**In the Matter of**
**THE LABOR ARBITRATION BETWEEN:**

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|---|---|---|
| State of Ohio, Adjutant General Dept.<br>Public Employer | ) | Case No. ADJ-2020-00971-14 |
| | ) | Grievance: Removal (M. Erdman) |
| and | ) | ARBITRATOR GREGORY P. SZUTER |
| OCSEA/AFSCME Local 11, AFL-CIO<br>Employee Organization | ) | **ARBITRATION DECISION AND AWARD** |

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Major Jamie Kreps, ANG, Judge Advocate Staff*

Date of Decision: March 1, 2021
Briefing Date: January 15, 2018
Grievance Date: March 11, 2020
Hearing Date: December 17, 2020 (9:00 a.m.)
Hearing Locale: [Videoconference] OH

## I. INTRODUCTION

The parties to this arbitration are State of Ohio, ("Employer" or "Management" or "State ") Adjutant General Department ("ADJ") and OCSEA/AFSCME Local 11, AFL-CIO ("Union"). This arbitration arises from a grievance filed on March 11, 2020 by the Union under the collective bargaining agreement between the parties, effective, May 12, 2018 through February 28, 2021. ("CBA" or "Agreement") The grievance seeks redress for the removal Melissa Erdman ("Grievant") from public employment at the Camp Perry Lodging & Conference Center ("CP") operated by ADJ.

## II. RECORD OF HEARING

The hearing was held by videoconference jointly hosted by the Union and the State, on December 17, 2020 at which the parties presented their evidence. The parties submitted a signed joint stipulation ("stip")[1] and seven Joint Exhibits ("JX").[2] The State offered six Management Exhibits. ("MX ).[3] The Union offered one exhibit. ("UX")[4] The parties timely filed post hearing briefs. The no transcript of the testimony ("TX") was taken. The testimony as preserved in findings of fact herein, together with the stipulations, exhibits and post hearing briefs constitute the Record of Hearing.

## III. THE GRIEVANCES

The grievance was filed on March 11, 2020 on behalf Grievant Melissa Erdman who was removed from public employment that same day. The grievance provides:

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[1] Tab A, Signed Issue Statement and Stipulation. The Parties submitted all exhibits in a binder divided alphabetically with tabs which, other than Tab A, will not be used herein in favor of the numbered exhibits. The binder Tabs B through G are joint exhibits excluding JX 2 and Tab H through M are the management exhibits.

[2] JX 1 - Administrative Investigation with attachments (minus witness statements)
JX 2 - Audio Recording of Plea hearing in State of Ohio vs. Erdman
JX 3 - Termination letter dated March 10, 2020
JX 4 - Erdman signed acknowledgment of Work Rules
JX 5 - Adjutant General's Department Word Rules dated February 29, 2016
JX 6 - Camp Perry daily reports for September 19, 2017.
JX 7 - Grievance history

[3] MX 1 - Ohio Revised Code Sections
MX 2 - Restitution payment
MX 3 - Email from Roth
MX 4 - Position Description — Administrative Professional 2
MX 5 - Witness statements from Administrative Investigation
MX 6 - Erdman Timesheets — PPE 02/03/2018, 05/12/2018, and 07/07/2018

[4] UX 1 Pre Disciplinary Meeting Officer's Report, March 4, 2020.

Statement of Grievance: On March 11, 2020 Melissa Erdman was removed for alleged rule violations: 2c insubordination, 5a dishonesty, 6a theft in office, 6f misuse of state owned computers. Management failed to prove how Melissa violated rules and solely based on these rule violations on a court case that didn't carry a conviction.
Resolution Requested: Cease and desist; Make whole in every way; Reduce/ remove.

## IV. PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT[5]

The following excerpts from the Agreement indicate some of the terms considered or construed herein by the parties or by the Arbitrator. Both Agreements in evidence are identical as to the quoted matter. As to the merits:

ARTICLE 24 — DISCIPLINE
24.01 - Standard

*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*. . . .

24.02 - Progressive Discipline

*The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.* Disciplinary action shall include:

a. One (1) or more written reprimand(s);

b. One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer.

If a working suspension is grieved, and the grievance is denied or partially granted and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balances in lieu of a fine levied against him/her.

c. One (1) or more day(s) suspension(s). A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a major suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer;

d. Termination.

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.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

If a bargaining unit employee receives discipline which includes lost wages, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay;

2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, employee, and the Union.

. . .

[5] *Italics* are inserted in the quoted matter in this section IV and in the next, V, are not for emphasis but for ease of location for the reader. Italics used elsewhere are for emphasis added except when noted as being in the original. Any underscoring or **boldface** shown appears in the original except for use herein to identify dates in the fact chronology.

24.06 - Imposition of Discipline

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as seasonably 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.*

. . .

*Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.*

...

An employee may be placed on administrative leave, without loss of pay (except in cases that fall within ORC Section 124.388(B)), or reassigned while an investigation is being conducted [exception for abuse cases]...

As to the arbitration proceeding:

Article 25 GRIEVANCE PROCEDURE

. . .

25.03 Arbitration Procedures

. . .

The expenses and fees of the arbitrator shall be shared equally by the parties.

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than forty-five (45) days after (1) the conclusion of the hearing; or (2) the date written closings are due to the arbitrator, unless the parties agree otherwise.

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

. . .

## V. EXTRA CONTRACTUAL DOCUMENTS

The memorandum issued February 29, 2016 by the Adjudant General titled " WORK RULES - State Employee Discipline" were referred to by the parties. Portions considered or consulted are:

. . .

GENERAL:

Employees shall abide by all directives, rules, and policies of the Adjutant General's Department as well as all local, state, and federal laws.

Disciplining an employee who violates rules, policies, and directives of the Adjutant General's Department or the Ohio Revised Code, is necessary, if order and efficiency are to prevail in the work place. The objective of imposing discipline is to correct undesirable behavior that adversely impacts the mission of the Adjutant General's Department.

It is of equal importance that disciplinary action shall be for just cause and shall be administered fairly and consistently throughout the organization within the guidelines set herein. *The suggested discipline outlined shall also be commensurate with the offense, taking into account the severity of the violation and mitigating circumstances, as well as previous discipline. The Adjutant General's Department is dedicated to the policy of corrective, progressive discipline. Disciplinary action should be imposed with the intent of giving the employee the opportunity to correct his/her behavior so long as the discipline is commensurate with the offense.* If the behavior is not corrected, discipline should become increasingly severe, up to and including removal. Certain offenses warrant severe discipline to include removal on the first offense.

The infractions included in this directive and the enclosed Table of Penalties are not intended to be all-inclusive. It is likely that many other types of infractions may occur, The infractions listed are intended to be representative examples of activities that will warrant immediate corrective action.
...
RESPONSIBILITIES
Illegal conduct on the part of any employee, whether on or off duty, is not only unlawful but reflects on the integrity of the Adjutant General and betrays public trust. ...
Conviction of a felony is cause for removal from employment with the Adjutant General's Department.

Procedures
Discipline shall be progressive in nature, Each violation of policy or procedure will move the disciplinary process to the next step. Discipline shall be imposed per the Table of Penalties
Joint Exhibit 5 attached, beginning with a written reprimand for minor violations and progressing with each violation. *Disciplinary action need not begin at a written reprimand for a major violation. The determination of whether a violation is minor or major is a management decision and based upon the circumstances surrounding the violation, as well as the nature of the violation.*
Definitions
. . .
f. Removal: An involuntary termination from duty with the Adjutant General's Department imposed by the appointing authority for recurring infractions or a serious breach of the rules and regulations or a combination of both.

Bargaining unit employees are entitled to union representation during all phases of the disciplinary process. Exempt employees are entitled to representation of their choice, if requested, during all phases of the disciplinary process.

*For major breaches in proper behavior, policy, or procedure, the principles of progressive corrective disciplinary action may not be appropriate. An employee may be disciplined immediately, without progression, based on the seriousness of the offense. Due process shall always be provided except for those serving in unclassified positions. Disciplinary action shall be commensurate with the offense(s).*
. . .

The Attachment is the Adjutant General's Department Progressive Disciplinary Guidelines For State Employees dated February 29, 2016 which includes a table of penalties. Parts considered or consulted are:

The following is a list of specific infractions which constitute unacceptable behavior or inefficient service for employees of the Adjutant General's Department. These infractions are violations of departmental policy, the Ohio Revised Code, the Ohio Administrative Code, or other laws governing civil service employees and/or citizens of the state of Ohio. *An employee who commits such infraction(s) shall be subject to the appropriate disciplinary action(s).* This list is not all inclusive nor are the recommended actions herein absolutely mandated. They will serve as guidelines only.
. . .

Finally, the department will comply with the Governor's Illegal Activities policy, requiring that illegal activities be appropriately reported and criminally investigated if outside authorities so determine. Employees have no right to personnel actions in lieu of criminal prosecution.

*Note: These guidelines are provided as an aid to supervisors in order to assure proper implementation of discipline. It may be appropriate to impose greater or lesser levels of discipline in specific cases depending on the severity of the offense.* Supervisors may issue one or more written reprimands before progressing to suspension/removal. Progressive discipline may be used for unrelated violations.

| DISCIPLINARY GUIDELINES<br>Violations | 1st | 2nd | 3rd |
|---|---|---|---|
| . . . | | | |
| 2 – Insubordination | | | |
| (c) – Violation of agency work rules or policies | Written Reprimand or suspension | Suspension | Removal |
| . . . | | | |
| 5 – Dishonesty | | | |
| (a) – Falsification of any employment document, including timesheet, employment application, medical evaluation, and expense reports | Suspension or Removal | Removal | |
| . . . | | | |
| 6 – Theft/Misuse of State/Federal property | | | |
| (a)– Theft in office | Removal | | |
| . . . | | | |
| (f) – Theft/Misuse of State/Federal property | Written Reprimand | Suspension | Removal |

## VI. STIPULATIONS ON ARBITRABILITY

The parties agreed that there a valid arbitration contract between the parties, and that the grievances were processed in substantive and procedural compliance with it. Stipulations on the merits are recorded in the Findings of Fact.

