

#1717

**OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN**

OHIO DEPARTMENT OF PUBLIC SAFETY

-AND-

Ohio Civil Service Employees Association AFSCME Local 11

Appearing for the Department of Public Safety

Charles R. Bower, Sergeant, Ohio State Highway Patrol

Renee Byers, Advocate Employer

Matthew D. Corlett, Account Examiner 3

Catherine M. Dennis, Account Examiner 3

Joseph Eckstein, Account Examiner Supervisor 2

Charles J. Linek, Sergeant, Ohio State Highway Patrol

Amy Tait, Labor Relations Specialists, OCB

Edward P. Waters, Lieutenant, Ohio State Highway Patrol

Appearing for OCSEA

William A. Anthony, Staff Representative OCSEA

Matthew D. Corlett, Account Examiner 3

Catherine M. Dennis, Account Examiner 3

Louella Jeter, Steward

D. Bryan Kirk, Trooper

Kemmeth Kirk, Grievant

Jennifer Lewis, Paralegal OCSEA

Mary Jo Miller, Account Examiner 3

Thomas R. Poulton, Deputy State Architect

Molly A. Staley, Management Analysis Supervisor 2

CASE-SPECIFIC DATA

Grievance No.

Grievance No. 02-02-20021122-078-01-14

Hearings Held

August 21, 2003 & September 3, 2003

Case Decided

October, 22, 2003

Subject

Removal-Dishonesty; Failure of Good Behavior

The Award

Grievance Denied

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

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I. The Proceedings

This is a disciplinary dispute, involving the Ohio Department of Public Safety ("the Agency"), OCSEA ("the Union"),¹ and Ms. Kemmeth R. Kirk ("the Grievant"). On April 11, 2003, the Agency notified the Grievant that she was charged with having violated Work Rules 501.01 (10)(c), "Dishonesty" and 501.01(10)(D), "Failure of Good Behavior, and that her pre-deprivation hearing was scheduled for April 14, 2003.² The pre-deprivation hearing was held as scheduled, and the pre-deprivation decision, sustaining both charges was issued on April 15, 2003.³ A notice of removal was therefore issued on April 15, 2003.⁴ On April 17, 2003, the Union responded with Grievance 15-00-030423 -0061-01-14 ("the Grievance), claiming that: (1) The Agency's evidence was solely circumstantial, (2) The removal was therefore too harsh, (3) The Grievant should be reinstated with back pay and make-whole relief. The Agency heard the Grievance in a Step-3 meeting on May 13, 2003 and denied it on June 11, 2003.⁵

II. FACTS

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Most of the facts leading to the Grievant's dismissal are not substantially disputed, but the inferences to be reasonably drawn from those facts are stoutly disputed. When she was removed, the Grievant was an Account Examiner 3 who had four months of tenure with the Agency, no active discipline, a satisfactory record of performance,⁶ and approximately seventeen years of service with the State of Ohio. The Grievant's former supervisor, Mr. Thomas R. Poulton, affirmed that she was a good employee. Another former supervisor, Ms. Molly A. Staley, said the Grievant was an excellent employee whom she would rehire if she had an opening.

¹ Collectively referred to as ("the Parties").

² Joint Exhibit No. 3A.

³ Joint Exhibit No. 3B.

⁴ Joint Exhibit No. 3C.

⁵ Joint Exhibit No. 2.

⁶ Union Exhibit No. 2.

1 As an Account Examiner 3, the Grievant's duties included correcting discrepancies in employees'
2 computerized payroll accounts and other data-related assignments involving computers. The Agency had
3 a verbal work rule, prohibiting employees from making changes to or entries in their own payroll accounts.¹⁷
4 The Grievant's immediate supervisor, Account Examiner Supervisor 2 Joseph Eckstein informed the
5 Grievant of this work rule, which, by her own admission, she clearly understood.¹⁸

6 This dispute arose when Account Examiner 3 Matthew D. Corlett discovered that sixteen hours of
7 leave—eight hours personal and eight hours compensatory—had been deleted from the Grievant's leave usage
8 balances. The Grievant had used the personal and compensatory leave on March 3, 2003 and March 6, 2003,
9 respectively.¹⁹ These dates fell within a two-week pay period, ending on March 8, 2003, during which the
10 Grievant had also accrued 8.5 hours of unused compensatory leave.²⁰ A record of the payroll for the
11 foregoing pay period was transmitted to the Department of Administrative Services ("DAS") on or about
12 March 10, 2003.

13 At 10:59 A.M. on March 11, 2003, the Grievant's husband, Trooper Bryan Kirk, telephoned her at
14 work from his cell phone, conversed with her about paying off his personal loan, and told her that he would
15 soon visit her at work. That conversation lasted approximately seven minutes, ending at 11:06 A.M.²¹
16 Trooper Kirk testified that he also telephoned the Grievant from his office at 11:15 A.M. on March 11, 2003,
17 ended that call approximately two minutes later at 11:17 A.M., changed his clothes, and visited the Grievant
18 in her pod at approximately 11:30 A.M.

