigned but was rehired. Mr. Davis testified he was never placed back under investigation upon his rehire. Mr. Davis' original resignation could not have been coded to raise a flag for future employment as the investigation had not been completed. He was re-hired at one (1) of twenty-five (25) institutions, not the Adult Parole Authority. That institution would have had no way of knowing about his pending investigation, or to alert Scott Kiser. The other side of that coin is Scott Kiser had no way of knowing Mr. Davis had returned. Management notes, ODRC is the largest agency in the state, and tracking these situations is nearly impossible.

Union Exhibit 10-Employment Notification

Barry Fisher, Jeff Davis and the Grievant all testified the reason Mr. Boehm fabricated text messages and lied about the Grievant's involvement, was because he did not get a job at Kettering Hospital. (Tr., pp. 459. 494, 636.) Union Exhibit 10 is a screen shot of the notification to Mr. Boehm he did not get the position at Kettering Hospital. Contained in Union Exhibit 10 is a note from Mr. Boehm thanking the Grievant and Mr. Davis for their help, not blaming them for not being awarded the position. He expresses no anger towards them in this message.

Union Exhibit 11 (alleged fabricated text messages)

Union Exhibit 11 is several allegedly fabricated text messages created by Nicholas Speelman. Mr. Speelman claims the process to fabricate texts is easy however he has fifteen (15) years of experience in IT. The Union has attempted to argue David Boehm is a poor businessman, does not keep accurate records and is an overall incompetent individual. (Union Exhibits 3, 4, 5, 6, 9, 18a, 18b.) Management reminds parties that Mr. Boehm did have difficulty with audio and camera capabilities on his phone during the Arbitration hearing. The likelihood of him using two phones, creating several contacts, taking screen shots, utilizing Adobe Pro then saving to his phone to fabricate text messages is unlikely if the Union's argument against him is also to be believed.

Union Exhibit 12-Barry Fisher NODA

Union Exhibit 12 is a Notice of Discipline issued to Barry Fisher. Barry Fisher's discipline was issued by his Appointing Authority (Warden), not Ms. Mauser. He was not found to have been as extensively involved in or provided information to David Boehm as the Grievant had. Mr. Fisher was not found to have violated many of the other rules of the SOEC as the Grievant had. Lastly, Barry Fisher's role in the Agency is starkly different than the Grievant's. A shift Lieutenant, while important to the operation of an institution, has no control over freedoms of individuals under the control of the Department, is not directly charged with protecting the public, and did not misuse secure law enforcement resources. Any attempts to argue the Grievant's discipline should be in line with his are without merit.

Union Exhibit 13-Evaluations

The Union introduced the Grievant's evaluations. Management accepts these evaluations paint the picture of a good employee with no notations of issues with her caseload. Had Management been aware of issues with her caseload, they would certainly have been reflected in her evaluations.

Union Exhibit 14, 15, 16, 19-Desk Calendar

The Union submitted the Grievant's personal desk calendar. These calendars were in existence and known to the Grievant at the onset of the investigation, however, were never mentioned until after Arbitration hearings were underway. The Grievant provided handwritten calendar pages that suspiciously contained white out, but her reasoning is even more suspicious. The Grievant testified she used white out because she is concerned about grammar, but admitted this calendar is not reviewed by anybody other than herself (Tr., p. 511.) Management points to Union Exhibit 14, specifically entries on February 15, 2018. A visual inspection of this date reveals the Grievant used white out to cover something up, then clearly wrote over it to support her claim the meeting with Jeff Davis was about a Kettering job. This document is insulting to our processes and highlights the lengths the Grievant is willing to go to deceive.

Union Exhibit 15 contains entries for February 21, 2018 and proves the Grievant's involvement with Mr. Boehm's surveillance. Entries on February 21, 2018, indicate the Grievant had a meeting at the Dayton APA office scheduled for 9:30 am. The entry states Tina (Patrick) and all staff (including Jason Perez) would be present. Joint Exhibit page 144 contains text messages between Jeff Davis, David Boehm and the Grievant for this same date. At 10:28 am, the Grievant sent a text stating "Did you do it yet? Hopefully we're out of a meeting". Joint Exhibit page 146 contains text messages on the same date between Jeff Davis and David Boehm. At 9:55 am, Jeff Davis sent a text advising, "They are currently in a meeting". The Grievant provided information to both David Boehm and Jeff Davis to assist in David Boehm's surveillance work; these texts and her desk calendar prove it.

Management refers the Arbitrator to Joint Exhibit page 513 and the Grievant's desk calendar entry for March 7, 2018 (the date she was at Kettering for David Boehm's interview). Page 513 contains the Grievant's FOT Notes. Management points out, the Grievant has listed, "No contact," and "Late Entry" for each of the offenders listed in her desk calendar on March 7, 2018. She has provided no reasoning for the "Late Entry" and as she had "no contact", nobody can verify she was conducting home visits at that time. The Union has failed to prove the Grievant was not at Kettering hospital on March 7, 2018.

The Union suspiciously called for a recess after the Grievant was challenged about white out in her calendar. After the recess, the Union introduced additional pages from the Grievant's calendar with white out to "prove" this was a regular practice of the Grievant. Management points the Arbitrator to an April 7 entry that is in past tense ("Looked at…"). Further entries on January 18 and 23, May 2, and October 5, contain white out, with nothing written over them. This contradicts the Grievant's statements that she would white things out to correct her spelling. (Tr., p. 511.) This feeble attempt of a defense illustrates the Grievant's willingness to deceive even an Arbitrator.

Union Exhibits 18a and 18b

We were promised on day one of testimony these documents would be introduced and discussed by a Union witness. While they were in fact, introduced by Barry Fisher, the, documents were not discussed. At all. Management asks you to give them no weight.

Union Exhibit 20

In a continued pattern of deceitful behavior, the Union submitted approximately seventy-two (72) text messages between the Grievant and her then supervisor, Chris Gibson, in the middle of day three of the Arbitration. Management asks the Arbitrator to consider two significant points.

1) The Grievant was unwilling to indicate when she saved and took screen shots of these messages. These screen shots and messages span several months and were presumably taken in preparation for Arbitration three years after her Removal. This is in direct conflict with prior testimony about her messages. The Grievant testified her phone doesn't save messages, "It only allows so long, and then it just disappears" (Transcript p. 530.)
2) The Grievant admitted on cross-examination that the texts between herself and her supervisor provided at the hearing were in fact authored by herself and nobody else. (Tr., p. 630.) There are ten (10) text messages from herself to Chris Gibson in which the Grievant used exactly two (2) exclamation points. In the texts from the Grievant to David Bohem, the **exact same number** of exclamation points is used, not more, not less. (Joint Exhibit, pp. 140, 149.) This is clearly a writing style of the Grievant when she is excited and proves Management's case the Grievant was in communication with David Boehm about his surveillance activities.

Management Response to Union Objections

The Union raised an objection during the proceedings relating to the Notice of Removal. These objections arose in relation to a line of questioning about telework, and lying to Keysha Dillon.

Management successfully argued the Grievant was put on notice her Removal was based on lying to Investigator Dillon as her Removal Notice states: "During the Agency's investigation into these activities, you failed to fully cooperate with investigators or provide truthful responses to their inquiries." Further, investigative reports by both investigators indicate deception by the Grievant. The Union could have sought clarification at the Pre-Disciplinary hearing if they were unclear about the allegations.

The Union also objected to the introduction of statements and evidence relating to telework violations. The Grievant accessed OHLEG at her residence, demonstrating she was working at home, in violation of Policy 35-PAY-09 Telework (JE p. 635) and Policy 05-OIT-09 OHLEG (JE p. 645). The Union's argument she was not put on notice in her Removal Notice is false. The Grievant was notified, "…you improperly accessed and/or used the OHLEG system.".

Witness Credibility

The Arbitrator's decision in this case hinges on the credibility of witnesses, three in particular: Mr. David Boehm, Mr. Jeff Davis and the Grievant. Credibility is supported through motivation, documentation and testimony. Supporting the argument of witness credibility can be found in the award for grievance DRC-2020-04521-03, (Gabbard, attached):

> An accused employee is presumed to have an incentive for not telling the truth, and when [his] testimony is contradicted by one who has nothing to gain or lose, the latter is to be believed.

(*OCSEA, Gabbard v. The Department of Rehabilitation and Correction,* OCB Award # 2689, pp. 14-15, quoting *United Parcel Serv., Inc. and Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., Local 89*, 66-2 ARB 8703 (Dolson 1966).)

Motivation

Management's motivation in this case is the same as the Arbitrator's. That is to come as close to the truth as possible. Unfortunately, we will never get there due to the antics of the Union, the Union's witnesses, and the Grievant's lack of willingness to simply tell the truth.

Scott Kiser and Keysha Dillon's motivations were to provide facts and discuss the truth. They reported what they learned through administrative investigations and document retrieval. Mr. Boehm is a party who has nothing to gain, yet stands to incur significant loses by testifying. Management has proven Mr. Boehm's credibility through outside sources (Table 1 and 2). Management asks you to consider Appendix A, which is a timeline of events involving Mr. Boehm and his involvement in this case between the initial meeting and his notification to the Adult Parole Authority of the events. This timeline proves Mr. Boehm's statements of when things occurred for which we do not have specific dates. The Union's claims that his motivation was revenge for not getting a job at Kettering Hospital are ridiculous. Union Exhibit 10, the text from Mr. Boehm to the Grievant and Mr. Davis stating he did not get the job at Kettering Hospital illustrates his gratitude for their help. Mr. Boehm should be applauded for his actions, not villainized.

The Union's and its witnesses' motivations are much different. Jeff Davis' motivation is in fact revenge. He openly testified to being a disgruntled employee with an ax to grind against the Agency and Tina Patrick. (Tr., p. 420.) He openly testified he was only interested in "making him (David Boehm) understand by the time when this is all said and done just what it's done to us, you know, his actions" (Tr., p. 460.) Mr. Davis has a history of making threatening statements. Recall, Mr. Boehm testified Mr. Davis made "concerning statements" which led to his calling Tina Patrick (Tr., pp. 42, 43, 89.)

The Grievant's motivations are obvious. She desires her position back with the Agency and is willing to do whatever it takes to get it back as evidenced by providing altered desk calendar entries as part of her defense. The Grievant, in her own words, had motivation to engage in the surveillance activities. She testified she was "hurt" and "upset" when Ms. Patrick suspended her from the STAR team. (Tr., p. 502.) She told Officer Simpson from the Miamisburg Township Police Department, "She had problems dealing with Tina as a supervisor" (JE. p. 171.)

Documentation

Management has obtained and provided documentation in a timely and transparent manner. Each document is proof of the Grievant's lies, actions and inactions. These documents cannot be fabricated and speak for themselves.

Documentation provided by the Union arrived hours before Arbitration dates and even during the hearing itself. These documents attempted to discredit David Boehm, and provided no substantial defense for the Grievant. Many exhibits from the Union were introduced with no testimony about their significance.

Testimony Provided

Testimony from Management witnesses during the Arbitration did not conflict with any documentation provided, expectations of the Agency, or policies. Testimony provided by Management

witnesses was consistent with statements provided at the onset of the investigation and has remained consistent.

The Union provided testimony with no documentation or corroboration to dispute the facts established by Management. Witness testimony from the Union is in direct conflict with documentation provided, statements and testimony of Management witnesses, whose testimony was supported by facts and documentation.

Remedy

Management has raised the issue of timeliness. The Grievant was removed on August 19, 2019. The first date of Arbitration was August 23, 2022, three (3) years later. Management is not seeking a ruling on arbitrability of this case. Rather, Management seeks relief in the event an award is made in the Grievant's favor. Management disputes Mr. Norris' testimony that Management and the Union work together to propose cases for Arbitration. Management points to Article 7.06 "Arbitration," which states, "The Union may request arbitration of the grievance within sixty (60) days of the date of mediation…". This article does not indicate anywhere that Management is involved in proposing cases for Arbitration.

Management requests any award made in the Grievant's favor take this into account.

SUMMARY OF THE UNION'S POSITION

The Union makes several arguments in this case related to notification, procedure, credibility, investigative integrity, and evidence. Rather than attempting to summarize them and risk unfairly truncating or distorting their content the undersigned arbitrator in reiterating the Union's case has chosen to provide a verbatim account of exactly what the Union's has argued in this case as stated in its brief.

I. ARGUMENT

a. PROCEDURAL ISSUES

i. The arbitration is properly before the Arbitrator and the State is not entitled to any mitigation in remedial back pay

At arbitration, the State made an argument regarding the timeliness of the grievance before the Arbitrator and/or that the Arbitrator should take into consideration the length of time between grievance steps in determining the proper remedial backpay. Both contentions are without merit.

Article 7 of the parties' collective bargaining agreement states:

> Arbitration - Grievances which have not been resolved under the ADR procedure shall be considered eligible for Arbitration. The Union may request arbitration of the grievance within sixty (60) days of the date of mediation, but no more than one hundred eighty

(180) days of the filing of the grievance. The parties shall conduct an arbitration within sixty (60) days of the date of the arbitration request. The parties agree that there shall be no more than one (1) thirty (30) day continuance requested for arbitration. If a cancellation is initiated by an arbitrator, the arbitration shall be conducted within thirty (30) days of the cancellation. However, grievances involving criminal charges of on-duty actions of the employee, grievants unable to attend due to a disability, or grievances involving an unfair labor practice charge may exceed the time limits prescribed herein. Employees who are terminated and subsequently returned to work without any discipline through arbitration, shall have the termination entry on their Employee History on Computer (EHOC) stricken."