## VII. STATEMENT OF THE ISSUES FOR DECISION

1. *Was the Grievant, Melissa Erdman, disciplined for just cause? If not what shall the remedy be?*

## VIII. THE FINDINGS OF FACT BASED ON THE RECORD AS A WHOLE.

### A. BACKGROUND

The Adjutant General's Department (ADJ) is the state agency responsible for providing support to the Ohio Air and Army National Guard. The federal military employees, Ohio National Guard both Army and Air Force, serve with the State's civilian employees with the result that there is cross over in many functions. For example, the information technology access for the ADJ State employees is not on the State's Office of Information Technology (OIT) network. Rather they work with the Department of Defense network. Therefore all State employees are required to pass a federal

Suitability of Employment background check prior to gaining access to the federal network.

The Camp Perry Lodging and Conference Center(CPLCC) supports the nearby Camp Perry Joint Training Center (CPJTC) for the Ohio National Guard. On its grounds is one of the largest outdoor rifle ranges in the world. Annually it hosts "National Matches" conducted by the Civilian Marksmanship Program (CMP), a government-chartered program that promotes firearm safety and training, and the "National Rifle Matches" conducted by National Rifle Association (NRA), a private program that promotes firearm safety training. Lodging with the CPLCC is in great demand during the annual marksmanship matches.

The CPLCC is a self-sustaining. It provides lodging and hosts large group gatherings such as conferences, "purse parties," weddings and wedding receptions. It maintains the Camp Perry Chapel on site for weddings. The principal facility where cottages and camping (recreation vehicle) sites are rented is the Camp Perry Clubhouse (Clubhouse). Debbie Paul is the Clubhouse Manager. She explained that the revenue received through rentals and events are used to provide for the overhead, maintenance, improvements and renovations of the facility. "RoomMaster" is the point of sale computer software used at the Clubhouse for the lodging guests. The system generates a variety of documents, including shift end reports, journals, revenue breakdown sheets, and Day-end Reports.

The Clubhouse Manager is assisted by an Administrative Professional 2 who was responsible for providing both administrative and financial support to the Clubhouse. The position was serve as part of the check and balance system for rental and event revenue. Duties (MX 4) as pertinent here were:

> 50% ...Assist Administrator with Camp Perry Lodging & Conference Center (CPLCC) operations by managing lodging & conference rental (e.g., process reservations, payments, changes & cancellations). . . . Knowledge: ...OAKS, RoomMaster ...[6]
> 35% Assists Administrator with managing business functions CPLCC operations; prepare deposits & maintain accounting records for rental operations; compile financial date & prepare rental operation reports; set up lodging payment folios for billed groups;... Knowledge: bookkeeping, accounting.

Persons and job titles identified in the record:

Richard Willinger, Assistant Quartermaster General, ADJ
Major Michael M. Yates, OHARNG, Base Operations Supervisor, Camp Perry Joint Training Center
Major Jamie M. Kreps, ANG, Staff Judge Advocate
Rebecca Allen, Grants Manager, ADJ
Debbie Paul, Manager of Camp Perry Clubhouse
Cindy Dixon, Camp Perry Financial Analyst
Administrative Professional, Melissa Erdman, then Erica Sanchez,
Cashiers: Adam Janes, Erica Mowell, Kim Zibert,
Tpr. Jonathan Werner, Ohio State Highway Patrol

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[6] OAKS is the database, Ohio Administrative Knowledge System. "roomMaster ™" is a proprietary business name of In Quest Software and repeated herein with out the trademark and with the capitalization forced by the wordprocessing software used.

B. CHRONOLOGY

Melissa Erdman (Grievant or Melissa) was employed with ADJ as an Administrative Professional 2 for over 7 years. She was hired by the Adjutant General's Department on **April 9, 2012.** She was acting supervisor during the months in between supervisors and served as the assistant manager in Ms.Paul's absence.

The current rendition of the ADJ Work Rules was issued four years later on **February 29, 2016** which superseded the 2011 version. Grievant signed the acknowledgment of the ADJ Work Rules on **April 11, 2016.** The 2018 Conference Center Standard Operational procedures (SOP's) was updated on January in **January 2018** and distributed to "Kim, Missy, Erica and Major Yates."

Between December, 2017 and her eventual promotion in July 2018, Ms. Erdman falsified Clubhouse financial records of 13 accounts including two weddings. Many of the lodging accounts were long standing, reoccurring, cash paying customers, some returning annually since 2015. The only fact the 11 accounts and 2 wedding deposits had in common were that they were all cash deposits and all involved the Grievant's falsification of records. The total of all the account revisions was $2781.56. None of this activity was discovered until after her promotion.

On one day, **May 28, 2018**, at 12:10 a.m. on a holiday Ms. Erdman came on site. She did not record those hours on her timesheet. Ms. Paul did not know she was on site at that time. While she was there she falsified Clubhouse records of three accounts amounting to $782.18. The falsified records amounted to $782.18. (Dudas Account: $550; Burns Account: $154; Faunch Account: $78.18).

On **July 8, 2018**, Grievant's received a promotion to Financial Analyst for the ADJ at the 200th Red Horse Squadron of the Air National Guard. Erica Sanchez took over as Administrative Professional 2 at the Clubhouse after Ms. Erdman left. Grievant sought to return for temporary assistance at the Clubhouse for the annual Matches but the was refused by ADJ management.

On **August 20, 2018**, Natasha Roth, a wedding customer, called Ms. Sanchez to inquire about the remaining balance due for her wedding. Ms. Roth told Ms. Sanchez that she should only owe $1540 of her $2200 total bill, because she paid a $660 deposit in the prior September of 2017. Ms. Sanchez did not see the money posted to that account in RoomMaster.

On **September 8, 2018**, Ms. Mowell, Cashier, texted Ms. Paul that Ms. Roth's groom had tried to pay the remaining balance on the account. Ms. Paul and Ms. Mowell investigated the account but were unable to locate the missing deposit. Ms. Sanchez reviewed the physical file and found the contract on which Ms. Erdman had noted a $660 cash deposit paid by Ms. Roth. Ms. Erdman had initialed the deposit and completed contract form, dating it **September 19, 2017**. However she did not create a RoomMaster account at that time which is normal procedure.

On **September 9**, **2018**, Ms. Paul told Ms.Sanchez the $660 deposit was missing. Ms. Sanchez ran a report on the transaction and noticed that the date the amount was posted on October 30, 2017,

over a month after the contract date of September 19, 2017. Ms. Zibert, Cashier, remembered seeing Ms. Roth hand Ms. Mowell the deposit which was then handed to Ms. Erdman. Ms. Mowell did not recall this event. Ms. Erdman attempted to throw suspicion on Ms. Zibert's statement stating she believed Ms. Zibert "hated" her. However, Ms. Erdman did not deny taking cash from Ms. Roth for the wedding deposit. She identified her initials on the document but had no explanation to why it was entered a month later or where the money went.

On **September 13, 2018,** Ms. Paul, notified her superior, Maj Yates, concerning the Roth wedding deposit. He in turn notified Asst. Quartermaster Willinger who contacted Ohio State Highway Patrol Tpr. Jonathan Werner. Meanwhile on **September 14, 2018** Ms. Paul emailed Ms. Roth, stating there was a paperwork discrepancy on her deposit. She acknowledged the $660 deposit but asked Ms. Roth to whom the payment was given. Ms. Roth responded the same day to Ms. Paul stating:

> "I paid a $660 down payment when we booked the conference center and that was paid in cash to Missy. My final payment was a check and that was given to Erica." MX 3.

Later that day Ms. Paul related this information to Major Yates among others via email.

Tpr. Werner and Ms. Allen, ADJ Finance Grants Manager, reviewed revenue collections and deposit documents and reports from OAKS for the Camp Perry Clubhouse for the months of September through November 2018. They and where unable to find records of the $660 deposit. On **September 18, 2018**, Tpr. Werner and Ms. Allen went to the Clubhouse to interview Ms. Paul and review the documentation. After this visit, they concluded that the $660 documented as collected by Ms. Erdman was either lost or stolen. Tpr. Werner conducted an additional criminal investigation.

On **November 16, 2018** Shari Amigo, a customer planning a wedding at Perry Chapel, arrived that evening and asked for the key to measure the Chapel for decorations. The Chapel rental is $200. While she was away Ms. Sanchez told Ms. Paul that, although there was a signed contract dated January 18, 2018, the deposit had not been received. She asked if she should request the deposit that night. Ms. Paul agreed. When Ms. Amigo returned Ms. Sanchez asked for the deposit. Ms. Amigo said that she paid by cash in full when the contract was signed. Ms. Paul and Ms. Sanchez told her they would check into it and call her. However, Ms. Amigo called later that evening. She said she had given the cash to Melissa who had sent her a receipt. Ms. Paul asked for a copy of the receipt. It was dated January 19, 2018 for the full amount, $200. The $200 was never inserted into RoomMaster nor was it deposited in the bank.

Ms. Sanchez and Ms. Paul immediately began to review the revenue spreadsheet for January 2018 for other cash deposits and discovered a number of discrepancies. Around **November 26, 2018**, Ms. Paul and Ms. Allen reviewed 2018 accounts. Investigating the cash deposits they found eleven other discrepancies not including the two wedding deposits. On **November 28, 2018** Ms. Paul outlined their findings regarding Grievant's activities at the CPLCC in a letter to Tpr. Warner.