19 At 11:22 A.M. on March 11, 2003, the Grievant was logged on her computer under her User ID and

¹⁷ Joint Exhibit No. 5, at 10.

¹⁸ Joint Exhibit No. 5, at 20.

¹⁹ Joint Exhibit No. 4, at 22.

²⁰ *Id.*

²¹ Union Exhibit No. 4, at 4.

1 password, assessing the impact of different withholdings on her income tax.^{¶12} Her user identification code
2 ("User ID") was "DAKRK." At 11:22:22 A.M., User ID "DAKRK" deleted eight hours of personal leave
3 usage from the Grievant's leave usage balance in the "PAYU" screen. At 11:22:46 A.M., User ID DAKRK
4 deleted eight hours of compensatory leave from the Grievant's leave usage balance in the same screen. User
5 ID "DAKRK" logged off the "PAYU" screen at 11:23:00 on March 11, 2003.^{¶13}

6 At 11:23 A.M. on March 11, 2003, the Grievant left her computer,^{¶14} walked around the corner to
7 Ms. Catherine Dennis' pod,^{¶15} and asked her to pull up the "PAYU" screen. Ms. Dennis complied, and the
8 Grievant inquired about the impact of different levels of withholdings on her payroll. Ms. Dennis accessed
9 the tax worksheet screen ("Worksheet" or "WWW Screen") in the Grievant's payroll account at 11:23:44
10 A.M. and exited that screen at 11:24:32 A.M.^{¶16} Shortly thereafter, the Grievant asked whether Ms. Dennis'
11 User ID would be displayed as the last to have updated the Grievant's payroll account. Ms. Dennis observed
12 that her User ID was, in fact, the last to update the Grievant's payroll account.^{¶17}

13 On March 12, 2003, Mr. Corlett was verifying that the DAS State payroll entries had been correctly
14 transmitted when he came upon the Grievant's payroll record on DAS' state payroll. He noticed that
15 "DAKRK" had deleted the Grievant's personal and compensatory leave usage records from the DAS file,
16 leaving both usage columns with zero balances, which Mr. Corlett knew to be erroneous. However, the 8.5
17 hours of accrued compensatory leave had not been deleted.^{¶18} Mr. Corlett noticed that Ms. Dennis' User ID,

¶12 Joint Exhibit No. 5, at 19-20

¶13 Joint Exhibit No. 4, at 13, 15.

¶14 Joint Exhibit No. 5, at 20. While interviewing the Grievant during the criminal investigation, Sergeant Vinson asked her what did she do after hitting her "F1" key at 1123 hours on 3/11/03, and the Grievant answered without denying that she struck that key at the time indicated.

¶15 Joint Exhibit No. 4, at 36.

¶16 Joint Exhibit No. 10B (p3). The "F1" key must be struck to implement any updates to the payroll.

¶17 *Id.*

¶18 Joint Exhibit No. 4, at 13.

1 "DPCMD," was the last to have updated the Grievant's payroll account, accessing it at 11:23:44 and exiting
2 it at 11:24:32.¹¹⁹ He therefore asked Ms. Dennis if she had deleted the leave usages, and she denied having
3 deleted that data.

4 Mr. Corlett reported the matter to Mr. Eckstein who asked Acting Payroll Administrator Jerry A.
5 Miller to assist in investigating the incident, and Mr. Miller's report helped Mr. Eckstein to verify the
6 deletions. Mr. Eckstein admitted that anyone in possession of the Grievant's password and User ID could
7 change her payroll data from virtually any computer on in the work area. Mr. Miller's report indicated that
8 User ID "DAKRK" struck the "F1" or "Update" key on March 11, 2003, at 11:23:00 A.M.,¹²⁰ a fact verified
9 by the computer record.¹²¹ Because of the deletions, the Agency revoked the Grievant's computer privileges
10 and launched both a criminal and Administrative investigation of the problem.

11 A. Criminal Investigatory Interview

12 On March 17, 2003, Sergeant Michael D. Vinson conducted a criminal investigatory interview with
13 the Grievant. At the end of that two-hour interview, the Grievant drafted, reread, understood, and entered
14 the following statement into the investigatory record: "On March 13 I was informed that an investigation
15 was being done on my payroll. I was told on March 17th that 16 hours of leave was removed from my
16 payroll screen under my sign in. I can't deny this was done it was proved to me it was. All I can say is that
17 it was done by *pure accident*. I can honestly say that *if I did it, which it appears that way, that it was an*
18 *accidental mistake.*"¹²² Also, during that interview, Sergeant Vinson asked the Grievant: "Are we in
19 agreement at the time the 16 hours of leave was removed, you were in fact at your computer and logged on

¹¹⁹ Joint Exhibit No. 4, at 13, 15.

¹²⁰ Joint Exhibit No. 4, at 13. See also Joint Exhibit No. 10, at 2, the computer record of payroll transactions, showing that "DAKRK" made an entry on 2003/03/11 at 11/22/22.

