In the Matter of the
Arbitration between

SERVICE EMPLOYEES INTERNATIONAL UNION/DISTRICT 1199

and

OHIO DEPT. OF REHABILITATION & CORRECTIONS/ADULT PAROLE AUTHORITY

DRC Case No. 2018-03800-12

Grievant: Mariah Robinson

Arbitrator: Tobie Braverman

OPINION AND AWARD

APPEARANCES:

For the Employer:

Christina E. Haselberger, Advocate/Policy Analyst
Victor Danridge, Labor Relations Advocate
Jill Harlan, Labor Relations Officer
Jill Dewitz, Parole Services Supervisor
Bobbi Miller, Risk Management Supervisor
Keysha Dillon, Parole Program Specialist
Cynthia Mausser, Deputy Director, Division of Parole & Community Services
Meredith Kurucz, Toledo Municipal Court Administrative Assistant

For the Union:

Peter J. Hanlon, Advocate/MRC Director
John Norris, Executive Vice President
Mariah Robinson, Grievant
Angela Foltz, Senior Parole Officer

The Ohio Department of Rehabilitation and Correction, Division of Parole and Community Services, Adult Parole Authority Office (hereinafter referred to as "Employer") and Service Employees International Union/District 1199 (hereinafter referred to as "Union") have submitted the grievance of Mariah Robinson (hereinafter referred to as "Grievant") to the Arbitrator for decision pursuant to the Collective Bargaining Agreement of the parties. Hearing was held at Columbus, Ohio on June 17, 2019. The parties submitted post hearing briefs which were received by the Arbitrator on August 6, 2019. The parties stipulated that the grievance is properly before the Arbitrator for decision, and further stipulated that the issue for decision is as follows:

Was the Grievant removed from her position as a Parole Officer for just cause, and if not, what shall the remedy be?

FACTS

The Employer is a division of the Ohio Department of Rehabilitation and Corrections ("DRC") which operates the Adult Parole Authority ("APA") Office in Toledo, Ohio. The Office employs seven parole officers and two administrative staff who are supervised by Jill DeWitz, Parole Services Supervisor. The Grievant began her employment with DRC on February 10, 2014 as a corrections officer. She was employed as a Parole Officer ("PO") in the Toledo Office from January 11, 2015 until her removal effective November 7, 2018. At the time of her removal, the Grievant's work record included a prior two day suspension in an unrelated disciplinary matter.

The evidence presented at hearing established that the duties of the position of Parole Officer involve many aspects of the supervision of offenders on parole. These duties include supervising offenders' home and employment activities, making regular contact with offenders and their employers and relatives, conducting surveillance, arrests and searches as necessary, and other activities in the office and the field in an effort to both supervise offenders on parole and to promote behavioral change. The position requires that PO's maintain a drivers licence and proof of financial

responsibility since the job requires work in the field, including travel to conduct interviews and investigations, to arrange for employment, check on living arrangements and conditions, and to transport lab specimens and offenders, among other field activities. There was little dispute that the position requires the regular use of a car, and PO's regularly work outside of the office. The evidence further demonstrated that the Employer has a policy which generally requires the use of a state owned vehicle for work purposes, but permits the use of a privately owned vehicle in the event that none is available. The office has the use of two state owned cars and a state owned van. While PO's do utilize their own vehicle when necessary, as a general rule, state vehicles are used to conduct work activities.

The incidents which led to the Grievant's removal began during July, 2018. At that time, Supervisor Dewitz learned through office conversation with another supervisor that the Grievant had recently appeared in Toledo Municipal Court on criminal charges. This information prompted an investigation since Dewitz was aware that the Grievant had not recently requested to use either vacation or personal leave. The investigation was referred to Keysha Dillon, who reviewed Toledo Municipal Court dockets and contacted the Court to establish the facts of the Grievant's appearances in Court. It was learned through the investigation that the Grievant had been initially charged with a failure to yeild the right of way when she struck a pedestrian in a crosswalk while driving her personal vehicle off duty on June 2, 2018. The investigation did not go any further at that time. However, on August 1, Dillon learned that an additional charge of "assault recklessly causing serious physical harm" was added on July 27, 2018. At that time, as a result of that additional more serious charge, the Grievant was placed on administrative leave.

Based upon this new information, Dillon revived her investigation. She contacted Meredith Kurucz, Toledo Municipal Court Administrative Assistant, regarding the court proceedings. Kurucz testified that each of the Toledo Municipal Courtrooms is equipped with cameras which records both video and audio. The cameras and are positioned both behind the bench and at the rear of the courtroom. These cameras are used to record all court proceedings. At Dillon's request, she

reviewed the recordings from Courtroom 7 for the dates on which the Grievant was scheduled to appear in court on the traffic citation and assault charge. In reviewing both the dockets and recordings, Kurucz determined that the Grievant was present in Courtroom 7 on July 13, July 25 and August 7, 2018. Kurucz further testified that the Grievant was present in court from 9:23 a.m. through 10:27 a.m. on July 13, a total of sixty-four minutes.