C. CRIMINAL INVESTIGATION

The criminal investigation and court proceedings consumed the next year. Administrative activity on the same incidents was held in abeyance according to policy,

Grievant was indicted on eight charges by the Ottawa County Grand Jury. She entered a plea of not guilty to all eight charges in the Court of Common Pleas Ottawa County, Ohio, case number 19-CR-010. Later on **October 28, 2019** she entered a guilty plea to two of the counts. They were Count #3: Breaking and Entering, a felony of the fifth degree (F5) under ORC Sec. 2911.13(A)(C) and Count #4: Unauthorized Use of Computer Equipment, a felony of the fifth degree (F5) under ORC Sec. 2913.04(B(G)(2)). The Plea of Guilty on Indictment and Request for Pretrial Diversion was signed by was Ms. Erdman. In it she admitted that she withdrew her plea of not guilty to the indictment and entered a plea of guilty on two of the counts with the intention of completing a pretrial diversion program. The Court dismissed the rest of the eight counts of the indictment. Pending her successful completion of the pretrial diversion program, the Court would withhold sentencing on the two guilty pleas and the prosecutor would recommend dismissal. It also stated:

> "*By pleading guilty I admit committing the offense and will tell the Court the facts and circumstances of my guilt*. I understand my right to appeal, my other limited appeal rights and any other appeal must be filed within 30 days of my sentence. I understand the consequences of a conviction upon me if I am not a US citizen. My attorney has advised me of my right to appeal. I understand that I will be further advised of my right to appeal by the court. I hereby waive my right to appeal matters in this case occurring prior to sentencing. *I enter this plea voluntarily*."

During the hearing where the Court examined the guilty plea, the Prosecutor set forth the Grievant's actions in violation of law. In court Ms. Erdman made a statement (her "allocution" in support of her plea) with her Defense Attorney stating that she entered the office at night and tampered with records on her computer.

The same day an Agreed Judgement Entry on Restitution in the amount of $2,781 to the Treasurer, State of Ohio c/o Adjutant General Department. The Judgment Entry was entered by the Court after being signed by Ms. Erdman and her counsel and the prosecutor. Grievant satisfied this restoration order in **November 2019.**

D. ADMINISTRATIVE INVESTIGATION

Immediately after the guilty plea the administrative investigation proceeded. Major Jamie Kreps, an attorney with the 180th Fighter Wing, conducted interviews on **November 20, 2019** with Debbie Paul, Erica Mowell, and Kim Zibert. Adam James was interviewed **December 3, 2019.** Erica Sanchez was interviewed on **December 4, 2019.** Follow-up interviews were held thas same day with Erica Mowell and Kim Zibert.

On **November 21, 2019** an incident report was generated by Grievant to the Department of the Air Force 200th Red Horse Squadron where she was then working. In it she walked back her guilty plea.

"I plead guilty to these charges because I did come in during unscheduled work hours and I did use my CAC card to access my work files. ..."
"I never once had any ill intent when going into my office during unscheduled work hours - my thoughts were always how I could make the clubhouse more successful and recognized for its great customer service."

Melissa Erdman was interviewed by Major Kreps on **November 22, 2019.**

On **February 2, 2020** Major Kreps submitted the report of her administrative investigation of rule violations and misconduct by Grievant. It included 26 attachments of which eight were witness statements from the interviews. In addition she included records of 14 customer accounts, copies of applicable policies, Grievant's timesheets and the guilty plea, Major Kreps found as follows:

Between December 2017 and June 2018, Ms. Erdman manually adjusted cashier reported transactions on roughly eleven accounts and failed to post two wedding deposits to the Clubhouse's computer registration system, RoomMaster. The adjustments on the approximately eleven accounts and amount of two wedding deposits totaled $2781.56. Not any part of this total was ever accounted for. Ms. Erdman did not deny making adjustments on these accounts nor does she deny accepting the cash deposits concerning the two weddings in question, although she did not specifically recall any single transaction. She does deny taking the money for herself and claims that her adjustments stem from wanting to make the cash she received from the cashiers after a work day or work weekend equal the amount indicated on their RoomMaster reports. Ms. Erdman stated that her adjustment descriptions weren't meant to be accurate, they were meant to serve as a meaningless place holder so that she could correct mistakes made by the cashiers. Rather than alert management, Ms. Erdman claimed to have wanted to aid the cashiers and fix their mistakes to help them.
. . .

Ms. Erdman's assertions that she was trying to help the Clubhouse on her own time is inconsistent with the evidence. Ms. Erdman was known by all the staff as someone who would directly report employee misdeeds to Ms. Paul and who also knew the gravity of failing to account for lost money. The preponderance of the evidence indicates that Ms. Erdman committed the following violations under the Work-Rules, State Employee Discipline, Disciplinary Guidelines Table, Violations:

(i) Paragraph 2. Insubordination,
(ii) Paragraph 5a. Dishonesty, Falsification of any employment document, including timesheet,
(iii) Paragraph 6a.Theft in office,
(iv) Paragraph 6f. Misuse of state-owned computers, and
(v) Paragraph 8. Felony conviction.

Major Kreps found that based on the preponderance of evidence Ms. Erdman took the missing money and adjusted it off the reports to cover her theft by use of government computers and falsified her employee timesheet in the process.

Pursuant to notice a pre-disciplinary meeting was conducted **March 3, 2020** by Caroline Anderson with Grievant present with her Union representative and a management representative. Grievant submitted a written statement. In principal part it claimed Ms. Paul reconciled all the books and that a Ms. Paul signed all time sheets and that the guilty plea was made in order to enter a diversion program. The hearing officer's report dated **March 4, 2020** made findings that there are facts that

show the allegations that Grievant violated several Work Rules are founded. UX 1. Specific findings were that Grievant adjusted a number of accounts fraudulently writing off $2781.56 that was repaid in the restitution check and that Grievant made several of the fraudulent account adjustments between midnight and five a.m. However, because Grievant made a guilty plea without a conviction, the charge that Grievant committed felony was not founded.

Grievant was terminated on **March 11, 2020** for violation of Work Rules: 2(C) Insubordination — Violation of agency work rules or policies, 5(a) Dishonest —Falsification of any employment document, including timesheet, employment application, medical evaluation, and expense reports, 6(a) — Theft/Misuse of State/Federal property — Theft in office, 6(f) Theft/Misuse of State/Federal property — Misuse of state-owned computers, telephones, vehicles, and other state property. The termination letter did not include violation of Work Rule paragraph 8, felony conviction.

E. EVIDENCE OF GRIEVANT'S ACCOUNTING MISCONDUCT

Clubhouse management initiated an investigation upon discovery of the Roth missing deposit and followed up with the missing Amigo deposit. The two amounted to $860 in total. That led to the identification of 11 other accounts reviewed by ADJ management and the Ohio State Highway Patrol. Major Kreps who conducted the administrative investigation testified at arbitration. She concluded that Grievant tampered with over 11 reservations in RoomMaster computer reservation system, falsified deposit slips, and failed to record and deposit two wedding deposits resulting in a theft of over $2,800 from the Adjutant General's Department. Major Kreps determined that there were 11 customer accounts which were paid in cash and 2 cash wedding deposits were received that were never deposited into the Camp Perry Clubhouse bank account. The following summarizes the detail of her investigation which was also presented at the arbitration.

Customers must pay for their entire stay upon check-in by cash or by credit card debit. The initial deposit is reduced by charges for each day until a zero balance is achieved. The actual paid-in-full receipt or "zero balance folio" is tendered at check-out upon request but is rarely requested.

Upon check-in the system generates a Customer Acknowledgment form and a Rules Acknowledgment form.[7] The Customer Acknowledgment states the total charges for the stay but does not state any amount that is received. Then a Rules Acknowledgment form that identifies the rules that apply during the stay, and a key log (ie receipt for keys) are generated. which the guest also signs. The forms are signed by the guest to indicate their knowledge of the amount due and length of stay and other details.

When cash (money or check) is used at check-in, it is recorded in RoomMaster after the two acknowledgment forms are signed. The cashier who receives cash from the customer and puts it in

[7] The acknowledgment forms do not show a formal title on thier face but are referred to by the witnesses as such. In order to differentiate the two acknowledgment forms generated at check-in the convention of capitalizing them is used herein for clarity.

the cashier's independent drawers in an envelope. A debit is then made on RoomMaster. All payments including credit card slips go into this envelope. At the end of the shift the cashier matches the envelope contents with the shift report. If the cash drawer receipts do not exactly equal the numbers from the Day-end reports, the cashier must track down the reason for the discrepancy. If the cashier cannot resolve the discrepancy, the Manager, Ms. Paul, is to be notified.

Wedding Accounts

*Roth Account*: $660 (9/19/17 to 9/14/18)
Grievant created contract and initialed deposit receipt for $660 which was not included in revenue breakdown prepared by Grievant .

*Amigo Account:* $200 (1/18/18 to 11/16/18)
Grievant signed receipt with paid stamp for $200 but not accounted for in the software.

Lodging Accounts.

In each case one of the cashiers processed the guest and received a cash deposit that was later taken off the books by Grievant through a series of computer entries. When cash is received it is entered as a debit in RoomMaster. In order to reverse it such as for a refund, a credit entry is made in RoomMaster. Often Grievant would void the debit, then make credit entry to reverse it with a notation to explain the credit. However, the correct folio for the debit to be offset was not indicated nor any entry made offsetting the action in the notation. This pattern persisted throughout all the discrepancies listed below.

*Hart Account:* $242 (12/22/17 to 12/30/17)
A Cashier processed a check-in to room 525 with the acknowledgment and rules forms and a cash deposit of $242. The Cashier moved the guest from 525 to room 524. Grievant prepared a credit entry notation of "wrong folio" for room 524. The correct folio was not indicated nor any entry offsetting that notation. Result: $242 cash deposit taken off the books.

*Andrick Account:* $242 (12/22/17 to 12/30/17)
A Cashier processed a check-in to room 521 with the acknowledgment and rules forms and a $110 cash deposit. Grievant prepared a credit entry notation of "wrong folio" for room 521. Result: $110 cash deposit taken off the books.

*Burgin Account:* $110 (1/20/18 to 1/22/18)
A Cashier processed a check-in to room 521 including acknowledgment form and a cash credit $315.70. Days later Grievant entered a series of transactions. Grievant entered and initialed $205.70 in "actual" column and $110 in "difference" column. She removed the $110 from the system by three debits to the system followed by three voided credits. Final entries were a "room adjustment" debit of $110 as a "no-show" for room 521 initialed by Grievant with the shift end report showing $110 cash write off. Result: $110 cash deposit taken off the books.