The language in place in the current CBA is identical to the language in place in this article in effect at the time of the filing of the instant grievance. The parties entered into bargaining in 2021 and reached a successor agreement. During the bargaining for the successor agreement the employer did in fact introduce proposals to modify Article 7. Union Exhibit A. The Union submitted counterproposals to this article and the parties ultimately arrived at a tentative agreement on the article (Union Exhibits B, C) that was ultimately properly ratified by the parties and is now in effect in the current CBA.

In 2019, prior to the negotiation of the current contract, the State raised this identical objection, and the issue was decided by Arbitrator Sherri Passmore on May 21, 2019. The decision clearly establishes the obligations of the Union to put the employer on notice and satisfy the procedural requirements of Article 7. Union Exhibit D. The decision lays to rest the question of the Union's is obligation to notify the employer of its intent to arbitrate, and the method utilized to do so. The instant grievance was processed in an identical fashion as the grievance decided in the arbitration decided by Arbitrator Passmore. This decision has unquestionably set the precedent for this issue, and the State had ample opportunity to bargain any changes to this process that they sought. The State did not even introduce a proposal to address this alleged concern. The Employer has undeniably acquiesced to the precedent and should not now allege that there is some type of flaw with this grievance, as there is quite obviously not.

The instant grievance trail clearly shows that this grievance denotes was carried forward and moved through the process in the exact same fashion and satisfied all contractual timelines in place at the time and that are currently in effect. Union Exhibit E. This grievance was filed on August 19, 2019, the same day Ms. Fisher was terminated. This is unquestionably within the 20-day requirement of the article. The grievance was heard at mediation on November 14, 2019. That day under the "Resolution Step History" on the grievance trail this grievance was marked "Changed Result to Carried Forward to Arbitration" at 1:07 PM. Id. The information input on the "Resolution Step History" was input into the system by Steven Baker. Steven Baker worked for the Office of Collective Bargaining. The State obviously had knowledge of the Union's intent to move this grievance forward. The Employer did not carry its burden of proving that the Union violated Article 7.06 by failing to timely request arbitration.

Further, the Employer seems to seek some mitigate on the remedial damages in this case due to the length of time between the mediation and arbitration. There is no basis for this. There is no contractual language allowing the Arbitrator to limit damages based on the time between the mediation and arbitration, especially when there is no showing that the Union was the party the caused a delay. Instead, there was a global pandemic in the interim, which was obviously not the fault of the Union. There

is no proof that the State was somehow prejudiced in this matter while the Union, specifically the Grievant, were not. There is no justification to limit any remedial award based on this argument.

ii. The State's actions do not satisfy the procedural safeguards required of just cause

The concept of "just cause" encompasses a number of procedural safeguards. This includes but is not limited to a thorough and fair investigation of the facts and circumstances that led to the discipline, notice of the charges, prompt action once the basis for the discipline becomes known to the Employer, and an opportunity for the employee to confront the evidence against him or her. Further, it requires that the Employer consider the sufficiency of evidence considering mitigating circumstances or other exculpatory evidence provided by the employee after being confronted with the evidence. Here, though the State provides hundreds of pages in "support" of its allegation that Ms. Fisher should be terminated for the claimed wrongdoing, it has failed to fulfill many requirements essential and inherent in fulfilling the "just cause" provision of the contract both procedurally and substantively.

Procedurally, this is evidenced by a number of factors: (1) the failure to fulfill Loudermill requirements regarding the allegation that Ms. Fisher was untruthful in her answers in the second investigation; (2) attempts by the State to base the Grievant's termination on two counts not included in the Notice of Discipline signed by the appointing authority; (3) the exceedingly long delay between the time that the State learned of the potential wrongdoing and the implementation of termination- a period of 17 months; and (4) the obvious lack of a fair and impartial investigation.

During the arbitration, the State attempted to set forth allegations against the Grievant as justification for her termination that are not in the Notice of Discipline. This includes one allegation that was never in the pre-disciplinary notice and an allegation that was in the pre-disciplinary notice, but not the Notice of Discipline.

First, the State claims that the following gives the Union notice that there are untruthfulness allegations attached to the second investigation. The Notice of Disciplinary Action lists a total of five (5) allegations. Both the pre-disciplinary and disciplinary notice specify:

> You participated in an unauthorized private investigation of two DRC employees. During the Agency's investigation into these activities, you failed to fully cooperate with investigators or provide truthful responses to their inquiries.
>
> Employer Exhibit pp.7-8

This is the first on a list of alleged misconduct and the only allegation investigated by Mr. Kiser. The notice then goes on to list another four (4) allegations, all investigated by Ms. Dillon in the "second" investigation. Untruthfulness and failure to cooperate are never mentioned again or in relation to the other charges or Ms. Dillon's investigation. When this was objected to at arbitration, the State insisted that the Union had notice because evidence was provided about these allegations in the 700-page packet provided by the State when notifying the Grievant of the pre-disciplinary hearing. However, the requirements of notice and ability to confront the evidence against you are separate requirements of Loudermill.

In Cleveland Board of Education v. Loudermill, 470 US 532 (1985), the Supreme Court determined that non-probationary public employees hold a constitutionally protected property interest in their employment. As such, this property interest cannot be taken from the employee without the due process guarantees in the 5th and 14th amendments to the U.S. Constitution. The right is outside the protections of Chapter 4117, Ohio's collective bargaining law, and exists outside of the CBA between the parties. This constitutionally protected right generally requires that the employee be given: (1) notice of the charges, (2) an explanation of the evidence against them, and (3) an opportunity to respond. Loudermill at 546; Buckner v. City of Highland Park, 901 F.2d 491, 494 (6th Cir. 1990).

A reasonable person, like the Grievant, would assume when reading the charges against her of untruthfulness allegations against her related to the Boehm (Mr. Kiser's investigation), but would not know that there were other truthfulness allegations based on the regular rules of writing and grammar. The notice alleges: "You participated in an unauthorized private investigation of two DRC employees. During the Agency's investigation into these activities, you failed to fully cooperate with investigators or provide truthful responses to their inquiries." There is no other reasonable way to read that sentence. It refers to the investigation into the allegation of an unauthorized investigation. It is the first charge and does not reappear. As Ms. Fisher was not properly notified of the untruthfulness allegations against her related to the second interview, the State did not satisfy its Loudermill obligations as to this charge.[1]

Next, neither the allegation of untruthfulness as to the second interview or the Kronos allegations related to working off the clock are contained in the Notice of Discipline. It has been well established that only the appointing authority can terminate the Grievant. The appointing authority in this case, Cynthia Mausser, states: "[a]s the appointing authority I'm responsible for the ultimate discipline that is enacted." T.375. Ms. Mausser testified that she normally takes into consideration the investigatory report and the pre-disciplinary hearing report before making her decision. T.371. Ms. Mausser never signed the pre-disciplinary notice, hearing document, or report. She never adopted the pre-disciplinary findings in part or in entirety in the Notice of Discipline. Instead, she set forth discrete justifications for the Grievant's termination in a document she signed. Some of the allegations set forth in pre-disciplinary hear are the same as in the Notice of Discipline, **but not all**. The Appointing Authority was under no obligations to use all the allegations set forth in the pre-disciplinary notice. And she did not. Instead, she set forth the following reasons for Ms. Fisher's termination:

- You participated in an unauthorized private investigation of two DRC employees. During the Agency's investigation into these activities, you failed to fully cooperate with investigators or provide truthful responses to their inquiries.
- Between September 2017 and January 2018 you failed to properly supervise numerous offenders on your caseload. You failed to take appropriate action with regard to the violation

[1] This charge also lacks any type of specificity as to how or what the grievant is alleged to "fully cooperate with investigators or provide truthful responses to their inquiries" about. If the State believed that the grievant was believed to have been dishonest or untruthful about something, the employer has an obligation to identify what that is and how her answers and responses were somehow untruthful. In a situation such as this, it is imperative to provide specific allegations so that the accused be afforded the opportunity to further explain, offer mitigation or introduce facts that support their responses and dispose of any alleged falsehoods or misinterpretations. This crucial part of due process exists to ensure that the accused is clear on the accusation being leveled against them. This crucial part of due process is absent from the state's investigation of the grievant. The first opportunity the grievant had to explain any perceived discrepancies was at arbitration.

behavior or several offenders. You failed to appropriately document offender activity and/or supervision activity taken for several offenders.

- Between September 2017 and March 2018 you improperly accessed and/or used the Ohio Law enforcement Gateway (OHLEG) system.

- On or about March 7, 2018 you were present at Kettering Health Network for personal business during work time.

- While on paid administrative leave you worked for your outside employer, Kettering Health Network, on March 30, 2018 and September 5, 2018 during the hours you were assigned to APA work schedule.

Employer Exhibit p.5.

The Notice did not include the following charge that a was in the pre-disciplinary hearing notice:

Between September 2017 and March 2018 you conducted work outside your assigned work schedule either at home or at other locations without permission and without documenting the work time on your time sheet. This resulted in unauthorized overtime. Your actions were in violation of the written and verbal instruction you received as well as the Payroll and Timekeeping policy, 35-PAY-04.

The remaining charges were basically identical to the pre-disciplinary notice and report. The CBA does not base its grievance timelines on the pre-disciplinary hearing or report. It bases the timeline from the date on the Notice of Discipline. Similarly, in Ohio Rev. Code 124.34(B), "the appointing authority shall serve the employee with a copy of the order of reduction, fine, suspension, or removal, which order shall state the reasons for the action" to a public employee in the classified service. This is a requirement separate and apart from Loudermill. And this notice of discipline is the basis for an employee to appeal the determination to SPBR. Why would Ms. Fisher be entitled to less notice simply because she is within the bargaining unit? She would not.

To make the Grievant now face a justification for her termination that is not included in the Notice of Disciplinary Action, nor signed or approved by the appointing authority is procedurally unjust. Further, the authority of the Arbitrator is limited to the question before him. The question before him is whether Ms. Fisher was terminated for just cause. The justifications for that termination are in the Notice signed by the appointing authority. The Appointing Authority abandoned these allegations when making her determination of what to include in the Notice.

Further, Ms. Fisher was on paid administrative leave for a year and a half without knowing the allegations against her. Due process requires employees to be disciplined within a reasonable period of time. This is to ensure an employee can adequately defend him or herself, an ability which may erode

with the passage of time; to prevent an employer from holding disciplines over the head of the employee or stacking the incidents on top of one another; and to provide a degree of predictability in employment.

In the case of Mr. Kiser, he had the overwhelming majority of the documents, both those that are expunged that those that are not, in his investigatory packet available to him within a month or so after Ms. Fisher's administrative leave. Employer Exhibit pp. 39 (April 2, 2018), p.42 (April 20, 2018), p.102 (upon request from the State), p.119 (June 18, 2018), p.123 (June 14, 2018), p.127 (April 2, 2018), p.132 (April 3, 2018), p.136 (April 9, 2018), p.140 (April 3, 2018), p.152 (April 3, 2018), p.158 (April 12, 2018).[2] He finished his first round of interviews by August 28, 2018 (5 months into the investigation).

The sole piece of evidence in the packet that was not available to him at that time were the subpoenaed records from Verizon, which were not subpoenaed by the State under February 19, 2019 (11 months into the investigation). Id p.685. The Investigator then waited another two months later to interview Mr. Boehm for the second time. p.29. But there is no evidence that Mr. Boehm provided the investigators with any further evidence during that interview, though he did contradict himself on multiple occasions.

If a worker allegedly commits an act and is promptly interviewed, disciplined, and has use of the grievance process, the issue is fresh in the minds of all involved. The grievant and witnesses will undoubtedly have more reliable recollections and the importance of the situation will cement the facts and circumstances in memory. In this matter, the first time the Grievant was able to know, understand, and respond to the allegations against her was July of 2019, months and often years after the events allegedly occurred. Then, the State sends an over 700-page pre-disciplinary packet days before the hearing and expects PO Fisher and other potential witnesses to recall events the majority of which happened at least a year ago. Employer Exhibit pp.4-5. Then, the State somehow seems offended at arbitration that the Union had not come up with every possible argument, witness, and exhibit to support its contention that the Grievant was not terminated for just cause when the State had a year and a half to create is packet and the Union has only a number of days in which to respond.

The last procedural issue is the obvious lack of impartiality in the investigation. Cynthia Mausser testified that she relies on the investigator's reports for her understanding of what occurred and would not go through all of the exhibits, nor review listen to the interviews conducted. T.371-372. As such, Ms. Mausser would be dependent on the investigators' accounts of what occurred as the basis for the Grievant's discipline. If there is a deficiency in the report, then there is a deficiency in the decision.