¹²¹ Joint Exhibit No. 10B (p.3), showing that "DAKRK" made entries from 11/22/22 on March 3, 2003 through 11/23/00 on that day.

¹²² *Id.* at 19 (emphasis added).

1 using your password?" The Grievant answered, "yes."²³ Finally, during that interview, the Grievant
2 indicated her willingness to take a polygraph to prove her innocence, but the record does not show that one
3 was administered.²⁴

4 B. Administrative Investigatory Interview

5 Sergeant Charles R. Bower conducted administrative investigatory interviews with the Grievant on
6 March 24, 2003²⁵ and March 25, 2003.²⁶ During the March 25 interview, the Grievant denied having made
7 both of the foregoing statements in the March 17 criminal interview. First, regarding the deletions being "an
8 accidental mistake," she flatly denied not only that she intentionally deleted the leave times, but also that she
9 could have even accidentally deleted them.²⁷ The Grievant claimed that at the beginning of the criminal
10 investigatory interview, Sergeant Vinson asked if she had deleted the leave times, and she offered the
11 following response:

12 I told him [Sergeant Vinson] that I did not change it, and I kept tellin' him I did not it. And
13 he said could it have been an accident? And I said if I've done it, it was an accident. . . . I
14 say but I didn't do it. And he says well, could it have been a mistake? I said if it was done,
15 it was an accidental mistake; but I did not do it.²⁸

16 Next, the Grievant denied that she was logged on her computer under her User ID ("DAKRK") and password
17 when the deletions were made, stating, ". . . um, and the period that they told me that it [the leave usage
18 balance] was changed, I don't even think that I was at my desk. I'm almost positive I wasn't at my desk. I
19 went over to Katie. . . ."²⁹ During the arbitral hearing, before the Undersigned, the Grievant reiterated and
20 strongly embraced both of these denials.

²³ *Id.* at 20.

²⁴ *Id.*

²⁵ Joint Exhibit No. 8.

²⁶ Joint Exhibit No. 9.

²⁷ Joint Exhibit No. 9.

²⁸ Joint Exhibit No. 9, at 2.

²⁹ Joint Exhibit No. 8, at 3.

1 III. Regulatory and Contractual Provisions

2 ODPS - Policy and Procedure Management (DPS-501 .0 1)

3 d. Failure of Good Behavior - Any misconduct which violates recognized standards of conduct, including but not limited
4 to unauthorized release of information, violation of traffic laws in state vehicles, misuse of position for personal gain,
5 taking bribes, threats or acts of physical violence, verbal abuse or criminal convictions.

6 NOTE. The Ohio Department of Public Safety expects its employees to maintain a standard of conduct that is consistent
7 with the mission, goals and objectives of the Department. Employee actions that adversely affect their duties and
8 compromise or impair the ability of the Department to carry out its mission, goals and objectives will be subject to the
9 disciplinary process.

10 The Department of Public Safety follows a disciplinary procedure which attempts corrective action through a progression
11 of steps designed to help the employee modify unacceptable behavior or job performance before more extreme
12 disciplinary action is taken. The progressive disciplinary process, depending upon the nature of misconduct, might
13 involve a series of steps including verbal or written reprimands, suspensions of varying lengths, and/or demotion or
14 removal, in accordance with the applicable labor agreement.

15 The steps of progressive discipline shall generally be followed. However, more serious discipline or a combination of
16 disciplinary actions may be imposed at any point if the infraction or violation merits the more severe action. The
17 employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.

18 e. Work Rule Violations - Employees may be disciplined for failure to follow guidelines contained in these work rules,
19 which result from failure to follow applicable policy and procedure of the Department of Public Safety.

20 * * * *

21 10. EMPLOYEE DISCIPLINE - Employees of the Department of Public Safety are expected to maintain good behavior
22 and efficient service while employed. Employees will not be reduced in pay or position, suspended or removed unless
23 such action is for just cause, and or in accordance with the applicable collective bargaining unit agreement. Types of
24 misconduct which can result in disciplinary action are:

25 insubordination, neglect of duty, *dishonesty*,

26 * * * *

27 violation of the *rules, policies and procedures* of the Department, or any other *failure of good behavior* or acts of
28 misfeasance. . . in office.

29 The categories and types of misconduct specified in this section are not intended to constitute an exclusive or exhaustive
30 list of offenses subject to disciplinary action.

31 * * * *

32 c. Dishonesty - Employment-related dishonesty, falsifying and/or altering employment applications or any other
33 job-related documents, records, or statements.

34 24.01- Standard

35 Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof
36 to establish just cause for any disciplinary action.

37 24.02- Progressive Discipline

38 The Employer will follow principles of progressive discipline. Disciplinary action shall be commensurate with the
39 offense.