In reviewing the Grievant's time records for that date, they reflect that the Grievant left the office at 8:51 a.m. She testified that she met with offenders prior to her arrival at court, but provided no specifics as to where or with whom she met. She clocked out for a lunch period using her computer from 9:30 to 10:00 a.m., leaving the balance of the time in court unaccounted for. When interviewed by Dillon and advised that she had been in court for sixty-four minutes on July 13, the Grievant indicated that she did not recall having been in court for that long. At the pre-disciplinary hearing and at arbitration, however, she testified that the sixty minutes was a combination of her thirty minute lunch and two fifteen minute breaks. The Grievant testified that she had merely made a mistake in logging her time. It was this unaccounted for thirty-four minutes which initially prompted the determination to discipline the Grievant.

Ultimately the assault charge was dismissed, and the Grievant pled no contest to the right of way charge, for which she was assessed a two points on her driving record. At around the same time, however, Dillon learned that the Office of Risk Management had suspended the Grievant's insurance coverage. That action had its genesis in a request from DAS counsel, Amy Parmi, to the Office of Risk Management which operates the State of Ohio self insurance system, in May, 2018 requesting a check on the Grievant's driving record for purposes of insurance eligibility. There was no evidence as to what prompted that request, but it was determined at that time that, based on her driving record, the Grievant was a moderate risk, and remained insurable. That request was renewed in July, when the Employer learned of the traffic citation discussed above. In that review, the Office of Risk Management concluded that the Grievant was high risk due to this second major violation. It therefore determined to suspend insurance coverage, finding that the Grievant

presented a "threat to the motoring public" who should not be permitted to drive in the course of employment. This suspension of insurance was related to Parmi in a letter dated August 28, 2018, but not provided directly to the Grievant.

The evidence at hearing was that the Office of Risk Management does not routinely review employee driving records, but does so after an accident in a state owned vehicle or upon request from an agency, as occurred here. Although the work rules do not directly state that employees may be disciplined in the event that their state insurance is suspended, they do provide for removal for failure to maintain any "certification, license, etc., that is required to perform the duties of the position". DAS Directive 06-13 provides that insurance coverage may be terminated for three years for a list of specific offenses, and on a case by case basis in the event that a driver's actions are deemed to present a threat to the motoring public. Although Union witnesses testified that they were unaware of this policy, the Grievant acknowledged receipt of this policy on an orientation checklist when she began her employment as a PO on January 15, 2015.

After the conduct of the required pre-disciplinary hearing, the Grievant was issued a Notice of Disciplinary Action on November 5, 2018 removing her from employment effective November 7, 2018. The stated grounds included Rule 7, failure to follow post orders, Rule 22, falsifying a document or record, Rule 48, failing to maintain or keep current any certification, license, etc., that is required to perform the duties of the position or to meet minimum qualifications of the position, and Rule 50, any act of incompetency, inefficiency, unsatisfactory performance or other misfeasance or malfeasance. A timely grievance was filed, and the matter proceeded through the grievance procedure without resolution to arbitration.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

The Union agrees that all of the function, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Accordingly, the Employer retains te rights to: 1) hire and transfer employees, suspend, discharge and discipline employees for just cause; ...

ARTICLE 8- DISCIPLINE

8.01 Standard
Disciplinary action may be imposed upon an employee only for just cause.

8.02 Progressive Discipline
The principles of progressive discipline shall be followed. These principles usually include:
A. Written Reprimand
B. A fine in an amount not to exceed five (5) days pay
C. Suspension
D. Removal
The application of these steps is contingent upon the type and occurrence of various disciplinary offenses. ...

ARTICLE 24 - HOURS OF WORK AND OVERTIME

24.07 Meal Periods

Employees shall be granted an unpaid meal period of not less than thirty (30) minutes and no more than sixty (60) minutes near the midpoint of each shift, if feasible. If it is not feasible near the midpoint of the employee's shift, every attempt will be made to reschedule it at the earliest available time during the shift. ....

24.08 Breaks

A paid rest period of fifteen (15) minutes shall be granted to each employee for every four (4) hours of regularly scheduled work performed ... At the request of the employee, the rest period(s) shall be scheduled with the meal period unless operational needs preclude combining rest period(s) and lunch. ....