One of the most basic examples of this is the allegation that the Grievant was at Kettering Hospital on March 7, 2018. While this is described in more detail below, the Investigator based this entire allegation on the interview of Mr. Boehm conducted by Investigator Kiser. T.306. Based entirely on this allegation, Ms. Dillon determines that the Grievant left Butler county and was out of her jurisdiction to come to Kettering Hospital with Mr. Boehm on that date. Employer Exhibit p.325.There is no indication, either during the investigation or at arbitration, that Ms. Dillon attempted to ascertain what time on March 7th the interview occurred. Mr. Boehm stated that it started in the morning. T.39-40. If the State believes Mr. Boehm that the interview occurred on March 7th, it would be logical that they also believe it occurred at this time.

Even though the State's own KRONOS logs show that Ms. Fisher was at training until nearly 2pm on March 7th at the Dayton APA office, they found the Grievant guilty of this offense. Employer Exhibit

[2] The following expunged documents were available as follows: p.44 (April 9, 2018), pp.106, 112 (April 13, 2018)

pp.4-5. It should also be noted that there was not even an attempt to contact Kettering Hospital to verify this claim. In fact, no one at the State ever contacted Lt. Emmons, who could verify the veracity of several of Mr. Boehm's claims. T.313.

In investigating the OHLEG charge, Investigator Dillon made no attempt to ascertain if the Grievant safeguarded her FOT and OHLEG information and password while she was worked at Kettering- or otherwise followed the procedures and regulations. T.319. She made no attempt to get dates from the Grievant on potential uses of OHLEG from the Grievant's personal computer and no attempt to see if OHLEG was accessed on a non-work devices during the periods of time Ms. Dillon alleges the Grievant was violating OHLEG policy. T.320-321. No attempt made to review the search history of the Grievant's FOT that has been in the State's possession since April of 2018. Employer Exhibit p.684.

Ms. Dillon never asked the Grievant if there were texts messages or other evidence related to the two (2) hours of pay she received while she worked at Kettering on September 5, 2018. And even when some evidence was actually provided about the May 30th date that Kettering paid the Grievant without her knowledge, this is completely disregarded and never mentioned in the Investigative summary- the only part of the investigation Ms. Mausser reviewed when making her determination.

And to be sure, Ms. Dillon is not a poor investigator. This is the same Investigator that compared the OHLEG audit times and IP addresses with half a year of Ms. Fisher's KRONOS logs. Employer Exhibit pp.454-477. This is the same Investigator that checked months of the Grievant's Kettering hours with her APA hours. Id pp.479-536. The same Investigator that did an extremely thorough investigation into the offender supervision allegations. However, it appears that it is only when evidence supports the conclusion that was obviously already made by the State that the Investigator actually investigates.

And she is not alone. Investigator Kiser never made any attempts to verify any of the information Mr. Boehm provided. He, too, never called the Hospital to see if Mr. Boehm was being truthful about the things that were verifiable through Lt. Emmons or see if Mr. Boehm had been turned down for a job just days before he contacted Tina Patrick, which seems relevant to his credibility. He made no attempt to review the text messages and phone calls other than to say that there were nine (9) calls and seventy-nine (79) texts messages between them. Id. p.39. Mr. Boehm's narrative was that the Grievant was constantly feeding him information and that he was uncomfortable providing her information because she was not a client. However, in reviewing the evidence, Ms. Fisher did not call Mr. Boehm after February 21, 2018 (the day she alleges that Boehm was interviewed) and of the 79 text messages, only ten (10) were sent by the Grievant. The remainder were sent by Mr. Boehm. Id pp.782-784, 787-789, 820, 830, 832.[3] As will be explained in more detail below, the Investigator also did not compare the text messages provided by Mr. Boehm to the log to see if they corresponded. See Section IV.C below.

Investigator Kiser stated that in response to the subpoena, Verizon was only able to provide text message back a certain time frame, so there are no text message record going back to February 2018, which is the time period that Mr. Boehm claims most of Ms. Fisher's conduct occurred. T.132. The State's failure to subpoena these records until February 2019, a year after they occurred and over ten (10) months from Mr. Boehm's call to Tina Patrick, is prejudicial to the Grievant and Union, neither of whom have subpoena powers and could have benefitted from the likely exculpatory information.

[3] The chart attached captures all MMS and SMS text messages between Mr. Boehm and Ms. Fisher in the order in which they occurred. The green color are texts messages FROM the Grievant. The orange/yellow color are texts messages FROM Mr. Boehm.

Finally, the State did not appear to do any research on Mr. Boehm when a simple FOIA request would have shown issues he had with complying with the law in the past. Union Exhibit 3, 4, 5, and 18. One would think if the State chose to believe a man they don't know over two (2) twenty-five year employees with no discipline of record, they would at least have the wherewithal to check his credentials. These investigators accepted as gospel those bits of information that supported their pre-determined conclusion and did not consider any other version of events or give any merit to the responses and truths offered by Ms. Fisher during this process.

The State has failed to provide the procedural safeguards required by "just cause." Before even turning to the merit of the allegations against the Grievant, the termination is procedurally defective, and the grievance should be sustained.

b. THE STANDARD AND BURDEN OF PROOF

As this is a disciplinary matter, the State, as the Employer, has the burden of proving both that: (1) there were violations of established policies and/or protocols; and (2) if such violations did occur, that the proper level of discipline was imposed considering the seriousness of the infraction and other mitigating factors. See Pepsi-Cola Co., 104 LA 1141 (Hockenberry 1995). Because the instant matter is a termination case, the burden of proof is not a simple preponderance of the evidence standard. Instead, the Employer must both sustain the allegations and establish "just cause" for termination by the heightened standard of "clear and convincing evidence."

Because termination is recognized as the most severe of all industrial penalties and because all contractual benefits are at stake if a termination is upheld, the elevated burden of "clear and convincing" proof is warranted. See Atlantic Southeast Airlines, Inc., 101 LA 515 (Nolan 1993) (using clear and convincing standard for termination); Government of the Virgin Islands, 103 LA 1055 (Kessler 1994) (The simple "preponderance of evidence" standard is "rarely used" in labor arbitration discharge cases); ODRC v. SEIU District 1199, Case 28-03-071001-0187-02-12 (Termination Prendergast), p.21. The State in this instance must be held to a higher-than-normal standard as the imposition of a lesser burden than clear and convincing evidence "fails to give consideration to the harsh effect of summary discharge upon the employee in terms of future employment." General Telephone Co. of California, 73 LA 531, 533 (Richman 1979).

The "clear and convincing" evidence standard requires more than a mere preponderance of the evidence and requires "more than a slight tilt on the scale of justice." J.R. Simplot Co., 103 LA 865 (Tilbury, 1994). As Arbitrator Kravit stated in Scottsboro Bd. of Education, 126 LA 1732, 1736 (2009):

> A separate issue is the quantum of proof that should be required in discharge cases. Proof merely by a preponderance of the evidence is not sufficient where the employee has been discharged for an offense so serious that it reflects on his or her character or adversely affects prospects for future employment. In the present case, the proper standard is that of .clear and convincing. evidence, i.e., evidence of sufficient quality which enables me to reach a point where I am convinced that the employee is guilty based on proofs submitted at the hearing and that .termination. is the appropriate penalty.

Again, in order to satisfy its burden to fulfill "just cause" under the Agreement, the State must show that the incident in question occurred and was a violation of established protocol or policy, and the discipline imposed was fair and just under the circumstances. Even if it is determined that Ms. Fisher

should be disciplined for the violation of policy as alleged by the State, the Arbitrator is within the well-settled authority to modify the imposed penalty if found to be in violation of fundamental notion of fairness or due process. It is respectfully submitted that the State has not met its burden in proving that Grievant Jane Fisher was terminated for "just cause" in accordance with the collective bargaining agreement between the parties.

c. THE CREDIBILITY OF THE STATE'S WITNESS DAVID BOEHM

As the investigation of Jane Fisher was entirely brought about by the claims of perhaps former private investigator David Boehm, the credibility of this witness must be examined. As the State has the burden and chose to believe Mr. Boehm over Ms. Fisher, her husband Lt. Emmons, and Mr. Davis, the Arbitrator must decide if Mr. Boehm's credibility so far surpasses the Grievant's that his account is "evidence of sufficient quality which enables [the arbitrator] to reach a point where [the arbitrator is] convinced that the employee is guilty based on proofs submitted." Scottsboro Bd. of Education, supra at p.1736. There is no particular formula for evaluating the truthfulness of one person over another, but many of the claims Mr. Boehm has made during his testimony, as well as during his previous interviews, are easily proven false, are obviously inconsistent, and often times make little to no sense at all- all of these factors make his testimony less than reliable.

First, Mr. Boehm's interviews with APA and testimony he provided at arbitration were clear violations of the Ohio Revised Code. In so doing, Mr. Boehm also violated the contract he entered into with Jeff Davis. This on its face shows a man unable to keep his word in a professional setting, as he neither abides by the law nor his own contracts.

On or about March 30, 2018, APA Dayton Regional Administrator (RA) Tina Patrick received a communication from Mr. Boehm, who was at the time a private investigator licensed by Private Investigator Security Guard Services (PISGS) part of the Ohio Department of Public Safety. Employer Exhibit pp. 39-40, Union Exhibit 3, 18. During that communication, Mr. Boehm advised Ms. Patrick that he had been retained for his services a private investigator by Parole Officer Jeff Davis, who had been a probationary parole officer with the Dayton APA where Ms. Patrick was the Regional Administrator. Id pp.39-40. Mr. Boehm alleged that Mr. Davis had requested that Mr. Boehm place a tracking device on Ms. Patrick's car in order to conduct surveillance in an attempt to discover suspected inappropriate conduct by Ms. Patrick and co-worker Mr. Perez. In communicating with Ms. Patrick, Mr. Boehm also references specific conversations he had allegedly had with Mr. Davis. Id.

Mr. Boehm's communication with Ms. Patrick is undeniably in violation of Ohio Rev. Code §, which prohibits the sharing of such information without the express authorization of the client.

The relevant section of statute states:

> (B) No class A, B, or C licensee, or registered employee of a class A, B, or C licensee shall:
>
> ***

(3) Divulge any information acquired from or for a client to persons other than the client or the client's authorized agent without express authorization to do so or unless required by law

***

Mr. Davis, Mr. Boehm's client, never gave him permission to reveal any information "acquired from or for" him. T.87, 429, 430. Mr. Boehm was not required to provide the information under the law, which is the only exception to Ohio Rev. Code §4749.13(B)(3).[4] Instead, Mr. Boehm affirmatively sought Ms. Patrick out to reveal this information and continued to voluntarily provide the information to APA during his interviews, following up by forwarding information he received either from his client or for his client through the course of his representation. Further, Mr. Boehm claims that Mr. Davis at their initial meeting requests that he participate in illegal activities. T.91, 93. Yet, Mr. Boehm decided at that meeting to still take on Mr. Davis as a client even though Mr. Davis had apparently repeatedly asked him to break the law. If this is true, Mr. Boehm's acceptance of employment may also be a violation of Ohio Rev. Code §4749.13(B)(4), which prohibits licensed private investigators from accepting employment which includes obtaining information for illegal purposes.

Likewise, the contract that Mr. Boehm asked Mr. Davis to sign in order to engage his services as a private investigator states in part, "MSPI agrees not to disclose or use any information it receives the from the client under this agreement that has been identified as confidential or believed to confidential in nature." P. 159. This further shows Mr. Boehm's disregard for the law and his inability to stand by his promises and legal commitments. He undertakes professional obligations and treats them with contempt when they are no longer beneficial to him.

And this seems to be a pattern for Mr. Boehm when it comes to following the law. On March 26, 2018, the same day Mr. Boehm told Ms. Fisher and Jeff Davis that he did not get the job at Kettering and just days before contacting Tina Patrick, a letter was sent by the Ohio Department of Public Safety to Mr. Boehm charging him with several (other) violations of the Ohio Revised Code. These charges allege 417 days of violations. Union Exhibit 4. On May 18, 2018, the matter was adjudicated, and violations found. Union Exhibit 5. Apparently, this ultimately led to Mr. Boehm voluntarily relinquishing his license- no longer being a private investigator in this State. Union Exhibit 6. If Mr. Boehm can't be trusted to uphold his statutory and contractual responsibilities, how can his testimony be considered more reliable than the testimony of the Grievant, Barry Fisher, Lt. Emmons, and Jeff Davis?

Next, there is Mr. Boehm's testimony itself, which is riddled with claims that are easily proven false or are inconsistent with his own prior interviews. For example, Mr. Boehm testifies that he had an interview at Kettering Hospital on March 7th and that Jane Fisher was in attendance. T.39. This claim was the entire basis of one of the charges against Ms. Fisher in her Notice of Disciplinary Action. However, the Kronos audit trail the State provided as part of the packet shows that Ms. Fisher was at the Dayton APA office at this time as she had clocked in by a physical timeclock at 7:03AM and clocked out at 1:46pm.

[4] There was no evidence provided that Mr. Boehm was under any subpoena when speaking with APA or any other evidence that he was required to report any of his interactions with Mr. Davis to any law enforcement agency, let alone APA, who does not have the jurisdiction to criminally investigate the matter and apparently never reported it to any jurisdiction that could criminally investigate the matter.

