Susan Grody Ruben, Esq.
Labor Arbitrator
30799 Pinetree Road, #226
Cleveland, OH 44124

ARBITRATION PROCEEDING PURSUANT TO COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC.

and

OHIO DEPARTMENT OF NATURAL RESOURCES

Grievant: Matthew Roberts
Case No. 25-18-20121007-0010-05-02

ARBITRATOR'S OPINION and AWARD

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, the FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC. ("the Union") and the STATE OF OHIO ("the State" or "ODNR") under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. Her decision shall be finding and binding pursuant to the Agreement. The Parties

stipulated there are no procedural impediments to a final and binding Award.

Hearing was held October 24 and December 9, 2013. Both Parties were represented by advocates who had full opportunity to examine and cross-examine witnesses and introduce documentary evidence.[1] Both Parties filed timely post-hearing briefs.

APPEARANCES:

On behalf of the Union:

PAUL L. COX, Esq., Chief Counsel, Fraternal Order of Police, Ohio Labor Council, Inc., 222 East Town Street, Columbus, Ohio 43215.

On behalf of the State:

KANDIE L. CARSON, Esq., Labor Relations Officer, Ohio Department of Natural Resources, 2045 Morse Road, Building D-1, Columbus, Ohio 43229.

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[1] On January 7, 2014, the Union made a Motion to Supplement the Record with a December 13, 2013 report from the Ohio Office of the Inspector General relating to the subject of the instant grievance. On January 21, 2014, the State opposed the Union's Motion. The Arbitrator hereby denies the Union's Motion.

[2] E.g., the OIG report states the Grievant was with his supervisor, David Warner, at 4:35 a.m. on December 3, 2009. Record evidence, which ODNR had in its possession prior to the termination, shows the Grievant was not with Mr. Warner until 11:30 a.m. that morning.

[3] Indeed, an Acting District Manager for Wildlife testified at the arbitration hearing

ISSUE

Did the State have just cause to terminate the Grievant's employment? If not, what is the appropriate remedy?

RELEVANT PORTIONS OF THE AGREEMENT

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ARTICLE 19 – DISCIPLINARY PROCEDURE

19.01 Standard

No bargaining unit member shall be reduced in pay or position, suspended or removed except for just cause.

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19.05 Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. At the Employer's discretion, disciplinary action shall include:

1. **Verbal Reprimand (with appropriate notation in employee's file);**
2. **Written Reprimand;**
3. **One of more fines in an amount of one (1) to five (5) days pay for any form of discipline. The first time fine for an employee shall not exceed three (3) days pay;**
4. **Suspension;**
5. **Leave reduction of one or more day(s);**
6. **Working suspension;**
7. **Demotion;**
8. **Termination.**

However, more severe discipline may be imposed at any point if the infraction or violation merits the more severe action.

The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.

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ARTICLE 20 – GRIEVANCE PROCEDURE

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20.08 Arbitration

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5. Limitations of the Arbitrator

Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the language of this Agreement. 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.

…

20.09 Disciplinary Grievances

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3. In cases involving termination for dishonesty or making false statements, if the arbitrator finds dishonesty occurred or false statements were made, the arbitrator shall not have authority to modify the disciplinary action.

…

. . .

FACTS

The Grievant was employed by the State as a Wildlife Officer Cadet on January 3, 2005 and was appointed as an ODNR Wildlife Officer on June 26, 2005 following his Ohio Peace Officer Basic Training.

On July 19, 2012, in response to a citizen complaint, the Ohio Office of the Inspector General ("OIG") issued an investigative report regarding three ODNR Wildlife Officers, including the Grievant. The OIG report found the Grievant "was hunting while on duty in 2010," and "did not follow the ODNR communications directive by failing to sign on at the beginning of work periods, to sign off at the end of work periods, and to update [his] status on an hourly basis." The OIG directed the ODNR to respond to the report within 60 days. The OIG also forwarded the matter to the Brown County Prosecutor.

