

In the Matter of Arbitration	:	Grievance Number: COM-2015-01552-14
	:	
Between the	:	
	:	
OHIO DEPARTMENT OF COMMERCE,	:	Grievant: Dale L. Dittrick
	:	
Employer	:	
and the	:	
	:	Date of Hearing: May 4, 2016
OHIO CIVIL SERVICE EMPLOYEES	:	
ASSOCIATION, AMERICAN	:	
FEDERATION OF STATE, COUNTY	:	
AND MUNICIPAL EMPLOYEES,	:	Howard D. Silver, Esquire
LOCAL 11, AFL-CIO,	:	Arbitrator
	:	
Union	:	

DECISION AND AWARD OF THE ARBITRATOR

APPEARANCES

For: Ohio Department of Commerce, Employer

John Dean
 HCM Manager
 Ohio Department of Commerce
 77 South High Street, 23rd Floor
 Columbus, Ohio 43215
John.Dean2@com.state.oh.us

For: Ohio Civil Service Employees Association, American Federation
 of State, County and Municipal Employees, Local 11, AFL-CIO, Union

Michael Scheffer
 Staff Representative
 OCSEA, AFSCME, Local 11, AFL-CIO
 390 Worthington Road, Suite A
 Westerville, Ohio 43082
mscheffer@ocsea.org

TABLE OF CONTENTS

	Page
Case Caption	1
Appearances	1
Procedural Background	3
Stipulated Issue	3
Joint Stipulations of Fact	3
Joint Exhibits	4
Statement of the Case	4
Summary of Testimony	20
Frank Conway	20
Larry L. Flowers	22
Tim Thompson	23
Christine Lightner	26
Dan Ely	27
Gerald F. Robinson	27
Carol Yoders	29
Mike Isgett	29
William T. Spradlin	30
Kenny Thompson	31
Dale L. Dittrick	32
Positions of the Parties	32
Position of the Employer	32
Position of the Union	41
Discussion	49
Award	66
Certificate of Service	67

PROCEDURAL BACKGROUND

This matter came on for an arbitration hearing on May 4, 2016 at 10:00 a.m. in a conference room at the Ohio Fire Academy at 8895 East Main Street, Reynoldsburg, Ohio 43068. At the hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The hearing concluded on May 4, 2016 at 4:10 p.m. and the evidentiary record was closed at that time.

This matter proceeds under the collective bargaining agreement, Joint Exhibit 1, that was in effect between the parties from March 1, 2012 through February 28, 2015.

Each of the parties filed a post-hearing brief with the arbitrator by June 13, 2016 and these post-hearing briefs were exchanged between the parties by the arbitrator on June 14, 2016.

No challenge to the arbitrability of the grievance has been raised. Under the language of the parties' Agreement, Joint Exhibit 1, the arbitrator finds the grievance arbitrable and properly before the arbitrator for review and disposition.

STIPULATED ISSUE

Did the Ohio Department of Commerce remove the grievant from his position as a Fire Training Officer 2 for just cause?

If not, what shall the remedy be?

JOINT STIPULATIONS OF FACT

The parties stipulated to the following facts:

1. Dale Dittrick began employment with the Department of Commerce on February 1, 2010.

2. Mr. Dittrick was a Fire Training Officer 2 in the Division of the State Fire Marshal for the entirety of his employment with the Department of Commerce.

JOINT EXHIBITS

The parties stipulated to the authenticity and admissibility of the following Joint Exhibits:

Joint Exhibit 1 – Parties’ Collective Bargaining Agreement – in effect March 1, 2012 through February 28, 2015.

Joint Exhibit 2 – Grievance Trail – Grievance number COM-2015-01552-14

Joint Exhibit 3 – Report of Investigation – Ohio Department of Commerce, Investigation Number 14-005

Joint Exhibit 4 – Discipline Trail – Pre-Disciplinary Notice, Pre-Disciplinary Report and Recommendation, and Notice of Removal dated May 6, 2015

Joint Exhibit 5 – Letter from Licking County Prosecutor Kenneth W. Oswalt dated March 23, 2015

Joint Exhibit 6 – Ohio Inspector General’s Report of Investigation, File ID No.: 2013 - CA00030, issued March 4, 2014

Joint Exhibit 7 – Ohio Department of Commerce Discipline Policy, Policy Number 201.0 – Revised Date: January, 2013

STATEMENT OF THE CASE

The parties to this arbitration proceeding, the Ohio Department of Commerce, the Employer, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, the Union, are parties to a collective bargaining agreement that was in effect from March 1, 2012 through February 28, 2015, Joint Exhibit 1.

Within the parties’ Agreement, Joint Exhibit 1, is Article 24 - Discipline which begins in section 24.01- Standard with the following language: “Disciplinary action shall not be imposed

upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action...”

Article 24, section 24.02 – Progressive Discipline in paragraph (e), Termination provides:

Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence, consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer’s decision to begin the disciplinary process.

Article 24, section 24.05 – Pre-Discipline begins with the following language: “An employee has the right to a meeting prior to the imposition of a suspension, a fine, leave, reduction, working suspension or termination.” Section 24.05 also includes the following language:

... Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action.

Article 24, section 24.05 concludes with the following language: “At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-disciplinary meeting may be delayed until after disposition of the criminal charges.”

Article 24, section 24.06 – Imposition of Discipline begins with the following language:

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-discipline meeting. The decision on the recommended disciplinary action shall be delivered to the employee, if available, and the Union in writing within sixty (60) days of the date of the pre-discipline meeting, which date shall be mandatory. It is the intent to deliver the decision to both the employee and the Union within the sixty (60) day timeframe; however, the showing of delivery to either the employee or the Union shall satisfy the Employer’s procedural obligation. At the discretion of the Employer, the sixty (60) day requirement will not apply in cases where a criminal investigation may occur

and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The collective bargaining agreement between the parties applicable to this proceeding, Joint Exhibit 1, also includes an agreed grievance procedure presented in Article 25 – Grievance Procedure. Article 25, section 25.01 – Process in paragraph (A) defines “grievance” as “any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement.”

The grievant in this proceeding, Dale L. Dittrick, was hired by the Ohio Department of Commerce on February 1, 2010 to serve as a Fire Training Officer 2 in the Division of the State Fire Marshal for the purpose of providing instruction at the Ohio Fire Academy. The Division of the State Fire Marshal is within the Ohio Department of Commerce. For the entirety of his employment with the Ohio Department of Commerce Mr. Dittrick served as a Fire Training Officer 2. See Joint Stipulations 1 and 2.

When Mr. Dittrick had been applying to fill a Fire Training Officer 2 position at the State Fire Marshal’s Ohio Fire Academy located in Reynoldsburg, Ohio, during a pre-employment interview, Mr. Dittrick was asked about the location of his residence. Mr. Dittrick explained that his residence was located in Brookville, Ohio, a community located to the northwest of Dayton, Ohio that is ninety miles from the Ohio Fire Academy in Reynoldsburg, Ohio. The position sought by Mr. Dittrick was assigned to the Ohio Fire Academy where the incumbent of the position was to report on a daily basis during the work week from 8:00 a.m. to 5:00 p.m., most frequently Monday through Friday but with occasional weekend instruction. Mr. Dittrick responded during his pre-employment interview when questioned about the distance of his residence in Brookville, Ohio from the Ohio Fire Academy in Reynoldsburg, Ohio and the 180-mile daily commute

necessitated by the distance separating the work site from Mr. Dittrick's residence that this would not be problem for him because he had relatives living in the Columbus, Ohio area near Reynoldsburg, Ohio with whom Mr. Dittrick could stay. Mr. Dittrick's assurances in this regard were accepted and Mr. Dittrick was hired as a Fire Training Officer 2 effective February 1, 2010, assigned to duties at the Ohio Fire Academy located in Reynoldsburg, Ohio.

During the first three years of Mr. Dittrick's employment as a Fire Training Officer 2 at the Ohio Fire Academy, that is, from February 1, 2010 through March 4, 2013, neither the Ohio Fire Academy nor the Ohio State Fire Marshal nor the Ohio Department of Commerce had had a written policy in place that addressed the use of dormitory facilities at the Ohio Fire Academy by Ohio Department of Commerce staff. Dormitory rooms at the Ohio Fire Academy are made available for overnight accommodations to students receiving instruction at the Ohio Fire Academy. Until March 5, 2013 when an initial written policy concerning staff usage of Ohio Fire Academy dormitory facilities was issued, no written policy about Department of Commerce staff using the Ohio Fire Academy dormitories was in existence.

Effective March 5, 2013 a written policy that addressed staff usage of the Ohio Fire Academy dormitories was issued that remained in effect until October 4, 2013 at which time a revised policy on staff usage of the Ohio Fire Academy dormitories was issued.

On May 3, 2013 the Ohio Department of Commerce directed to the Office of the Ohio Inspector General an anonymous written complaint that had been received by the Ohio Department of Commerce. The anonymous written complaint passed along to the Ohio Inspector General's Office alleged that two state employees of the Ohio Department of Commerce's State Fire Marshal's Office were living at the State Fire Marshal's Ohio Fire Academy in the academy's dormitories. It was alleged in this anonymous complaint that these two employees, Dale Dittrick

and Dennis Dupree, had been living at these state of Ohio facilities at the Ohio Fire Academy for two years. In response to the anonymous complaint received on May 3, 2013, the Office of the Ohio Inspector General opened an investigation effective May 14, 2013 and conducted an investigation of Dale Dittrick, a Fire Training Officer 2; Dennis Dupree, a Fire Training Supervisor; and a third employee, William T. Spradlin, a Deputy Director 2/Bureau Chief who had been accused of separate allegations.

The investigation conducted by the Office of the Ohio Inspector General into the dormitory usage at the Ohio Fire Academy began with a request directed to the Division of the State Fire Marshal for all applicable policies and procedures, timesheets, key card access records, dormitory room assignment records, instructor class assignments, instructor logs, and emails. The Office of the Ohio Inspector General received two written policies from the State Fire Marshal, one that addressed the usage of dormitory facilities at the Ohio Fire Academy by academy students and another policy that addressed the use of Ohio Fire Academy dormitory facilities by people not employed by the Ohio Department of Commerce. The Office of the Inspector General received no written policy that addressed the use of Ohio Fire Academy dormitory facilities by Ohio Fire Academy staff that was in effect prior to February 26, 2013.

On February 26, 2013 a new written policy was issued by the Superintendent of the Ohio Fire Academy, Dana Smith that addressed the use of dormitory facilities at the Ohio Fire Academy by Ohio Department of Commerce staff, including State Fire Marshal and Ohio Fire Academy staff. This new policy was distributed to Mr. Dittrick and other employees on March 5, 2013 and was distributed to staff at a meeting on March 11, 2013.

The new written policy that addressed the use of Ohio Fire Academy dormitory facilities by Ohio Department of Commerce staff received by Mr. Dittrick on March 5, 2013, Joint Exhibit

3, page 10, stated that the use of the dormitories by Ohio Department of Commerce full-time staff was limited to "... participating in a multiday course where the course is scheduled to occur or continues into the evening and the class scheduled requires the employee to be available early the next morning of the multiday course." This policy allowed the Ohio Fire Academy dormitory facilities to be used in the event of inclement weather or other extreme events or emergencies that may necessitate a Department of Commerce staff member staying in the Ohio Fire Academy dormitories.

The March 5, 2013 written policy about the use of Ohio Fire Academy dormitory facilities concludes with the following language:

5. It is inappropriate and unacceptable for any DOC employee to use Academy dormitory rooms for any purpose other than those listed above without the approval of one of the following: the Director of Commerce, the State Fire Marshal, Chief Deputy Fire Marshal or Academy Superintendent.

6. Single or consecutive overnight stays that are not in accordance with the foregoing provisions are not permitted.

See Joint Exhibit 3, page 10.

The Ohio Inspector General's report of investigation, Joint Exhibit 6, presents descriptions of interviews of Mr. Dittrick and other employees of the Division of the State Fire Marshal and the Ohio Fire Academy. These interviews include former Ohio Fire Academy Superintendent Frank Conway who was serving as the Superintendent of the Ohio Fire Academy in 2010. At the time of the interview of Mr. Conway Mr. Conway was serving as Chief of the Bureau of Fire Prevention. Mr. Conway recalled during his interview by the Office of the Inspector General that occurred on July 25, 2013 that it had come to Mr. Conway's attention in early 2011 that Mr. Dittrick was continuing to live in the Ohio Fire Academy dormitory facilities. Mr. Conway recalled

meeting with Deputy Superintendent of the Ohio Fire Academy Gerald Robinson and directing Mr. Robinson to “take care of it.” Mr. Conway told his interviewer that Mr. Conway had thought that the matter had been handled but apparently there had not been follow-up.