POSITIONS OF THE PARTIES

Employer Position: The Employer contends that it has met its burden of proof to demonstrate that the Grievant is guilty of the offenses with which she is charged and that the penalty of discharge is the appropriate penalty for those offenses. The proof is clear that the Grievant clocked out for a thirty minute lunch period, but was in court on July 13 attending to personal business for a total of sixty-four minutes. Although she now contends that this was her lunch and breaks combined, she did not advance this argument initially, and she never requested to combine her paid breaks, which are to be taken in the office, with her lunch as required. In addition to this offense, the Grievant's actions in striking a pedestrian in a crosswalk led to the suspension of her state insurance coverage. There is no question that driving a vehicle is an integral part of the position of a PO. PO's must drive almost daily in the course of their duties to complete investigations, coordinate offender job and residential placements, conduct investigations, transport offenders, court documents and lab specimens, among other duties in the field. The Office of Risk Management has determined that the Grievant's poor driving record presents too great a risk for the state to insure her while driving state vehicles, and permitting her to use her personal vehicle for work purposes would expose the Employer to serious potential liability. The Grievant was advised of the policy which permits the Office of Risk Management to terminate coverage when she began her work as a PO, and has been provided with policy updates. It was her obligation to review those policies. The Grievant already had a two day suspension on her record at the time of these incidences. Due to the presence of that prior discipline as well as the serious nature of these offenses, the grievance should be denied.

Union Position: The Union argues that the Employer has failed to meet its burden of proof to demonstrate just cause for the Grievant's termination in this case. The investigation conducted by the Employer was cursory and insufficient. Dillon failed to interview key witnesses including the supervisor who first relayed the rumor of the Grievant's criminal charge,

the Risk Manager who rescinded the Grievant's insurance. She further failed to view the court video to substantiate the Grievant's time in court. These failures render the investigation flawed and unreliable. Further, the Employer's evidence established only that the Grievant was in court for just over one hour. She testified that she was combining her forty-five minute lunch and fifteen minute break, indicating that her improper use of state time was a de minimis four minutes. The Grievant's record of her time was nothing more than a four minute mistake, and did not warrant termination. Under these circumstances, the Grievant's offense was minor, and the severity of the offense clearly does not warrant the severe penalty of termination. Further, the Grievant maintained a valid drivers license and proof of responsibility as required by the PO position description throughout this time. The Grievant was unaware of either the existence of state insurance or the basis on which it could be suspended. Nor was the Grievant ever advised that she was at moderate risk and could lose coverage in the event of an additional major traffic violation. She was clearly not sufficiently forewarned that she could be terminated if the Employer's insurance were suspended. She was therefore not provided with an opportunity to alter her conduct based upon the information that she was at risk of such as suspension. The grievance should be sustained the Grievant should be reinstated with full back pay and benefits.

DISCUSSION AND ANALYSIS

This being a case of termination, the burden of proof rests with the Employer to demonstrate that the Grievant is guilty of the offense with which she is charged, and that the commission of that offense warranted the penalty of discharge. Generally, this Arbitrator has subscribed to the requirement that the two elements of the Employer's burden of proof be demonstrated by the intermediate evidentiary standard of clear and convincing evidence. This standard of proof recognizes the severe and lasting impacts that a discharge has on the Grievant and her ability to obtain future employment by requiring greater proof than a mere

preponderance of the evidence. That is the burden of proof which will be applied in the instant case.

Before addressing the merits of the case, it is necessary to address the Union's contention that the Employer failed to conduct a full and fair investigation, depriving the Grievant of her rights and resulting in a lack of just cause for the termination. As the Union urges, if an investigation is cursory or incomplete, its conclusions are likely to be flawed. For this reason, a complete and fair investigation is an integral element of just cause. As noted above, the Union stresses that the investigation here is flawed since there were several individuals who were not interviewed, and Dillon did personally view the court video. While the Union notes these alleged deficiencies, however, it does not provide any convincing evidence either that the inclusion of these interviews and view of the video would have added anything significant to the investigation or that their absence prevented the investigation from being sufficiently thorough.

The Union contends that Dillon should have interviewed Supervisor Gabriel Robinson who first reported the rumor of the Grievant's criminal charges to Supervisor Dewitz. While Dillon could have interviewed Robinson, the question is whether the lack of an interview detracted from the thoroughness of the overall investigation. Dewitz testified that Robinson reported that his employees were talking about the criminal charge. As a result of that information, the investigation which was launched unearthed the existence and the specifics of the Grievant's traffic and assault charges. The Arbitrator is at a loss to determine what more an interview of Robinson would have contributed to that aspect of the investigation, and the Union has not provided any help in that regard. Robinson's only involvement was to relay the existence of office talk, the facts of which were found to be substantiated. There was no fatal flaw in the investigation by virtue of the failure to interview him.