Employer Exhibit p.102. Investigator Dillion explained the difference between clocking in on the timeclock at a facility and clocking in via the web, testifying that Ms. Fisher was at the Dayton APA office until 1:46pm. T.310. Ms. Fisher's testimony is consistent with the Kronos records. Her date book also showed that she was in training the morning of March 7 at the Dayton APA Office. Union Exhibit 16.

Though Mr. Boehm's testimony varies about what time the interview allegedly took place, most of his claims seem to indicate the morning or noon for the time of the interview. T.39-40. As such, it was impossible for Jane Fisher to be at Kettering Hospital on March 7th as claimed. The State still chose to believe Mr. Boehm over the Grievant even with their own exhibits showing this impossibility. See again, Employer Exhibit p.102.

Mr. Boehm also claims that Ms. Fisher was in attendance for his entire interview at Kettering with Lieutenant Emmons. This is a claim that both Ms. Fisher and Lieutenant Emmons refute. T.405. Mr. Boehm further maintains that Lieutenant Emmons offered him a job the day that he was interviewed, which the Lieutenant again denies and maintains that he never had any intention of hiring Mr. Boehm. T.405. The Lieutenant's version of events is also supported by the fact that Kettering Hospital did not hire Mr. Boehm. See Union Exhibit 10.

We next move to the claim that Ms. Fisher called Mr. Boehm expressing concerns that she had not received any information about the progress of the investigation. Mr. Boehm claims that this occurred at some unknown time, but after the interview at Kettering. T.79-80; Boehm Interview 2.1, 23:00. However, the phone records subpoenaed by the State show that this is obviously untrue. Ms. Fisher did call Mr. Boehm a few times between February 19 and February 21 (the actual date of Mr. Boehm's interview at Kettering). Employer's Exhibit pp.726, 728. Mr. Boehm also claims that Jane Fisher called him to tell him that she didn't think he had gotten the job. Boehm Interview 2.2, 14:45. However, there is no record that Ms. Fisher ever called Mr. Boehm after February 21st. Any phone calls after that time were initiated by Mr. Boehm. Employer Exhibit p.806, 803.

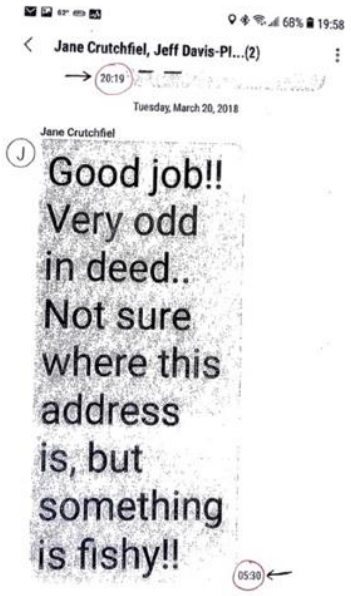
Mr. Boehm further claims that he "blocked" the Grievant and Mr. Davis on March 13th and did not speak to them due to the issues he had during the investigation. Boehm Interview 2.2, 12:00. On April 2, 2018, Ms. Patrick reports that he had stopped working for Mr. Davis and communicating with Ms. Fisher 2.5 weeks before he contacted her on March 30. Employer Exhibit p.39. However, the records show that Mr. Boehm sent (as in he was the sender of the texts) approximately fifty (50) texts to the Grievant after March 13th and called her at least once. Id pp.782, 783, 784, 819, 820, 830, 832. The screenshots provided by Mr. Boehm to the State even allege a text message sent on March 19 and 20th. Employer Exhibit p. 149. Ms. Fisher only replied to Mr. Boehm a handful of times (approximately 6) during the same period of time. Id pp. 783, 784, and 820. After sending the texts to Ms. Fisher and Mr. Davis showing that he did not get the job at Kettering on March 26th (this again is after March 13th), he continued to text the Grievant, and she did not answer. Id. She did not talk to him again.

Moving on to the reliability of these "text" messages. The State provided photocopies of emails of screenshots of text messages sent by Mr. Boehm.[5] Employer Exhibit, pp. 140-150. Several of these photocopies claim that they are only between Mr. Davis and Mr. Boehm. pp. 146-148. Others are shown to be between Boehm and the Grievant, or Boehm, Davis, and the Grievant. It is important to note that there are no records of texts messages in the Verizon response to the State's subpoena that correspond to the dates and times that some of the photocopied/screenshot texts that were provided by Mr. Boehm

[5] There is no evidence that the State ever saw the actual text messages on Mr. Boehm's phone. Though requested, it was not provided by Mr. Boehm.

allege. Employer Exhibit beginning at p. 685. Even when the dates of these alleged communications can be ascertained, the copies of these conversation provided **do not match the Verizon records**.

For example, Boehm's screenshots provided at pages 149-150 of the State's exhibit book alleges a conversation between Jane Fisher, Jeff Davis, and Dave Boehm that occurred on March 20, 2018. This document alleges that at 05:30 (military time, 5:30am) on March 20, 2018, Ms. Fisher texted "Good job!! Very odd in deed… Not sure where this address is, but something is fishy!!"



The last text in this group chat right above it has a time stamp of 20:19 (military time, 8:19pm), though the content of the text can't be seen. However, this shows that the last text message sent before the Grievant's alleged message at 05:30 on March 20, 2019 was at 20:19 on March 19, 2018.

Yet the texts message log provided by Verizon as part of the State's subpoena request disagrees. The log does not have a corresponding entry that Jane Fisher texted Boehm and Davis at 05:30 on March 20th either for a submission date/time or a record date/time.[6] See pp.782-783. And there is another

[6] See also chart referenced in footnote 7. The Verizon documentation is rather confusing to review. For ease of operation, the times have been broken down based upon the following reasoning:

verizon✓
Verizon Security Assistance Team
180 Washington Valley Rd. | Bedminster, NJ 07921
Phone: 800-451-5242 | Fax: 888-667-0028, 888-667-0028

Historical MMS (Picture/Video Message) Detail Report Explanation Form

NET_ELEM_NM	ATTCHMNT_CNT	ATTCHMNT_TYPE	CHRG_INFO	MSG_SZ	ORIG_ADDR	RCPNT_ADDR	RCPNT_ADDRESSES	RCD_DT_TM	SUBMIT_DT_TM	MDN
This is the switch that the message is hitting off of	This is the number of attachments	This is the type of file that was sent	This is the direction of the message	This is the total size, in bytes, of the content	Mobile number of person who sent the message	Person who received the message	Person who received the message	Date and time the message was received	Date and time the message was sent	This is your target number.
			MO1170 is an outbound message							
			MT1170 is an incoming message							

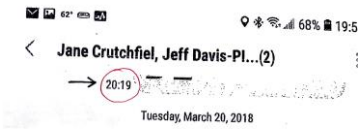
The above chart is found at p.687 and explains the codes for MMS messaging. The columns from left to right are: NET_ELEM_NM (the switch that the message is hitting off of), ATTCHMT_CNT (number of attachments), ATTCHMNT_TYPE (type of file sent), CHRG_INFO (direction of the message, MO1170 is an outgoing message and MT1170 is an incoming message), MSG_SZ (size of message), **ORIG_ADDR (number that sent message), RCPNT_ADDR (number that received message), RCPNT_ADDRESSES (number that received message), RCD_DT_TM (date/time message was received), SUMIT_DT_TM (date/time message was sent),** and MDN (target number). The record above account for the columns in black. For example:

NET_ELEM_NM	ATTCHMT_CNT	ATTCHMNET_TYPE	CHRG_INFO	MSG_SZ	ORIG_ADDR	RCPNT_ADDR	RCPNT_ADDRESSES	RCD_DT_TM	SUBMIT_DT_TM	MDN
MMS19	1	3:01	MT1170	1230	9372662266	5132763256	N/A	3/20/18 4:47	3/20/18 4:47	5132763256
MMS06	2	5000:1;3:1	MO1170	426	5132763256	N/A	9378306787	3/20/18 5:40	3/20/18 5:40	5132763256

curious discrepancy. There were a host of text messages sent between March 19th and March 20th on the group text between these three individuals. Id pp. 782-783. On March 19th, Mr. Boehm sends 21 texts messages to the group starting at 16:02 and ending at 20:18.

Record Time	Submission Time	Originator	Recipient	Exhibit Location
3/19/18 16:03	3/19/18 16:02	Boehm	Fisher	p.782, line 56
3/19/18 16:05	3/19/18 16:05	Boehm	Fisher	p.783, line 2
3/19/18 16:19	3/19/18 16:19	Boehm	Fisher	p.782, line 58
3/19/18 16:21	3/19/18 16:21	Boehm	Fisher	p.782, line 57
3/19/18 16:22	3/19/18 16:22	Boehm	Fisher	p.783, line 3
3/19/18 16:28	3/19/18 16:28	Boehm	Fisher	p.783, line 4
3/19/18 17:17	3/19/18 17:17	Boehm	Fisher	p.782, line 59
3/19/18 17:17	3/19/18 17:17	Boehm	Fisher	p.783, line 7
3/19/18 17:18	3/19/18 17:18	Boehm	Fisher	p.782, line 55
3/19/18 17:20	3/19/18 17:20	Boehm	Fisher	p.783, line 11
3/19/18 19:06	3/19/18 19:06	Boehm	Fisher	p.783, line 9
3/19/18 19:17	3/19/18 19:17	Boehm	Fisher	p.783, line 5
3/19/18 19:17	3/19/18 19:17	Boehm	Fisher	p.783, line 14
3/19/18 19:19	3/19/18 19:19	Boehm	Fisher	p.783, line 6
3/19/18 19:21	3/19/18 19:21	Boehm	Fisher	p.783, line 12
3/19/18 19:28	3/19/18 19:28	Boehm	Fisher	p.783, line 1
3/19/18 19:28	3/19/18 19:28	Boehm	Fisher	p.783, line 10
3/19/18 20:16	3/19/18 20:16	Boehm	Fisher	p.783, line 16
3/19/18 20:17	3/19/18 20:17	Boehm	Fisher	p.783, line 8
3/19/18 20:17	3/19/18 20:17	Boehm	Fisher	p.783, line 3
3/19/18 20:18	**3/19/18 20:18**	**Boehm**	**Fisher**	p.783, line 15

Again, the copy of the email of the screenshot of the texts shows a message sent at 20:19. p.149.



Is shown above as:

Record Time	Submission Time	Originator	Recipient	Exhibit Location
3/20/18 4:47	3/20/18 4:47	Boehm	Fisher	p.783, line 22
3/20/18 5:40	3/20/18 5:40	Fisher	Boehm	p.783, line 17

The first column Record Time is RCD_DT_TM, Submission Time is SUBMIT_DT_TM, Originator is ORG_ADDR, Recipient is either RCPT_ADDR or RCPT_ADDRESSES, and the Exhibit location is where the line can be found in the original exhibit. The first line shows that Mr. Boehm (9372662266) sent Fisher (5132763256) a message on March 20th at 4:47 (SUBIT_DT_TM) and it was received on March 20th at 4:47 (RCD_DT_TM). It is further shown that this was an incoming message to the Grievant's phone by the code under CHRG_INFO. MT1170 means an incoming text. Similarly, the Grievant (5132763256) sent Boehm (9372662266) on March 20th at 5:40, which was received at the same time. MO1170 shows that this was an outgoing message.

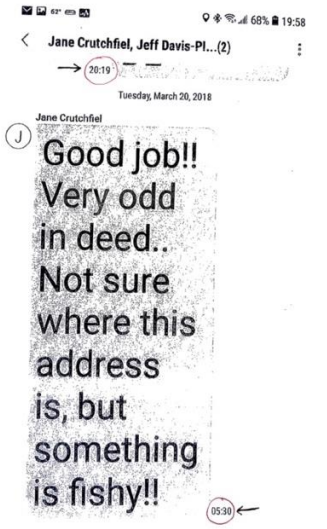
However, Mr. Boehm continues to text this group after this time into the early hours of March 20th at 02:35, 02:41, 02:46, and 02:49.

Record Time	Submission Time	Originator	Recipient	Exhibit Location
3/20/18 2:35	3/20/18 2:35	Boehm	Fisher	p.783, line 27
3/20/18 2:41	3/20/18 2:41	Boehm	Fisher	p.783, line 24
3/20/18 2:46	3/20/18 2:44	Boehm	Fisher	p.783, line 19
3/20/18 2:49	3/20/18 2:49	Boehm	Fisher	p.783, line 23
3/20/18 4:30	3/20/18 4:30	Fisher	Boehm	p.783, line 20
3/20/18 4:39	3/20/18 4:39	Fisher	Boehm	p.783, line 18
3/20/18 4:46	3/20/18 4:44	Boehm	Fisher	p.783, line 21
3/20/18 4:47	**3/20/18 4:47**	**Boehm**	**Fisher**	p.783, line 22

The first time anyone texts back is the Grievant at 04:30 and 04:39. Then Boehm again at 04:46, 04:47.