40 IV. Summaries of the Parties' Arguments

41 A. Summary of the Agency's Arguments

42
43 1. The Employer clearly established the times of the deletions and irrefutably linked them to the Grievant's user

1 ID.

- 2 2. The Grievant admitted, during the criminal investigatory interview, that she was at her desk and logged on her
3 computer when the deletions were made.
- 4 3. Nothing in the record shows that any other employee had access to the Grievant's password.
- 5 4. Nothing in the record shows that any other employee had a motive to delete the leave usage balances.
- 6 5. The inherent bias of spousal testimony effectively discredits Trooper Kirk as a witness for the Grievant.
7 Trooper Kirk's own testimony further undermined his credibility as a witness.
- 8 6. In addition to contradicting her prior statements, the Grievant provided false and inconsistent testimony at the
9 arbitral hearing.

10 **B. Summary of the Union's Arguments**

- 11 1. The Agency's case is based solely on circumstantial evidence.
- 12 2. Someone else could have deleted the leave time from any computer in any work area. The Grievant claims to
13 have been in Ms. Dennis' pod when the deletions occurred and that Ms. Dennis assisted her in filling out
14 deduction cards. Finally, the Grievant believed that co-workers in close proximity to her office could have
15 heard her conversation with Trooper Kirk, and thus determined what the Grievant was doing.
- 16 3. Someone else could have accessed the Grievant's User ID and password, since the Agency had no policy that
17 forbade employees to share their User IDs and passwords, and the Grievant taped her password onto the right
18 side of her monitor.
- 19 4. Ms. Dennis is not a credible witness because she denied giving Mr. Corlett a copy of the Grievant's criminal
20 investigatory interview.
- 21 5. Mr. Corlett could have deleted the leave time. He takes pleasure in eavesdropping and prying into other
22 employees' records. He admits that he has been in the Grievant's pod during her absence. The walls of the
23 pods are high enough to conceal employees therein, and it is not unusual for employees to visit co-workers'
24 pods.
- 25 6. The investigation was not thorough, fair, or conclusive as evidenced by the Agency's failure to investigate the
26 foregoing situations.
- 27 7. Despite her contradictory statements, the Grievant specifically denied under oath that she deleted the leave
28 times and she insists that the phrase "accidental mistake" was Sergeant Vinson's.
- 29 8. The Agency's rush to judgment is accentuated by the failure of the criminal investigation to result in criminal
30 charges being filed against the Grievant.
- 31 9. Arbitrator DuVal Smith sustained a grievance where an Agency's case was supported by strong circumstantial
32 evidence but undermined by a less than fair and full investigation.
- 33 10. The Grievant had no motive to delete the leave times because she had no problem with her leave balances,
34 copies of which were on file with the Agency. Until this incident, the Grievant had maintained a discipline-free
35 record and a spotless reputation with co-workers and employers, past and present. She had more than seventeen
36 years of State service, and had absolutely nothing to gain and everything to lose by deleting sixteen hours of
37 leave. Such an act is wholly out of character for the Grievant. Moreover, she needed her job because, among
38 other things, she faced potential medical expenses for her daughter, and had to care for the twins of her recently

deceased sister.

V. The Issue

Whether the Grievant was terminated for just cause. If not, what shall the remedy be?

VI. Discussion and Analysis

A. Evidentiary Standards

Because this is a disciplinary dispute, the Agency has the burden of proof or persuasion with respect to its charges against the Grievant. Thus, the Agency must adduce *preponderant* evidence in the arbitral record as a whole showing *more likely than not* that: (1) The Grievant engaged in the misconduct alleged; (2) The conduct constitutes "Failure of good behavior" and "Dishonesty"; and (3) The penalty imposed is neither unreasonable, arbitrary, nor capricious. Doubts with respect to these issues shall be resolved against the Agency.

B. The Grievant's Whereabouts and the Nature of the Case

The threshold and pivotal issue in this case is the Grievant's whereabouts on March 11, 2003, between 11:22:22 A.M. and 11:22:46 A.M. Was she in her pod or in Ms. Dennis' pod? When assessing that issue below, the Arbitrator is ever mindful that the Agency's case against the Grievant rests entirely on circumstantial evidence. However, a strong case of circumstantial evidence can be as persuasive as a case premised on direct evidence. Still reason and credibility loom larger in a case of circumstantial evidence. The most common and major difficulty with circumstantial evidence is the inevitable task of drawing *reasonable* inferences from the evidence presented.

C. The Agency's Case

Because no evidence in the record definitively placed the Grievant at a particular location when the deletions occurred, one must assess the Agency's evidence and inferences regarding the Grievant's whereabouts between 11:22:22 A.M. and 11:22:46 A.M. on March 11, 2003 against the Union's account of the Grievant's whereabouts during that period. The core of the Agency's evidence comprises computer records, the Grievant's prior inconsistent statements, and other evidence that contradicts her testimony. The

1 computer records show that on March 11, 2003, the Grievant's User ID ("DAKRK") was used to delete eight
2 hours of personal leave and eight hours of compensatory leave at 11:22:22 A.M. and 11:22:46 A.M.,
3 respectively. In addition, the Agency's evidence establishes that, during the criminal investigatory interview,
4 the Grievant admitted that when the deletions were made, she was at her computer and logged on under her
5 User ID and password. The Agency's evidence further demonstrates that, during the criminal investigatory
6 interview, the Grievant admitted that she could have accidentally deleted the information. Also, the Agency
7 establishes that the Grievant damaged her credibility by later changing her position on these issues and
8 offering testimony that was largely rebutted by testimonies of other witnesses.