*Dravenstott Account:* $110 (5/5/18 to 5/7/18)
A Cashier processed a check-in to room 520 including acknowledgment and rules forms and cash receipt of $110. Grievant voided the debit noted as "checked out early" and initialed it. Shift end report indicated $110 write off. Result: $110 cash deposit taken off the books.

*Dudas Account:* $550 (5/20/18 to 5/28/18) - one of the "midnight" adjustments.
A Cashier processed a check-in for room 505 with acknowledgment and room forms and cash deposit

$550. Grievant voided the debit noting "wrong code" and wrote off the amount on the shift report indicating no cash receipt. Customer checked out after five days which was processed by Cashier. Three days later Grievant made a credit entry of $550 noting "training folio." The shift end report indicated a write off of that amount. Result: $550 cash deposit taken off the books.

*Burns Account:* $154 (5/25/18 to 5/28/18) - one of the "midnight" adjustments.
A Cashier processed a check-in to room 519 with cash credit of $462 with the of a three night stay checking out 5/27/18. Grievant's shift end report showed total cash $1710.33 but the software showed $1864.33 with the difference of $154 which represents the room charge of $140 and two tax entries totaling $14. Two days later Grievant made an adjustment entries for the room charge of $140 and for both the sales tax and excise tax as "early departure." On the following day Grievant made entries to advance the "early departure" to 5/28/18 with notations each for the room charge of $140 and the sales tax. The properties change journal was altered by Grievant to a two night stay instead of a three night stay with checkout on 5/28/18. Result: $154 cash deposit taken off the books.

*Faunch Account:* $78.18 (5/25/18 to 5/28/18) - one of the "midnight" adjustments.
A Cashier processed a check-in for an RV camping sites, RVP 02 and 03, with a cash deposit of $79.18 total for three day stay. Grievant decreased the reservation from three days to two and entered a "training folio" debit for each space. Result: $79.18 cash deposit taken off the books.

*Dillon Account:* $121.98 (6/22/18 to 6/25/18)
A Cashier processed a check-in for RV camping site RVP 15 with $121.98 cash deposit. Grievant reversed it in three credit entries totaling that amount all noting "no charge." Result: $121.98 cash deposit taken off the books.

*Fuller Account:* $220 (6/22/18 to 6/25/18)
A Cashier processed a check-in for room 523 with acknowledgment and rules forms and cash deposit of $220. Grievant entered a credit entry for a $220 as a "room adjustment." Result: $220 cash deposit taken off the books.

*Hufford Account:* $220 (6/22/18 to 6/25/18)
A Cashier processed check-in to room 525 with and acknowledgment forms with a cash deposit of $220. Grievant reversed it with a credit entry for a $220 as a "room adjustment." Result: $220 cash deposit taken off the books.

*Paprone Account:* $114.40 (6/29/18 to 6/30/18)
A Cashier processed a check-in to room 156 with rules and acknowledgment forms and a cash deposit of $114.40. The shift end report signed by cashier showed $114.40. Grievant voided the debit with the notation "AC" and entered a credit entry with notation "wrong code." Grievant then entered a voided debit for that credit indicating "wrong code." On her shift end report she indicated $114.40 write off and the Day-end report indicated zero cash received. Result: one $114.40 cash deposit taken off the books.

## F. GRIEVANT'S EXPLANATIONS

Grievant raised a number of explanations that only serve to deny, distract and deflect attention to the evidence. They are each unsupportable by the evidence.

One of Ms. Erdman's explanations was that she was merely attempting to have the Day-end report figures match up with RoomMaster. The SOP states, "if errors cannot be corrected contact the Manager." When Ms. Erdman encountered the accounts above, she did not contact the Manager.

Instead Ms. Erdman adjusted codes on these accounts so that the numbers in the RoomMaster reports equaled the amount of cash that ultimately was reported by Ms. Erdman and then deposited by Ms. Dixon. Rather than go to the Manager as the SOP required, Ms. Erdman "washed" the numbers taken in over any given weekend.

One of the means by which Grievant washed the numbers was to delay the posting of the cash. Grievant asked Ms. Mowell, cashier, on certain weeks not to record cash collected cash for room reservations into RoomMaster that was received on a Friday and even on a Thursday evening, or over the weekend. This was to prevent the cash received from sitting in the office over the weekend. Grievant also asked Ms. Mowell to tell her if she knew of any cash collected. If cash came in during these times, Ms. Mowell was to leave a a post-it note for Ms. Erdman showing which account it was in. Not documenting cash received was meant to satisfy a non-existent "two day rule."[8] The cash and checks otherwise would stay in the safe up to five days before Ms. Dixon returned to work on the following Monday. By delaying the documentation, the cash would appear to be in-house for only two days before Ms. Dixon's deposit. However Grievant did not adjust her deposit dates on the deposit slips to the "two days." She showed that cashiers had received cash as much as four days before Ms. Dixon would have deposited them into a bank.

Without the cash being posted to RoomMaster, there was less of a paper trail which in turn could have allowed time for Ms. Erdman to collect the cash herself while she revised he records to her liking. Also by not posting the cash timely, it would be easier to blame Ms. Mowell for any loss or for the cash never to be noticed at all.

Ms. Erdman claims that anyone could have been responsible for the missing cash because of the numbers of persons working at the Clubhouse. Ms.Paul testified that whenever there was a discrepancy everything would stop until that discrepancy was resolved. She testified that the discrepancy was often with credit cards being recorded as the wrong type or having the number entered incorrectly. Cash discrepancies were mostly in the order of two $5 dollar bills sticking together or miscounted change by a few cents.

The interviews confirmed that. In hers Ms. Mowell stated she has never even been off as much as $10. Mr. James stated that "if he found himself missing $550 he would have called Ms. Paul because that would be a huge problem." Ms. Zibert stated that "Ms. Erdman would have lost her mind if Ms. Zibert's transaction was actually missing money." She described how Ms. Erdman "freaked out" when Ms. Zibert's envelope did not appear in the safe but it had slipped behind something and was there. Ms. Paul also testified that the only discrepancies after Grievant's promotion had to do with credit cards and none with cash.

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[8] Ms. Erdman only told Ms. Mowell about this procedure. The witness statements record the other cashiers never having heard of it and being surprised at such a practice. It was not provided for in the SOP.

Because the cash could have been lost by anyone, Ms. Erdman claims she entered the revisions in order to to cover for the errors of the others. That means, over many months, she repeatedly made many entries, more than 40 in the records found, to cover for others. Such a labor of love begs credulity especially since one of the Cashiers, according to Grievant, hated and threatened her.

The Customer Acknowledgment does not show any actual payment received upon check-in. In fact Major Kreps wrote in her own hand on some of the acknowledgment forms"customer receipt" which did not show any cash payment. The Union argued at hearing (but not in the brief) that since the Customer Acknowledgment shows that no monies were received, no monies could have gone missing. However, the Customer Acknowledgment was generated merely to show the room rate and length of stay. It is generated prior to the payment being made and entered into RoomMaster. That was clearly explained in Ms. Paul's description of the check-in process. She also said that Major Kreps' handwriting was not on the original records. Grievant in her testimony also confirmed that the lack of payment recorded on that form was part of the check in process.

Ms. Erdman explained the timesheet for May 28, 2018 on which she failed to record her time. She claims she was merely at work outside her regular work hours for the benefit of the agency and that no one told Grievant that she could not be at work outside her work hours. She also claimed that there were many times she did so with Ms. Paul's consent. The examples she gave were call-back situations when Ms. Paul asked her to return to assist a guest with lost keys. Rather than report her call-back on the time sheet she used flex time to leave early to offset the four hours of call back.

An employee is entitled to four hours of call back pay when they are required to return to the work place outside of their regular under certain conditions. An employee is also allowed to flex their hours with their manager's approval. Ms. Paul explained that flex time may be used in this manner provided the timecard properly reports the call-back hours and the Manager requested the call back. Like any "what about" arguments his challenges tangential events to deflect blame and does not actually address what happened. She was on site without permission to falsify records.

## IX. POSITIONS OF THE PARTIES

### A. THE EMPLOYER'S POSITION

The Union in opening argument requested that due to the severity of the allegations, a clear and convincing standard should be used. It is well established that just cause is the appropriate standard of review in discipline cases. The severity of the violations does not change the standard of review.

Grievant tampered with over 11 reservations in the Room Master computer reservation system, falsified deposit slips, and failed to record and deposit two wedding deposits resulting in a theft of over $2,800 from the Adjutant General's Department. The Employer had just cause to discipline Grievant for violating the Adjutant General's Department's four Work Rules:

> *Rule 2 (c)* – Insubordination – "Violation of agency work rules or policies" – violating established work rules on reconciling cash on hand and daily reports by entering false codes into the Room Master system and, instructing Erica Mowell to

not enter cash deposits on the weekend and notify her with a text or a post it note;

*Rule 5 (a)* – Dishonesty – "Falsification of any employment document, including timesheet, employment application, medical evaluation, and expense reports" - repeatedly over several months, entering over 40 separate false, and admittedly "completely not accurate" entries into the Room Master system resulting in a $2,891.56 loss to the Adjutant General's Department;

*Rule 6 (a)* – Theft/Misuse of State/Federal property – "Theft in office", stealing $2,891.56 from the Adjutant General's Department; and

*Rule 6 (f)* – Theft/Misuse of State/Federal property – "Misuse of state-owned computers, telephones, vehicles, and other state property – using her Department of Defense computer to tamper with in her own attorney words "some evidence or some records on her computer" to effectuate her crime.