Gerald Robinson, former Deputy Superintendent of the Ohio Fire Academy, was interviewed by the Office of the Ohio Inspector General on July 24, 2013. During this interview Mr. Robinson recalled that prior to the issuance of a first written policy about Ohio Department of Commerce staff using the dormitories at the Ohio Fire Academy, staff members simply requested a dormitory room and would be assigned one. Mr. Robinson recalled that the written policy had been instituted in reaction to the residence of Dennis Dupree and Dale Dittrick in the dormitory at the Academy.

When Mr. Robinson was re-interviewed by the Office of the Ohio Inspector General on September 30, 2013 Mr. Robinson was asked whether Superintendent Conway had directed Mr. Robinson to follow up on the Dupree/Dittrick situation at the dormitory facilities. Mr. Robinson told the interviewer that he had no recollection of being directed by Superintendent Conway to address that situation and Mr. Robinson stated that if he had been directed to handle it he would have taken care of it.

The Office of the Ohio Inspector General’s report of investigation describes an interview of Scott Walker on July 24, 2013. Scott Walker was the employee in charge of the day-to-day operation of dormitory facilities at the Ohio Fire Academy and responsible for the security of key cards used at these dormitory facilities. Mr. Walker recalled asking Ohio Fire Academy Superintendent Dana Smith about why the change in usage policy had occurred. Superintendent Smith responded, according to Mr. Walker’s recollection, that the State Fire Marshal had been informed that Mr. Dittrick and Mr. Dupree were staying in dormitory facilities at the Ohio Fire

Academy during the work week and they should not be living there. Mr. Walker told his interviewer that he, Mr. Walker, had assumed that Mr. Dupree and Mr. Dittrick had had permission to stay in the Ohio Fire Academy dormitory facilities. Mr. Walker noted that it had not been a secret that these two employees were residing in the Ohio Fire Academy dormitory facilities.

Mr. Walker was re-interviewed on September 30, 2013. Mr. Walker stated at that time that he did not recall a meeting wherein Ohio Fire Academy Superintendent Conway had directed Mr. Walker or Deputy Superintendent Robinson to stop Mr. Dittrick and Mr. Dupree from continuing to reside in the Ohio Fire Academy dormitories.

Dana Smith, the Superintendent of the Ohio Fire Academy since late August, 2012 was interviewed on September 26, 2013. Superintendent Smith informed the interviewer from the Inspector General's Office that he had learned in February, 2013 that Mr. Dittrick was residing in the Ohio Fire Academy dormitory. Superintendent Smith stated that he considered it a misuse of these facilities. Because there was no written policy as to Ohio Department of Commerce employees residing at the Ohio Fire Academy dormitory facilities, Superintendent Smith determined to establish such a written policy and did so in February, 2013, distributing the policy to all State Fire Marshal employees at a staff meeting on March 11, 2013.

On August 8, 2013 and again on September 26, 2013 the Office of the Ohio Inspector General interviewed Kenny Thompson, an Administrative Professional 2 working within the Ohio Fire Academy's Registrar's Office. Mr. Thompson's duties included assigning dormitory rooms to students and, when appropriate, to Ohio Fire Academy staff. Mr. Thompson told the interviewer from the Inspector General's Office that Mr. Dittrick had stayed in Ohio Fire Academy dormitory rooms almost as if the dormitory was his residence. Mr. Thompson told the interviewer that Mr. Dittrick had requested dormitory rooms after the release of the new policy in March, 2013. Mr.

Thompson noted that while he assigned dormitory rooms at the Ohio Fire Academy to students and staff, he did not know if these people actually stayed in the assigned rooms overnight. Mr. Thompson noted that prior to Superintendent Smith there had been no written policy on the use of Ohio Fire Academy dormitory facilities by Ohio Department of Commerce staff.

Also interviewed on September 26, 2013 by the Office of the Ohio Inspector General was Deborah Storts who worked in the Registrar's Office at the Ohio Fire Academy. Ms. Storts had not been aware of a new policy as to dormitory usage at the Ohio Fire Academy by departmental staff until an investigation had been initiated. Ms. Storts recalled that when employees had asked for a dormitory room their requests were accommodated. Ms. Storts recalled that Mr. Dittrick and Mr. Dupree had stayed in the Ohio Fire Academy dormitory rooms over extended periods of time. Ms. Storts stated that although dormitory rooms had been assigned to Mr. Dittrick and Mr. Dupree on numerous occasions, Ms. Storts could not say from first-hand knowledge that they had stayed overnight in the rooms assigned.

Dennis Dupree was interviewed by the Office of the Ohio Inspector General on August 8, 2013 during which Mr. Dupree stated that he had stayed at the dormitories at the Ohio Fire Academy but noted that: "It was hit and miss." Mr. Dupree stated he had assumed he had had permission "but it seems like it wasn't as freely open as I thought." Mr. Dupree told the interviewer that he would sometimes secure a dormitory card but typically would just use his regular access card as a supervisor at the Ohio Fire Academy to access the dormitory facilities as his card provided twenty-four hour, seven day per week access, including access to dormitory rooms. Mr. Dupree told the interviewer that he, Mr. Dupree, knew that Mr. Dittrick "... stays here and does a lot of work after hours." See Joint Exhibit 6, page 11.

Dale Dittrick was interviewed by the Office of the Ohio Inspector General on August 8, 2013 during which Mr. Dittrick confirmed that he had stayed in the Ohio Fire Academy dormitories “a fair amount of time” during winter months. Mr. Dittrick told the interviewer that since the establishment of the new policy he had stayed at the Ohio Fire Academy dormitory twice. When asked whether he had lived in the Ohio Fire Academy dormitory prior to the new policy, Mr. Dittrick had responded: “I had been.” Mr. Dittrick explained that it had mostly been during the winter and stated that Superintendent Conway had known that Mr. Dittrick was there.

Mr. Dittrick told his interviewer from the Ohio Inspector General’s Office that after his assigned duty hours Mr. Dittrick would help with evening classes, answer questions from students, assist in cleaning up after class, and handle paperwork. Mr. Dittrick told his interviewer that he would stay late quite frequently and had not requested overtime payment for these extra hours.

Based upon an examination by the Office of the Ohio Inspector General of Ohio Fire Academy dormitory room logs, instructors’ schedules, and instructors’ logs from March, 2013 through August, 2013 it was found that Mr. Dittrick had reserved an Ohio Fire Academy dormitory room on twenty-one days. In one instance Mr. Dittrick was listed as an instructor; on three occasions Mr. Dittrick was listed as working twelve-hour days, all on a Saturday. On those three occasions Mr. Dittrick had reserved an Ohio Fire Academy dormitory room the day before and the day after instruction. All other work days were found to have been reported by Mr. Dittrick to have been between 8:00 a.m. and 5:00 p.m.

The Office of the Ohio Inspector General found that Mr. Dittrick had seventeen occasions when he was not working late and/or early the next day necessitating a dormitory stay. The Office of the Inspector General stated that Mr. Dittrick was unable to justify these dormitory stays based

on weather or an emergency. The Office of the Inspector General found that these seventeen occasions were not in accordance with the new policy and should not have occurred.

The Office of the Ohio Inspector General found reasonable cause to believe that a wrongful act or omission had occurred.

The report of the investigation by the Office of the Ohio Inspector General was issued on March 4, 2014. On March 5, 2014 the Ohio Department of Commerce commenced its investigation into Mr. Dittrick's usage of Ohio Fire Academy dormitory facilities.

The investigation initiated by the Ohio Department of Commerce on March 5, 2014 was assigned case number COM 14-005. The Ohio Department of Commerce's investigation considered Mr. Dittrick's use of Ohio Fire Academy dormitory rooms without proper public purpose and/or in violation of State Fire Marshal policy during three distinct time periods: February 1, 2010 through March 4, 2013, when no written policy was in existence that addressed Ohio Department of Commerce staff usage of the Ohio Fire Academy dormitory facilities; March 5, 2013 through October 3, 2013, the period of time when the initial written policy on Ohio Department of Commerce staff usage of the Ohio Fire Academy dormitory facilities was in effect, and from October 4, 2013 through March 27, 2014, a period of time during which a revised written policy that addressed Ohio Department of Commerce staff usage of Ohio Fire Academy dormitory facilities was in place.

The investigation conducted by the Ohio Department of Commerce initiated on March 5, 2014 looked at Mr. Dittrick's time reporting, work-related tasks assigned to Mr. Dittrick including Ohio Fire Academy course/class data, Ohio Fire Academy training records from 1988 through March 25, 2014, Mr. Dittrick's personal calendar from February 24, 2013 through August 24, 2013, course records for Firefighter I and II classes, and courses offered to emergency medical

technicians (EMTs). The Ohio Department of Commerce examined dormitory usage records, dormitory reservation logs, Ohio Fire Academy dormitory room assignment summaries, and handwritten dormitory room reservation cards from 2010 through 2014.

Interviews conducted by the Ohio Department of Commerce in the conduct of its investigation included former Superintendent of the Ohio Fire Academy Frank Conway, Dale Dittrick, Dennis Dupree, State Fire Marshal Larry Flowers, Chief Deputy State Fire Marshal Jeff Leaming, Gerald Robinson, former Deputy Superintendent of the Ohio Fire Academy; Dana Smith, Superintendent of the Ohio Fire Academy since August, 2012; Ohio Fire Academy Registrars Debbie Storts and Kenny Thompson, and Deputy Superintendent of the Ohio Fire Academy Scott Walker.

The Ohio Department of Commerce's investigation found dormitory usage at the Ohio Fire Academy by Mr. Dittrick from February 1, 2010 through March 4, 2013 on a regular basis for reasons grounded in Mr. Dittrick's personal convenience, a circumstance confirmed by the interviews of Gerald Robinson and Kenny Thompson. The Ohio Department of Commerce investigation found eighty-eight days upon which Mr. Dittrick accessed the Ohio Fire Academy dormitory facilities without an offer to pay for the use of these facilities by Mr. Dittrick.

The Ohio Department of Commerce's report of its investigation referred to Superintendent Conway's direction that Mr. Dittrick not be permitted to continue to reside in the Ohio Fire Academy dormitory facilities but because there was no written policy prohibiting such use and because of some disagreement about what directions were communicated concerning Mr. Dittrick's extended stay at the Ohio Fire Academy dormitory facilities, the Ohio Department of Commerce found at page four of the report of its investigation:

... Thus, to the extent that each of Dittrick's stays needed supervisor approval or had to be in accordance with a formal written policy, it cannot be concluded that the stays were unauthorized.

The Ohio Department of Commerce found in its investigation that unreimbursed stays at the Ohio Fire Academy dormitory rooms were to occur as needed by the agency and cannot include use of state property for personal benefit or gain, an impermissible violation of Ohio law under Ohio Revised Code sections 2913.02, Theft; 2913.04, Unauthorized use of property – computer, cable, or telecommunication property; 2913.41, Defrauding a rental agency or hostelry; and 2921.421, Prosecuting Attorney, elected chief legal officer, or township law director appointment of assistants or employment of employees.¹

The Ohio Department of Commerce found through its investigation that during the initial time period at issue, February 1, 2010 through March 4, 2013, there had been ten occasions when Mr. Dittrick had reported work beyond an assigned eight-hour work day. These ten days include May 17, 18, and 19, 2011 at the State Emergency Operations Center; April 28 and 29, 2012 for unknown reasons; and October 13, 14, 20, and 21, 2012 to teach volunteer firefighting on a weekend. The Ohio Department of Commerce found October 13, 14, and 20, 2012 to have been three occasions of operational need by the academy leaving eighty-five days of dormitory usage at the Ohio Fire Academy by Mr. Dittrick when the operational need of the academy was not the reason for the stay.

The Ohio Department of Commerce's investigation looked at the time period March 5, 2013 through October 4, 2013, the time period of the first written policy that addressed Ohio

¹ The Ohio Department of Commerce's investigation report refers to a violation of Ohio Revised Code section 2921.421 which refers to the Prosecuting Attorney, elected chief legal officer, or township law director appointment of assistants or employment of employees. The arbitrator believes this citation to Ohio Revised Code section 2921.421 to be typographical error. The arbitrator believes that the citation intended was Ohio Revised Code section 2921.41, Theft in Office.

Department of Commerce staff usage of the Ohio Fire Academy dormitories. For this time period the Ohio Department of Commerce looked at dormitory reservation logs, dormitory room registration cards, recorded usage of Mr. Dittrick's State Fire Marshal employee identification card to gain access to the dormitory facilities, dormitory room key assignment records, dormitory room key card access records, and associated data. The Ohio Department of Commerce found twenty-seven potential dates of Ohio Fire Academy dormitory room usage by Mr. Dittrick between March 5, 2013 and October 4, 2013. The Ohio Department of Commerce found that among these twenty-seven occasions, nine days of dormitory usage by Mr. Dittrick could be verified. Those verified stays were for the nights of March 6, 7, 16, 17, 22, 23, 24, and 25, 2013 and May 4, 2013. The Ohio Department of Commerce found that what could not be verified as improper was the use by Mr. Dittrick of dormitory rooms for the nights preceding, during, or immediately after March 16, 2013; March 17, 2013; March 22, 2013; March 23, 2013; March 24, 2013; and May 4, 2013.