Similarly, while an interview of a representative of the Office of Risk Management might have lent some clarity as to the basis for their decision to suspend the Grievant's

insurance coverage, it was not necessary to a determination of the fact that the Grievant's insurance had been suspended or the reasoning bbehind that action. Those matters are clearly articulated in the August 28, 2018 letter. Finally, the failure to review the court video was not necessary in the absence of some reason to believe that Kurucz was not being forthright in her review and reporting of the video. There was simply no basis to doubt the veracity of disinterested court personnel who reviewed and reported on the contents of the video, and an independent view was superfluous in the absence of any reason for such doubt. Under the circumstances of this case, the investigation cannot be categorized as insufficient merely because every possible stone was not overturned.

The Arbitrator must similarly reject the Union's contention that the Grievant did not improperly complete her time records for July 13, 2018 because she was simply flexing her lunch and break periods. It must first be noted that the policies in place require that employees obtain permission to flex their hours, to combine breaks and lunch and require that paid breaks be taken in the office. As a result, even if the Grievant was accounting for her time by utilizing her breaks in combination with her lunch, she did so without the required supervisory approval. While this alone does not rise to the level of an offense warranting termination, in fact, this does not appear to be what actually occurred in this case.

It must be noted first that the Grievant did not make any attempt to justify her actions on July 13 as a mere combination of lunch and break times when she was initially interviewed in this matter. It was not until the pre-disciplinary hearing that this contention was advanced, indicating that it was likely an after the fact justification. Further, as the Employer notes, the Grievant's time records indicate that she consistently recorded a thirty minute lunch. If it were the Grievant's intention to deviate from that pattern by a full thirty minutes, she was clearly obligated to note that on her time records. She did not do so, and it appears that her actions were intentional and exhibit a degree of dishonesty that is unacceptable.

The Grievant's misconduct regarding her time records, however, is significantly

compounded by the suspension of her insurance coverage. There can be no doubt that the position of PO requires the ability to drive state owned vehicles. In fact, when an offender must be transported, the failure to utilize an appropriately equipped state vehicle would put the PO's at risk of harm. It is noteworthy that while the Union argues that the Grievant did not have sufficient notice that there existed a risk of her insurance coverage being suspended and the consequence of such a suspension, it does not seriously contest the decision to suspend coverage. The Grievant's recent driving record included two major offenses, which the Office of Risk Management defines as "reckless" rather than "negligent". Undoubtedly, by any definition, striking and seriously injuring a pedestrian in a sidewalk during daylight hours falls well within the category of "reckless". The decision to suspend the Grievant's insurance coverage was based upon a reasonable determination that permitting the Grievant to drive state owned vehicles for work purposes exposed the Employer to a significant risk of serious liability.

The evidence additionally supports the conclusion that the Grievant did have adequate notice that her insurance coverage could be suspended. DAS Directive No. 06-13 clearly provides under the heading of "Termination of Coverage of Individuals" that the Office of Risk Management "reserves the right to terminate coverage if the driver's actions present a threat to the motoring public". This Directive was provided to the Grievant as part of her initial training in January, 2015 as evidenced by her initials on the orientation checklist. While the Union notes that none of the topics reviewed are signed by the person conducting the orientation in the space provided on the form, the fact remains that the Grievant initialed the document indicating that she was provided with the information. While it is entirely possible that she did not thoroughly read it, it was her obligation to do so. The Grievant was put on sufficient notice that her ability to drive state vehicles could be in jeopardy in the event that she committed driving offenses which could pose a threat to the public.

The Arbitrator cannot accept the Union's argument that since maintenance of state insurance is not expressly listed in the position description for PO, the suspension of that

insurance cannot be considered to be a requirement for the job. Rule 48 provides for the penalty of removal for "failure to obtain, maintain and/or keep current an certification, license, etc., that is required to perform the duties of the position...". There is no dispute that the duties of PO require the ability to drive a state owned vehicle, and that the ability to be insured is a necessary part of that ability. While the position description refers to the maintenance of "financial responsibility" the possession of insurance on a personal vehicle alone does not meet that requirement when an employee must drive state owned vehicles in the course of her employment. Rather, that obligation must extend to the ability to be insured by the Employer as well. Since the Grievant was suspended from coverage for valid and substantial reasons, she is no longer able to meet this requirement of the position, and the Arbitrator has no choice but to uphold her removal.

The Grievant's actions in falsifying her time reporting on July 13, 2018, together with the suspension of her insurance coverage and her prior disciplinary record establish just cause for her removal from employment. The grievance is therefore denied.

AWARD

The grievance is denied.

Dated: September 11, 2019

Tobie Braverman, Arbitrator