9 In addition, there is another piece of circumstantial evidence that weighs against the Grievant: Her
10 desire, shortly after 11:23:00 A.M. on March 11, 2003, to verify that Ms. Dennis' User ID was the last to
11 update the Grievant's payroll record. The proximity of this inquiry to the time of the deletions is at least
12 puzzling if not outright suspicious. One has difficulty viewing the timing as mere coincidence or
13 happenstance. Indeed, it is not unreasonable to conclude that the existence and timing of the Grievant's
14 concern about Ms. Dennis' User ID supports a reasonable inference that she sought to implicate Ms. Dennis
15 as the culprit if the deletions were subsequently discovered. The computer records together with the prior
16 inconsistent statements, contradictory testimony from other witnesses (discussed below), and the Grievant's
17 suspicious inquiry undermine her credibility and point a dire accusatory finger at her. In other words, at this
18 point in the analysis, the Agency's evidence supports a reasonable inference that the Grievant more likely
19 than not deleted her leave usage balances on March 11, 2003, at 11:22:22 A.M. and 11:22:46 A.M.
20 Nevertheless, the question remains whether the Agency's evidence weathers the ensuing discussion of the
21 Union's evidence.

22 **1. The Role of Motive**

23 What the Agency's evidence does not show (and what the Union stresses) is that the Grievant had
24 a motive for deleting the leave usage balances. The Union argues that the Grievant had no motive to do so

1 because she had everything to lose and virtually nothing to gain from such misconduct. In addition, the
2 Union maintains that the Grievant needed her job and in fact had available leave time. The Agency, in
3 contrast, suggests that the medical circumstances surrounding the Grievant's family could have pressured
4 or motivated her to increase her leave time by deleting her leave usage balances. Preponderant evidence in
5 the record does not establish the Agency's argument and the Arbitrator therefore cannot embrace it. In short,
6 the evidence in this case does not support an inference of motive on the Grievant's part.

7 Still, for the following reasons, that conclusion does not assist the Grievant in this particular case,
8 even though motive is not an uncommon consideration in a charge of dishonesty that essentially boils down
9 to theft. But, absent a specific regulatory, statutory, or contractual provision that specifically establishes it
10 as a formal element of a party's burden of proof, motive is merely an ancillary factor whose importance turns
11 on the strength and type of evidence adduced in a given case. If, for example, an employer had a videotape
12 (direct evidence) of an employee's pilfering, motive would be wholly irrelevant to the merits of the charge.
13 Conversely, motive may be material and relevant in a less than "airtight" case based upon circumstantial
14 evidence. And, as a general proposition, the probative value of motive is inversely proportional to the
15 strength of the circumstantial evidence in a given case. In other words, motive may assume greater probative
16 value in assessing the merits of a charge where circumstantial evidence of alleged misconduct is weak and
17 credibility, pivotal.

18 Turning to the instant case, one cannot entirely discount the role of the Grievant's motive, but it is
19 not a decisive factor because the Agency's circumstantial evidence is strong. It shows that the Grievant was
20 in a location with the means to delete the leave times and that the deletions were made with the Grievant's
21 User ID and password. Also, of equal importance, the substantial erosion of the Grievant's credibility, as
22 discussed below, strengthens the already formidable circumstantial evidence against her. But for the
23 Grievant's lack of credibility, motive *could have been* a factor in assessing the merits of the Agency's
24 charges against the Grievant. But, as matters stand, the Agency's failure to establish a motive cannot

1 exonerate the Grievant.

2 **D. The Union's Case**

3 As previously mentioned, a pivotal issue in this dispute is the Grievant's whereabouts on March 11,
4 2003 between 11:22:22 A.M. and 11:22:46 A.M. Accordingly, the most promising argument for the Union
5 is that the Grievant was not at her computer logged on under her password and User ID when the deletions
6 were made; instead, she was in Ms. Dennis' office. The effectiveness or probative value of this *affirmative*
7 *defense* turns almost entirely on the Grievant's credibility

8 **1. The Grievant's Credibility**

9 Unfortunately, the Grievant's credibility constitutes a major pitfall for the Union's case because the
10 Grievant's prior inconsistent statements and unsupported accusations effectively discredited her as a witness
11 in this case.¹³⁰ The Grievant contradicted her prior statements on several issues, some of which were vital
12 to the Union's case and to an assessment of the merits. During the administrative investigatory interview,
13 for example, the Grievant contradicted a key statement that she actually drafted and offered at the end of that
14 interview. In that statement, she declared: "I can honestly say that *if I did it*, which it appears that way, *that*
15 *it was an accidental mistake*."¹³¹ Later, however, she categorically rejected that statement for an absolute
16 denial that she either intentionally or accidentally deleted the leave times.