Of the remaining dates, March 6, 7, and 25, 2013, it is reported that Mr. Dittrick claims to have been given time to remove his personal belongings but the report of investigation notes no written approval for these stays and no agency operational need for these stays. The investigation by the Ohio Department of Commerce questioned why two days were needed to move out of a dormitory room. The Ohio Department of Commerce's investigation found March 6, 7, and 25, 2013 to have been unauthorized uses of Ohio Fire Academy dormitory facilities under the written policy then in effect about Ohio Department of Commerce staff usage.

As to the time period October 4, 2013 through March 27, 2014, the Ohio Department of Commerce did not find Ohio Fire Academy dormitory usage by Mr. Dittrick that was in violation of the written policy then in effect.

The Ohio Department of Commerce's investigation found that during the October 4, 2013 to March 27, 2014 time period, in response to the issuance of the Ohio, Inspector General's report, Mr. Dittrick had placed a piece of tape on his State Fire Marshal-issued uniform that made the uniform appear to be a prison uniform. The tape had a number written upon it that represented a prisoner's identification number on a jailhouse uniform. The investigative report stated that Mr. Dittrick had admitted he should not have attached the tape to his uniform. The allegation in this regard was determined founded.

The Ohio Department of Commerce's investigation concluded on September 26, 2014 with the following conclusions: 1) Mr. Dittrick had engaged in unauthorized use of dormitory rooms without a proper public purpose and/or in violation of State Fire Marshal policy; 2) for the time period February 1, 2010 through March 4, 2013 no written State Fire Marshal dormitory use policy existed and therefore no violation of a written State Fire Marshal policy occurred during this time period; 3) from March 5, 2013 through October 3, 2013 Mr. Dittrick used Ohio Fire Academy dormitory rooms on March 6, 7, and 25, 2013 in violation of the State Fire Marshal's policy on Ohio Department of Commerce staff's use of such facilities; 4) for the time period October 4, 2013 through March 27, 2014 no improper use by Mr. Dittrick of Ohio Fire Academy dormitory rooms was found; 5) the Ohio Department of Commerce's investigation found that Mr. Dittrick had placed an unauthorized label on his uniform that served to discredit the Department.

On September 26, 2014 a notice of a pre-discipline meeting scheduled for October 3, 2014 at 9:00 a.m. was directed to Dale Dittrick. This memorandum, Joint Exhibit 4, notified Mr. Dittrick that the purpose of this memorandum was to give notice to him that he may be disciplined for violation of department work rules and that the potential level of this discipline could be a

reprimand, suspension, or removal based on the following charges. There follows in the pre-disciplinary notice the following:

#2 – Insubordination – Failure to follow written or known policies, procedures, practices and/or supervisory direction

#5 – Any act that embarrasses, discredits or interferes with the Department's mission

#4 – Failure of Good Behavior – any actions disruptive to the workplace; unprofessional conduct; discourteous and/or rude treatment of another or the public

It is alleged that during the time frame of February 1, 2010 through March 4, 2013, and on March 6, 2013, March 7, 2013 and March 25, 2013, you used the Ohio Fire Academy dormitory rooms on 88 days. However it is alleged that your usage did not meet an operational need and that you did not pay for the use of the dorm room. Further, it is alleged that on March 4, 2014 you placed and wore an unauthorized label on your State Fire Marshal provided work uniform in response to a report that was issued by the Office of the Ohio Inspector General on March 4, 2014.

The pre-discipline meeting scheduled for October 3, 2014 was rescheduled for October 10, 2014. In attendance at the October 10, 2014 pre-discipline meeting was Dale Dittrick, employee; Christine Lightner, Union Chapter President; Tim Thompson, Management Representative/Investigator; Diane Lease, Management Representative/Investigator; and Dina Karshner, Labor Relations Officer. A written report of the October 10, 2014 pre-discipline meeting appears in the hearing record in Joint Exhibit 4, a memorandum dated November 14, 2014 prepared by Dina Karshner, Office of Human Resources, the presiding Employer representative at the October 10, 2014 pre-disciplinary meeting.

On May 6, 2015 the Director of the Ohio Department of Commerce directed written notice to Dale Dittrick that advised Mr. Dittrick that effective immediately upon receipt of this letter, Mr. Dittrick was removed from his Fire Training Officer 2 position within the Division of the State

Fire Marshal. This notice stated that the removal of Mr. Dittrick was based upon violations of department work rules as set forth in policy 201.0 of the Department's Policy and Procedures Manual, and specifically cited rules #2 – insubordination – Failure to follow written or known policies, procedures, practices and/or supervisory direction; #5 – Any act that embarrasses, discredits or interferes with the Department's Mission; #4 – Failure of good behavior – any actions disruptive to the workplace; unprofessional conduct; discourteous and/or rude treatment of another or the public.

On May 11, 2015 a grievance was filed on behalf of Dale Dittrick that claimed that Mr. Dittrick's employment had been terminated by the Employer without just cause. The grievance filed on behalf of Mr. Dittrick requested a remedy that includes reinstating Mr. Dittrick to his former position with all back pay and benefits, and in all other ways making Mr. Dittrick whole. The grievance remained unresolved between the parties and the grievance was moved to final and binding arbitration at the direction of the Union.

SUMMARY OF TESTIMONY

Frank Conway

Frank Conway since July, 2012 has served as the Chief of the State Fire Marshal's Fire Prevention Bureau. In 2010 Mr. Conway had been serving as the Superintendent of the Ohio Fire Academy.

Mr. Conway recalled a pre-employment interview of Dale Dittrick about the Fire Training Officer 2 position sought by Mr. Dittrick in early 2010. During the pre-employment interview of Mr. Dittrick Mr. Dittrick's residence was discussed. Mr. Dittrick's residence at that time was located in Brookville, Ohio near Dayton, Ohio, ninety miles from the Ohio Fire Academy in Reynoldsburg, Ohio. Also discussed with Mr. Dittrick during this pre-employment interview was

the fact that the work of the position he was seeking was scheduled from 8:00 a.m. to 5:00 p.m. Monday through Friday at the Ohio Fire Academy in Reynoldsburg, Ohio. Mr. Conway recalled that Mr. Dittrick had stated that this would not be a problem for Mr. Dittrick as he had family members living nearby in Columbus, Ohio with whom Mr. Dittrick could stay.

Mr. Conway testified that staying at the Ohio Fire Academy dormitory required a business-related reason for doing so. In October, 2010 Superintendent Conway became aware of employees living in the Ohio Fire Academy dormitory. Mr. Conway stated in his testimony that it had been possible for Mr. Dittrick to secure a key to a dormitory room without securing supervisory approval.

Under questioning by the Union representative, Mr. Conway stated that he had served as Superintendent of the Ohio Fire Academy for twelve years and moved from this position in the fall of 2012. Mr. Conway confirmed that during his tenure as Superintendent of the Ohio Fire Academy there had been no written policy in place about Ohio Department of Commerce staff using the Ohio Fire Academy dormitory facilities. Mr. Conway noted that his then Assistant Superintendent, Gerald Robinson, had been overseeing the operation of the dormitory facilities and Mr. Conway stated that as Superintendent of the Ohio Fire Academy he had been served by two Deputy Superintendents, Gerald Robinson and Scott Walker. Mr. Conway recalled that the Ohio Fire Academy dormitory facilities in 2010 had been relatively new, having been constructed in 2006. These facilities included a student lounge that contained a pool table and a television set. Mr. Conway testified that the first written policy on Ohio Department of Commerce staff usage of Ohio Fire Academy dormitory facilities was established in March, 2014.

Mr. Conway confirmed that during his tenure as the Superintendent of the Ohio Fire Academy Ohio Department of Commerce staff could secure approval from a registrar at the

academy for a dormitory room and no additional approval had been required. Mr. Conway confirmed that there was no policy against an Ohio Department of Commerce staff member entering the dormitory facilities to interact with students in the dormitory and in the student lounge.

Larry L. Flowers

Larry L. Flowers is Ohio's State Fire Marshal and has served in this capacity since April, 2011. State Fire Marshal Flowers testified that in early 2013 an anonymous, handwritten note was received that complained of improper usage of Ohio Fire Academy dormitory facilities by Ohio Department of Commerce staff. State Fire Marshal Flowers testified that he had had no prior knowledge of Mr. Dittrick using the Ohio Fire Academy dormitory rooms.

State Fire Marshal Flowers testified that the policy of the State Fire Marshal that first took effect in March, 2013 and was revised in October, 2013 requires an operational need on the part of the agency or an extenuating circumstance such as inclement weather or an emergency for an Ohio Department of Commerce staff member to properly utilize the Ohio Fire Academy dormitory facilities. State Fire Marshal Flowers testified that he had never authorized Mr. Dittrick to use the Ohio Fire Academy dormitory facilities, and both Mr. Dupree and Mr. Dittrick were removed from their employment with the Ohio Department of Commerce. Deputy Superintendent Robinson was suspended for thirty days for a failure to adequately manage these employees.

Under questioning by the Union representative, State Fire Marshal Flowers testified that he was not aware of a written policy in effect concerning Ohio Department of Commerce staff members' usage of Ohio Fire Academy dormitory facilities until March, 2013. State Fire Marshal Flowers remained of the opinion, however, that usage of the Ohio Fire Academy dormitory facilities required an approval.

State Fire Marshal Flowers testified that he turned over the anonymous, handwritten complaint to the Ohio Department of Commerce's General Counsel, Diane Lease, who in turn directed the complaint to the Office of the Ohio Inspector General.

State Fire Marshal Flowers testified that the information gathered about Mr. Dittrick's usage of Ohio Fire Academy dormitory facilities was presented to the Licking County, Ohio Prosecuting Attorney, Kenneth W. Oswalt, for a consideration of whether a misuse of state property had occurred such that a criminal offense had been perpetrated.

State Fire Marshal Flowers testified that he is of the opinion that when an employee resides in a dormitory on eighty-eight separate days in three and one-half years, that the employee was living at that location.

Tim Thompson

Tim Thompson serves as the legal counsel to the State Fire Marshal and has served in this capacity since September, 1999. Mr. Thompson participated directly as an investigator in the inquiry conducted by the Ohio Department of Commerce into Mr. Dittrick's usage of Ohio Fire Academy dormitory facilities. Mr. Thompson noted that the initiation of the investigation he participated in with the Ohio Department of Commerce's General Counsel, Diane Lease, had been held in abeyance until the investigation by the Office of the Ohio Inspector General had been completed and issued on March 4, 2014. Mr. Thompson testified that he began in the investigation on March 5, 2014.

Mr. Thompson testified that the investigation conducted by the Ohio Department of Commerce into Mr. Dittrick's usage of Ohio Fire Academy dormitory facilities was divided among three time periods: February, 2010 through March, 2013; March, 2013 through October, 2013; and

after October, 2013. Mr. Thompson identified Joint Exhibit 3 as the report that was produced by the investigation conducted by the Ohio Department of Commerce.

Mr. Thompson noted that prior to March, 2013 there had been no written policy about the use of Ohio Fire Academy dormitory facilities by Ohio Department of Commerce staff. Mr. Thompson noted that Mr. Dittrick admitted to using the dormitory facilities at the Ohio Fire Academy and claimed to have had permission to do so. Mr. Thompson noted in his testimony that using state property for personal gain was and remains a violation of Ohio Revised Code Chapter 2921., Offenses Against Justice and Public Administration.

Mr. Thompson noted that from 2010 through March, 2013 swipe cards had been used to gain access to the dormitory facilities at the Ohio Fire Academy and it was found that Mr. Dittrick had used a swipe card to gain entry to the dormitory facilities. Mr. Thompson testified that a card was needed to get into a dormitory room. Prior to March 5, 2013 Mr. Thompson noted that it had been difficult to reconstruct which entries involved an overnight stay in an Ohio Fire Academy dormitory room and which entries did not. Mr. Thompson testified that the Ohio Department of Commerce's investigation found eighty-eight separate dates upon which Mr. Dittrick accessed the dormitory facilities at the Ohio Fire Academy, usually after assigned working hours, with no ostensible reason to be in the Ohio Fire Academy dormitory. As an example, Mr. Thompson referred to pages 15 and 16 of the Ohio Department of Commerce's report of investigation, showing that on Thursday, February 3, 2011 Mr. Dittrick had entered the dormitory facilities at 10:08 p.m.

Mr. Thompson testified that the Ohio Department of Commerce investigators looked at time records, matched teaching assignments and work status with dates of dormitory usage and found three instances of dormitory usage by Mr. Dittrick that had had an operational or emergency

purpose. Mr. Thompson noted that Mr. Dittrick's assigned duty hours had been Monday through Friday, 8:00 a.m. to 5:00 p.m. and Mr. Dittrick had, on less than ten occasions, requested payment for overtime hours worked.