Record Time	Submission Time	Originator	Recipient	Exhibit Location
3/20/18 5:40	**3/20/18 5:40**	**Fisher**	**Boehm**	p.783, line 17
3/20/18 5:41	3/20/18 5:41	Boehm	Fisher	p.783, line 26
3/20/18 5:47	3/20/18 5:47	Fisher	Boehm	p.783, line 25

Ms. Fisher texts at 05:40, then Boehm texts back at 05:41. Now, there is no time on the Verizon text message log that correspond to the 05:30 alleged text message from Jane (either sent or received). The closest thing would be a message recorded at 05:40 and sent at 05:40. Id p.783, line 17. Between 20:19 on March 19th and 05:40 on March 20th, there were eight (8) messages sent between Boehm and the Grievant according to Verizon. Id p.783. The last message sent before the 05:40 message according to Verizon was at 04:47 by Mr. Boehm. p.783, line 22. This means that the last time stamp before the 05:30 message <u>should</u> be 04:47, not 20:19.



In order for 20:19 to have been the last timestamp prior to the alleged message at 05:30, eight (8) messages would have had to have been erased prior to the screenshot being taken by Mr. Boehm, then emailed to the State, then photocopied for the exhibit to make any sense. It would also require the timestamps on the Verizon records to be off by ten (10) minutes. In other words, the screenshot above provided by Mr. Boehm was definitively altered. It does not exist in the form shown above- unless Mr. Boehm's testimony is also more believable that subpoenaed records from a multibillion-dollar telecommunications company.

The testimony of Nick Speelman at arbitration showed how easily screenshots of text messages can be manipulated to say whatever you want from whoever you want, even the parties' arbitrator. T.397-398, Union Exhibit 11. The State has no corroborating evidence from the Verizon subpoena establishing that any texts were sent during the days or times alleged, specifically February 21, 2018, which is the only other screenshot allegedly including Jane that actually had a date besides the March 7th message, which is obviously fabricated, above.

Mr. Boehm also claims that Ms. Fisher was intimately involved when Mr. Boehm put the tracker on Mr. Perez's vehicle. He claims that the Grievant texted him a picture of Perez's vehicle which he gave to investigators, which the Union and apparently the State has never seen (T.67-68). Boehm also first claimed that he was alone in the parking lot while putting on the tracker (Interview 1, 10:58) and subsequently stated that he took his wife with him as a lookout (Interview 2.1, 24:40).

In addition to the alleged photo of Perez's car that Ms. Fisher allegedly sent to Mr. Boehm, Mr. Boehm also claims he gave the State: a business card with the name Jane Crutchfield on it (T.70), information from the tracker on Jason Perez's vehicle (T.81), and a photo of Tina Patrick's office allegedly provided by the Grievant (T.94). All of which are supposedly damning evidence of Ms. Fisher's involvement but were never provided to the Union (and we assume the State as they were not included in its investigation).

Finally, the timing of events also supports the testimony provided by both Jane Fisher and Jeff Davis at the arbitration. On March 26, 2018, Boehm texted a photo showing that he had not been hired by Kettering. Union Exhibit 10. Interestingly, the date and time stamp on that message (March 26, 14:41 PM) exactly corresponds to the Verizon log, unlike any of the screenshots provide by Mr. Boehm. See Id p. 784, line 46.

447	9376027196@vzwpix.com	5132763256@vzwpix.com	N/A	
1834	9372864917@icmms1.sun5.lightsurf.net	5132763256@text.vzwpix.co	N/A	3/26/2018 16:31 3/26/2018 16:30 5132763256
1661	9372662266@icmms1.sun5.lightsurf.net	5132763256@text.vzwpix.co	N/A	3/26/2018 14:41 3/26/2018 14:41 5132763256
1862	9372864917@icmms1.sun5.lightsurf.net	5132763256@text.vzwpix.co	N/A	3/26/2018 16:36 3/26/2018 16:36 5132763256
1946	9378306787@icmms1.sun5.lightsurf.net	5132763256@text.vzwpix.co	N/A	3/26/2018 13:37 3/26/2018 13:37 5132763256
1909	9372864917@icmms1.sun5.lightsurf.net	5132763256@text.vzwpix.co	N/A	3/26/2018 13:34 3/26/2018 13:34 5132763256

Mr. Boehm was also very inconsistent in answering questions regarding when he was notified of not being hired by Kettering. He alternatively states: a couple of weeks after he called Tina Patrick (Interview 2.1, 8:20), the end of March (Interview 2.2, 13:00), and in May of 2018 (T.81). He apparently told Tina Patrick this had occurred when she wrote her Incident Report on April 2, 2018. Employer Exhibit pp.39-40. We now know that date to be March 26. Union Exhibit 10, Employer Exhibit p.784. This was three (3) days BEFORE Mr. Boehm called Tina Patrick on March 30, 2018 and after Jane Fisher stopped replying to Mr. Boehm's various texts. Employer Exhibit pp. 39, 784.

d. THE STATE HAS FAILED TO SATISFY ITS BURDEN AND HAS BEEN UNABLE TO PROVE THAT JANE FISHER PARTICIPATED IN ANY UNAUTHORIZED INVESTIGATION

i. Jane Fisher did not participate in an unauthorized investigation and did not lie about her lack of participation

The basis for this charge is the testimony of Mr. Boehm. Investigator Kiser's charges are entirely based on Mr. Boehm's two interviews. Though Tina Patrick and Jason Perez testified at arbitration, neither has any firsthand knowledge of this alleged "unauthorized investigation." Employer Exhibit p.39-40. These witnesses only testified about what they were told by Mr. Boehm and how his allegation affected them. And while their situations are certainly sympathetic, it provides no evidence of Jane Fisher's alleged involvement. When it comes down to it, if the Arbitrator believes Mr. Boehm's account, he must also discount the testimony of Jane Fisher, Barry Fisher, Lt. Emmons, Jeff Davis, as well as the Kronos Audit provided by the State. If the Arbitrator chooses to find Ms. Fisher more credible, the Arbitrator can still believe the testimony of Mr. Perez and Ms. Patrick.

Much of the State's evidence ties Jeff Davis to hiring Mr. Boehm for the investigation of Tina Patrick and Jason Perez, which Mr. Davis freely admitted to arbitration and before. The State presents a contract between Mr. Davis and Mr. Boehm. Employer Exhibit p.123. They have a check written by Mr. Davis to Mr. Boehm; an email between Mr. Boehm and Mr. Davis; text messages between Boehm and Davis; a list of documents Mr. Bohem allegedly printed out on Ms. Patrick. Id. 127, 211, 152, 137-138, 207, 213-217, 238-272. None of these things tie the Grievant to this "unauthorized" investigation independent of Mr. Boehm's testimony. Even the incident reports authored by Ms. Fisher that Mr. Davis testified he gave Mr. Boehm, do not tie her to the investigation apart from Mr. Boehm's claims, which are refuted by Mr. Davis.[7]

When we remove Mr. Boehm's allegations from this matter, we are left with a handful of screen shots of texts messages. Even if these screen shots are to be believed, which they clearly should not be, they do not support the testimony of Mr. Boehm that the Grievant was instrumental in providing information for the investigation and was somehow aggressive in seeking information from him acquired during the investigation. What is interesting is everything Mr. Boehm said that would closely tie Ms. Fisher to the investigation was never given to the investigators- a text message when she allegedly shares a picture of Tina Patrick's office and of Jason Perez's vehicle. He claims he has these things. Investigators ask him for these texts message and they were never provided (at least to the Union), even though Mr. Boehm insists otherwise. These items were not produced at arbitration. T.81, 94. The evidence shows that Mr. Boehm was overwhelmingly the one contacting the Grievant, not the other way around. Employer Exhibit pp. 782-789, 820, 830, 832; fn 7. That even though Mr. Boehm claims the Grievant called him in the weeks after the interview wanting to know why he was not providing any more information, there is no record of such a call. One cannot reasonably believe that such a call ever took place given the concrete proof to the contrary. Id. 803, 806.

Again, this is simply a matter of who has more credibility as examined above- an over 25-year employee with great evaluations, no discipline of record, no evidence of any past issues with the supervision of her offenders, and a former member of the SRT/STAR team (as well as the testimony of Barry Fisher, Lt. Emmons, and Jeff Davis) or a (perhaps former?) PI, who voluntarily gave up his license after being found guilty of multiple violations of the Ohio Revised Code, who was told days before he

[7] The State spends some time on allegation about Jane made by others, including Jeff Davis. And while this can be problematic for the Union's case as far as the credibility of Mr. Davis, there are no documents or interviews in which the Grievant admits to participating in this investigation.

contacted APA that he did not get a job at Kettering Hospital and the Grievant stopped replying to his texts?

Respectfully, the State has not fulfilled its burden of proving that the Grievant participated in an unauthorized investigation by a mere preponderance of the evidenced standard- let alone the requisite clear and convincing evidence standard.

ii. Even if the State could prove the alleged policy violations, termination is not justified

After being asked by the Arbitrator what part of the investigation of Jane Fisher was most troubling, Cynthia Mausser, Deputy Director of the Division of Parole and Community Services at the ODRC, testified that the "unauthorized investigation is." T.377. This implies that it was the most serious of offenses of the Grievant's charges. And though Ms. Mausser testified that she had not seen another instance of a disciplinary investigation being conducted regarding such a matter, ODRC certainly has- Barry Fisher.

Barry Fisher's charges related to an "unauthorized investigation" state:

> You participated in an unauthorized private investigation of two DRC employees. During the Agency's investigation into these activities. You failed to fully cooperate with investigators or provide truthful responses to their inquiries. Your actions are clearly in violation of DRC Policies and the Standards of Employee Conduct.

The Notice alleges violations of Rule 7, Rule 24, and Rule 50. Union Exhibit 12.

These rule violations are set forth in the Standards of Employee Conduct. Ms. Mausser testified that the Standards apply to all DRC employees, not just APA. T.372-373. Barry Fisher received a 2-day suspension. As he is an exempt employee, he did not have the opportunity to go to arbitration like his wife has, though he did attempt to appeal the matter. However, he was returned from administrative leave, remains at the same facility, and has been recently promoted to Captain.

Jane Fisher's charges related to an "unauthorized investigation" state:

> You participated in an unauthorized private investigation of two DRC employees. During the Agency's investigation into these activities. You failed to fully cooperate with investigators or provide truthful responses to their inquiries. Your actions are clearly in violation of DRC Policies and the Standards of Employee Conduct.

The Notice alleges violations of Rule 7, Rule 24, and Rule 50.

For the sake of clarity, this charge is identical to the charge against Barry Fisher. Ms. Fisher was terminated. Her husband receives a 2-day suspension. Jeff Davis, who by his own admission was the one responsible for hiring Mr. Boehm, quit prior to his interview. He was then rehired by DRC and he continued to work for the State for over half of year before quitting again. Union Exhibit 7. During this time period, he was never contacted further about this matter and never disciplined. T.662.

e. THE OFFENDER SUPERVISION ISSUES PRESENTED BY THE STATE CAN ONLY SUPPORT A LOW-LEVEL DISCIPLINE

The Union and the Grievant herself are quick to admit that several of the issues brought forward by the State regarding the supervision of offenders were policy violations and that in some circumstances, the Grievant dropped the ball. During the arbitration, Jane Fisher was clear about what she believed the issues were and how she should have handled them.

Ms. Fisher was accused of: (1) failing to investigate Offender Sanner after being notified of a charge felonious assault and failure to notify Florida of his conduct. As such the violation behavior of the offender could not be addressed; (2) failure to record a verbal sanction for Offender Rios and failure to staff the matter with her supervisor; (3) failure to investigate an assault charge (reported through Justice Web) against Offender Farr and staff the matter with her supervisor. As such the violation behavior of the offender could not be addressed; (3) failure to investigate threats allegedly made by Offender Workman against the mother of his children. As such the violation behavior of the offender could not be addressed. See Employer Exhibit pp. 320-321.

There are several mitigating factors related to these policy violations and even if no mitigation did exist, the discipline levied by DRC in similar situations is low-level discipline at best. First, the current ratios of offenders to parole officers are approximately 60 to 1. T.375. At the time Jane Fisher was placed on administrative leave, she had more than double that amount, between 140 and more than 160 offenders. See e.g. Employer Exhibit pp.391, 411. This is such a high number even the Advocate for the State found it unbelievable until evidence was shown from the State's packet to the contrary.[8] T.613; Employer Exhibit pp. 395 (showing Jane was supervising 161 offenders), 415 (showing Jane was supervising 149 offenders).

[8] T.613:
Q. Is it possible though? It is possible though? Okay. So I told you a few minutes ago that I had a prior life in parole and probation and the APA. I was a unit supervisor. I was a parole officer for the better part of 12 years. And in this role, you know, I do a lot of work with 1199. And I have to -- I'd like to revisit the caseload number. So you testified earlier that your caseload was up around 150, 180; is that correct?
A. No. What I said was I had a caseload at one time in the 178. I think I had that much at one time.
Q. At one time?
A. Yeah.
Q. When was that?
A. When I was at Dayton. I don't know.
I was a parole officer for 18 years, sir. I don't know. I don't remember.
Q. So was it -- did you have 178 offenders on your caseload at the time leading up right before you transferred out of Wanda Deardurff's unit?
A. No. I think I had 130, 140, I think.
Q. Okay. That's still really high. If
you had said 90, 100, I wouldn't have batted an eye. But even 120, 140, that's really high. Were you covering for somebody else at that time?
A. Oh, no.