*Rule 2(c)* – Exhibit A sets forth the Grievant's affirmative actions in each account. Those affirmative actions of falsification resulted in a theft of $2,891.56. Grievant was the second most tenured employee at the Clubhouse. She knew the ins and outs of the process and procedures and used that to her advantage. Here four individuals all concur that it was a major deal when there was the least discrepancy. However, Grievant claims that, when the cash on hand didn't match the receipts, she did not know to notify anyone. Looking at the totality of the evidence, statements given, arbitration testimony, and guilty pleas, there is no other reasonable explanation other than Grievant was the one who stole the money.

Arbitrator Smith held that theft of property of any value is so violative of the necessary bond of trust between employee and employer that discharge for the first offense is reasonable. Cf. *OCSEA and Department of Transportation* (R.Brown Grievance) number 31-02-9101110003-01-06. In the Brown case, Grievant was removed for theft and misuse of state property (one time transportation & dumping of stone, a $30 value, onto private property). In this case, Grievant's theft is far more egregious than Mr. Brown's. Grievant's actions were repeated over numerous months. Grievant's actions resulted in a theft of $2,891.56.

*Rule 5(a)* – Falsification is defined as the act of counterfeiting or submitting something that is false or misleading. Each and every false entry into Room Master is a falsified an employment document. Exhibit A, Chronology of Account Transactions, documents over 40 examples of falsification committed by Grievant. She admitted in the arbitration, in her administrative investigation, and during her allocution in the Court hearing that those entries were false, specifically, "completely not accurate." It is undisputable that Grievant falsified these employment documents. Pursuant to the Work Rules' discipline grid, the penalty for a first offense of Falsification of any employment document, is Suspension or Removal. Arbitrators interpreting just cause provisions in the OCSEA contract have upheld discharges for similar actions. Cf. Arbitrator Ray, *OCSEA and State of Ohio Department of Public Safety* (E.Eddie Grievance), number 15-03-(93-05-15)-00340l-07.

The uncontroverted false entries made by Grievant are without a doubt falsification of records and employment documents. The Union argues that many people had access to the cash deposits and therefore Management cannot prove that Grievant was the one to steal the money. That would make every cashier incompetent, losing money all over the place requiring her to clean up the messes by entering falsified entries.

The record is full of examples where Grievant's timesheets accurately document hours worked outside of her standard work schedule. Grievant acknowledged that these were in fact her signed timesheets and that the time and attendance policy required her to accurately report her work hours. However, the Union argues that Grievant was merely at work outside her regular work hours for the benefit of the agency and that no one told Grievant that she could not be at work outside her work hours. Breaking and entering is not a mere trespass. Grievant entered into the premises, with the purpose to commit a theft offense. Grievant acknowledged that she did not report any hours worked on May 28, 2018 at 12:10 am. and that her supervisor did not authorize her to be on site at that time.

The Union claims that Management is cherry picking this one timecard and ignoring other inaccurate time and attendance recording particularly the a call in and- flex time situations. Flex time may be used for call back hours provided the timecard properly reflects the call back hours. Nonetheless the Union failed to produce the timecard in question to substantiate their argument.

*Rule 6(a)* – Management proved that they had just cause to terminate Grievant for theft in office. There were 11 customer accounts who paid in cash and 2 wedding deposits received that were never deposited into the Camp Perry Clubhouse bank account. The only things those transactions had in common were that (1) they were all paid in cash and (2) they all involved Grievant's falsified employment documents. Exhibit A sets forth Grievant's affirmative actions in each account. Those affirmative actions of falsification resulted in a theft of $2,891.56.

Grievant claims that she did not falsify those transactions which happen to support her criminal theft. She claims they were merely the acts of an untrained employee lacking any direction and guidance in performing the essential duties of her job. This argument doesn't pass the smell test. It is inconceivable that an employee with over seven years of experience, who served as acting supervisor in both official and unofficial capacities, would not know the policies and procedures for properly reconciling cash receipts. It is exactly this knowledge of the policies and procedures that enabled the theft and deception to go unnoticed until Grievant was promoted.

*Rule 6(f)* – The Union claims Grievant was never counseled about the appropriate use of computer equipment. This is not a case of an employee using her work computer to do some internet shopping or checking her personal emails outside of her scheduled breaks and lunches. Grievant used her work computer to falsify numerous employment documents, alter reservations, and steal $2,891.56.It is incomprehensible that an employee would not know that using a government computer on the Department of Defense network to falsify documents and steal money is not an acceptable use. Furthermore Grievant pleaded guilty to "unauthorized use of Computer Equipment." She used the network to perfect her crimes. In fact, during her allocution in her Court hearing, the Prosecutor set forth Grievant's acts and modius operandi of how she used her computer to change some records. Her Defense Attorney stated that she tampered with some evidence or some records on her computer.

Management proved through testimony and direct evidence that Grievant used her position, her work computer, the Department of Defense network, and her extensive knowledge of Camp Perry Clubhouse policies and procedures to steal. Grievant was on notice that these violations had consequences. Some of those consequences are severe. When Grievant signed her acknowledgement of the State Employee Discipline Policy,2 she was put on notice that there would be repercussions for any work rule violations. Management respectfully requests that you deny Grievant's grievance

and uphold her termination.

B. THE UNION 'S POSITION

Melissa Erdman had been an eight year employee with the State of Ohio with no prior discipline. She was removed from employment with the Adjutant General Agency at Camp Perry on March 11, 2020 for the following alleged violations of the Employer's Rules: 2c Insubordination, 5a dishonesty, 6a theft in office and 6f misuse of state owned computers. Management failed to present just cause in the arbitration proceedings to remove the Grievant from her employment.

Grievant has been fired for some of the most serious allegations an Employer can levy. The stench of this removal, if the grievance is not granted, will follow Grievant around for the rest of her employment life. Management is trying to ruin the life of a single individual without any hard evidence or direct evidence, only tenuous correlations and innuendo trying to make Grievant is responsible for over more than 100k in losses. Therefore, Management must prove she committed the alleged rule infractions Beyond a Reasonable Doubt. That higher standard of evidence is necessary for a case of such grave accusations. The Club House deals with $1000 of dollars every day. Management wants to say it is probable (not clear and convincing, certainly not beyond a reasonable doubt) that Grievant took the money in every insistence shown.

The charges that Management found Grievant guilty of were based solely on what happened in court. Management did not decide if they were going to administratively charge Grievant until the outcome of her court case. The discrepancies presented in this case occurred between September 19, 2017 and June 29, 2018. Those discrepancies were not found until November 2018, when the investigation began and it was sent to the authorities. Management waited until November 2019 to start their administrative investigation, over a year and then later put blame on Grievant for their incompetence.

Management failed to prove just cause on policies or procedures being violated while being employed. The time it took for Management between the removal and the first discrepancy was over 2.5 years while Management continued to allow Grievant to work and handle finances. Grievant even took a promotion before an investigation was started. In fact Management could not have done a thorough investigation, due to the time that lapsed between when the money went missing and when the investigation started. The Union too was prejudiced in defending Grievant by the delay. During their investigation Grievant was found guilty on pure speculation and circumstantial evidence. Management failed to provide direct evidence to show that any offense committed.

Management believes money was taken at Camp Perry when deposits were made, and people were booking hotel or cabin stays. Management tried to show that Grievant was the only person in that building that could have taken money. This is not true.

The monies in question passed through several employees' hands. Any of these employees could have been responsible for the missing money, whether by accident or intention. There were so many people involved in dealing with cash at the Club House they would never be able to tell whether these were errors or a theft to place.

While working at Camp Perry Grievant followed the work rules and did what she was trained to do. After years of completing reports the same way, not once did Management question or even edit her work. She was just doing her job the best way she knew how, in the absence of set policies

and procedures.

Management only included files that showed adjustments but not those that did not. Only certain people who had transactions refunded or lost for various reasons such as customer complaints, entry errors by co-workers, and stays not completed were questioned, but not all of them. Neither did they question her when money was refunded. To prove guilt they should have questioned all people involved in the money errors at Camp Perry. Never once was there evidence from any individual that stayed in the cottages or hotel that said they paid cash for their stay. Management had over nine alleged stays, but no testimony or receipts to prove individuals stayed or money was collected. Management only showed every discrepancy that had Grievant's name on it. Yes! This does look bad since her name is on them. However every transaction was explained by Grievant. She testified that she just made the books balance. She explained the process of how she zeroed out the discrepancies every day. There is not one day that there was a discrepancy that Management showed she did not zero out the discrepancy. There was never a day were she blamed another person for the missing money or left anyone's drawer unbalanced so they could get in trouble. That includes even someone that she allegedly "hated."

Grievant testified how the processes for the customer transactions and making deposits were not air-tight. Misplacing monies or making any number of clerical mistakes could result in discrepancies. With this sheer number of transactions posted per day to the Club House, it is just likely that there were isolated, unrelated accounting errors as it is that Grievant masterminded a plan to steal over $2000 over a 2 year period? Therefore the discrepancies could have been theft by any another individual because as Becky Allen testified, "anybody can take money and hide it."

Part of just cause for discipline is fair notice to Grievant. Management never provided procedures and policies for doing her job when it comes to balancing accounts and paperwork. Management claims Grievant did not follow the SOP for the Clubhouse,. However, Management never provided evidence that she received the SOP. On the other hand she had three levels of supervision that checked her work that she is completing and turning in accordance with the SOP. Not one person testified that Grievant was ever counseled to correct her procedures or to follow the SOP. Grievant even testified that she did her job in a vacuum and that no one ever gave her clear directions on what to do. She just figured it out herself.

Management allowed Grievant to commit the alleged rule violations over several years, without corrections or discipline. Management failed to do their job when checking reports that were submitted. It could have addressed the mistakes that employees were making or address alleged money missing. If Grievant took the money, evidence could be easily attainable through the video record of the office. No such video evidence is in this case. Looking at timesheets, computer usage and accounting practices, Management should have been aware of Grievant's practices but it was only brought into question when money was alleging missing and they needed someone to blame.

Management did not prove anything except that they lacked policies and procedures for money keeping, report editing, and secure storage of the building. Management needed a fall person for the lack of policies and procedures on money keeping and report editing. Management is stacking charges to try having more weight on a case that has so many holes and an unproven theory.