Mr. Thompson testified that from March, 2013 through October, 2013 when a written policy about Ohio Department of Commerce staff usage of the Ohio Fire Academy dormitory facilities had been in effect, it was found that March 6, 2013; March 7, 2013; and March 25, 2013 had been days upon which Mr. Dittrick stayed in the Ohio Fire Academy dormitory that had no approval attached to them.

Mr. Thompson stated that after October, 2013 no improper usage of the Ohio Fire Academy dormitory by Mr. Dittrick was found by Ohio Department of Commerce investigators.

Under questioning by the Union representative, Mr. Thompson was referred to Joint Exhibit 6, the report of the investigation by the Office of the Ohio Inspector General at page 12 (paginated in the report as page 9) which presents the following:

Of the total number of stays at the OFA dorms listed above for Dittrick and Dupree, an analysis showed Dittrick stayed at the dorms 17 times and Dupree 54 times in which their timesheets and their instructor logs showed they were not working late the day before or early the next day that would have necessitated their need to stay in the dorms...

Mr. Thompson testified that this would have been only during the period when a written policy was in effect, from March, 2013 on.

Mr. Thompson testified that Mr. Dittrick's Ohio Fire Academy dormitory use had been improper because it had been for Mr. Dittrick's personal benefit.

Mr. Thompson was asked whether Mr. Dittrick had been forthcoming in his interaction with Ohio Department of Commerce investigators. Mr. Thompson recalled in his testimony that

Mr. Dittrick had always been affable but had not provided clear answers to investigators' questions and some of Mr. Dittrick's answers were not direct responses to the questions put to him.

Christine Lightner

Christine Lightner is a Union steward and Union Chapter President and has served as Union Chapter President since the beginning of 2012.

Union Chapter President Lightner testified that she had talked to Ohio Department of Commerce investigator Lease about Mr. Dittrick and had been told that the department was alleging that Mr. Dittrick had been staying in dormitory facilities without approval and the department believed that Mr. Dittrick had been staying overnight at these dormitory facilities. Union Chapter President testified that she was told that only card swipes and room reservations were available to show Mr. Dittrick's dormitory usage.

Union Chapter President Lightner testified that there had been a pre-discipline meeting but neither the Union nor the grievant received a copy of the pre-disciplinary meeting hearing officer's report prior to the discharge of Mr. Dittrick. President Lightner testified that this report was first made available to the Union and the grievant at the time Mr. Dittrick's employment was terminated. Union Chapter President Lightner testified that she was never told by a representative of the Employer that Mr. Dittrick's case was being held in abeyance. Union Chapter President Lightner testified that she was told that there was the potential for a criminal charge but when she saw Joint Exhibit 5, the correspondence from Licking County, Ohio Prosecuting Attorney Kenneth W. Oswald dated March 23, 2015 that said it was too early to decide whether a criminal charge was warranted against Mr. Dittrick but stated in the letter that the state of Ohio was free to go forward with whatever employee-disciplinary action the State Fire Marshal deemed appropriate.

Union Chapter President Lightner testified that the Union had believed that the allegations against Mr. Dittrick had been resolved when no disciplinary action had been taken within sixty days. Union Chapter President Lightner referred to a Step 2 grievance meeting for which a response from the Employer had been expected but never received.

Dan Ely

Dan Ely is a Union staff member who had talked to Dina Karshner, the pre-disciplinary meeting hearing officer. Ms. Karshner informed Mr. Ely that: "Everything's done." Mr. Ely was not told that criminal proceedings were pending. Mr. Ely testified that after the pre-disciplinary meeting the Union and Mr. Dittrick had expected to receive a copy of the hearing officer's report.

Under questioning by the Employer representative, Mr. Ely stated that he had not reviewed the Ohio Inspector General's report and had not been aware that the matter had been referred to the Licking County Prosecutor's Office.

Gerald F. Robinson

Gerald F. Robinson began his employment with the Division of the State Fire Marshal in 2000 and retired in October, 2015. For one and one-half years Mr. Robinson served as a Deputy Superintendent of the Ohio Fire Academy, was promoted to the position of Chief Deputy to the State Fire Marshal, a position from which he served until January, 2007. Mr. Robinson was then as a Public Information Officer 2 for one year and then returned to the Ohio Fire Academy as a Deputy Superintendent of the academy.

Mr. Robinson explained that the current Ohio Fire Academy dormitory area was opened in January, 2007 following a major remodeling of the dormitory facilities. Mr. Robinson recalled that anyone who had wanted to stay at the dormitory facilities filled out a form at the registrar's office,

with students having the option of staying in a private room for \$60 per night or staying in a double occupancy room for \$30 per night. Mr. Robinson explained that employees were required to stay overnight at the dormitory under certain circumstances associated with teaching a course, Mr. Robinson noted that Mr. Dittrick could request to stay at the dormitory, and employees were not charged for these stays.

Mr. Robinson testified that the State Fire Marshal had no written policy on Ohio Department of Commerce staff usage of Ohio Fire Academy dormitory usage until after the Ohio Inspector General's investigation had been initiated. Mr. Robinson recalled that if an employee wanted to stay at the dormitory the employee talked to Superintendent Frank Conway and the employee would stay. Mr. Robinson recalled no discussion about what was appropriate versus what was inappropriate. Mr. Robinson recalled that he stayed occasionally overnight at the Ohio Fire Academy dormitory and recalled that there had been no prohibition of any kind about entering the dormitory area. Mr. Robinson stated that an employee's stay at the Ohio Fire Academy dormitory facilities was to be for an operational need of the agency, for example, if class instruction ran into an evening and started up early the next day.

Mr. Robinson recalled that training materials had been stored in at least one closet at the Ohio Fire Academy dormitory.

Mr. Robinson was aware of no documentation as to his overnight stays at the dormitory. Mr. Robinson recalled that it had been an open situation, that is, people staying in the dormitory.

Under questioning by the Union representative, Mr. Robinson recalled that before, when the Superintendent of the Ohio Fire Academy had been Frank Conway, Superintendent Conway had determined who could stay at the Ohio Fire Academy dormitory. Mr. Robinson recalled that Superintendent Conway had had to approve who would stay in the Ohio Fire Academy dormitory.

Mr. Robinson recalled that there had been applied a “shotgun approach” to a problem tha had been completely flawed.

Carol Yoders

Carol Yoders, until her retirement in October, 2011, worked within the Division of the State Fire Marshal, having begun her employment there in 1998. Ms. Yoders retired from the Division of the State Fire Marshal as an Administrative Assistant. One of Ms. Yoders’ duties was to send out billing invoices for stays in the dormitory at the Ohio Fire Academy, stays that were posted by the Ohio Fire Academy’s Registrar’s Office.

Ms. Yoders recalled that she received a folder containing the identities of those employees who were not to be billed. Ms. Yoders recalled that during this time period the Superintendent of the Ohio Fire Academy had been Frank Conway. Ms. Yoders testified that at that time she had not been aware that the Ohio Fire Academy dormitories were being used inappropriately.

Ms. Yoders recalled that she had been aware of dormitory usage by Mr. Dittrick. Ms. Yoders testified that it had been through word of mouth and recalled that it had been common knowledge.

Mike Isgett

Mike Isgett is an intermittent instructor at the Ohio Fire Academy who teaches Firefighting 1 and 2, Hazardous Materials, and Rescue, and occasionally stays at the Ohio Fire Academy dormitory facilities. Mr. Isgett began providing instruction at the Ohio Fire Academy in 2010 along with Mr. Dittrick.

Mr. Isgett testified that prior to the present entry procedures used at the Ohio Fire Academy dormitory facilities, if a student had an identification card the student could gain access to the

dormitory. Mr. Isgett testified that today for access to the Ohio Fire Academy dormitory facilities a person must possess an access ID card.

Mr. Isgett recalled that after work he would semiregularly run into Dale Dittrick and eat supper with him later in the evening. Mr. Isgett recalled that when Mr. Dittrick was in the dormitory he was talking to students about classes that were coming up.

Under questioning by the Employer representative, Mr. Isgett explained that his residence is in West Portsmouth, Ohio, 110 miles and two hours of travel from the Ohio Fire Academy in Reynoldsburg, Ohio.

Mr. Isgett recalled that whenever he did stay at the Ohio Fire Academy dormitory he would notify the Registrar's Office and always notified the Registrar's Office if he intended to stay overnight.

William T. Spradlin

William T. Spradlin worked as the State Fire marshal's Arson Bureau Chief from January, 2008 through September, 2014, managing twenty-one Arson Bureau investigators.

Mr. Spradlin recalled that in January, 2008 when he accepted the job of Chief of the Arson Bureau the Assistant Superintendent of the Ohio Fire Academy at that time, Mr. Cooper, had informed Mr. Spradlin that any time Mr. Spradlin needed to stay over he was just to check out a key for use of a dormitory room. Mr. Spradlin stated that this was a common practice among field staff.

Mr. Spradlin recalled seeing Dale Dittrick in his office late at night and sometimes they dined together.

Kenny Thompson

Kenny Thompson joined the State Fire Marshal's Division in July, 1989 and retired effective June 1, 2015. Mr. Thompson entered the State Fire Marshal's Division as a Clerk, moved to an Administrative Assistant 1 position, and retired from an Administrative Professional 2 position. Mr. Thompson served as a registrar for students at the Ohio Fire Academy, making dormitory reservations upon request.

Mr. Thompson recalled that when Frank Conway had been the Superintendent of the Ohio Fire Academy there had been no written policy on the use of the Ohio Fire Academy dormitory facilities by Ohio Department of Commerce staff and therefore determining what was an appropriate stay at the Ohio Fire Academy dormitory had been left up to Mr. Thompson. Mr. Thompson expressed his concern to Superintendent Conway and had been told not to worry about it, that it did not affect Mr. Thompson.

Mr. Thompson testified that Mr. Dittrick was treated no differently than any other person, receiving access to a dormitory room only if he signed out a card. Mr. Thompson testified that Mr. Dittrick could not access a dormitory room unless he had a card issued by Mr. Thompson. Mr. Thompson testified that there is a record of each time Mr. Dittrick accessed the Ohio Fire Academy dormitory facilities, but to stay overnight in a dormitory room required a card issued by Mr. Thompson.

Mr. Thompson stated that he served as a registrar for over twenty years.

Under questioning by the Employer representative, Mr. Thomson testified that he had expressed his concern to Superintendent Conway about Mr. Dittrick using the Ohio Fire Academy dormitory facilities because of the frequency with which Mr. Dittrick was using these facilities so frequently. Mr. Thompson testified that he was instructed by Superintendent Conway to forget it.

Dale D. Dittrick

Dale D. Dittrick, the grievant in this proceeding, testified that his overnight stays in the Ohio Fire Academy dormitory had not been wrong. Mr. Dittrick was asked whether he had maintained records about the occasions upon which he stayed overnight at the Ohio Fire Academy dormitory facilities and Mr. Dittrick responded that he had not.

Mr. Dittrick testified that after a policy was issued by the State Fire Marshal concerning Ohio Department of Commerce staff usage of the Ohio Fire Academy dormitory facilities, Mr. Dittrick had stayed at the dormitory facilities only with approval. Mr. Dittrick recalled that he would bring spare clothes to the dormitory. Mr. Dittrick recalled that he received a bill for a long list of stays at the Ohio Fire Academy dormitory, a bill amounting to \$2,834.43.

Mr. Dittrick testified that he had not been interviewed by any criminal investigator. Mr. Dittrick recalled that when he asked Dina Karshner about the sixty-day timeframe for disciplinary action to occur that had already elapsed, Ms. Karshner had responded: "Relax, it's over." Mr. Dittrick testified that he had never been informed that the Employer intended to hold his disciplinary case in abeyance.

POSITIONS OF THE PARTIES

Position of the Director of the Ohio Department of Commerce, Employer

On behalf of the Employer, the Director of the Ohio Department of Commerce, post-hearing written arguments were submitted that begin with a consideration of the procedural issues raised by the Union at the arbitration hearing.

First, as to the lack of a response from the Employer to a Step 2 grievance meeting conducted on July 21, 2015, a mutually agreed date for the Step 2 grievance meeting, the Employer

points out that the parties at that time were operating under a Memorandum of Understanding that contracted the five grievance steps formerly described in the parties' agreed grievance procedure to four grievance steps under the Memorandum of Understanding. This contraction in grievance steps occurred through combining Steps 1 and 2 under the former grievance procedure to form a single first step under the Memorandum of Understanding. Thus, notes the Employer, what had been under the prior grievance procedure a Step 3 grievance meeting, under the Memorandum of Understanding became a Step 2 grievance meeting.