Second, Investigator Dillion identified that Ms. Fisher had not been properly supervised by PSS Deardurff regarding two of the cases, Jerry Sanner and Jesse Workman. PSS Deardurff was made aware of both situations by PO Fisher noting the issues in her NOETC notes (supervisor only notes) and failed to provide work direction regarding the matters- even when they were staffed in the weeks after. In one instance, PSS Deardurff directed PO Fisher to not notify Florida of Sanner's charges until after he was indicted. As such, PSS Deardurff also failed to follow policies and procedures. See Employer Exhibit p.325. There was no evidence provided that Ms. Deardurff was ever investigated or disciplined for these failures.

And finally, the Grievant had been performing her job as a PO for almost 18 years at the time she was placed on administrative leave, and in that time, she had never had any offender issues come up in the annual audit, she had great performance evaluation, and there was no evidence that she ever had any prior issues with the supervision of her offenders. T.548, Union Exhibit 13.

Even if the above facts were completed ignored, DRC's discipline of other bargaining unit employees for similar, and in some case much more severe, cases is certainly not termination. For example, failing to properly document supervision of numerous offenders for a period of nearly a year is punishable as a written reprimand. Union Exhibit 17, p.1 (Baumgarten). A written reprimand has also been given to bargaining unit members in APA for:

- failure to sanction for activity requiring a mandatory hearing (firearm possession or allegations of violence). See Id p.6 (Dotson), p.12 (Lurry), p. 13 (Berry- allegations of violence);

- keeping an offender on supervision for three (3) months past his termination recommendation date. Id p.7 (Mathias);

- failing to complete a placement approval form causing an offender, who was supposed to be seen every month, to be seen only once during a 6-month period. Id p.8 (Bender);

- general failure to update FOT notes. Id p.9 (Caughman); and

- failure to conduct the required number of contacts for offenders and failure to investigate alleged violations of supervision. see Id p.10 (Turner), p.11 (Woods)

Again, most of the allegations against Ms. Fisher related to offender supervision dealt with not investigating matters that could lead to mandatory hearings and as such, the offender was not properly sanctioned. Similar conduct, above, was punished through reprimand. Id p. 6, 10-13.

Much more serious conduct has also been addressed by the APA- again, without terminating the employee. PO Tillman is accused of allowing an offender to be placed at the home of an individual that had an active protection order against the offender and canceling a WUVL without face-to-face contact. Id p.2. PO Soeder[9] was accused of failing to conduct an offender risk reassessment, failing to complete

[9] In the case of PO Soeder, after receiving a 2-day suspension for the above conduct was also accused of failure to follow supervisor work direction including conducting assessments, records checks and reports within the required

reports and records checks, and failing to enter contacts into FOT (note: there were no offender notes for at least one offender of a period of 2-years). Id p.5. PO Droll was accused of violations of Rule 7, Rule 8, and Rule 36 (act/failure that could potentially harm the public). DRC claims that PO Droll did not following direction of her supervisor and failure to notify her supervisor about issues regarding an offender, failed to properly investigate an incident, and failed to search for a firearm. Id p.14. And finally, PO Alexander was accused of: (1) failing to make personal contact with an offender, who was still in contact with his victim, for over a year, never declaring a WUVL, failure to conduct custody checks, and having the improper supervision resulted in violations of supervision not being addressed; (2) having no contact with an high supervision offender for 2.5 months, failure to address violation behavior, failure to begin WUVL process, and having the improper supervision resulted in violations of supervision not being addressed; and (3) having not positive contact with a high supervision level offender for 5 months and failed to declare him WUVL during that time. Id pp. 16-17. Again, PO Alexander was given a 2-day suspension.

The Grievant is prepared to be disciplined for her violations of policy related to the supervision of these offenders. However, the policy violations do not support a termination or other serious discipline.

f. THE STATE HAS FAILED TO SATISFY ITS BURDEN AND HAS BEEN UNABLE TO PROVE THE JANE FISHER IMPROPERLY ACCESSED OR USED OHLEG BETWEEN SEPTEMBER 2017 AND MARCH 2018

The State alleges that: Between September 2017 and January 2018 [the Grievant] improperly accessed and/or used OHLEG. Employer Exhibit, p.5. In the investigatory packet, Investigator Dillon included the BCI/OHLEG User Agreement signed by Ms. Fisher on August 31, 2016, the OHLEG rules and regulations effective February 22, 2016, and DRC's OHLEG policy. Employer Exhibit pp.444, 448, 645.

The User Agreement specifies that OHLEG will only be used for the official purposes of one's agency and for the administration of criminal justice; that the user will abide by the OHLEG rules and regulations, and notes that if the system is used in a matter prohibited by the Ohio Rev. Code 2913.04, the violation is a fifth-degree felony. Id p.444. The OHLEG rules and regulations, provided in part, as of February 22, 2017 set forth a user's responsibilities regarding OHLEG passwords, physical protection of devices, and the prohibition on the use of personally owned computers and publicly accessible computers. Id pp.448-453. The DRC OHLEG policies reiterates the requirements of OHLEG's rules and regulations and specifies the required that OHLEG should only be accessed from state-issued computing equipment, protecting passwords and the physical the device used to access OHLEG.

Investigator Dillon finds that in evaluating the OHLEG audit: "PO Fisher accessing the OHLEG system afterhours or on her day off were found that include location(s) that have not been authorized." Id p.322. Nothing in any of the documents provided by the State prohibits the use of OHLEG outside of normal APA work hours, when the search is still for work related purposes (looking up the offenders that the grievant supervised). T. 247. The entire purpose of the audit being conducted in the first place was to find out if Ms. Fisher was using OHLEG to conduct prohibited searches (assumedly related to the unauthorized investigation the State says she conducted). **None were found.** T.325. All of the searches

period. Though this happened approximately three (3) months after her last discipline, PO Soeder received another 2-day suspension. Id.p.4.

conducted by Ms. Fisher were utilized "exclusively for the administration of criminal justice for the official purposes of my agency." Employer Exhibit, p.444.

There nothing in any of the material presented that accessing OHLEG at a particular location is unauthorized, as long as the user can restrict the use of OHLEG to authorized users. For example, Ms. Dillon states that it is not necessary a violation of policies and procedures to be on WiFi that does not belong to the State. The question is whether the information is properly safeguarded. T.318. Yet, the Investigator admits that she never asked Jane what she did to protect the OHLEG information when she accessed it on either the Kettering's or home IP addresses. T.319. That there was no evidence Jane shared her sign-in credentials, allowed an authorized person to access the database, left her tablet unattended, left her sign-on credentials unattended, or did anything that in anyway compromised the confidentiality of the search. Id.

When Ms. Fisher was finally asked at arbitration about the safeguards she used to protect her tablet and safeguard OHLEG information while at work at Kettering, she stated that her tablet and the OHLEG database were password protected; that she kept her tablet on her or if she had to leave she would place it a secured locker that only she had access to in an office only members of dispatch, security and police had access to (many of whom had OHLEG access themselves) and no other workers were allowed access to the area unescorted. She also testified that she never did the list of prohibited actions specified in the OHLEG Rules and Regulations. T.539-541.

There is no proof that Ms. Fisher failed to safeguard her equipment or protect OHLEG information and there is no violation of OHLEG policy, the User Agreement, or the Rules and Regulations for conducting OHLEG checks outside of regular business hours as long as those checks were for the intended purpose. As such, this entire charge seems to be based upon Ms. Fisher's answer to a question during an interview about the use of her personal computer. After Jane had been placed on administrative leave for a period of four (4) months at an interview, the notification of which did not specify the reason or subject matter of the interview. Ms. Dillon asks the general question: when you check your OHLEG, what devices are you using?

> Ms. Fisher: I use the FOT and then my home computer
>
> Ms. Dillon: Do you use your cell phone… your work cell phone?
>
> Ms. Fisher: Yes
>
> Ms. Dillon: Your personal cell phone?
>
> Ms. Fisher: No
>
> Ms. Dillon: So just those three devices?
>
> Ms. Fisher: Yes, I believe so
>
> …
>
> Ms. Dillon: have you used any of Kettering's computers to search OHLEG?
>
> Ms. Fishers: I don't believe so, I had my tablet there

Fisher Interview (Dillon) 1, beginning 1:03:00

Though the State provides a list of IP addresses, those addresses do not establish that Ms. Fisher used her personal computer for OHLEG searches from September 2017 to January 2018. T.320. IP addresses cannot tell the Investigator what equipment was used to access the OHLEG database, because it simply shows where the user was. Id. Ms. Dillon never asks Jane when or how frequently she used her personal computer. Ms. Dillon admits that she never asked Jane what devices she use to access OHLEG on each of the dates indicated in the OHLEG audit. T.320. In fact, any time Ms. Fisher was asked specifically what device she used, she stated that she used her tablet. See e.g., Fisher Interview 1, 1:03:00, 1:07:00. Ms. Dillon never asked, and Ms. Fisher never stated that she accessed OHLEG from her personal computer at any time between September 2017 and January 2018, and again, IP addresses do not show what device is used. As such, there is no evidence to substantiate the claim that the Grievant used her home computer during the time period alleged.[10]

What could have possible proven that Ms. Fisher accessed OHLEG on some device other than her work device would be a search history of her tablet, which was in the State's possession since Ms. Fisher was placed on administrative leave at the beginning of April. T.537, 538. The State spends an excruciating amount of time comparing the OHLEG audit to the IP addresses (only showing where Ms. Fisher was and when she accessed the database- neither of which are violations of the OHLEG agreement, rules, or regulations), when it could have easily compared the OHLEG audit to her search history on her work tablet to show if there was access from someplace other than her work computer.[11] They didn't do this, or at the very least didn't include it in the investigation if they did. This simple search could have laid the issue soundly to rest. An adverse inference against the State must be drawn as to why this evidence was not examined.

Further, Ms. Fisher has been a PO for 18 years with OHLEG access for most of that time. There was no evidence provided that the use of a personal computer was a violation of policy prior to February of 2017. Employer Exhibit, p.444. She testified that in the time she has had OHLEG access, she may have accessed it from her home computer, but she does not recall a specific incident. T.542. Ms. Fisher states that she did use her personal computer for work, like writing reports in word documents, and searching court websites, but has no specific memory of ever using her personal computer to conduct secure searches like OHLEG. T.544-545.

Finally, there is no proof that BCI/OHLEG administers or any other agency responsible for OHLEG took any action against Ms. Fisher or revoked her (or the agency's) OHLEG access, even though the State implies that her actions may be a felony.[12] Employer Exhibit 243, T.322. There was no evidence provided

[10] It is curious that though the State claims that Ms. Fisher's action were so serious that they support termination, there is never an attempt to discover the extent of the Grievant's possible violation of OHLEG regulations. There is no attempt to find out where and when possible security violations occurred or the extent to which OHLEG credentials may have been compromised. The State treated this potential violations that could cause the agency to lose access to OHLEG with a rather cavalier attitude- other than to fire the Grievant.

[11] OHLEG access is gained on a website: www.ohleg.org. A search history would have shown the date and time this website was accessed by Ms. Fisher on her work computer.

[12] Ms. Mausser alleges that OHLEG violations are typically removals with last chance agreements, the State did not provide any records in response to the Union's record request (that included all disciplines in APA for a period of three years) that any member had been disciplined (removed or otherwise) for any OHLEG violation. T.365, 664.

at arbitration showing that DRC or APA even reported this incident to BCI. T.364-365.[13] The State simply makes this unfounded allegation for "wow" factor at arbitration, knowing full well that IF there were any concerns that legitimately rose to the level of the possibility of felonious infractions they would, or at very least should have, reported the concern for further investigation by the proper authorities.

The original point of the BCI audit was to ensure that Ms. Fisher had not been using the database illegally, e.g., looking up individuals that she had no work-related reason to look up. T.243. Again, there were no such issues found. T.325. The State's expansive review of the audit for purposes other than for what it was intended did not prove that Ms. Fisher violated the OHLEG User Agreement, the OHLEG Rules and Regulations, or DRC's OHLEG policy.

g. THE STATE HAS FAILED TO SATISFY ITS BURDEN AND HAS BEEN UNABLE TO PROVE THAT JANE FISHER WAS AT KETTERING HOSPITAL ON MARCH 7, 2018

Investigator Dillon makes the following finding:

> An area of concern for this investigation related to the introduction of PO Fisher reports to have made for David Boehm during March 2018 at Kettering Hospital main campus. She reports working in the field when this introduction took place and could not recall the date, but advised she was working when this occurred. She reports to have stopped to use the restroom as the Kettering, OH is in the area she was assigned to work. PO Fisher had canvassed and started in the Butler APA unit 3/4/18. Her cases in Montgomery County had been reassigned to other officers for supervision. In review of PO Fisher's daily activity logs she was conducting field work during March 2018 in Middletown, OH, which is in Butler Co. It is unclear why PO Fisher would be conducting field work in Montgomery County when her assigned cases were in another county. Additionally, PO Fisher reported being present for Mr. Boehm's interview but could not recall if she was at the hospital longer than her 15-minute break. Mr. Boehm estimated PO Fisher was in the hospital for almost an hour. Employer Exhibit p. 325.