Management's insubordination charge is based on falsification of employment documents, including her timesheet, employment application, medical evaluation, and expense reports (the rule 2c violation). However, every time sheet she turned in was approved by her Supervisor and was

never questioned. Management failed to provide any other documents showing how she violated this work rule. Management did not prove that she received the SOP or that it was violated. Ms. Paul testified, "we have made polices and changed procedures after discovering missing monies." This proves Management is basing guilt on what happened at court and is stacking up charges to justify the removal.

Management claims Grievant's coming into workplace at night or on weekends and using the computer was misuse of the state computer. Management cannot produce evidence as to what harm was done to the computer or how she violated a policy or procedure when using the computer. Grievant needed a CAC card to gain access governmental computers and government websites. That is a military ID with a chip that allows access. Management knew years before she was charged that she had accessed work computers outside of normal working hours and did nothing to correct her. Furthermore, Grievant notified her supervisor when she worked outside of normal hours. Management is unable show how the computer was misused. The computer is not restricted to use for work purposes. What Management tried wass to provide a criminal code violation about state-owned computers, which does not even constitute for a work rule violation for any discipline for the employee.

Management charged Grievant with dishonesty for the simple reason that they believe she took the money and did not admit to doing so during the investigation. Management claimed that Grievant failed to properly fill out time sheet, however Ms. Paul signed off verifying that timesheets were complete and accurate. Grievant told the truth during this whole investigation. She was even be honest about why she agreed to a plea deal.

Management charges Grievant with theft in office by taking deposits and taking money collected for stays at Camp Perry. However, Management failed to show when and how she took the money. They will paint a picture that Grievant came to work, took the money with no one seeing it while being on camera yet she is the only one that could have taken the money. All Management has shown is that money was reported to have come in but that money never materialized. Management will also say that since she took a plea deal that she must have taken the money. It claims no one would do such a thing if they were innocent.

The biggest claim Debbie Allen and Management made was that Grievant was responsible for the loss of more than $100K in revenue for the Camp Perry Clubhouse. There is no evidence to back up claim other than Grievant went to a new job and then revenue went up. Management had no explanation as of how this occurred, but that it just did. The claim that over $100k was embezzled of taxpayer's money should be a serious prison sentence, not a removal from employment. Management lost all credibility by making this claim and having no evidence to back up claim.

Management has cherry picked circumstantial evidence to cobble a case against the Grievant. It is apparent that Management really does not know who took the money. Management took so long to notice these money errors that they had to put the blame on someone.

Under Art. 24.01 the discipline must be commensurate with the offense. Grievant had no prior discipline to the alleged rule violations. Management showed no prior attempt to correct her on the way she completed her duties. Management even called on her to be a TWL supervisor during this lapse and promoted her. Article 24.02 also requires the Arbitrator to consider the timelines of the Employer's decision to begin the disciplinary process. Management took years to start the disciplinary process. Article 24.06 allows for the Employer to put the employee on administrative

leave even without pay according to Ohio Revised Code 124.388(B). Management did not chose to do so. For someone that Management claimed was responsible for possibly more than 100k loss of revenue, why did they feel comfortable with letting her continue to work with money?

The Union asks that this grievance be granted in its entirety, that all back pay be granted, that all lost leave benefits be granted (ie. sick, vacation, and personal, medical, dental, and vison benefits), and that other amounts be repaid )ie. union dues, all taxes, insurance and retirement benefits). If she is not guilty of theft, the possibilities for other charges on first offenses are: 2c insubordination calls for a written reprimand or suspension, 5a dishonesty calls for a suspension to removal and 6f misuse of state-owed computers written reprimand. All these possibilities are based on the severity of the rule being violated, if even they were violated.

## X. DISCUSSION AND DECISION

### A. PROVING JUST CAUSE.

### *1.0 Burden and Quantum of Proof*

The Employer has the burden of proving just cause for its disciplinary actions and to support them with a relatively high degree of proof, clear and convincing evidence.[9] Determining the quantum of proof is a procedural matter within the arbitrator's powers.[10] The Employer has the burden of proving just cause for its disciplinary and discharge actions and to support them with a relatively high degree of proof, clear and convincing evidence.[11] That is not a moral certainty but it is beyond mere probability. It is the proof needed to form a firm belief.[12]

### *2. 0 Standards for Just Cause*

Where the CBA does not define just cause, it is a matter of interpretation by the Arbitrator.

"In the absence of an express provision to the contrary, it [is] for the arbitrator to determine the

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[9] *Georgia Pacific Corp.*, 87 LA 217 (Cohen 1986), *Imperial Glass Corp.*, 61 LA 180 (Gibson 1973), *Chemical Leaman Tank Lines, Inc.*, 55 LA 435 (Rohman 1970).

[10] KOVEN & SMITH, JUST CAUSE: THE SEVEN TESTS, Ch. 5.II.A.,"Proof"(Kenneth May, ed., BNA3rd ed., 2006) at 311.

[11] The State appears to argue for a preponderance standard. The Union mentions both the clear and convincing standard and the reasonable doubt standard. The trend of authority is in favor of the clear and convincing standard. See e.g. *A.R.A Mrg. Co.*, 83 LA (Canestraight 1984). *State of Piqua, Ohio v. Fraternal Order of Police*, 185 Ohio App.3d 496, 2009 -Ohio- 6591 (Ohio App. Dist.2 12/11/2009). In any event the criminal standard of beyond a reasonable doubt is inapplicable. In *OAPSE, AFSCME v. Lakewood City School Dist. Bd. of Edn*. (1994), 68 Ohio St. 3d 175, 624 N.E.2d 1043 (Ohio, 1994) the Ohio Supreme Court noted that an arbitration is not a criminal matter. That said, the quantum of proof is not crux of this case.

[12] Cf. *Black's Law Dictionary* 5th ed. It is a standard that requires evidence "so clear, direct, weighty and convincing as to enable the court to make its decision with a clear conviction." *Polselli v. Nationwide Mut. Fire Ins. Co.*, 23 F.3d 747, 752 (3d Cir. Pa. 1994).

meaning of 'just cause."[13]

The Company argues in favor of its just cause by reference to the multi-factor analysis of Arbitrator Carroll R. Daugherty in *Enterprise Wire Co.*, 46 LA 359 (1966) as the traditional source.[14] Originally propounded as a set of questions, Professor Daugherty's approach was that a single "NO" would defeat any finding if just cause. This is sensible when it is considered that the questions he propounded were for the railway industry where the arbitrator sits as might an appellate court on the employer's fact finding and does not consider the case *de novo*. In the mid 1980's Arbitrator Dennis Nolan adopted a "systemic" approach which has become the much more the current method used by most arbitrators in deciding cases where the issue is *de novo*. Arbitrator Nolan succinctly encapsulated the standards into two considerations :"[f]irst, the Employer must show that the employee committed the acts for which discipline was imposed; and second, the Employer must show that the level of discipline imposed was appropriate."[15]

This Arbitrator has used the Nolan approach with modifications. Within the two Nolan headings subsist the Daugherty questions. Since the Nolan approach sought to encapsulate the Daugherty principles without their critical deficiencies, it could only come to the same result.

The just cause concept consists of both substantive and procedural elements. The first inquiry is the substantive justice inquiry, whether the grievant's action is so detrimental to the employer's interest as to preclude the continuation of the employment relationship. This is often referred to as fault.[16] It is the cause itself which must have some inherent justice to it. Without this standard being reached, the inquiry ends, the employer's decision is not sustainable and the employer's decision making procedures need not be tested.

Only if the employee's fault is present are the qualities of the Employer's decision making examined. Those are the procedural or due process issues which test how just that cause may be in a wider context. Among these are most of the Daugherty questions which are substantially procedural. The burden of production passes to the Union to show that one or more of the procedural factors would have changed the decision. Argued here by the Union are inconsistent application of the standards and the proportionality of the penalty. Although the Union has the burden of production, the Employer maintains the burden of persuasion including on this prong of just cause.

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13 *Dayton v. AFSCME, Ohio Council 8*, Montgomery App. No. 21092, 2005-Ohio-6392, cited with approval in *City of Piqua, Ohio v. FOP (supra)*. See also *Summit Cty. Children Services Bd. v. CWA*, at ¶¶19, 29.

14 KOVEN & SMITH, JUST CAUSE: THE SEVEN TESTS, ( BNA 3rd ed., 2006, K. May), summarized the Daugherty analysis into its chapter headings: notice, reasonable rules and orders, investigation, fairness of investigation, proof, equal treatment, penalty.

15 *Marine Corp Air Station*, 82 LA 28 (Nolan 1983). Similarly *Texas Lime City,* 83 LA 116, 121 (Neas, 1984). Abrams & Nolan, *"Towards a Theory of 'Just Cause" in Employee Discipline Cases,"* 1985 DUKE L. J. 594 (1985).

16 Fault is often defined by reference to the Employer's legitimate standards of conduct or performance published in a reasonable set of work rules. See KOVEN & SMITH, JUST CAUSE: THE SEVEN TESTS, K. May ed. (BNA 2006, 3rd ed.), Ch. 5.II.A.,"Proof,"at 311.

B. SUBSTANTIVE JUSTICE ELEMENT: FOUR DISCIPLINARY GUIDELINES.

The substantive justice inquiry, involves matters of fault initiated by the employee in an antagonistic posture against the nature of the employment. The substantive cause of discipline recited in the termination letter are four violations listed in the Disciplinary Guidelines attached to the Work Rules.[17] One had to do with violation of agency policy (categorized under "Insubordination") and the three others had to do with forms of fraud, i.e. falsification of records, theft, and misuse of computers.

There is no dispute as to the publication and dissemination of the Work Rules and no dispute that they are reasonably related to the Employer's interests.[18] The dispute arises over the evidence that supports violations.