The Employer notes that the Step 2 grievance meeting under the Memorandum of Understanding was held on July 21, 2015, and one week after the Step 2 grievance meeting, on July 28, 2015, the Union appealed the grievance to mediation. The mediation hearing was scheduled for August 4, 2015, all within the thirty-five days allowed for a Step 2 response from the Employer following the Step 2 grievance meeting.

The Employer notes that on the date set for mediation, August 4, 2015, the Union waived mediation of the grievance.

The Employer points to the language of Article 25, section 25.02 that provides:

If the grievance is not resolved at Step 3, or if the Agency is untimely with its response to the grievance at Step Three, absent any mutually agreed to time extension, the Union may appeal the grievance to mediation...

See Joint Exhibit 1, page 103.

The Employer points out that the language of Article 25, section 25.06 of the parties' Agreement, Joint Exhibit 1, at pages 106-107, reads as follows:

In the absence of such extensions at any step where a grievance response of the Employer has not been received by the grievant and the Union representative within

the specified time limits, the grievant may file the grievance to the next successive step in the grievance procedure.

The Employer argues that the Step 2 response from the Employer did not occur because the thirty-five days allowed for such a response were truncated by the Union's direction, after only seven days, that the matter be moved to mediation. The Employer points out that the Union then waived the mediation the Union had requested and now claims the arbitrator should sustain the grievance because a Step 2 response from the Employer was not received. The Employer points out that the remedy for a lack of response to a Step 2 grievance meeting is the authority to file the grievance at the next successive grievance step in the grievance procedure as expressed in Article 25, section 25.06. The Employer claims that the lack of a Step 2 response from the Employer does not support sustaining the grievance in this case and any and all remedies for a lack of a Step 2 response available under the parties' Agreement have been afforded the Union. The Employer claims that a lack of a Step 2 response in this matter on these facts provides the Union with no grounds to complain that it was disadvantaged in any way and the Employer contends that this procedural issue should be rejected by the arbitrator as a basis for sustaining the grievance.

The second procedural issue raised by the Union at the hearing, as argued by the Employer, referenced the fact that the pre-disciplinary meeting report was not provided to the Union or the grievant prior to the imposition of discipline. A third procedural issue raised by the Union contends that the discipline imposed was untimely, based upon the date of the pre-disciplinary meeting that occurred on October 10, 2014.

As to the pre-disciplinary meeting report issued by the hearing officer who presided at the pre-disciplinary meeting that occurred on October 10, 2014, the Employer points out that there is no language in the parties' collective bargaining agreement that requires the Employer to provide

this pre-disciplinary meeting report to the employee or the Union prior to the imposition of discipline. The Employer contends that that information required to be provided to the Union and the employee prior to imposing discipline as provided in express language in the parties' collective bargaining agreement was satisfied by the Employer in this case. The Employer claims that it had neither a contractual duty nor did it engage in any past practice that called for the provision of the pre-disciplinary meeting report to the grievant and the Union prior to the imposition of discipline.

The Union complains that the discipline imposed in this case occurred more than sixty days after the pre-disciplinary meeting, in contravention of the language of Article 24, section 24.06 of the parties' collective bargaining agreement. The Employer points to other express language in Article 24, section 24.06 that reads: "At the discretion of the Employer, the sixty (60) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on discipline until after disposition of the criminal charges."

The Employer contends that its belief that a criminal investigation could occur as a result of the actions of Mr. Dittrick at the Ohio Fire Academy dormitory facilities was reasonably rooted in the action of the Office of the Ohio Inspector General which referred the matter of Mr. Dittrick's Ohio Fire Academy dormitory usage to the Licking County, Ohio Prosecuting Attorney. The Employer deferred to the decision of the Licking County, Ohio Prosecuting Attorney and did not proceed with disciplinary action against the grievant until the Licking County Prosecuting Attorney had had an opportunity to reach a conclusion about whether criminal charges were to be lodged against Mr. Dittrick. The Employer contends that the grievant is entitled to no relief based on this procedural objection and the Employer asks the arbitrator to overrule all of the procedural objections raised by the Union.

The Employer notes that the Union has complained of a failure by the Employer to produce documents, in particular weekly status reports of Mr. Dittrick. The Employer agrees that the Union has a right to documents that are “reasonably available from the Employer and relevant to the grievance under consideration.” See Joint Exhibit 1, Article 25, section 25.09, page 107. The Employer contends that it undertook every reasonable effort to locate the documents requested by the Union, culminating in a meeting between the Employer, the Union, and the grievant that included the Employer’s Chief Information Security Officer. The Employer contends the parties searched the Employer’s files in an attempt to locate the requested information but were unsuccessful in locating this information.

The Employer notes that while the Union claims that these documents were known to the Employer because they were referenced at the pre-disciplinary meeting on October 10, 2014, the Employer points out that neither the pre-disciplinary report nor the notes taken by Tim Thompson at the meeting reference to the reports or arguments these reports allegedly support.

The Employer points out that at the arbitration hearing the grievant testified he emailed his status reports to a supervisor. The Employer was able to produce the grievant’s complete Outlook files that included his calendar appointments, email messages, and attachments. The Employer points out that this information was made available to the Union months prior to the arbitration hearing and the Employer contends that those documents requested by the Union that were found by the Employer were turned over to the Union. The Employer argues that the procedural objections raised by the Union should be rejected.

As to the just cause underlying the discharge of the grievant from a Fire Training Officer 2 position effective May 6, 2015, the Employer points out that the grievant was provided with forewarning and notice of the Employer’s work expectations, having received Agency work rules

at the time of his hire and notice of updates, as well as annual ethics training. Former Ohio Fire Academy Superintendent Frank Conway testified at the arbitration hearing of what was expected in terms of Mr. Dittrick's living arrangements as communicated to Mr. Dittrick at a pre-employment interview immediately prior to Mr. Dittrick's hire effective February 1, 2010.

The Employer argues that for the use of dormitory facilities at the Ohio Fire Academy to be proper the use must serve a public purpose. The Employer refers to a thorough, complete, and objective investigation conducted by the Ohio Department of Commerce culminating in a report of investigation, Joint Exhibit 3. The Employer points out that the information gathered was analyzed fairly and reasonably, and both employees who were determined to have stayed at the Ohio Fire Academy dormitory facilities for their personal convenience had their employment terminated, an appropriate degree of discipline, argues the Employer, given the widespread personal use of the state dormitory facilities.

The Employer points out that at the pre-employment interview of Mr. Dittrick by Ohio Fire Academy Superintendent Frank Conway Mr. Dittrick had been provided specific, express, advance notice that the dormitory facilities were to be used for the business needs of the Academy or due to exigent circumstances such as an emergency or inclement weather.

The Employer concedes that under Ohio Fire Academy Superintendent Conway use of the Ohio Fire Academy dormitory facilities by Ohio Department of Commerce employees was based upon an honor system under which an employee need only check out a key from the registrar's office to access a dormitory room. While the Employer maintained a card reservation system for the use of dormitory rooms, it proved to be incomplete, and keys could be checked out with nothing more than another, non-supervisory employee handing them out. The Employer claims a reservation card was filled out for a room key only sporadically.

As to the initial time period considered by the Ohio Department of Commerce in its investigation, from February 1, 2010 through March 4, 2013, when no written policy about Ohio Department of Commerce staff usage of the Ohio Fire Academy dormitories had been in place, the investigation by the Ohio Department of Commerce identified eighty-five nights on which a proper public purpose could not be established for Mr. Dittrick's stay. These dates were established through badge swipe records which showed Mr. Dittrick accessing dormitory areas. The Employer concedes it cannot establish which dormitory room was used by Mr. Dittrick. The Employer points out, however, that Mr. Dittrick admitted during his investigatory interview to staying "semi-frequently" in dormitory rooms during this time period. See Joint Exhibit 3, page 47. This information was corroborated by information from investigatory interviews of Gerald Robinson, Kenny Thompson, and Debbie Storts. The Employer claims the grievant stayed in the dormitory rooms without approval and without a public purpose. The Employer claims there is a preponderance of evidence in the hearing record establishing that the grievant utilized the dormitory facilities for personal gain without a legitimate business purpose on eighty-five occasions during the February 1, 2010 through March 4, 2013 time period.

As to the time period from March 4, 2013 through October 4, 2013 when an initial written policy was established as to Ohio Department of Commerce staff usage of the Ohio Fire Academy dormitories, the grievant stayed in dormitory rooms at the Ohio Fire Academy on three nights in violation of the written policy then in effect and in violation of state law.

The Employer notes that badge swipe records, course schedules, students' records, instructors' records, timesheet information, and calendar notes were reviewed to determine if and when the grievant stayed inappropriately at the Ohio Fire Academy dormitory. The Employer notes that during this time period dormitory access key swipes were available and were reviewed

to determine when the grievant swiped a card to enter a specific dormitory room. The review of this information, argues the Employer, shows the grievant stayed in the dormitory rooms without a public purpose and in violation of the dormitory use policy then in effect, on March 6, 7, and 25, 2013.

The Employer does not allege inappropriate Ohio Fire Academy dormitory usage by the grievant after October 4, 2013.

As to the witnesses called to testify by the Union, the Employer notes that testimony from Union Chapter President Christine Lightner was primarily directed at procedural issues. The Employer contends that nothing described in the testimony of Union Chapter President Lightner supports the conclusion that the Ohio Department of Commerce's investigation violated the grievant's rights under the parties' collective bargaining agreement. The Employer reiterates that the investigation it conducted was thorough and fair.

As to the testimony provided by Gerald Robinson, the former Deputy Superintendent of the Ohio Fire Academy, the Employer points out that Mr. Robinson confirmed that an approval was required from the Ohio Fire Academy's Superintendent to stay in the dormitory facilities. Mr. Robinson talked about legitimate reasons for staying in the Ohio Fire Academy dormitory, none of which are applicable to the grievant in this case during his inappropriate stays at the dormitory.

Mike Isgett, an intermittent instructor, confirmed that he only stays in the Ohio Fire Academy dormitory when there is a legitimate reason to stay and always informed the registrar's office when he did so.

As to Mr. Dittrick's testimony that he was never instructed that overnight stays in the Ohio Fire Academy dormitory facilities were wrong and Mr. Dittrick's testimony that he complied with the dormitory use policy once it was established in that he only stayed in the dormitory after March

4, 2013 with approval, the Employer contends that these claims are not supported by statements from Mr. Dittrick in prior interviews by the Office of the Ohio Inspector General or by the Ohio Department of Commerce. When questioned about who authorized his stays, the Employer points out that Mr. Dittrick had said: “[he didn’t] believe there was anyone specifically authorizing his stays. If it was needed, dorms are available whether student or instructor.” See Joint Exhibit 3, page 48. The Employer points out that while Mr. Dittrick refers to a “need” to use the dormitory facilities, what the grievant is unable to establish is a legitimate business reason to use the facilities on numerous occasions. The Employer claims that the grievant used the Ohio Fire Academy dormitory facilities as an extension of his personal space.

It is the position of the Employer that it has established by a preponderance of the evidence in the hearing record the grievant’s improper use of the Ohio Fire Academy dormitory facilities and this usage was extensive. The Employer acknowledges that while no formal written dormitory use policy existed until March 4, 2013, Ohio law does not and did not permit a public employee to use state resources for private gain. Even after extending to the grievant every benefit of the doubt, the Ohio Department of Commerce found eighty-eight occasions during which Mr. Dittrick stayed at the dormitory facilities at the Ohio Fire Academy without a public purpose. The Employer notes that the grievant was given an opportunity to support these stays but the grievant was not able to do so.

The Employer points out that the grievant has never explained why he chose to stay at the dormitory at the Ohio Fire Academy rather than at a family member’s home as he had indicated he would during a pre-employment interview. The grievant cannot explain, argues the Employer, why the grievant used the dormitory facilities as an extension of his personal space. Based on Mr. Dittrick’s extensive personal use of this valuable public resource, the Employer claims it executed

the only disciplinary action commensurate with the offenses underlying the grievant's repeated, frequent, and improper behavior, removal.

The Employer contends there was just cause for the discharge of the grievant; the Employer claims there are no procedural defects that violated the grievant's rights under the parties' collective bargaining agreement, and the Employer urges the arbitrator to deny the grievance in its entirety.

Position of the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Union

On behalf of the Union and the grievant it is noted that the grievant's employment was terminated based upon insubordination; an act that embarrasses, discredits, or interferes with the Department's Mission, and a failure of good behavior. It is contended by the Union that the Employer has failed to meet the burden of proof required to establish just cause for the discharge of the grievant. The Union contends that the termination of the employment of the grievant violates the language of Article 24, section 24.06 that provides: "Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment."

The Union notes that until the discharge of the grievant on May 6, 2015 Mr. Dittrick had received no discipline of any kind and, as argued by the Union at page one of its post-hearing brief: "... It is not as if he had been charged with the most severe and egregious behaviors such as theft, violence, or some other heinous behavior that one would expect when the employer proceeds directly to termination."