17 Neither of those denials is availing for the Grievant, however. With respect to the claim that the
18 deletions were accidental, the number of keystrokes and/or mouse clicks necessary to delete data in the
19 "PAYU" screen makes it highly unlikely that *both* deletions were accidental.¹³² As the agency argued in its
20 Post-Hearing Brief, even if one were inclined to believe that one of the deletions could have been accidental,

¹³⁰ The Arbitrator wishes to clarify that he is not calling the Grievant a liar. He merely finds that the positions and propositions that she offered in this case are not supported by evidence.

¹³¹ Joint Exhibit No. 5, at 19 (emphasis added).

¹³² To delete data in the "PAYU" screen, one must first access that screen, either tab, arrow to (or click on) the upper right hand area of the screen, place the cursor on the characters to be deleted, and strike the space bar.

1 it overtaxes credulity to suggest that both deletions were accidental, especially where, as here, they were but
2 twenty-four seconds apart—11:22:22 A.M. to 11:22:46. A.M. Consequently, the Arbitrator cannot accept the
3 proposition that the deletions were accidental or mistaken. Nor does an absolute denial fair any better. In
4 the final analysis, such a denial must somehow overcome Ms. Dennis' testimony (discussed below)
5 concerning the Grievant's whereabouts as well the strong reasonable inferences to be drawn from the
6 computer records, which unequivocally establish that User ID "DAKRK" deleted the leave times.

7 Also, when attempting to deny her statement that the deletions were an "accidental mistake," the
8 Grievant sought to attribute the phrase to Sergeant Vinson. Assuming, *arguendo*, that Sergeant Vinson first
9 suggested the phrase, the Grievant, nevertheless, adopted it in her own handwritten statement. Furthermore,
10 the Grievant's statement explicitly concedes that the evidence against her supports an inference that she
11 deleted the leave times. In this respect, she said, "I can honestly say that if I did it, *which it appears that way*.
12 ..."¹³³ Yet, the Grievant adamantly insisted, during the administrative investigatory interview and the arbitral
13 hearing, that she did not mean what she in fact had explicitly written. During the arbitral hearing, she
14 struggled unsuccessfully to reconcile that absolute denial with her handwritten statement. Standing alone,
15 this type of contradiction is extremely corrosive to any witness' credibility.

16 Also, when testifying during the arbitral hearing, the Grievant flatly contradicted her statement,
17 during the criminal interview, that she was at her computer, logged on under her password and User ID when
18 the leave times were deleted. After acknowledging that admission, during the administrative investigatory
19 interview and the arbitral hearing, the Grievant flatly contradicted it, testifying, under cross-examination, that
20 she was in Ms. Dennis' office from 11:15 A.M. to 11:30 A.M., which encompasses the time the deletions were
21 made. The Grievant attempted to explain the earlier admission by stating that she *normally* would have been
22 sitting at her desk during the period that the deletions were made but during the time of the deletions she was
23 in Ms. Dennis' pod seeking assistance on the impact of various deductions on her net pay.

¹³³ *Id.* at 19 (emphasis added).

1 The difficulty is that Ms. Dennis forcefully denied the Grievant's fifteen-minute version of her
2 visitation. Instead, Ms. Dennis insisted that the Grievant remained in her (Ms. Dennis') pod for no more than
3 five minutes on March 11, 2003. This creates a critical and potentially outcome-determinative contradiction
4 that is amenable only to credibility assessments of Ms. Dennis' and the Grievant's statements.

5 Aggravating this assessment is that neither the Grievant nor Ms. Dennis is fully a credible witness
6 in this case.¹³⁴ However, independent corroborative evidence tends to support Ms. Dennis's position as to
7 the Grievant's whereabouts when the deletions occurred, thereby disentangling this potential Gordian knot
8 of conflicting statements by two less-than-credible witnesses.

9 Because computer records tend to corroborate Ms. Dennis' account, the Arbitrator credits her
10 testimony over the Grievant's and, based on the ensuing reasoning, finds that the Grievant did not remain
11 in Ms. Dennis' pod from 11:15 to 11:30 A.M. on March 11, 2003 but was there for approximately five
12 minutes, from 11:23:14 A.M. to 11:28:14 A.M.

13 Computer records establish that "DAKRK" logged off the "PAYU" screen at 11:23:00 A.M. and that
14 Ms. Dennis logged on the "WWW Screen" forty-four seconds later at 11:23:44 A.M.¹³⁵ Ms. Dennis' testified
15 that she logged on the "WWW Screen" approximately *thirty seconds* after the Grievant entered Ms. Dennis'
16 pod. Of paramount importance here is that despite her lack of credibility, Ms. Dennis' version essentially
17 jibes with the computer records. Accordingly, the Arbitrator finds that the Grievant entered Ms. Dennis' pod
18 at approximately 11:23:14 A.M. Also, Ms. Dennis testified that the Grievant entered Ms. Dennis' pod on

¹³⁴ Ms. Dennis lost credibility when she repeatedly insisted that she shared a copy of the report of the Grievant's criminal investigatory interview with no one but Mr. Eckstein. Yet, Mr. Corlett adamantly maintained that Ms. Dennis permitted him to review that report. The Arbitrator credits Mr. Corlett's testimony. He had no apparent reason to impugn Ms. Dennis' credibility or integrity. However, Ms. Dennis had some reason to conceal that she disseminated a copy of the criminal report, since that could cause her to appear to be a busybody or, worse, to be biased against the Grievant, which could have diminished the value of any testimony she planned to offer against the Grievant.