To some extent, ODNR conducted its own investigation. ODNR interviewed the Grievant. ODNR did not interview the Grievant's supervisors, nor collect information such as the Grievant's GPS records

showing his whereabouts on the dates in question. To a great extent, ODNR relied upon the OIG report, which was factually flawed.[2]

The State removed the Grievant from his position effective September 28, 2012. The removal letter provides in pertinent part:

> **[Y]ou were found guilty of violating the following provisions of the Ohio Department of Natural Resources (ODNR) Disciplinary Policy:**
>
> - **…Dishonesty - …Willfully falsifying or removing any official document.**
> - **…Failure of good behavior….**
> - **…any act that brings discredit to the employer.**

The Union filed the instant grievance dated October 5, 2012. The Grievance states in pertinent part:

> **On September 28, 2012 I was terminated from my position as a Wildlife Officer with the Division of Wildlife. I would like to appeal this decision as I do not believe that there was just cause for my removal.**

[2] E.g., the OIG report states the Grievant was with his supervisor, David Warner, at 4:35 a.m. on December 3, 2009. Record evidence, which ODNR had in its possession prior to the termination, shows the Grievant was not with Mr. Warner until 11:30 a.m. that morning.

POSITIONS OF THE PARTIES

State Position

During the ODNR investigation, the Grievant admitted he hunted while on duty and admitted he turned in false time reports. The Grievant's conduct was self-serving and violated both ODNR's and the public trust. The Grievant's conduct was dishonest, was a failure of good behavior, and brought discredit to ODNR.

Record evidence demonstrates the Grievant should have known his activities and behavior violated ODNR policy. During a time management training module, the Grievant was evaluated as having "a good understanding of keeping a schedule and the importance of recording deadlines." The ethics curriculum the Grievant was trained on expressly warned him away from unethical behavior and falsification. The Grievant was expressly taught that "[f]alsifying reports is one of the most common unethical acts within the ranks of law enforcement….Once an officer distorts the truth for any self-serving reason, it becomes easier to lie about other matters….Corrupt Activity [includes] Soliciting or receiving improper compensation." The Grievant was further instructed, "When

confronting ethical dilemmas, ask yourself…Is it worth my job and career?...Is it legal?"

The Grievant admitted he had knowledge of the Voice Radio & Mobile Data Communications Directive. This policy directs that officers "will sign on using the mobile data computer when beginning a work period and will keep mobile status updated for the duration of the work period. At a minimum, Mobile Data equipped Officers will use mobile data to update their status hourly and/or when their work status, facility, or geographical jurisdictional changes when the officers[sic] is in the vehicle or vessel." The Grievant acknowledged he failed to comply with this policy on the dates in question.

The Union proposes the Grievant's training and the ODNR policies are meaningless in the face of the "straight 8's" mindset of the post where the Grievant was assigned. This argument fails. Both State and Union witnesses substantiated both officers and management were provided with ample training regarding accurate and ethical timekeeping. When asked if they would ever claim hours they did not work or if they would ever hunt on State time, Union witnesses all said no. It was acknowledged the Chief and the District Manager who hunted with the

Grievant on one date in question had taken the day off. Time off was allowed and would have been the appropriate course of action for the Grievant to take.

An important distinction arises between "straight 8's" as a means of avoiding incurring overtime and falsely claiming "straight 8's" and thereby getting paid for hours not worked. The Grievant's own timesheets evidence time entries ranging from 4 to 12 hours during 2009 and 2010 – where are the "straight 8's" referred to by the Union? The Grievant's entries demonstrate ODNR had implemented a policy of flextime and discouraged "straight 8's" reporting.

Arbitrator Richard Mittenthal defined a past practice as a "course of conduct that is the understood and accepted way of doing things over an extended period of time, and thus, mutually binding and enforceable." "Past Practice and the Administration of Collective Bargaining Agreements," 59 Michigan Law Review (1961). Arbitrator Harry Shulman ruled:

> **A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which it is based. But there are other practices which are not the result of joint**

> **determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation….Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion….But there is no requirement of mutual agreement as a condition precedent to a change of a practice of this character. A contrary holding would place past practice on a par with written agreement and create the anomaly that, while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice.**

Ford Motor Co., **19 LA 237, 241-42 (1957).**

As such, ODNR was within its purview beginning in the late '90s to disavow the unapproved mentality of "straight 8's," and implement accurate time reporting. Any alleged agreement or practice in support of "straight 8's" would have required written agreement pursuant to Article 5 of the Agreement.

Arbitrator Jules Justin held that "In the absence of a written agreement, 'past practice,' to be binding on both Parties, must be:

1. **Unequivocal;**
2. **Clearly enunciated and acted upon; [and]**

3. Readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties.

***Celanese Corp. of America*, 24 LA 168, 172 (1954). The Ohio Supreme Court found the *Celanese* test to be "a sound and logical test" and adopted it. *Association of Cleveland Fire Fighters, Local 93, IAFF v. City of Cleveland* (2003), 99 Ohio St.3d 476.**

Proof of past practice falls upon the Union, which has failed to meet its burden. The Union has failed to demonstrate that in 2009 and 2010, "straight 8's" and the falsification of time records were condoned by ODNR by mutual agreement or that it was in any way an accepted practice by ODNR. Rather, both State and Union witnesses contradict a past practice, and merely tell a disturbing story of the dishonesty and corruption the Grievant adopted for his own benefit.