The Union contends that there has been no evidence presented showing that the actions of the grievant were so egregious that the most severe penalty available, termination, was warranted. The Union points out that the hearing record clearly reflects the Employer had no policy governing

the use of the dormitory facilities at the Ohio Fire Academy for the first three years of Mr. Dittrick's employment as a Fire Training Officer 2, and when a written policy was put in place the grievant complied with the policy. The Union contends that the hearing record reflects that from the time the dormitory usage policy went into effect in 2013 until Mr. Dittrick's discharge in May, 2015 Mr. Dittrick had had no unauthorized overnight stays in the dormitory facilities at the Ohio Fire Academy.

The Union concedes that Mr. Dittrick had stayed overnight in the dormitory facilities at the Ohio Fire Academy and the Union points out that neither the Union nor the grievant has ever argued otherwise. The Union argues that Mr. Dittrick, however, had wholeheartedly believed that it was permissible for him to stay in the dormitory facilities at the Ohio Fire Academy and the Union points out that there is no evidence in the hearing record indicating that the grievant had ever been put on notice, in writing or orally, that his actions were impermissible. The Union argues that had Mr. Dittrick been told that it was not permissible for him to have acted as he did the events leading to this arbitration proceeding would not have occurred.

As to the reasonableness of the grievant's belief that it was permissible for Mr. Dittrick to stay overnight in the Ohio Fire Academy dormitory facilities, the Union notes that the grievant's direct supervisor, Mr. Dupree, had been aware that Mr. Dittrick sometimes stayed overnight in the dormitory facilities and supervisor Dupree himself had also been staying overnight in the Ohio Fire Academy dormitory facilities. The Union claims that Mr. Dittrick never tried to hide the fact of his stays at the Ohio Fire Academy dormitory and followed the only procedure of which he had been made aware. That procedure consisted of going to the registrar's office, and requesting and securing a room key, and returning to the registrar's office with the room key after the dormitory room stay was over. The Union contends that as far back as the 1970s there had been no policy on

Ohio Department of Commerce staff usage of the dormitory facilities at the Ohio Fire Academy and it had been a common occurrence among Ohio Department of Commerce employees to stay overnight at the Ohio Fire Academy dormitory. The Union argues that the Employer cannot contend that it had been unaware that no policy existed as the lack of such policy was known to a number of witnesses who testified at the arbitration hearing, including Registrar Ken Thompson. Registrar Ken Thompson had had the authority to assign dormitory rooms and followed the only procedure in place prior to March 5, 2013, that is, when Mr. Dittrick requested the use of a dormitory room and one had been available, Mr. Thompson assigned a dormitory room to Mr. Dittrick, providing a room key to him for this purpose. The Union notes that Ken Thompson in his testimony recalled that Mr. Dittrick's ID badge had not had a key to any dormitory room in which people slept, only to the dormitory's recreational area. If the grievant desired a room at the dormitory to sleep in one would have been assigned to him by the registrar's office. Ken Thompson testified that any time he checked a dormitory room out to the grievant the system would generate the appropriate paperwork that would authorize the grievant to stay in the dormitory room. The Union notes that when Ken Thompson approached Superintendent Conway about the lack of a clear, written policy on dormitory usage by Ohio Department of Commerce staff, Ken Thompson was informed that the question he was raising was "above your pay grade."

The Union argues that the facts cited above can only be construed as tacit approval by management for Mr. Dittrick's stays at the dormitory facilities. The Union contends that the evidence available and the sheer amount of time involved makes it implausible that supervisors were unaware of how the dormitories were being used. The Union points out that it was not until an anonymous written complaint was directed to the Ohio Department of Commerce and forwarded on to the Office of the Ohio Inspector General that the Employer decided to implement

a written policy. The Union describes Mr. Dittrick as a scapegoat used to redirect attention away from the absence of actions that should have been taken by managers during the time periods in question.

The Union argues that the Employer presented no evidence indicating why it was necessary to terminate the employment of the grievant and no evidence was presented showing that the discharge of the grievant is commensurate with the severity of the charges lodged against the grievant. The Union points out that no testimony was offered as to why a lesser level of discipline would not have been appropriate and beneficial to both the grievant and the Employer or if a lesser level of discipline had even been considered. The Union argues that there is no evidence in the hearing record proving that the grievant, in fact, violated any work rule or policy.

The Union points out that although Tim Thompson provided testimony at the arbitration hearing from his perspective as an investigator who worked with General Counsel Diane Lease in investigating this matter on behalf of the Ohio Department of Commerce, Tim Thompson had had no role in determining whether the Employer possessed just cause to discipline the grievant. The Union claims that other people in the Ohio Department of Commerce determined whether any work rule or policy had been violated.

At page four of the Union's post-hearing brief the following appears:

... On cross examination, I began to question Mr. Thompson on how he felt his investigation proved that the grievant has spent the night on the dates that were turned over to the Attorney General's office for collection. Mr. Thompson then testified that it wasn't a case of whether the grievant spent the night in the dorms but rather it was of the grievant having merely been present in the dorm area after hours. This was an absolute shocking statement to the Union and was surprising evidence. This directly contradicts the employers own documents that have been used and referred to repeatedly throughout this entire matter. The Union argues that this amounts to what is essentially a "bait and switch". Even the currently implemented policy governing the dorm rooms has no prohibition against using the recreational areas, but rather only addresses staying overnight. At that moment in

time that Mr. Thompson made that statement was the very first instance that it had ever even been suggested that the grievant was being charged for anything other than staying overnight. This contradicts everything contained in the record. There has never been a single individual in the history of the State Fire Marshal's office who has been charged for merely accessing the dormitories. The only time that anyone has been charged is for staying overnight in the dormitories. This testimony is even in direct contradiction to the hearing officers report that had been turned in to Director Porter. A cursory review of the hearing officers report (Joint Ex.4 pg.1) makes it irrefutably clear that this is simply not the case. Management had only ever been concerned with, and made issue of, the dates in which they felt they could prove that the grievant had spent the night in a dorm. The hearing officer is the person of record whose primary task is that of making a determination of whether probable cause exists to pursue disciplinary action against the grievant for violation of work rules. In the hearing officers report, the hearing officer clearly states in her finding that the dates in question had been narrowed down to only three (3) days. The hearing officer then continues on in the report and further narrows it down to only two (2) days. This 2 day in question was what the hearing officer had very clearly based her finding on and is what was turned over to Director Andre Porter for him to make his ultimate determination...

The Union argues that the "bait and switch" by the Employer simply serves to illustrate the arguments and procedural defects raised by the Union. The Union claims the Employer's charges against the grievant at the pre-disciplinary meeting and the charges about which Tim Thompson had provided testimony are two different things and such a change from a pre-disciplinary meeting to the imposition of discipline to post-discipline procedures presents a grievous due process violation. The Union argues that had a Step 2 response been provided by the Employer this confusion would have been avoided. The Union argues that the testimony from Tim Thompson is not relevant to the charges against the grievant used to terminate his employment.

The Union then turns its attention to the procedural issues raised at the arbitration hearing.

The first procedural issue addressed by the Union in its post-hearing brief is grounded in Article 25, section 25.09 that prohibits the Employer from unreasonably denying a request by the Union for specific documents, books, papers or witnesses reasonably available to the Employer and relevant to the grievance under consideration. The Union argues that the Union had made

numerous and repeated requests for information in reference to the circumstances of the grievant beginning in May, 2015 but these requests had been ignored. By January, 2016 and March, 2016 the requested information had still not been provided to the Union by the Employer, and when the Employer took action and looked for the information requested by the Union, the information was not found. The Union claims that for some unexplained reason all of this evidence was found to be missing although this evidence was gleaned from the same documents used by the grievant at the pre-disciplinary meeting, the same evidence used to establish the times Mr. Dittrick stayed in the dormitory rooms.

The Union refers the arbitrator to Article 25, section 25.02, Grievance Steps, which calls for a response by the agency head or designee within fifty days of the appeal or agreed upon extension date. According to this language the response is to include a description of the events giving rise to the grievance and the rationale upon which the decision is rendered.

The Union argues that the Employer has ignored the language of Article 25, section 25.02 by failing to submit a Step 2 response. The Union claims that the failure to respond at Step 2 violates the grievant's due process rights as the grievant had a right to know the Employer's rationale for the case against him. The Union claims it raised numerous questions and procedural errors at the Step 2 grievance meeting and argues the Employer had had an obligation and duty to investigate the issues raised and answer questions raised in defense of the grievant. The Union claims that when the Employer failed to issue a Step 2 response after the Step 2 grievance meeting the Employer violated due process by guaranteeing a lack of ability on the part of the grievant or the Union to secure answers to pertinent questions. Instead, argues the Union, in this case, the Step 2 grievance meeting afforded the Employer an opportunity to hear the defenses being proffered by the Union without providing any definition of the reasons for the actions being contemplated by

the Employer in considering imposing discipline upon Mr. Dittrick. The Union claims that it was for this reason that the Union had no choice but to waive mediation as the Employer would have again had the benefit of receiving advice from the Union about the grievant's defenses in this case with no reciprocal communication from the Employer about the grounds for the discipline. The Union claims the Employer could have submitted a late Step 2 response but that is demonstrably different than no response at all. The Union claims that if the Employer is permitted to terminate the employment of an employee and simply fail to respond to a Step 2 meeting, how is the bargaining unit member to receive due process? The Union claims that such a failure interferes with the Union's ability to prepare an effective defense on behalf of the grievant.

The Union refers to Article 24, section 24.06, Imposition of Discipline, which includes the following language:

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-discipline meeting. The decision on the recommended disciplinary action shall be delivered to the employee, if available, and the Union in writing within sixty (60) days of the date of the pre-discipline meeting, which date shall be mandatory...

The Union points out that the pre-discipline meeting that addressed Mr. Dittrick occurred on October 10, 2014, and the hearing officer's pre-discipline meeting report was directed to the Director of the Ohio Department of Commerce on November 4, 2014. There ensued four and one-half months during which no disciplinary action was taken against Mr. Dittrick. The Union points out that the Employer did not take action against Mr. Dittrick until May 6, 2015, a circumstance that is described by the Union as an extremely excessive amount of time that exceeds the explicitly stated time limit of sixty (60) days in which such discipline is to be imposed. The Union contends it is not reasonable for the Employer to have held the disciplinary case in abeyance for such a

lengthy period of time and argues that there is no language in the parties' Agreement that empowers the Employer to exercise its discretion in this regard retroactively. The Union points out that to allow such a retroactive effect would nullify the very reason and need this language is intended to address. The Union emphasizes that the pre-discipline meeting occurred on October 10, 2014; the hearing officer's report of the October 10, 2014 pre-discipline meeting was issued on November 4, 2014; the discharge of Mr. Dittrick occurred on May 6, 2015, far beyond the sixty-day deadline for the imposition of discipline as expressed in Article 24, section 24.06.

As to the sixty-day time limit addressed above, the Union attached the Opinion and Award of Arbitrator Robert Brookins, J.D., Ph.D. that examined the same language in Article 24, section 24.06 in the Matter of Arbitration Between the Ohio Department of Rehabilitation and Corrections (Department of Youth Services) and Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO, grievance number 35-07-20130205-0005-01-03, issued December 4, 2013. The case addressed by Arbitrator Brookins was a discharge case. Arbitrator Brookins sustained the grievance in its entirety upon finding a fatal procedural error. Within Arbitrator Brookins' Opinion and Award at page 11 Professor Brookins held: "... Such pellucid language and surrounding circumstances paint an extremely clear picture of the Parties' intent regarding the Agency's duty of notification to the Union..." The Union points out that Arbitrator Brookins found that this type of procedural error, if proven, deprives the arbitrator of jurisdiction to consider the merits of the grievance.

The Union claims that the procedural defects alone in this matter committed by the Employer are fatal to the discharge of the grievant ordered by the Employer. The Union also argues that the Employer has failed to establish just cause for the termination of the employment of the grievant.

The arbitrator in the case herein is urged by the Union to sustain the grievance in its entirety, reinstate Mr. Dittrick to his employment with full back pay and benefits, and make Mr. Dittrick whole by placing him in the position he would have been in had the discharge not occurred. The arbitrator is requested by the Union to retain jurisdiction over this matter for one year.

DISCUSSION

The Union has raised four procedural issues, each of which, argues the Union, leads to a resolution of the grievance prior to a determination of whether just cause was possessed by the Employer for the removal of the grievant.

The first procedural issue raised by the Union addresses the witnesses, documents, books, and papers relevant to the grievance to be provided to the Union by the Employer under the language of Article 25, section 25.09 – Relevant Witnesses and Information. The Union claims that information that should have been available to the Employer to be provided to the Union, Mr. Dittrick's weekly status reports, were never provided although these documents had been requested by the Union.