The Notice of Disciplinary Action charges: "On or about March 7, 2018, you were present at a Kettering Health Network facility for personal business during work time." Employer Exhibit, p.5. Ms. Mausser testified that she would rely on the investigator's reports for her understanding of what occurred and would not go through all of the exhibits, nor review listen to the interviews conducted. T.371-372. As such, Ms. Mausser would be dependent on Ms. Dillion's account of what occurred at Kettering as the basis for the Grievant's discipline.

The sole evidence relied upon in charging the Grievant for attending an interview with Mr. Boehm on March 7th was Mr. Boehm's prior interviews, allegations which are corroborated by no one and nothing else. Investigator Dillon, who was responsible for investigating this allegations, testified that she did not separately interview Mr. Boehm but relied on the prior interviews in the investigation conducted by Investigator Kiser. T.306. Ms. Dillon noted that Mr. Boehm claimed that Ms. Fisher attended the interview with him and was with him for an hour. Employer Exhibit p.335. Mr. Boehm claimed that the interview on March 7th occurred in the morning and going into the afternoon. T.39-40.

[13] Ms. Mausser refers to filing a "wrongdoer report" generally when the agency believes there was a violation of OHLEG rules and regulations. There is no evidence that such a report was filed in this instance.

At the time Ms. Fisher was interviewed regarding the matter, over ten (10) months after the event, she was unable to remember the date she had met Mr. Boehm at Kettering Hospital. However, she never stated that this interview occurred on March 7 or that she stayed during the entire interview.[14] Ms. Fisher did she did state that Kettering was in her "area" at the time. Fisher Interview (Dillon) 2, 7:15, 8:05. The March 7th date was significant in Ms. Dillion's investigation because the Grievant transferred to a new jurisdiction in the beginning of that month. Employer Exhibit pp. 324-325.[15] If the interview had occurred on March 7th, Kettering would have been out of Ms. Fisher's "area." However, if the interviewed occurred prior to that transfer, say on February 21st, the Grievant would have been within her jurisdiction at Kettering Hospital. T.312.

Ms. Dillon does not specify a time she believed this interview occurred but stated: In review of PO Fisher's daily activity logs she was conducting field work during March 2018 in Middletown, OH, which is in Butler Co. Employer Exhibit, p. 324. Again, Mr. Boehm previously stated that his interview began in the morning on March 7th. T.39-40. Ms. Fisher's activity log of March 7th indicates that Ms. Fisher was at training at the Dayton Office that morning until approximately 1:45pm and then fieldwork in the afternoon. Employer Exhibit pp.513. The Grievant's datebook indicates that she was in training that morning. Union Exhibit 16. Ms. Dillon testified that she never looked into where the training was. T.308. She also never contacted Lt. Emmons to substantiate or refute any of Mr. Boehm's claims about the date and time of the interview (or anything else). T.404. And Ms. Dillon's apparently did not review the Kronos audit of Ms. Fisher's time for March 7, 2018, which was provided in both Mr. Kiser and Ms. Dillon's investigations.

Though Mr. Kiser was unable to identify the document or its purpose at arbitration, Investigator Dillon was familiar with it. She testified that employees clock-in on a timeclock at a particular location if they are at the office and on-line if they are in the field. T.308. The Kronos log shows that Ms. Fisher clocked-in on the time clock at the Dayton APA Office that morning and did not clock-out until 1:46pm. T.318, Employer Exhibit p.103. She then began to work in the field at 1:46 pm. So, if Mr. Boehm claims that Ms. Fisher was with him on the morning of March 7th at Kettering Hospital, he was mistaken or lying. And under either circumstance, there is absolutely no basis for this charge. The grievant was NOT at Kettering Hospital on March 7, of this there is no question.

Further, Mr. Boehm was also inaccurate, whether purposefully or not, regarding other events that happened the day Ms. Fisher met him at Kettering. Mr. Boehm claims that Ms. Fisher stayed with him for the hour he was interviewed. The Investigator notes that Mr. Boehm claims that Ms. Fisher was at Kettering for a long period of time. Ms. Fisher stated that she did not know if she was there longer than her 15-minute break. However, she states: "I introduced him and another gentleman that wanted a job at Kettering"… "went to the bathroom, introduced them and left." Fisher Interview 2, 7:00-8:30. Lt. Emmons similarly testified that Jane introduced Mr. Boehm and left and was only there for a few minutes. She did not attend the interview. T.405. And as has already been examined, Mr. Boehm was never offered a job at Kettering Hospital, though he claims otherwise. T.82, 406, 407.

In summation, this charge is demonstratively false using the State's own evidence. It provides further evidence of a biased and ineffective investigation, as Ms. Dillon never attempted to check with

[14] Please note that this contradicts the testimony of Ms. Dillon, when she answers "yes" to Mr. Rader's question: "Did she admit to you that she was at Kettering Hospital on March 7th, 2018?" T.292

[15] See also, State's Opening "What makes her actions on this date [referring to March 7, 2018] so outrageous is that Kettering Hospital was not located in the county in which the grievant was assigned to work…Let me clarify this allegation. The grievant left the county she was assigned to work, traveled to her secondary place of employment in a different county." T.21

Kettering Hospital about this event, made little to no effort to ascertain the time of this alleged event, never did any further investigation about the training Ms. Fisher's daily logs indicate she was in on the morning of March 7, and did not apparently review Kronos audit for Ms. Fisher that day. This is especially troubling because this charge is entirely based upon the interviews of Mr. Boehm, with whom Ms. Dillon never directly spoke. And finally, it also shows yet another claim by Mr. Boehm that is demonstratively false. It is only because the Union searched through this 800-page packet (well after the pre-disciplinary hearing) that these mistakes came to light. The State has not met their burden to prove that Ms. Fisher was anywhere other than where she says she was and where the documentation and evidence proves she was on March 7.

h. THE TWO DISCREPANCIES IN REQUESTING TIME OFF TO WORK AT KETTERING HOSPITAL WERE NOT PURPOSEFUL, EASILY EXPLAINED, AND NO DISCIPLINE IS WARRANTED

Next, the State alleges that Ms. Fisher was paid to work at Kettering during a time period (on May 30, 2018 and September 5, 2018) that she was also on paid administrative leave. Ms. Fisher was on paid administrative leave from April 3, 2018 until her termination on August 19, 2019. During that period of time, Investigator Dillon found only these two (2) discrepancies that added up to four (4) hours.

The first date, May 30, 2018, Ms. Fisher went to Kettering Hospital at the request of her Chief to talk about an issue she was having with another employee. Kettering unilaterally determined to pay her a 2-hour stipend. This caused the 2-hour stipend and 2-hours of the Grievant's administrative time to overlap. Ms. Fisher did not request, nor was she informed that she received this payment. Lt. Emmons provided a letter that was part of Ms. Dillon's investigatory packet stating as such. Employer Exhibit p.478. Ms. Fisher was not required to stay in Butler County (her assignment at the time) during her administrative leave. T.315. Both her home and Kettering were in Montgomery County. During her administrative leave, she was required to be "in work status ready" according to Investigator Dillon. Id. All evidence shows that she was in work ready status. T.561-562. This discrepancy was unintentional and does not warrant discipline, though, of course, Ms. Fisher is happy to pay the time back if that has not previously been done.

During the time the Grievant was on administrative leave, the State never asked her to do any work, but she was to remain in work ready status. The Grievant's pattern when she needed time off (meaning she would be paid by her contractual leave banks and not administrative leave) would be to notify her supervisor and then request the time off in Kronos. Union Exhibit 20. On September 5, 2018, Ms. Fisher notified her supervisor, Chris Gipson, that she would need some time off beginning at 1:30 and that she would put the matter into Kronos. Union Exhibit 8. Apparently, the matter was never entered into Kronos. Ms. Fisher had requested time off several days that week to work, but the 2-hours on September 5th were not included. T.564. Once she found out that the hours had not be deducted from her pay, she requested that they be deducted.

Both of these cases are simple oversights and were obviously not intentional. This was four (4) hours in the 14-months that the Grievant was on administrative leave that have been called into question. Even if this was an intentional act, which it clearly was not, APA has given no more than a written reprimand for more severe Kronos oversights. See Union Exhibit 17 pp.18-20.

i. ALL EVIDENCE THAT RELATES TO OR DISCUSSES THE PROTECTION ORDERS, WHICH HAVE NOW BEEN EXPUNGED, SHOULD NOT BE CONSIDERED DURING THIS ARBITRATION

The State has previously included evidence that has been expunged under Ohio law in violation of Ohio Rev. Code §§2953.54-2953.55, and though the expunged documentation has been removed from the Exhibit Book, any reference to it elsewhere in the packet should not be considered under Ohio Rev. Code §2953.52. Union Exhibit 2. The relevant code section states:

> **(B)** An officer or employee of the state or any of its political subdivisions who knowingly releases, disseminates, or makes available for any purpose involving employment, bonding, licensing, or education to any person or to any department, agency, or other instrumentality of the state, or of any of its political subdivisions, any information or other data concerning any arrest, complaint, indictment, information, trial, adjudication, or correctional supervision, the records of which have been sealed pursuant to section 2953.52 of the Revised Code, is guilty of divulging confidential information, a misdemeanor of the fourth degree.

Further, it also appears that the State plans on providing documents that investigators created in reliance on such sealed records, which is also prohibited. Ohio Rev. Code §2953.54 states:

> **(A)** Except as otherwise provided in Chapter 2950. of the Revised Code, upon the issuance of an order by a court under division (B) of section 2953.52 of the Revised Code directing that all official records pertaining to a case be sealed and that the proceedings in the case be deemed not to have occurred:
>
> > **(1)** Every law enforcement[16] officer possessing records or reports pertaining to the case that are the officer's specific investigatory work product and that are excepted from the definition of "official records" contained in section 2953.51 of the Revised Code shall immediately deliver the records and reports to the officer's employing law enforcement agency. Except as provided in division (A)(3) or (4) of this section, no such officer shall knowingly release, disseminate, or otherwise make the records and reports or any information contained in them available to, or discuss any information contained in them with, any person not employed by the officer's employing law enforcement agency.

II. CONCLUSION

For all the foregoing reasons, the Union asks that the Arbitrator sustain the grievance that the termination of PO Fisher was not for just cause and order that the Grievant be made whole, including reinstatement, backpay, seniority, and other pay and benefits. Further, the Union requests that the Arbitrator retain jurisdiction over the matter until backpay has been paid by the State.

DISCUSSION

From the facts provided it is reasonable to conclude that this matter was complex and multifaceted, and it warranted the actions of the Employer to conduct a special investigation(s). (Jt. Ex. 2 pp 583) The investigation of the Grievant was triggered by Employer witness David Boehm ("Boehm"), who at the time in 2018 was a private investigator hired by former state/DRC employee Jeff Davis. After a relatively short period of time covering several weeks, Boehm contacted one of the people he was hired to surveil, Patrick. He told her he had been hired to conduct surveillance on her and on her subordinate supervisor, Perez. That contact triggered an investigation of this matter which began in early April 2018 and did not conclude until August 19, 2019. (Jt. Ex. Pp. 4-5) In the investigation period, during which there were two separate investigations conducted, the Grievant was on paid administrative leave. While that is a protracted investigation period, the circumstances and evidence gathered was detailed and had to be assembled from a variety of sources. It also involved the Employer having somewhat limited contact with Davis, who resigned his employment with the state of Ohio. (Tr. 149) Imperfect contact with Davis, subsequent ongoing litigation against Boehm, two police reports filed against Boehm, numerous text messages, telephone calls, disciplinary action taken against the Grievant's spouse who is an employee of DRC, the involvement of an outside employer, Kettering Hospital ("Kettering"), and other investigations of the Grievant involving matters of improper OHLEG usage, improper time keeping practices, conducting personal business at a place of secondary employment, failure to properly document, staff and address violent and high severity violations committed by supervised offenders, and Civil Protective Stalking Orders against the Grievant and Davis appeared to significantly contribute to the length of this investigation. (Employer brief, p. 3)

During the more than fifteen months on which the Grievant was on administrative leave and being investigated concerning the extent of her involvement regarding an unauthorized surveillance, the Employer avers it uncovered several other rule violations that ranged in severity. It is not the intent of the arbitrator to minimize the importance of these separate charges and subsequent findings, yet it is clear what the central issue is in this case. It is the unauthorized surveillance of two managerial employees. Deputy Director Mausser when asked at the hearing

that among everything involved in this case what is it that "jumps" out as particularly troubling. She stated unequivocally, *"The unauthorized investigation is particularly troubling."* (Tr. 377) A considerable amount of time, costs, and human effort has gone into the investigation, prosecution, and defense of this case by both the Employer and the Union. Addressing every charge and evaluating all the evidence in support of said charges and conducting an analysis of the extensive and carefully developed arguments made by the Union in the Grievant's defense on all of the charges beyond the central issue of surveillance would add considerable costs to the arbitrator's ruling in this case. Therefore, for the sake of economy and cost savings for both parties the arbitrator in this matter will first focus on the major incident that initially led management to investigate the Grievant's conduct regarding her alleged participation along with Davis in the surveillance of Patrick and Perez, which appears to encompass Rule 7, 18, 24, and 50. If necessary all of the other charges will be addressed assuming they are determinative of the outcome.