Timekeeping methodology evolved throughout the '90s; electronic reporting was in place before 2009. The Grievant's conduct of conspiring with his supervisor, either implicitly or with absolute intent, was not the accepted policy or practice of ODNR. The Union's justification of the Grievant's dishonesty should be disregarded.

The ODNR disciplinary grid for the Grievant's offenses range from suspension to removal. The ODNR disciplinary policy recognizes "Certain offenses, by their nature, may warrant more severe disciplinary action up to and including removal, irrespective of issuance of prior discipline." ODNR's concern that the Grievant's falsification of official documents has has caused an irreparable breach of trust is valid.

The Grievant's lack of lengthy service provides no mitigation. Additionally, the Grievant had an active verbal reprimand dated July 17, 2012.

The Ohio Supreme Court has recognized, "it is settled public policy'…that police officers are held to a higher standard of conduct than the general public.'" *Jones v. Franklin County Sheriff* (1990), 52 Ohio St.3d 40. "A dominant, well-defined public policy prohibits the reinstatement of a police officer who falsifies a report…" *City of Ironton, Ohio v. Beth Rist* (2010), 2010-Ohio-5292. As in *Rist*, the Grievant's "continued employment…can only serve to erode public trust and confidence in the department. And because of…vulnerability to impeachment, the department would face a serious problem if it had to rely upon [his] testimony in legal proceeding."

The Grievant, unlike his exempt supervisor, is bound by the Agreement. Article 20.09 provides that "In cases involving termination for dishonesty or making false statements, if the arbitrator finds dishonesty occurred or false statements were made, the arbitrator shall not have authority to modify the disciplinary action." Given the Grievant's dishonesty, the removal should not be altered by the Arbitrator.

Alternatively, the State seeks a finding of just cause and imposition of discipline consistent with the ODNR Disciplinary Policy and with various OCB Awards, including No. 907, *FOP v. ODNR*.

<u>Union Position</u>

The State failed to meet its burden of proving the removal was for just cause. Despite the State's attempt during the arbitration hearing to increase and/or change the charges, the State's case rests upon the three charges in the charging document – 1) dishonesty/willfully falsifying an official document; 2) failure of good behavior; and 3) bringing discredit to the State.

There is no basis for the charge of dishonesty/willful falsification. The Grievant has made no attempt to deceive the State. Throughout the OIG investigation and the subsequent criminal and ODNR investigations, he has been truthful.

The practice of reporting straight 8's was an established practice for thirty years. Each employee who testified at the arbitration, including those called by the State, testified they were taught to report straight 8's on their timesheets regardless of the actual hours worked. Obviously, this practice was conceived to avoid the payment of overtime.

Wildlife officers set their own schedules out of necessity. The position description states they are "on call 24 hrs., 7 days per week." Flextime is not only permitted, it is a necessity. A wildlife officer may work fifteen hours one day and only four hours the next. In accordance with their training and instructions from their supervisors, wildlife officers record 8's hours on their timesheets for each of those days. Brian Goldick, the Acting District Manager for Wildlife, testified that he was instructed to record straight 8's on day one in the Academy. He testified he questioned that and was told if he wanted to be a wildlife officer, he

should shut up about straight 8's. When wildlife officers, including the Grievant, recorded straight 8's, they were simply following orders.

What the Grievant did was no different than what wildlife officers have been instructed to do since 1980. He worked more hours than he reported and he flexed his time. Yes, he went hunting. He has the right to do what he wants with his time off. The State cannot embrace straight 8's for thirty years to avoid the payment of overtime, and then punish dedicated employees for following that method. Using flextime to enable hunting has been accepted by the State for thirty years. The Grievant had no idea in 2009 and 2010 that he was doing something that was prohibited.

David Lane, who worked as a training officer from 2002-2005, testified that officers would sometimes use leave to go hunting, but that if they had put in enough time, they could flex. The State attempted to imply that when the electronic TARS system was instituted, wildlife officers were trained on the proper method for reporting time. David Warner, a former wildlife supervisor, testified at the arbitration that the electronic TARS system training was on how to record, not what to

record. The implementation of the electronic TARS system did not change the requirement for reporting straight 8's.