¹³⁵ Joint Exhibit No. 10B, at 2.

1 March 11, 2003 approximately thirty seconds before Ms. Dennis accessed the "WWW Screen" at 11:23:44
2 A.M. to help the Grievant manipulate payroll deductions. The Arbitrator also credits this point.

3 Finally, the Arbitrator credits Ms. Dennis' testimony that the Grievant remained in Ms. Dennis' pod
4 for no more than five minutes, which means that the Grievant left Ms. Dennis' pod at approximately
5 11:28:14.³⁶ Based on the foregoing discussion and evidence, the Arbitrator finds that the Grievant was in
6 Ms. Dennis' pod from approximately 11:23:14 until approximately 11:28:14 on March 11, 2003.

7 2. Other Contradictions of the Grievant's Testimony

8 The number of internal inconsistencies in some of the Grievant's testimony essentially decimate her
9 credibility, which in turn renders the remainder of her testimony vulnerable to credible conflicting testimony
10 from opposing witnesses. For example, the Grievant testified that, on March 11, 2003, she had not learned
11 to modify files in the "PAYU" screen. In contrast, Mr. Eckstein testified that in the course of her normal
12 duties, the Grievant corrected discrepancies in the upper right-hand corner of the "PAYU" screen, sometimes
13 under the "Usage" column where her leave usages were deleted. Mr. Eckstein explained that part of the
14 Grievant's job specifically involved correcting discrepancies in employees' leave usages and making entries
15 in payroll areas.

16 Mr. Eckstein even cited examples where the Grievant had actually corrected discrepancies that would
17 have required her to enter the usage field in the "PAYU" screen. For example, M. Walker was not credited
18 for three hours vacation on Friday, December 27, 2002. The Grievant's initials (K/K entry and kk 12-30-02)

³⁶ Nor does Trooper Kirk's testimony assist the Grievant here. Recall that Trooper Kirk testified that on March 11, 2003, he last spoke with the Grievant at 11:17 A.M. and later saw her in her pod at approximately 11:30 A.M. Thus, Trooper Kirk's testimony does not account for the Grievant's whereabouts and activities from 11:17 A.M. to 11:30 A.M., when the deletions occurred. In fact, Trooper Kirk's testimony tends somewhat to contradict the Grievant's allegation that she was in Ms. Dennis' office from 11:15 A.M. to 11:30 A.M. because Trooper Kirk's testimony places her on the telephone with him from 11:15 A.M. to approximately 11:17 A.M. Furthermore, Trooper Kirk's testimony cannot account for the Grievant's whereabouts and activities from 11:17 A.M. until she appeared in Ms. Dennis' office at approximately 11:23:14 A.M., the period during which "DAKRRK" deleted the leave usage balances.

1 appeared next to the statement, "3 hours vacation used."¹³⁷ Mr. Eckstein testified that the check (✓) next to
2 the foregoing quotation was evidence that the Grievant had corrected M. Walker's payroll account.
3 Similarly, the Grievant accessed the usage field of the "PAYU" screen to correct a discrepancy in Mr. Albert
4 Allen's vacation pay. As evidence that the Grievant processed this entry, Mr. Eckstein pointed out the
5 Grievant's initials on the e-mail dated January 2, 2003 that first cited the discrepancy.¹³⁸ Also, Mr. Eckstein
6 noted that the fifth line from the bottom of the On-Line Payroll Update List¹³⁹ indicates that DAKRK (the
7 Grievant's User ID) updated Mr. Albert Allen's payroll account on January 2, 2003. Lastly, the Grievant
8 testified that her password was taped on the right side of her monitor. Yet, no witness at the arbitral hearing
9 could recall seeing the password there.

10 3. Other Possible Culprits

11 The Union also postulates that someone other than the Grievant could have deleted the leave times.
12 This position poses at least two difficulties for the Union. First, this is an affirmative defense for which the
13 Union must bear the burden of persuasion, with doubts to be resolved against the Union on this issue. To
14 carry that burden, the Union must establish by preponderant evidence in the record as a whole that someone
15 deleted the leave usage balances.

16 Second, neither of the Union's positions is persuasive. For example, the Union broadly posits that
17 any co-worker could have obtained the Grievant's User ID, which was allegedly taped to the right side of
18 her computer monitor in her pod. The Union further contends that any co-worker with access to the
19 Grievant's User ID and password could have deleted the leave usage balances either from the Grievant's
20 computer or from any other computer in the work area.