Arbitrators have consistently found that police departments and law enforcement officers are unique public employees, not just by virtue of their contributions to serving the public, but by virtue of their particular position within the legal system. This arbitrator joins his many colleagues who have found that, as a law enforcement officer, Fisher's conduct is held to a higher standard than that of many other public employees. Law enforcement officers are expected to work with a high degree of independence and a minimal amount of supervisory contact in making quick decisions and exercising reasonable discretion, based on specific circumstances and the need to deal with a unique set of convicted offenders. Law enforcement agencies such as the APA may not be as formerly structured as police departments, yet law enforcement in general must adhere to codes of conduct which are more firm, more focused, and more disciplined than are the rules and regulations that apply to most other types of employment because the officers' conduct is constantly being observed and assessed by citizens, as well as superior and fellow officers. *City of Fort Worth, Texas and Combined Law Enforcement Ass'ns of Texas (CLEAT),* 99-2 Lab. Arb. Awards (CCH) P 3191 (Jennings 1999). And employees who work in corrections are well aware of how everything they do is being observed by a variety of people, including those they supervise daily.

When a parole officer, a law officer, is charged with participating in a formal unauthorized surveillance of two managerial employees, or for that matter any fellow employees, absent any evidence of a serious motive other than revenge, spite or to bring shame or humiliation to two fellow employees related to simply exposing an alleged extra-marital affair, and not related to typically found in the important and difficult undertaking that a Whistle Blower risks under the Whistle Blower Protection Act or under Common Law in Ohio, that is particularly disturbing. (www.whistleblowerprotectionact.com) Not only is it extremely disruptive to any operation of a public or private organization, but it is particularly troubling in a profession that deals with convicted criminals and the inherent level of anxiety that accompanies that activity. By adding the additional stress that in addition to the dangerous people you have responsibility for, you must also be fearful of your own fellow employees victimizes these employees and their families emotionally and economically. (Tr. 178-180, 190-196) During the hearing when Davis was asked why he hired private investigator Boehm, to surveil Patrick and Perez, Davis stated, *"To investigate some allegations brought to my attention that I believed were ongoing. Montgomery County obviously has some issues, and I was trying to, believe, it or not, actually make it a better place for those that were still working there."* (Tr. 420, 458, 461, 462) This vague answer not only short on substance, but it also appeared contrived and lacked sincerity. In order to undertake such an unusual and risky endeavor, one would expect more of a motive than what Davis expressed. The evidence indicates Fisher had more of a personal motive regarding her involvement. (Tr. 187, 500-502, 594-596)

The duty of an arbitrator is simply to determine the truth regarding the material matters of a controversy, as he believes them to be, based upon a full and fair consideration of all of the evidence and the weight to which he honestly believes it is entitled. An arbitrator must, therefore, consider whether the conflicting statements do ring true, weigh each witness's demeanor while testifying, and use certain guidelines to determine witness credibility—the self-interest or bias of a witness, the presence or absence of corroboration, and the inherent probability of the testimony. *CLEO, Inc. (Memphis, Tenn.) and Paper, Allied-Indus. Chem. And Energy Workers Int'l Union, Local 5-1766*, 177 LA 1479 (Curry 2002).

Honesty also plays a key role in determining the weight to be given to individual witness's testimony. It is the role of an arbitrator to observe the hearing witnesses and to determine who among them is telling the truth. *Givaudin Corp.,* 80 LA 835, 839 (Deckerman 1983). In addition

to determining the credibility of witnesses, the arbitrator must also determine the weight to be afforded to their individual testimony, as well as all of the other evidence submitted by the parties. *Minn. Teamsters Pub. and Law Enforcement Employees Union, Local No. 320, and City of Champlin, State of Minn.,* 00-2 Lab. Arb. Awards (CCH) P 3499 (Berquist 1999). To do so, an arbitrator must consider whether conflicting statements do ring true, weigh each witness's demeanor while he testifies, and use certain guidelines to determine credibility—the self-interest or bias of a witness, the presence or absence of corroboration, and the inherent probability of the specific testimony offered. *CLEO, Inc. (Memphis, Tenn.) and Paper, Allied Indus., Chem., and Energy Workers Int'l Union, Local 5-1766*, 177 LA 1479 (Curry 2002). An accused employee is presumed to have an incentive for not telling the truth, and when [her] testimony is contradicted by one who has nothing to gain or lose, the latter is to be believed. *United Parcel Serv., Inc. and Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., Local 89*, 66-2 ARB 8703 (Dolson 1966). One arbitrator noted: "In determining credibility, the arbitrator may consider not only the demeanor of the witnesses, but the motivation of those witnesses, as well." *Teamsters Local 688 and Meridian Med. Techs*., 01-1 Lab. Arb. Awards (CCH) P 3815 (King, Jr. 2001). Arbitrator King also noted: "A grievant's continued job tenure is sufficient motivation, in and of itself, to lie." *Teamsters Local 688. "*In resolving divergent claims, arbitrators are allowed to credit the testimony of disinterested witnesses over that of a grievant, absent a showing that witnesses called on behalf of the employer have a motive to lie." *Teamsters Local 688*. *"*Many arbitrators have also recognized that supervisors and disinterested witnesses have a higher goal than attempting to sustain the disciplining of an employee. An employee has an incentive for denying a charge against him, for he stands immediately to win (or lose) the most in the outcome of the case . . . [I]f there is no ill will toward the accused on the part of the accuser, and if there is no evidence upon which to base a conclusion that the accuser is mistaken, the conclusion that the charge is true should not be deemed improper. *Cargill, Inc. and Bakery, Confectionery, Tobacco Workers and Grain Millers Int'l, AFL-CIO, CLC, Local 49*, 00-2 Lab. Arb. Awards (CCH) P 3645 (Wyman 2000).

The arbitrator specifically found that the Grievant's hearing testimony was evasive, inconsistent with a great many of the facts and evidence (phone call records, text records, official

police reports, Boehm's testimony) was self-serving, and was lacking authenticity. It does not explain nor does it give convincing reasons regarding the numerous telephone calls between Davis and Fisher (Tr. 572) from February 2 to February 14, 2018, or the numerous phone calls and text messages with Davis, Boehm and herself after February 15, 2018, the day of the meeting between the Fishers, Davis, and Boehm, during a time when a contract was signed by Davis with Boehm to conduct unauthorized surveillance on Patrick and Perez. In Miami Township, the police officer states, *Jane stated Jeff hired a private investigator, David Boehm, to watch/follow Tina and a male coworker, Jason Perez. Jane has admitted to receiving emails and text messages from David (Boehm) about some of his findings (Binder, p. 171, 196)*

Remarkedly, the Grievant under direct examination had considerable recall regarding what she did not do involving Boehm and Davis. Yet, under cross examination she had little or no recall of the numerous phone calls in evidence and texts between Davis and Boehm. (Tr. 569-578, 589) Nor did she have any memory about setting up group chats, and or text contacts she had with Boehm and Davis. (Tr. 33, 34, 36) The Grievant in her defense speculated that Boehm may have fabricated the text messages using software or a software app, arguing its authenticity. (Tr. 389-394, 580-590) In response to that claim, Mr. Rader under cross examination of the Grievant confirmed a standing habit of the Grievant in her text messaging. She often included double exclamation points at the end of many of her text messages, several of which were in evidence proving communication with Boehm regarding his investigation and undermining her claims that Boehm faked these text messages. (Tr.629-634) Therefore, any defense of the Grievant to counter this fact is not set aside. The arbitrator in this proceeding finds that the text messages, which further demonstrate the Grievant's active involvement in the surveilling activity of Patrick and Perez is what is claimed by the Employer. The text messages provide convincing evidence in support of Boehm's testimony and statements that Fisher extensively participated in Boehm's surveillance of Patrick and Perez. (Tr. 631-634) On p. 213 of the Binder the Grievant made the following statements referring to contracting with Boehm for private investigative services, *"Myself and two other individuals were present for the signing of the contract and exchange of information and expectations." At no time did myself <u>or others involved</u> give David Boehm the authority to release that information or make contact with Tina Patrick or Jason*

Perez." [Emphasis Added] Raising the question, what others? The Fishers? During the hearing Davis contradicted this statement, stating that the Fishers were not there for the signing, indicating he was acting under the direction of his lawyer who gave him *"advice…I was instructed to put… the others in there"* (Tr. 433) Boehm stated they were at the meeting regarding surveillance. (Tr. 31) In fact, at times his testimony was so vague, admittedly so, and absent a discernible motive, the evidence appears to indicate Davis was simply a go between or "front man", hiring Boehm, with Boehm's efforts being largely directed by Fisher. (Tr. 427, 428)

A central witness in this matter for the Employer, Boehm, has his own set of concerns marred to some extent by the litigation in which he has been involved. However, the evidence gathered by Kiser, who presented careful and detailed testimony, demonstrated that in spite of Boehm's legal entanglements the information he provided to Kiser and others was consistent with statements made years earlier in 2018. And what Boehm provided to Kiser gained credibility as Kiser gathered the evidence submitted. While under direct examination Kiser stated, *"I believe the private investigator—Boehm's testimony and stuff he provided was more credible because there was physical evidence to back it up. There was –there was the information contained in texts and emails and subpoenaed phone records that validated or verified what he was saying was true, emails, statements, from other people, statements of Davis." (Tr. 121, 122)* On their own the phone calls and text messages may be considered somewhat disjointed and circumstantial in nature, but when combined with the consistent testimony of Boehm, and the lack of credibility of the accounts and testimony of Davis, greater credibility is given to the inferences that "connect the dots" in this case. (Koven, Smith, Farwell, Just Cause: The Seven Tests, 2d ed. 270-271; Problems of Proof in Arbitration, Proceedings of the 19th Annual Meeting of NAA, 98 (BNA, Books, 1967) Additionally, under cross examination the Grievant's evasive or non-responses are simply not believable, when viewed in the context of all the evidence, undermining her credibility that she had no involvement with Boehm's surveillance work. (Tr. 516, 570-578, 597-599)

In this matter, the employment relationship between the APA and Fisher has been damaged by her attempts to participate in the unofficial and improper investigation of two managerial employees. "A critical essence of the employment relationship has been destroyed

when an employee deliberately deceives the [Employer]." *Sysco Indianapolis, Inc., and Int'l Bhd. of Teamsters, Local 135*, 14-2 Lab. Arb. Awards (CCH) P 6206 (Kininmonth 2014). Honest dealing is broader than the more limited condition related to theft or fraud. While not every workday is the same and there are days when employees and supervisors alike do not perform at their best, and may indeed not like each other, that does not justify a willful intent to participate in an effort to invade the privacy of two supervisory employees and their families. This is a tragic waste of a career of an employee, who appears to not only be accomplished, having risen through the ranks, but one who is a worker, who puts in a lot of hours in more than one place of employment. In addition, the Grievant has had many good evaluations of her performance.

In the instant case, the credibility of the Grievant is at the core of the dispute. *S.C. Elec. & Gas Co. and Int'l Bhd. of Elec. Workers, AFL-CIO, Local 398*, 92-1 Lab. Arb. Awards (CCH) P 8143 (Holley 2009) Resorting to self-help rather than going through a labor union, particularly one of SEIU's reputation for vigorous representation, is almost always a fool's errand. The parties in every employment relationship have a duty to deal with each other honestly and fairly. This applies to employees, as well as management and union representatives. An employer has the right to demand honesty and truthfulness from its employees in every aspect of their employment, and employees have that same right to expect management to be honest with them. Participating in a private investigation of your coworkers is an act of dishonesty. There were alternative strategies available to the Grievant which could have been gleaned from the Union prior to this act of self-help and then was made worse through being dishonest. "When an employee is found to be willfully dishonest, rather than making an inadvertent misrepresentation, arbitrators uphold stiff penalties, including discharge." *The Boeing Co. and Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO*, 05-2 Lab. Arb. Awards (CCH) P 3203 (Holley 2005).

In spite of a very vigorous and professional defense of the Grievant by the Union's very competent advocate, it was the Grievant's own actions and unconvincing accounts of her innocence along with the unconvincing testimony of Davis that could not overcome the Employer's carefully investigated, compiled, and presented evidence, supported by the

testimony of Boehm and investigators Kiser and Dillon. It was sufficient to establish her complicity in Boehm's unauthorized surveillance activity. Both advocates deserve considerable credit for the presentation of each of their cases and for the civil and professional manner in which they dealt with this detailed and complicated case.

As previously addressed, the finding on the issue of the Grievant's active role in participating in the surveillance of Patrick and Perez supports the Employer's findings that the Grievant violated Rule 7, 18, 24, and 50 of the Standards of Employee Conduct, and based on all the evidence the arbitrator finds the Employer had just cause to discharge the Grievant. In addressing the other charges, the evidence and the Grievant's own statements support the fact that she violated the Standards of Conduct by failing to properly document, staff and address violent and high severity violation behavior of offenders which on its own would have warranted the issuance of minor discipline. (Tr. 547-558) However, I find there is insufficient evidence to sustain the remaining charges that involve the securing of law enforcement resources at home and at her secondary place of employment, conducting personal business at her secondary place of employment while being paid by ODRC, falsifying time sheets and all charges related to these allegations.

AWARD

Grievance denied.

Respectfully submitted to the parties this _____ day of January 2023.

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Robert G. Stein, Arbitrator