The hearing record indicates that in January, 2016 a joint effort by the parties to locate the information requested by the Union was exerted. A great deal of information was secured and provided to the Union including the entire contents of the Outlook email account used by Mr. Dittrick while serving in his Fire Training Officer 2 position. Officer during the time periods in question, with the grievant having asserted that the information sought had been attached to Mr. Dittrick's emails. The Employer located and provided to the Union the contents of Mr. Dittrick's Outlook email account in its entirety but the information requested was not found therein.

It is difficult to accept that, having provided reams of documents, data, correspondence, emails, instructors' logs, classroom schedules, and other pertinent information to the Union, the Employer would in this instance unreasonably deny to the Union this subset of requested information. The arbitrator finds the more credible explanation to be that a search for the information was conducted but the information was not found. The language of Article 25, section 25.09 empowers the Union to request specific documents, books, papers, or witnesses reasonably available from the Employer and relevant to the grievance under consideration. The language of Article 25, section 25.09 specifies that in the event of such a request the request shall not be unreasonably denied by the Employer.

The arbitrator does not find an unreasonable denial by the Employer to provide the information requested by the Union. The arbitrator finds the Employer provided a great deal of information to the Union pursuant to the Union's request but the Employer was unable to locate the weekly status reports for Mr. Dittrick. Considering that a large volume of documents possessed by the Employer including class schedules, instructors' logs, reports of investigation and their accompanying exhibits, reservation cards, and data as to ID badge card swipes were provided to the Union, the inability to locate the weekly status reports for Mr. Dittrick that had been requested by the Union is not found by the arbitrator to have been an unreasonable denial of the requested information. The arbitrator therefore does not find a violation by the Employer of the language of Article 25, section 25.09 nor does the arbitrator find that the absence of this subset of requested information interfered with the preparation of the grievant's defense such that fundamental principles of fairness and due process were violated. The arbitrator finds no basis upon which to sustain the grievance upon the language of Article 25, section 25.09 concerning the Employer's provision of relevant books, documents, papers, and witnesses to the Union.

The second procedural issue raised by the Union addresses the Employer's failure to issue a Step 2 response following the Step 2 grievance meeting that occurred on July 21, 2015. The language of Article 25, section 25.02 – Grievance Steps in Step 3 calls for a settlement of the grievance, a withdrawal of the grievance, or a response to the grievance prepared and issued by the Agency Head or designee within thirty-five (35) days of the Step 3 grievance meeting (Step 2 under the parties' Memorandum of Understanding). Seven days after the July 21, 2015 Step 2 grievance meeting, on July 28, 2015, prior to the Employer issuing its Step 2 response, the Union directed that the unresolved grievance be moved to mediation. The Union's request in this regard was honored and mediation of the grievance was scheduled for August 4, 2015. On August 4, 2015 the Union waived mediation of the grievance.

The arbitrator remains unclear about which provision of the parties' Agreement allows the Union to truncate the time allotted to the Employer to issue the Employer's Step 2 response by directing the grievance to mediation. Step 4 of the parties' contractual grievance procedure in Article 25, section 25.02 allows the Union to appeal a grievance to mediation if the Agency is untimely in issuing its response to the grievance following the Step 3 (now Step 2) grievance meeting. Step 4 of the parties' grievance procedure also provides that if the Agency were to be untimely in its response to the grievance at Step 3 (now Step 2), and absent a mutually agreed time extension, the Union could appeal the grievance to the next grievance step, Step 4 (now Step 3).

Whatever the mechanism used by the Union to move the unresolved grievance to mediation, that change in direction in the grievance process was at the request of the Union. By July 28, 2015 the Employer still had twenty-eight (28) days in which to issue its Step 2 response under the language of the parties' Agreement. By moving the grievance to mediation the Union

interfered with the timeline expressed in Article 25, section 25.02 for a Step 2 response by the Employer.

It is the case, nonetheless, that if we accept the Union's argument that the Employer remained under some form of obligation to issue its Step 2 response, even a late Step 2 response, the absence of such a Step 2 response does not give rise to an affirmance of the grievance. An absence of a Step 2 response under the language of the parties' Agreement allows the Union to move the case to mediation or to move the grievance to the next step in the parties' grievance procedure. The Union did move the unresolved grievance to mediation and after waiving that requested mediation the Union moved the unresolved grievance to the next step in the grievance procedure, Step 4 (now Step 3).

The arbitrator does not find that the Employer was under an obligation to issue a Step 2 response when the Union directed that the unresolved grievance be moved to mediation on July 28, 2015. The arbitrator nonetheless finds that if the Employer were to be found in violation of the language of Article 25, section 25.02 for having failed to issue a Step 2 response, the remedy available to the Union for this breach has already been afforded the Union, when the grievance was moved to mediation and when it was moved to the next step in the grievance procedure. Whether a violation has occurred or has not occurred by the absence of the Employer's Step 2 response, the Union has received any and all remedies available to the Union under the parties' contractual language in the event of such a breach. The arbitrator therefore finds no grounds upon which to end the consideration of the grievance at this point in the arbitration process based upon the absence of a Step 2 response from the Employer.

The third procedural issue raised by the Union involves the failure of the Employer to provide a copy of the hearing officer's report of the pre-discipline meeting to the grievant and the

Union prior to the imposition of discipline upon the grievant. The Union claims that fundamental principles of fairness and due process call for sharing the hearing officer's pre-discipline meeting report with the grievant and the Union during the pre-disciplinary process so as enable both parties to understand the nature and details of the charges being contemplated that may support imposing discipline upon the grievant.

The Employer points to the language of the parties' collective bargaining agreement and states that there is no language in the parties' Agreement that requires the Employer to share what is a management tool with the Union and the grievant prior to the imposition of discipline. The Employer rejects the Union's argument that the Employer violated the parties' Agreement by providing the hearing officer's report of the pre-discipline meeting at the time the discipline is imposed rather than providing the report to the Union and the grievant when the report is issued.

The pre-discipline meeting that considered Mr. Dittrick occurred on October 10, 2014 and the hearing officer's report of the October 10, 2014 pre-discipline meeting was issued on November 4, 2014. The pre-discipline meeting hearing officer's report and recommendation was directed to the Director of the Ohio Department of Commerce but was not shared with the Union or the grievant until May 6, 2015, the date upon which Mr. Dittrick's employment was terminated.

Agreed pre-disciplinary procedures are presented in Article 24, 24.05 of the parties' Agreement. Article 24, section 24.05 specifies that an employee has a right to a meeting prior to the termination of the employee's employment. This language provides that: "Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline." The language of Article 24, section 24.05 provides that: "At the discretion of the Employer, in cases where a criminal investigation

may occur, the pre-disciplinary meeting may be delayed until after disposition of the criminal charges.”

The language of Article 24, section 24.06 – Imposition of Discipline provides that the Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-discipline meeting.

There follows in Article 24, section 24.06 language on how discipline is to be imposed. Nowhere in the parties’ Agreement, however, neither in Article 24 – Discipline nor in Article 25 – Grievance Procedure is there a requirement that the hearing officer’s report and recommendation arising from the pre-discipline meeting required by Article 24, section 24.05 – Pre-Discipline be provided to the Union and the grievant. In the absence of such an express requirement the arbitrator does not find a violation of the parties’ Agreement based upon the hearing officer’s report not having been shared with the Union and the grievant prior to the imposition of discipline.

The fourth procedural issue raised by the Union addresses the amount of time that elapsed from the date of the pre-discipline meeting to the date upon which the discipline was imposed. The pre-discipline meeting that is required by Article 24, section 24.05 occurred on October 10, 2014. The hearing officer’s report of the October 10, 2014 pre-discipline meeting was issued November 4, 2014 and directed to the Ohio Director of Commerce for a final decision on the disciplinary action recommended against Dale Dittrick. The language of Article 24, section 24.06 reads as follows:

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-discipline meeting. The decision on the recommended disciplinary action shall be delivered to the employee, if available, and the Union in writing within sixty (60) days of the date of the pre-discipline

meeting, which date shall be mandatory. It is the intent to deliver the decision to both the employee and the Union within the sixty (60) day timeframe; however, the showing of delivery to either the employee or the Union shall satisfy the Employer's procedural obligation. At the discretion of the Employer, the sixty (60) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The sixtieth day following October 10, 2014, the date of the pre-discipline meeting that addressed Mr. Dittrick, is December 9, 2014. The discharge of the grievant occurred effective May 6, 2015, beyond the sixtieth day following the date of the pre-discipline meeting. This sixty-day time limit is described as "mandatory" within the language of Article 24, section 24.06 shortly before the language of Article 24, section 24.06 provides an exception to the "mandatory" sixty-day deadline.

The express language of Article 24, section 24.06 provides that "... At the discretion of the Employer, the sixty (60) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges."

It should be recalled that it was not the Ohio Department of Commerce that referred this matter to Licking County Prosecuting Attorney Kenneth W. Oswalt; the Office of the Ohio Inspector General forwarded the matter to Licking County Prosecutor Oswalt for his consideration. The Ohio Department of Commerce under the language of Article 24, section 24.06, having been apprised of the fact that the Licking County Prosecutor was reviewing the conduct of Mr. Dittrick to determine whether criminal charges were to be filed against Mr. Dittrick, decided to wait to take disciplinary action until the issue of criminal charges had been resolved. Such discretion is allowed to be exercised by the Employer under the language of Article 24, section 24.06 and was exercised

in this case by the Employer, an exception allowed by Article 24, section 24.06 to the otherwise mandatory sixty-day time limit for the imposition of discipline.

The Opinion and Award of Arbitrator Brookins attached to the Union's post-hearing brief addresses the sixty-day time limit expressed in Article 24, section 24.06 but not in the context of criminal charges. Arbitrator Brookins was presented with a case wherein neither the Union nor the employee was provided with a disciplinary order by the Employer within the sixty days allowed for service of the disciplinary order. The Employer argued in that case that there had been an accepted past practice between the parties that allowed service on the sixty-third day rather than the sixtieth day but this argument was rejected by Arbitrator Brookins as a construal in conflict with the clear, specific, and express language in Article 24, section 24.06.

The arbitrator in the case herein does not find that the Opinion and Award of Arbitrator Brookins cited by the Union is applicable to the facts of this proceeding.

Licking County Prosecutor Oswalt, directed correspondence to the Employer dated March 23, 2015 that expressed Prosecutor Oswalt's intention to continue to consider whether to lodge criminal charges against Mr. Dittrick but stated that Prosecutor Oswalt was not asking that disciplinary steps be held in abeyance pending Prosecutor Oswalt's final decision on whether to file criminal charges against Mr. Dittrick.

If the argument were to be made that having been released by Prosecutor Oswalt from delaying disciplinary action until criminal charges were resolved that the sixty-day time limit should be reapplied from the point in time when Prosecutor Oswalt's letter was issued on March 23, 2015, the May 6, 2015 order of discipline issued to the grievant would fall within the sixty days following March 23, 2015. The arbitrator finds no language in the parties' Agreement that expresses whether the sixty-day time limit would reattach to the Employer at the point in time

when the Prosecuting Attorney was no longer a reason to delay proceeding with the disciplinary process but the facts of this case show a decision within sixty days of Prosecutor Oswald's March 23, 2015 letter in any event.

The arbitrator does not find a violation by the Employer of Article 24, section 24.06 in taking more than sixty days from the pre-discipline meeting on October 10, 2014 to imposing disciplinary action upon the grievant on May 6, 2015. The exception expressed in Article 24, section 24.06 empowered the Employer to act in the way it did in this regard, under the discretion reserved to the Employer by the language of Article 24, section 24.06.

The arbitrator having declined to grant the grievance on procedural grounds now turns his attention to the merits of the grievance, that is, the just cause claimed to have been possessed by the Employer for the removal of the grievant.

The Employer carries the burden of proof on just cause in this proceeding. The Employer, to prevail, must establish that it possessed just cause to discharge the grievant. Because this is not a criminal proceeding the Employer is not charged with proving just cause beyond a reasonable doubt. The standard of proof in this case is, at a minimum, a preponderance of the evidence in the hearing record, and at a maximum, because this case considers a termination of employment, by clear and convincing evidence.

Just cause, however, is not defined by language in the parties' Agreement, commonly the case in collective bargaining agreements in recognition of the fact that just cause may arise from a broad range of circumstances, facts, conduct, and motives, and take myriad forms. Whether the grievant can be shown to have engaged in behavior that comprises just cause for discipline under the language of Article 24 of the parties' Agreement, and whether the discipline imposed is commensurate with the grievant's substantiated misconduct balances on whether the evidence

provided by the Employer intended to substantiate just cause for the discharge of the grievant preponderates in the hearing's evidentiary record.