As is typical in forensic accounting fraud investigations, the evidence amassed by the Employer is detailed, exhaustively so. The upshot is that 11 of the Employer's lodging accounts and two wedding deposits were affected. In essence that makes this a case of 13 distinct violations under each of the Disciplinary Guidelines cited. In addition the midnight timesheet incident can itself provide grist for an additional violation, the 14th. It potentially falls under all four of the Disciplinary Guidelines cited. For example, not completing the timesheet is contrary to policy, falsifies the document, creates unauthorized financial liability for the Employer and, to the extent computers (or other equipment) are used, it misuses them. The Employer has amply proven in all 14 violations including the timesheet, under each rule. The Arbitrator is convinced that Grievant was responsible for each of the frauds, none of which are authorized in any conceivable way, and of the policy violations in each instance. Moreover, any one of the 14 discrepancies alone would be sufficient substantive just cause.

The Union vigorously defends against the substantive just cause charges based two challenges to Management's proof. First it claims that all of the discrepancies established by Management rest on circumstantial evidence. It seeks to rebut the circumstantial evidence a number of ways. It claims Grievant was untrained in the proper procedure and was never corrected for any of the revisions she made in the past and did not receive the 2018 SOP. She could not have violated the procedures. The number of employees in the vicinity of the revisions made it impossible to prove which one is responsible for any given discrepancy. There is no direct evidence that Grievant participated in any of the discrepancies such as by personal observation or video. The delay between the revisions in early 2018 in the investigations of late 2019 could have only tainted the evidence.

Second, the Union claims that without support of circumstantial evidence, Management relied only on the criminal decision for its proof. Grievant explained her motive was to be a good employee in assisting the agency and not in tempting any kind of fraud.

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[17] The attachment is in the form of a grid or matrix. It is short on text, presenting concepts by bullet points. Violations are listed by category with subparts under each category. They do not expressly refer to the violations listed as "rules" which is how the Union identifies them. The Employer identifies them as "paragraphs." Herein the terms 'violation" or "guideline" are preferred.

[18] The Union does dispute Grievant's notice of the Clubhouse 2018 SOP which is not the Work Rules under which she was removed. The Union's notice argument is treated below.

*1.0 Circumstantial Evidence.*

There is nothing wrong with circumstantial evidence. Circumstantial evidence requires an inference from facts presented to reach other intermediate facts and the ultimate fact (eg. fault). ELKOURI AND ELKOURI, *HOW ARBITRATION WORKS*, explains:[19]

> The question, therefore, is not whether circumstantial evidence is valid, but what reasonable inferences may be drawn from the circumstances presented. It is not sufficient that the circumstances give rise to mere suspicion or speculation; *the circumstances must lead to inferences and factual conclusions based on a reasonable probability*. If the evidence producing the chain of circumstances pointing to [fault] is weak and inconclusive, no probability or fact may be inferred from the combined circumstances. The facts offered as circumstantial evidence must afford a basis for a reasonable inference of the existence or nonexistence of the fact sought to be proved. *The reasonable inference sought to be reached must be more probable and natural than any other explanation*, *although it is not necessary to be adequate that circumstantial evidence exclude every reasonable theory except guilt*.

The problem with circumstantial evidence is not any inherent weakness as compared to direct evidence. Crimes, which require proof beyond a reasonable doubt, are proved by circumstantial evidence.[20] The difficulty is that the chain that is made out of the circumstances is so fragile. Think of circumstantial evidence as links of a chain. It is a chain of inferences based on known circumstances that establish other probable facts that ultimately lead to the best natural probable conclusion. The whole chain can be defeated simply with proof that only one of the links in the chain of inferences is improbable. If only one link fails, there is no longer a chain that reaches all the way to the ultimate goal. The integrity of all the remaining links does not bridge the gap towards the ultimate fact (eg. fault) with any one link being broken. In other words, nothing can be inferred from all the remaining intact links (ie circumstances) if only one fails.[21]

The Union challenges the chain of inferences arguing Management did not present direct evidence like an eye witness or videotape. Management had proof enough. Here there are 13 chains of circumstantial evidence. Every discrepancy has Grievant's initials or other identity marker in them. Every one ends with cash that was once on the books being taken off the books. It was the Union that had to rebut each of the 13 circumstantial chains with direct evidence. Not one of the 13 was directly rebutted. The 14th was corroborated by the timesheet and access card swipe. None of Management's circumstantial evidence has been contradicted by direct evidence presented by the Union.

The Union did present one eye witness to the events, Grievant. However, she did not rebut any of the circumstances. She admitted the procedure as described by Ms. Paul and by the SOP. She admitted she made revisions. She admitted they made the books "inaccurate." She contradicted no

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19 ELKOURI AND ELKOURI, *HOW ARBITRATION WORKS*, 6th Edition, at 384.

20 Although Charles Manson did not physically participate in the murders at Sharon Tate's home, circumstantial evidence was used to show that he had orchestrated the killings for which he was found guilty. HELTER SKELTER by Vincent T. Bugliosi and Curt Gentry (1974).

21 The O.J. Simpson murder trial is a case of the chain of inference being broken by the notorious glove that did not fit and, according to some jurors, possibly also by the timeline.

facts. She merely said that she meant well by making the revisions to clean up the bookkeeping and that she did not know where the cash went but she did not take it. Saying that she did not know what happened to the cash is not a fact. It is a statement if ignorance of the fact. It rebuts nothing.

The Union's attacks on the circumstantial evidence were not with direct evidence. Rather the Union used circumstantial evidence to disprove circumstantial evidence. It is very difficult to refute a circumstantial case with circumstantial evidence. Doing so has all the problems of circumstantial evidence but, unlike Management, the Union's inferences were easily disproved, mostly by Grievant's own testimony.

The claim that any one could have taken the money does not address who did. Management's evidence with Grievant's markers and admissions to the revisions tends to prove Grievant took it. Management's inference is clear. After making the actual cash disappear from the books with the accounting manipulations, making the actual cash disappear would be far too easy by comparison. To disprove the inference that she took the cash, the Union must show who did, at least in one of the instances. It did not.

The delay in investigating the records from the time of the frauds could taint the evidence. More than speculation is necessary. There needs be a showing of some event, a catastrophe or at least a system conversion, that could have affected the records causing more than Grievant's revisions of cash deposits to be erased.

Grievant denies having received the Clubhouse 2018 Standard Operating Procedures. The Union argues that, not having received the procedures, Grievant should not be held to them. Therefore, her conduct could not have violated policy under the "insubordination" guideline and she could not have committed the frauds as charged because she had not been instructed otherwise.

Grievant's testimony is not the fact. Ms. Paul testified that Grievant did in fact receive the 2018 SOP along with others when she distributed it. The interviews of the cashiers all indicate that they were aware of it. Thre would have been no the point to distribute it to the cashiers and not to the Administrative Professional 2 who in some sense oversaw their work product. The Administrative Professional 2 position description states that the successful applicant is required to have knowledge of bookkeeping and RoomMaster. Such knowledge is a prerequisite to receiving the job. Grievant drew a paycheck as an Administrative Professional 2 for seven years for the exercise her knowledge of the RoomMaster software and the bookkeeping discipline. She was proficient enough to temporarily fill in for the Manager. Therefore, even had she not received the SOP, she knew (or was supposed to know) RoomMaster and she knew (or was supposed to know) bookkeeping. Both the software and the discipline allow for no procedures to make cash, once received, disappear through a series of manipulations of the accounts.

Finally, the claim that Grievant was not trained or corrected on her practices is another case of "whataboutism." That is an example of the *tu quoque* fallacy[22] which attempts to discredit an opponent's position by attacking the opponent's own behavior as being inconsistent with their

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[22] Literally "you too." It is an attempt to dismiss an argument based on criticism of the person making it because of their inconsistency, and not considering the position itself, Thus, it is a form of the *ad hominem* argument. Although someone might be acting inconsistently or hypocritically, this does not invalidate his argument.
"tu quoque." Definitions.net. STANDS4 LLC, 2021. Web. 12 Feb. 2021. <https://www.definitions.net/definition/tu+quoque>.

argument without directly refuting or disproving their argument. It is a deny, distract and deflect tactic. Because Management did not adequately train or correct her, she was not supposed to know that she should not make fictitious changes to the accounting records. Even if she never received the SOP, which the evidence shows she did, she should have known such nefarious actions could not be authorized by Management.

The Union failed to break the chains of inference leading to the clear and convincing proof that Grievant committed 14 instances of fraud and policy violation

*2.0 Grievant's Guilty Plea.*

Contrary to the Union's argument, Management did present direct evidence, Grievant's guilty plea to two felonies. Her plea directly contradicts whatever Grievant said about her motives. The plea is an admission to everything that is described by the criminal statute. With counsel, in open court, she admitted breaking and entering the unoccupied Clubhouse (i.e. on May 28, 2019) to tamper with records on her computer in order to commit a theft offense. That is what the statute says; that is what she admitted. In other words, she was not there to benefit the agency but to steal from the Clubhouse.

The Union attempted to "refute" the guilty plea. While the guilty plea is admissible, it is not binding on ultimate liability. In a civil case litigants are entitled to give an explanation of why they pleaded guilty. The explanation often, as here, does not help much. In her letter before her interview with Major Kreps (JX 1Att. 11) she explained that she pled guilty because she did come into the Clubhouse on unscheduled time and used her Federal CAC card to access her computer. At her allocution hearing her attorney stated in front of her that when she was there she changed Clubhouse records. That is not much of a refutation. In other words she plead guilty because she did it and she could not deny it because of the record of her CAC access at that time.

The distinctions she attempts to make are that she meant no ill will and that she was allowed to come in during off hours at other times. As mentioned above, other times is no evidence about this time. As for being well meaning, all the lodging accounts were initiated by different cashiers but she manipulated the software to make the cash disappear. According to Ms. Paul she had no difficulty reporting about other situations. She could have reported discrepancies of other persons that she felt so compelled to "rectify" instead of taking cash off the books. Taking money off the Clubhouse records that was received by others is not helping the Clubhouse. Grievant's meaning well and forcing records to balance are not at all believable. The reasons Grievant made the revisions are immaterial. She did them; she admitted them; the cash disappeared.