The State wants to argue the Grievant stole the time he used to hunt because he was on duty. That is just not true. When the Grievant met up with supervisors to go hunting, he signed out. He was off-duty while he hunted. He then signed back in when he had finished hunting.

The Grievant drove his State vehicle to Brown County. He was in uniform. He worked on his way to Brown County. On December 3, 2009, from 7:13 am to about 9:30 am, he was in Clinton County working with a Highland County officer. He filed one ticket in Highland at about 10:20 am. The GPS maps show the Grievant was at the Brown County courthouse at 11:39 am, a time during which the State insists the Grievant was hunting. The Grievant filed several tickets at the Brown County courthouse. At 12:11 pm on December 3, 2009, the Grievant signed off and went hunting. He signed back on at 6:09 pm. He worked 6 hours and 37 minutes that day.

During the week of December 3, 2009, the Grievant worked 65 hours and 55 minutes, not including time spent on paperwork at home.

He reported only 64 hours. As had been the practice, the Grievant donated hours that week.

On December 2, 2010, the Grievant also worked his way to the hunting site. He investigated two spotlighting complaints. That week, he worked 69 hours and 20 minutes, excluding paperwork at home time. He reported only 64 hours on his timesheet. Again, as had been the continuing practice of the State, the Grievant donated hours that week.

The State has failed to show that the Grievant hunted without permission or that he should have taken leave on December 3, 2009 and December 2, 2010. Indeed, it was the Grievant's supervisor, David Warner, who invited him to hunt on both of the days in question. When Mr. Warner was asked during his PBR case if he thought hunting during deer gun week was a policy violation, he answered, "No, because at the time…as we were doing it we felt we were flexing our time….And we also had other higher ranking administrators and supervisors standing right there beside us." Mr. Warner approved the Grievant's timesheets for both weeks in question. Mr. Warner testified at the arbitration hearing that there was no doubt in his mind that the Grievant "worked more hours than were on his timesheet."

Mr. Warner's supervisor, Todd Haines, and the Chief of Wildlife, David Graham, all hunted with the Grievant. They knew the Grievant wore his uniform down to Brown County because he changed his shirt but wore the pants during the hunt. Officers leave their uniform pants on in case they have to respond to a call. Officers take their State vehicles to a hunt in case they have to respond to a call. Mr. Warner, Mr. Haines, and Mr. Graham all knew the Grievant was using flextime to hunt. None of them thought doing so was improper. As far as the Grievant knew, he was not doing anything wrong; his supervisors surely would have told him if he was.

The State cannot subject its employees to a loss of overtime pay and then charge its employees with dishonesty for not reporting time worked that they would be in trouble for if they actually claimed it. The overtime for this unit is not handled in the normal fashion. Officers do not work 15 hours one day and receive 7 hours of overtime for the day. They work 15 hours and receive 8 hours of straight-time for the day because overtime is allocated in advance.

The majority of overtime is available during deer gun season. For example, a memo from Doug Miller, Law Enforcement Supervisor, to all

Commission Personnel dated January 7, 2010 shows the allotment of overtime available during several holidays and enforcement projects. If no overtime is allotted during a specific workweek, employees must obtain permission in advance from a supervisor to report overtime. The use of overtime that has not been allotted is frowned upon. Were employees permitted to record the actual hours worked, the records would reflect an increase in hours, not a decrease, and would result in the payment of more overtime.

The Failure of Good Behavior charge is unspecified. The State has not indicated which specific rules were violated or presented any evidence to show how the failure of good behavior rule was violated. The Union therefore submits no violation occurred. In any event, because the Grievant's behavior was in accordance with his training and approved by his supervisors, the State has failed to prove any failure of good behavior occurred.

The State also has failed to show the Grievant's actions brought discredit to the State. Any publicity about this incident was the result of the State's actions, not the Grievant's. Generally, under the "discredit" rule, the State will provide news articles to show how the State was

crucified by the media. That did not occur here. The State has not been harmed by the Grievant's conduct. The Grievant remains dedicated to the profession of law enforcement and specifically, the Division of Wildlife.

ODNR failed to properly investigate this case; instead, it relied upon the OIG report. The OIG created a report without conducting a proper investigation. Therefore, ODNR's reliance upon the OIG report was inappropriate.