The Employer is limited by the parties' Agreement in imposing discipline by express language in Article 24, section 24.05 which requires that the employee and his/her representative be informed in writing of the reasons for the disciplinary action being contemplated by the Employer and the form of the discipline being contemplated. This written notice was provided by the Employer on September 26, 2014, Joint Exhibit 4. The September 26, 2014 notice provided to Mr. Dittrick advised Mr. Dittrick that the Employer was contemplating the imposition of discipline upon Mr. Dittrick for violation of Department Work Rules, and stated that the potential level of discipline being contemplated was reprimand, suspension, or removal. The charges presented in the September 26, 2014 written notice included violations of Department Work Rule #2, Insubordination, failure to follow written or known policies, procedures, practices and/or supervisory directions; Department Work Rule #5, Any act that embarrasses, discredits, or interferes with the Department's mission; and Department Work Rule #4, Failure of good behavior, any actions disruptive to the workplace; unprofessional conduct; discourteous and/or rude treatment of another or the public. Following the enumeration of the work rules alleged to have been violated, the following appears in the September 26, 2014 written pre-discipline notice directed to Mr. Dittrick and the Union:

It is alleged that during the time frame of February 1, 2010 through March 4, 2013 and on March 6, 2013, March 7, 2013 and March 25, 2013, you used the Ohio Fire Academy dormitory rooms on 88 days. However, it is alleged your usage did not meet an operational need and that you did not pay for the use of the dorm room. Further, it is alleged that on March 4, 2014, you placed an unauthorized label on your State Fire Marshal provided work uniform in response to a report that was issued by the Office of the Ohio Inspector General on March 4, 2014.

The work rules and enumerated charges listed in the September 26, 2014 written notice provided to Mr. Dittrick set out above were required to be provided to the employee prior to the pre-discipline meeting as specified by the language of Article 24, section 24.05. These charges presented in the pre-disciplinary notice in this case become particularly important in understanding what the grievant is charged with for purposes of determining just cause for the imposition of discipline because the hearing officer's report of the October 10, 2014 pre-discipline meeting was not shared with the employee or the Union prior to the imposition of discipline. While not sharing the hearing officer's report of the pre-discipline meeting with Mr. Dittrick and the Union prior to the imposition of discipline was not found by the arbitrator to be a violation of the parties' Agreement, not sharing the hearing officer's report with Mr. Dittrick and the Union until the discharge was effected on May 6, 2015 provides no notice to the employee or the Union of any alteration to the charges contemplated by the Employer as set out in the September 26, 2014 pre-disciplinary notice. Any expansion of the charges enumerated in the September 26, 2014 pre-disciplinary notice by the Employer following the October 10, 2014 pre-discipline meeting, therefore, would occur without written notice to the employee or his representative prior to the imposition of discipline, a violation of the express language in Article 24, section 24.05. Thus, while the actual written pre-disciplinary notice provided by the Employer to Mr. Dittrick and the Union about the discipline contemplated by the Employer against Mr. Dittrick was sufficient under the language of Article 24, section 24.05, no charges beyond those specified in the September 26, 2014 pre-discipline notice can serve to substantiate just cause because they were not provided to the employee and the Union prior to the imposition of discipline.

The express and specific charges presented in the September 26, 2014 written pre-disciplinary notice provided to Mr. Dittrick and the Union refer specifically to usage of the State

Fire Marshal's dormitory facilities by Mr. Dittrick from February 1, 2010 through March 25, 2013 on eighty-eight (88) days when Mr. Dittrick's stays did not meet an operational need and Mr. Dittrick did not pay for the use of the dormitory room.

The other charge presented in the September 26, 2014 pre-disciplinary notice relates to tape being placed by Mr. Dittrick over his uniform's identity tag in response to the issuance of the report of the investigation by the Office of the Ohio Inspector General on March 4, 2014. Mr. Dittrick does not deny placing the tape on his uniform and does not deny the inappropriateness of this gesture.

Placing tape over an identity tag may be embarrassing to the Department and may present unprofessional conduct on the part of the grievant but this misconduct does not, standing alone, present an offense that can support the removal of a five-year employee with no prior discipline. The mocking gesture presented by the tape with a number written upon it to make the uniform appear more like a prisoner's uniform had had a sneering quality to it such that it rises to the level of insubordination, an embarrassment, and unprofessional conduct, but in the discharge of the grievant on May 6, 2015 the prank with the tape on the uniform is an instance of misconduct that is appended to the more serious charges that moved the Employer to consider and order the discharge of the grievant.

Much has been made of the absence of a written policy as to Ohio Department of Commerce staff usage of the Ohio Fire Academy dormitory facilities prior to March 4, 2013. It is true that in the absence of a written policy it cannot be shown that the Employer's written policy was violated prior to March 4, 2013 because no written policy existed prior to March 4, 2013. This may serve to avoid accountability for violating a policy because the policy does not exist, but the lack of a written policy does not immunize an employee from accountability for misconduct that

is known or should have been known to be prohibited, even in the absence of a written policy to that effect.

Had the employee in this case helped himself to a state vehicle and state-provided fuel for the vehicle without a legitimate public purpose, the employee would rightfully be held to account for the use of state property without the consent of the owner of the property or the person authorized to give such consent.

In the case herein, there is no allegation that the grievant helped himself to the use of a state vehicle but there is clear and convincing evidence in the hearing record indicating that on frequent and repeated occasions between February 1, 2010 and March 25, 2013 the grievant did avail himself of the use of state property, namely a residential facility owned and operated by the state of Ohio used to facilitate state-sponsored training in firefighting, fire prevention, and emergency services. Ohio Revised Code section 2913.02, Theft, provides:

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

- (1) Without the consent of the owner or person authorized to give consent;
- (2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
- (3) By deception [.]

*

*

*

Ohio Revised Code section 2921.41, Theft in Office, provides that:

(A) No public official or party official shall commit any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, when either of the following applies:

- (1) The offender uses the offender's office in aid of committing the offense or permits or assents to its use in aid of committing the offense;
- (2) The property or service involved is owned by this state, any other state, the United States, a county, a municipal corporation, a township, or any political subdivision, department, or agency of any of them, is owned by a political party or is part of a political campaign fund.

"Public official" for purposes of Ohio Revised Code section 2921.41, Theft in Office, is defined by Ohio Revised Code section 2921.01(A) as including any employee of the state, whether in a temporary or permanent capacity. Mr. Dittrick was an employee of the state of Ohio as an employee of the Ohio Department of Commerce within the Division of the State Fire Marshal. Mr. Dittrick does not deny staying overnight at the Ohio Fire Academy dormitory facilities on numerous occasions during the time period from February 1, 2010 through March 4, 2013, and the arbitrator finds self-evident that Mr. Dittrick's proximity to the Ohio Fire Academy dormitory facilities, Mr. Dittrick's access to the Ohio Fire Academy dormitory facilities, and Mr. Dittrick's use of Ohio Fire Academy dormitory rooms to stay overnight were facilitated by Mr. Dittrick's position with the Ohio Fire Academy as a Fire Training Officer 2.

As to Mr. Dittrick's belief that he had permission to stay overnight on frequent occasions at the Ohio Fire Academy dormitory facilities, the arbitrator is unable to square this claimed belief with the pre-employment interview Mr. Dittrick engaged in with (then) Superintendent of the Ohio Fire Academy, Frank Conway. Had Mr. Dittrick been invited to stay overnight at the Ohio Fire Academy dormitory facilities at his convenience and for his personal benefit there would have been no reason to discuss the location of Mr. Dittrick's residence located ninety miles from the Academy and there would have been no reason to express concern about the commute required of Mr. Dittrick to his residence on a daily basis if Mr. Dittrick were to be hired for the position he was then seeking. Instead, at the pre-employment interview before Superintendent Conway, Mr.

Dittrick assured Superintendent Conway that Mr. Dittrick had access to a residence nearby where he could stay. Such an assurance makes no sense if the Ohio Fire Academy dormitory facilities were open to Mr. Dittrick for his personal use.

The arbitrator is also not persuaded that the approval purportedly received by Mr. Dittrick from his immediate supervisor, Mr. Dupree, provided the approval necessary to allow Mr. Dittrick to use state of Ohio resources on a repeated and frequent basis without paying for such use and without a public purpose for such use.

The arbitrator noted earlier in this discussion that the charges brought by the Employer against Mr. Dittrick as expressed in the written pre-discipline notice issued on September 26, 2014, Joint Exhibit 4, may not be expanded because there is no notice of any increase in the charges made against Mr. Dittrick after receiving the pre-discipline notice. The charges in the pre-discipline notice, provided to Mr. Dittrick in accordance with Article 24, section 24.05, refer to using the Ohio Fire Academy dormitory rooms without an operational need and not compensating the state of Ohio for the use of the dormitory rooms. These charges do not include Mr. Dittrick accessing the common areas in the Ohio Fire Academy dormitory facilities, such as the recreational lounge. Such access for this limited use of the dormitory facilities is not a violation of any work rule nor the subject of any administrative or criminal prohibition nor mentioned in the September 26, 2014 pre-discipline notice.

The arbitrator is persuaded that there is a preponderance of evidence in the hearing record that is credible, reliable, and convincing on the grievant's use of the Ohio Fire Academy dormitory rooms from February 1, 2010 through March 4, 2013. Mr. Dittrick used the dormitory facilities at the Ohio Fire Academy for personal gain on about eighty-five separate occasions. The dates of these occasions are in the investigative reports of the Office of the Ohio Inspector General and the

Ohio Department of Commerce and there is nothing in the hearing record indicating an operational need for these stays by Mr. Dittrick. It is impossible for the arbitrator to accept that there were a sufficient number of days of inclement weather, or emergencies, or late classes pouring over into early instruction the next day to justify the frequency of the dormitory usage by the grievant. If there is some ambiguity as to the precise number of Mr. Dittrick's stays from February 1, 2010 through March 4, 2013 it is clear from the testimony of witnesses that an overnight stay by Mr. Dittrick at the Ohio Fire Academy dormitory was a frequent occurrence, was well-known around the Ohio Fire Academy by word of mouth, and in many cases, as many as eighty-five cases, the Ohio Fire Academy dormitory facilities were used by Mr. Dittrick to stay overnight for no legitimate public purpose.

The hearing record presents clear and convincing evidence that Mr. Dittrick stayed overnight at the Ohio Fire Academy dormitory facilities on March 6, 2013; March 7, 2013; And March 25, 2013 during a time period when a written policy was in effect that required approval from officials designated in the policy if a purpose expressed in the policy was not a reason for staying overnight at the dormitory at the Ohio Fire Academy. A preponderance of evidence in the hearing record reflects that on March 6 and 7, 2013, after being informed of the written policy that was established in reaction to Mr. Dittrick's longstanding, frequent, and improper overnight stays at the Ohio Fire Academy dormitory, Mr. Dittrick stayed over on these two nights, March 6 and 7, 2013, without approval and in contravention of the new written policy. Mr. Dittrick explained at the arbitration hearing that he had used these two days to move his personal effects from the Ohio Fire Academy dormitory.

The arbitrator finds the improper usage of the Ohio Fire Academy dormitory facilities by Mr. Dittrick, both prior to and subsequent to March 4, 2013, provides just cause for discipline. The

frequency with which the improper usage occurred and the continuing improper usage of the dormitory facilities on March 6, 7, and 25, 2013 reflect a long-term pattern of misconduct, a recalcitrance in recognizing that this improper usage had to cease, and a sufficient basis upon which to order the removal of the grievant. In this regard the arbitrator reviewed the discipline policy of the Employer, Joint Exhibit 7, policy number 201.0. Within this policy is a disciplinary grid. The frequency with which Mr. Dittrick used state property for unauthorized purposes supports the severity of the discipline imposed.

The arbitrator finds no procedural basis upon which to sustain the grievance. The arbitrator finds the Employer did have sufficient just cause to order the discharge of the grievant effective May 6, 2015. The arbitrator therefore declines to grant the grievance.

[The remainder of this page is blank.]

AWARD

1. The grievance is arbitrable and properly before the arbitrator for review and disposition.
2. The Director of the Ohio Department of Commerce removed the grievant from his position as a Fire Training Officer 2 for just cause.
3. The frequency of the stays at the Ohio Fire Academy dormitory by the grievant without a public purpose and without approval supports the discharge of the grievant.
4. The grievance is denied.

Howard D. Silver

Howard D. Silver, Esquire
Arbitrator
500 City Park Avenue
Columbus, Ohio 43215
howard-silver@att.net

Columbus, Ohio
July 12, 2016

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO and the State of Ohio, Department of Commerce, grievance number COM-2015-01552-14, was served electronically upon the following this 12th day of July, 2016:

Michael Scheffer
Field Staff Representative
OCSEA, AFSCME, Local 11, AFL-CIO
390 Worthington Road
Westerville, Ohio 43082
mscheffer@ocsea.org

and

John Dean
HCM Manager
Ohio Department of Commerce
77 South High Street, 23rd Floor
Columbus, Ohio 43215
John.Dean2@com.state.oh.us

Howard D. Silver

Howard D. Silver, Esquire
Arbitrator
500 City Park Avenue
Columbus, Ohio 43215
howard-silver@att.net

Columbus, Ohio
July 12, 2016