*3.0 Substantive Justice Conclusion.*

Management proved that Grievant committed 14 events of policy violation and fraud identified by the Disciplinary Guidelines, 2c insubordination, 5a dishonesty, 6a theft in office and 6f misuse of state owed computers. The Employer proved the violations with circumstantial evidence, supported by direct evidence of the guilty plea, that it had substantive just cause to discipline Grievant. The inferences from the known facts have not been refuted by any attempt of the Union to challenge them.

## C. JUST CAUSE: THE PROCEDURAL DUE PROCESS ELEMENTS

The second tier of the just cause inquiry is procedural, whether the level of discipline imposed was appropriate. "The essential question for an arbitrator is not whether disciplinary action was totally free from procedural error, but rather whether the process was fundamentally fair."[23] To set aside discipline on due process grounds, an arbitrator must find that the defect deprived the grievant of a fair consideration of his case such that the result might have been materially different.

The procedural challenges here do not include the sufficiency of the investigation which the record shows was exhaustive. Nor are there examples of an the inconsistent application of the standard and penalty. Rather the challenge to the investigation is that it took too long. The other process issue is proportionality of the penalty.

### *1.0. The Timeliness of the Discipline*

Timeliness of the discipline is a factor the Arbitrator must address by contract:

> 24.02 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.

The Union argues that the removal was 2.5 years after the first account discrepancy. This argument is either that the investigation took too long, or that the delay alone is prejudicial to Grievant. Neither analysis has merit.

The Union cites Art. 24.06 that it is "mandatory" that the discipline be delivered by 60 days after the pre-discipline meeting. However Art. 24.06 also provides for its excuse in criminal cases:

> 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.

Without a contract argument on timing this becomes a claim of prejudicial delay. In just cause jurisprudence the length of an investigation is usually challenged for being too short. Whether it is a long or short, the length must be taken in context with the facts. The facts here make the length of the investigation justifiable as do the criminal implications of the policy violations. The delay until after the determination of criminal procedures is typical, the length only being a factor of the size and scope of the investigation.

The other approach is based on a laches theory, that of an inexcusable prejudicial delay. That is certainly not the description of the investigation here. Delay was reasonable and resulted in no prejudice to Grievant. Had the delay been shorter the result could have been the same. It might have been somewhat different if there were a lack of some of the evidence that was being discovered during the investigation. The result would be only to reduce the 14 incidents to something less but

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[23] *Cameron Iron Works*, 74 La 878 (Marlatt, Arb. 1970) cited in KOVEN & SMITH p. 210.

still subject to removal. That is not prejudice.

*2.0. The Proportionality of the Penalty Including Progressive Discipline.*

The proportionality of the penalty is a major factor in the procedural elements of just cause It is an inherent function of the Arbitrator. The reasonableness of the penalty, rather than the existence of proper cause, is the question for the Arbitrator in the issue of proportionality.

The Union argues the removal is disproportionate to the offense and out of line with principles of progressive discipline. The violations cited in the Disciplinary Guidelines allow some lesser penalty than removal except 6(a), theft in office. Confident theft had not been proven by direct evidence, the Union argues for some other penalty. Grievant had never been disciplined before in her seven years. During that time Ms. Paul and Ms. Allen said they were confident in her work and she served as temporary manager. The Union argue those individual variations of circumstances that tend towards mitigation should be considered in addition to her lack of "mal-intent."

Management argues that once substantive just cause is established the penalty chosen by the employer should stand unless it is arbitrary. In this case it claims that it is not. It also argues that progressive discipline does not dictate an automatic penalty.

Progressive discipline is a subject that cuts across other factors. It is not an independent procedural test of just cause. A system of escalating disciplinary actions as corrective education of the offender is a creature of contract or policy or, as here, both. Where it is present it ought be applied by its terms. There is no agreed progressive discipline scale in the Agreement here. The only references to it are a glancing recognition that a scale exists and that principles of progressive discipline would prevail. The CBA Art. 24.02:

> The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include: ...

The only mandatory language ("shall") pertains to the penalty being commensurate to the offense. There follows the definitions of increasing levels of penalty but no language on the application. In the introduction to the Disciplinary Guideline grid, the ADJ Work Rules provides likewise but adds:

> Certain offenses warrant severe discipline to include removal on the first offense.

Without more language to apply to the facts the progression of the penalty cannot be considered independently from the proportionality of the penalty in general.

The question presented in proportionality of the penalty is one of weighing the proven offense against aggravating and mitigating factors to determine if on balance it is proportionate.[24]

> "...[D]iscipline may be considered excessive ' if it is disproportionate to the degree of the offense, if it is out of step with the principles of progressive discipline, if it is punitive rather than corrective, or

[24] *Washington Hospital*, 75 LA 32 (Rothchild 1980); *Mason & Hanger Corp.*, 109 LA 957 (Jennings 1998)

if mitigating circumstances were ignored'".[25]

This inquiry is not one of just cause on the basis of what the Employer considered but on the basis of what it failed to consider. Progressive discipline puts the offense in a context specified either by contract or in policy while mitigation considers a wider context of putting the offense in the context of the grievant's worklife. Underlying both progressivity and proportionality is that under just cause any discipline imposed by an employer should be corrective, and not punitive.

> "{I}t is a fundamental tenant of industrial jurisprudence that discipline should be corrective rather than punitive and that the supreme penalty of discharge should be imposed only where the conduct is so egregious that it is inherently grounds for discharge or where efforts to correct improper behavior through corrective discipline have proved to have been unavailing." [26]

Many factors influence assessment of the penalty. The proportionality analysis begins with the penalty in the context of the offense. This is where the aggravating factors are viewed. That is followed by the mitigating factors, chiefly seniority, and discipline record. The others can be due process violations, delay in assessing discipline or other management fault, effort of improvement or contrition, the employee's age, likelihood of finding alternative employment, the employee's attitude, and whether the employee is remorseful and offers an apology among others.[27]

It is unnecessary to rehearse the many aggravating factors of these 14 incidents, any one of which would be sufficient grounds for removal.[28] The only mitigating factor on this record is the lack of past discipline. That history alone is insufficient to overcome the aggravating factors.

No other factors serve to mitigate the penalty to any form of reinstatement. There is no inexcusable delay in the investigation. At seven years, Grievant is a newer side in terms of length of service. She expressed no remorse; she did not give a hint of any recognition of responsibility. Her protest of lack of ill intent is not to be believed, particularly given the number of revisions she performed in the six month period examined and the final total dollars. She did make restitution. Arbitrator Smith held in the Brown Grievance that, although paying restitution has some merit, it does not amend the breach of the Employer's trust so an arbitrator cannot adjust the penalty on that ground. However, in this case, Grievant emphasized that she did not pay the restitution voluntarily. It was court ordered and she told Major Kreps she did not want to pay it but her attorney told her is was a requirement of her community diversion. JX 1, Att. 1 and 11. It has no merit at all for Grievant. Even if it did, restitution is not a basis to return her to the employment that she had abused.

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25 ELKOURI & ELKOURI, *HOW ARBITRATION WORKS*, (Ruben, ed., 6th ed 2003) ,964.

26 *Comair, Inc*., 110 LA 59 (Sergent, 1998).

27 DISCIPLINE AND DISCHARGE IN ARBITRATION, Brand, Ed.,(BNA, 1999) "Remedies for Inappropriate Discipline", pp. 392-399. COMMON LAW OF THE WORKPLACE, 2nd Ed. (BNA, 2005) St. Antoine, Editor, "Remedies in Arbitration,"§10.23 and "Seniority," §5.10, p. 157.

28 *OCSEA and Department of Transportation* (R.Brown Grievance) number 31-02-9101110003-01-06.

The Union is congratulated on its yeoman's work. The cards were running against Grievant ever prevailing, but the Union played what cards she had with strategic verve. The ultimate and persistent plea of the Union was that this removal will have long term effects on Grievant's worklife. That is a fact that only Grievant could have remedied by taking the actions that recognized the consequences of her choices and avoiding the misconduct. The penalty is appropriate.

*3.0 Procedural Justice Conclusion.*

The Arbitrator is convinced that the decision of removal by the Adjutant General Department of March 11, 2020 complied with the standards of procedural just cause.

## III CONCLUSION

In light of the record in this matter taken as a whole, the Arbitrator is convinced that the Adjutant General Department had just cause to remove Melissa Erdman from her public employment and that the defenses raised, including procedural ones, were not proven to be probable. This award draws its essence from the Arbitrator's interpretation of the parties' contract with respect to just cause, investigations and progressive discipline, the Department's policies and procedures and the evidence of record. The grievance is denied.

MADE AND ENTERED THIS MARCH 1, 2021
AT CUYAHOGA COUNTY, OHIO

GREGORY P. SZUTER, ARBITRATOR

**IN THE MATTER OF THE LABOR ARBITRATION BETWEEN:**

STATE OF OHIO, ADJUTANT GENERAL DEPT.
PUBLIC EMPLOYER
AND
OCSEA/AFSCME LOCAL 11, AFL-CIO
EMPLOYEE ORGANIZATION

Case No. ADJ-2020-00971-14
*Grievance of March 11, 2020, Melissa Erdman*

**AWARD**

I, The undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered into between the above named parties, and having duly heard the proofs and arguments of the parties, hereby AWARD as follows:

1. The Arbitrator finds for State of Ohio, Adjutant General Dept. and against OCSEA/AFSCME Local 11, AFL-CIO on the Grievance of March 11, 2020 on behalf of Melissa Erdman. The Grievance is denied.

2. The Agreement requires that cost and expenses of the arbitration shall be borne equally by the bargaining parties.

The foregoing is in full settlement of all disputes presented in the hearing of this matter.

MADE AND ENTERED THIS MARCH 1, 2021
AT CUYAHOGA COUNTY, OHIO

GREGORY P. SZUTER, ARBITRATOR