21 The Union casts a broad, speculative, accusatory net that is premised on the unestablished

¹³⁷ Joint Exhibit No. 4, p. 45,

¹³⁸ Joint Exhibit No. 4, p. 41.

¹³⁹ Joint Exhibit No. 4, at 39.

1 proposition that the User ID was tapped on the Grievant's monitor. No other witness, save the Grievant,
2 recalls seeing a User ID or password taped to the Grievant's computer or monitor. Even if the Grievant
3 publicly displayed her User ID, nothing in the record indicates who might have obtained it. Under this line
4 of reasoning, virtually everyone in the department is suspect. But a theory that sweepingly implicates
5 everyone, specifically incriminates no one and, in this case, fails to redirect the accusatory finger away from
6 the Grievant.

7 Next the Union seeks to point an explicit accusatory finger at Mr. Corlett, suggesting that he had the
8 motive, the means, and opportunity to delete the leave times, with the Grievant's User ID and password.
9 Again, the Arbitrator is unpersuaded because the evidence against Mr. Corlett is weak at best and does not
10 establish that he had a motive for sabotaging the Grievant. The only evidence of *motive* was the Grievant's
11 assertion of tension between her and Mr. Corlett, yet other witness perceived any tension between the
12 Grievant and Mr. Corlett. For example, Mr. Eckstein credibly testified that he was aware of no tension
13 between the Grievant and Mr. Corlett. And other evidence in the record corroborates Mr. Eckstein's
14 perception. The Grievant had, for instance, recently donated her children's clothes to Mr. Corlett's children,
15 which hardly suggests tension between the Grievant and Mr. Corlett. Finally, the Grievant herself admitted
16 that her perception of a tense relationship might very well differ from the perceptions of others.

17 Nor is the Arbitrator convinced that Mr. Corlett had the *means* to delete the leave usages because,
18 other than speculation, nothing in the record establishes that he had access to the Grievant's User ID and
19 password. Absent proof that Mr. Corlett at least had the means to delete the leave times, the Arbitrator has
20 no basis for adopting the Union's position that Mr. Corlett deleted them.

21 Having assessed the hearts or essence of the Agency's and the Union's cases, and for all the reasons
22 set forth thus far in this opinion, the Arbitrator holds that preponderant evidence in the arbitral record as a
23 whole ultimately supports a reasonable inference that more likely than not the Grievant deleted the leave time
24 in question.

1 **VII. The Penalty Decision**

2 The Agency has established that the Grievant engaged in misconduct that constituted failure of good
3 behavior and dishonesty; therefore, some measure of discipline is indicated. Assessment of the proper
4 quantum of discipline requires an evaluation of the mitigative and aggravative factors as well as an ultimate
5 determination of whether the penalty imposed, removal, is unreasonable, arbitrary, or capricious under the
6 circumstances of this case.

7 **A. Aggravative Factors**

8 The two aggravative factors that weigh most heavily against the Grievant are the serious nature of
9 her established misconduct and her short tenure with the agency. Essentially, the Grievant's misconduct
10 amounts to theft of leave time, which costs the Agency approximately \$354.56.⁴⁰ Equally important is that
11 she used the computer to commit this act and that her job duties require her to continually access and update
12 computer files. Under these circumstances, how can one reasonably expect the Agency to trust the Grievant
13 to perform such duties in the future? In addition, the Grievant is a short-term employee with the Agency and
14 therefore, does not benefit from any consideration of seniority.

15 **B. Mitigative Factors**

16 The mitigative factors include the Grievant's satisfactory record of performance and unblemished
17 disciplinary record with the Agency.

18 **C. Propriety of the Penalty**

19 As an Account Examiner 3, the Grievant must regularly access and modify computer files that
20 contain highly sensitive information. The very nature of the Grievant's misconduct is integral to and deeply
21 exploitative of the very duties that she was hired to perform. Yet, the Agency obviously places and must
22 maintain a high degree of trust and confidence in employees with access to such data. When an employee
23 who occupies such a position of trust engages in misconduct that is so strongly linked to the core of her

⁴⁰ Joint Exhibit No. 4, at 4.

1 duties, the bond of trust and confidence is permanently ruptured. Under these circumstances, progressive
2 discipline is no indicated, since no measure of progressive discipline is likely to revive the Agency's trust
3 and confidence in the Grievant. These considerations as well as the aggravative and mitigative factors
4 prompt the Arbitrator to hold that the Grievant's removal was not arbitrary, capricious or unreasonable.

5 **VIII. The Award**

6 For all the foregoing reasons, the grievance is hereby **DENIED**.

7 **Notary Certificate**

8 State of Indiana)

9)SS:

10 County of _____

11 Before me the undersigned, Notary Public for _____ County, State of Indiana,
12 personally appeared _____, and acknowledged the execution of this
13 instrument this _____ day of _____, 2003

14 Signature of Notary Public: _____

15 Printed Name of Notary Public: _____

16 My commission expires: _____

17 County of Residency: _____

18 _____
19 Robert Brookins