The only two items presented from the ODNR investigation are the Grievant's interview and Richard Corbin's summary. No one bothered to interview the Grievant's supervisors or other employees to see if this was a common practice.. During the Grievant's interview, it is evidence Mr. Corbin had already determined the Grievant was guilty. In his summary, Mr. Corbin purposely misrepresents the Grievant's words to create the appearance of guilt. For example, Mr. Corbin wrote that the Grievant admitted falsifying his time records, but what the Grievant actually said was that the hours he reported were inaccurate because he worked more hours than he reported.

During the arbitration, the State asked the Grievant why he didn't produce GPS records of his whereabouts on the dates in question and the

logs that show what he did on a daily basis. Really? Should that not have been part of the State's investigation, especially in light of the fact that the Grievant had to get those documents from the State through a public records request? ODNR's failure to properly investigate this incident caused the removal of an honest and dedicated employee for conduct that was an accepted practice.

Part of the problem with the ODNR investigation, or the lack of one, appears to be the result of a lack of understanding of the job performed by wildlife officers. For example, Mr. Corbin accused the Grievant of keeping two sets of books. What the Grievant actually had was a notebook he with him into the field that he later used to make computer entries. Wildlife officers spend most of their time in the field where there is no access to a computer.

The State argues the Grievant refused to interview with the OIG at the insistence of the Union. In fact, the Union agreed to an interview so long as it could participate and the Grievant received a Garrity warning. The State refused to give the Grievant a Garrity warning.

The meetings held in 2012 are proof the State was well aware of the use of straight 8's. Mr. Corbin and the Assistant Wildlife Chief went to

each District in 2012 to discuss various issues, including the proper completion of timesheets. At those meetings, it was made clear that no matter how time had been reported in the past, officers were to accurately record their actual hours on timesheets and that they would be paid accordingly. These meetings are an acknowledgement by the State that timesheets had not been accurately reported in the past. The Grievant, however, was removed for following the previously-accepted procedure.

The State failed to follow the progressive discipline found in Article 19.05. In September 2012, the Grievant received a verbal reprimand for losing a key. Assuming that an event occurring after the event for which discipline is sought to be administered can be used to justify the level of discipline administered, the State went from a verbal reprimand to removal, which is not progressive.

The Agreement permits the State to skip disciplinary steps only when there is serious misconduct. Since the Grievant's alleged conduct did not fall into the category of serious misconduct, the State attempted to enlarge the charges.

Ultimately, the question is not whether employees reported straight 8's, but whether the recording of this time was dishonest, whether the Grievant knew this practice was prohibited, and whether his reporting of his time constituted "willfully falsifying" documents. The answer is no. None of the employees, including the Grievant and his supervisors, considered what they were doing to be dishonest. Straight 8's and flextime were a common practice. There was no reason for the Grievant to believe this was prohibited. He had learned during training to record his time in this manner. This method was approved by his supervisors time and again.

There is no evidence the Grievant worked fewer hours than he reported. To the contrary, it has been shown he actually worked more hours than he reported. The Grievant was never dishonest. He simply did what his supervisors told him to do.

The Union requests the Arbitrator sustain the grievance, order reinstatement, and make the Grievant whole, including full backpay and benefits.

OPINION

The State's September 28, 2012 charging letter is the basis for analyzing whether the State had just cause for terminating the Grievant's employment. That letter charges the Grievant with being guilty of:

1. **Dishonesty – willfully falsifying an official document;**
2. **Failure of good behavior; and**
3. **An act that brought discredit to the State.**

It is apparent from the record that the crux of the charges against the Grievant is the dishonesty charge – willfully falsifying an official document. Given that the charging letter does not specify any acts of the Grievant other than willfully falsifying an official document, a finding of guilt on that charge is a condition precedent to a finding of a failure of good behavior and/or of an act that brought discredit to the State. In other words, if the Grievant did not willfully falsify his timesheets, he did not fail to conduct himself with "good behavior" and he did not bring "discredit" to the State. Accordingly, the Arbitrator's analysis focuses on whether the Grievant's timesheets for the days and weeks in question -- December 3, 2009 and December 2, 2010 -- were "willfully falsified" by the Grievant.

The State has accused the Grievant of hunting while on duty during both days in question. ODNR heavily relied on the OIG's July 19, 2012 Report ("the OIG Report") for that finding. The Arbitrator's job is not to evaluate the quality of the OIG Report. Rather, the Arbitrator's job is to determine whether the State had just cause for terminating the Grievant's employment.

The record demonstrates that during 2009 and 2010 (and years before), the Grievant (and his fellow Wildlife Officers) was required to call his supervisor before the workweek started to tell him how many hours the Grievant would expect to be working that week and which two days he would be taking off. When the Grievant (and his colleagues) would fill out the timekeeping software ("TARS") at the end of each pay period, he was expected and had been trained to enter 8 hours for each day worked for most weeks of the year – "straight 8's." As the Grievant testified at the arbitration hearing, "It was never my understanding that was something you weren't supposed to do." Other witnesses testified similarly.[3]

[3] Indeed, an Acting District Manager for Wildlife testified at the arbitration hearing that when he was at the Academy, he questioned the instruction to record straight 8's and was told, "Do you want to be a Wildlife Officer or not? If you do, shut up."

During certain weeks of the year – primarily during gun season – the Grievant (and his colleagues) were authorized in advance to work a certain number of hours of overtime. The TARS for those pay periods would have entries made by the Grievant (and his colleagues) that reflected the preauthorized overtime hours. On the Grievant's December 3, 2009 and December 2, 2010 TARS – the days in question, which were each during gun week when he had been preauthorized to work 64 hours -- he entered 10 hours.

The Grievant admits he went hunting on both of the days in question.[4] But the record shows he clocked out before he went hunting and clocked back in after he was finished hunting. <u>The record also shows that in both of the weeks in question, the Grievant worked more hours</u>

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[4] In fact, he was hunting along with his supervisor and Department managers. Moreover, the Grievant's supervisor approved his timesheets for the weeks in question. As the Grievant's supervisor testified at the arbitration hearing:

> I knew Matt had been hunting on both of those days and may not have been working the certain hours those days. As long as you worked the hours, you were fine. There was no doubt he worked more than the hours on his timesheets.

than he was paid for.[5] **Indeed, the record shows the Grievant often worked more hours in a week than he was paid for.**

As the Grievant credibly testified, it was not until 2012 that the Grievant and his colleagues were told to "just record your hours as you actually worked them." That is certainly what should occur. Doing so would make the Wildlife Officers' timekeeping practices in line with the Parties' Agreement, and state and federal wage and hour law.

Before 2012, however, the record overwhelmingly shows it was the understood practice by all affected employees and management to record on TARS straight 8's and evenly-allocated, pre-authorized overtime, regardless of actual hours worked. The Grievant and his colleagues were permitted – and indeed expected – to flex their hours to meet the irregular needs of the position.

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[5] Log-in and log-out records show the Grievant worked over 65 hours during the week of December 3, 2009, and over 69 hours during the week of December 2, 2010. As he was expected to do, he entered into TARS and was paid for 64 hours for each of those weeks. As the Grievant credibly testified at the arbitration hearing:

> I worked more hours than I got paid for. I went the extra mile. I'm the one who didn't get compensated. I did stuff the way I was taught to do….The only one cheated was myself. Everyone donated hours during gun week. We love our job. There's nobody else to do it. We do what needs to be done….The overtime was approved before I worked during the week. You'd spread the overtime hours over the week…this is the way I was led to believe it was supposed to be….You make your TARS match the overtime….Everybody flexed their time just like I did. Everybody worked more hours than they were paid….Nobody ever told me I was violating the timekeeping rule.

It would be fundamentally unjust – in the context of the Parties' collectively-bargained Article 19 standard of just cause – to hold the Grievant to a standard that did not get communicated to him until after the days in question for which he has been accused of wrongdoing. In the context of the arbitration record, the Grievant did not "willfully falsify" any official documents. The State cannot retroactively apply its 2012 timekeeping procedure to 2009 and 2010.

AWARD

For the reasons stated above, the grievance is granted. The State did not have just cause to terminate the Grievant's employment and thereby violated Article 19 of the Parties' Agreement.

As discussed above, Article 20.09 of the Parties' Agreement is not triggered because the Grievant's conduct was not dishonest in the context of this matter; nor did the Grievant make any false statements in the context of this matter.

The State is hereby ordered to reinstate the Grievant to his former position as a Wildlife Officer in Clinton County, Ohio. If that assignment is not available, the State is ordered to give the Grievant his choice of available Wildlife Officer positions.

If no Wildlife Officer positions are available, the State is ordered to place the Grievant on paid administrative leave until a Wildlife Officer position in any Ohio county becomes

available, or any other ODNR position in which the Grievant is interested and for which he is qualified becomes available.

The State also is ordered to compensate the Grievant for all lost backpay, seniority, and benefits. Set-offs for interim earnings, including unemployment benefits received, shall be made.

For purposes of implementing the remedy only, the Arbitrator retains jurisdiction until and including December 31, 2014.

March 6, 2014 *Susan Grody Ruben*
Arbitrator