

OPINION and AWARD

In Arbitration  
before  
RICHARD L. AHEARN

AAA No. 01 – 18 – 0001 – 6386  
(Steve J. Nelson Grievance)

Washington Federation of State Employees (WFSE)

Union,

and

Washington State Department of Agriculture

Employer.

Appearances:

For the Union:

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# **OPINION**

## **I. INTRODUCTION**

WFSE (Union) and the Employer (or Department) are Parties to a collective bargaining agreement (CBA) that was in effect at all times relevant to this matter. Grievant, a Weights and Measures Compliance Specialist 2 (Inspector), had been employed in the bargaining unit covered by the CBA for approximately 17 years at the time the Employer terminated his employment effective August 23, 2017. On September 18, 2017, the Union filed a step two grievance alleging that the termination violated Articles 5.1, 27, 27.1 and 27.4 of the CBA and seeking reinstatement, backpay and other remedies.

With no mutual resolution of the grievance, a hearing on this grievance was held in Tacoma, Washington on May 13 and 14, 2019. At the hearing the Parties had full opportunity to call witnesses, to make arguments and enter documents into the record. Witnesses were sworn under oath and subject to cross-examination by the opposing Party. Both Parties stipulated that the grievance was properly before me for a decision on the merits and thereafter to aid in the implementation of any remedy, should that be necessary. With the filing of the Parties' well-reasoned and comprehensive post-hearing briefs on July 24, 2019, the record closed.

## **II. STATEMENT OF THE ISSUE**

Pursuant to the Parties' stipulation at hearing, the issue before me is:

Did the Employer have just cause to terminate grievant?

If not, what is the appropriate remedy?

## **III. RELEVANT CBA PROVISIONS**

### **ARTICLE 5**

#### **PERFORMANCE EVALUATION**

##### **5.1 Objective**

- A. The Employer will evaluate employee work performance. The performance evaluation process will include performance goals and expectations that reflect the organization's objectives.

- B. The performance evaluation process gives supervisors an opportunity to discuss performance goals and expectations with their employees, assess and review their performance with regard to those goals and expectations, and provide support to employees in their professional development, so that skills and abilities can be aligned with agency requirements.
- C. To recognize employee accomplishments and address performance issues in a timely manner, discussions between the employee and the supervisor will occur throughout the evaluation period. Performance problems will be brought to the attention of the employee to give the employee the opportunity to receive any needed additional training and/or to correct the problem before it is mentioned in an evaluation. Such discussions will be documented in the supervisor's file.

## **ARTICLE 27**

### **DISCIPLINE**

- 27.1** The Employer will not discipline any permanent employee without just cause.
- 27.4** The Employer has the authority to determine the method of conducting investigations. Upon request, if an investigation will last longer than ninety (90) days from the date the employee was notified of the investigation, the Employer will provide an explanation to the employee and the Union of the current status of the investigation (for example: interviews still being conducted, drafting of investigative report, waiting for analysis of data), next steps and approximate timeframe for completion. At the conclusion of any investigation where the Employer elects not to take disciplinary action, the employee will be provided with a notification that the investigation is completed and that no discipline will be imposed. A traditional element of just cause requires discipline to be imposed in a timely manner in light of the need for thorough investigations.

## **IV. BACKGROUND**

In his role as an inspector, grievant was responsible for testing various devices that measure the quantity and in certain cases the quality of goods sold and purchased within the State of Washington. A critical function of inspectors is testing the accuracy of devices such as scales and fuel meters. The inspectors' work serves the dual benefit that consumers receive precisely the amount they believe they purchased, while providing businesses with assurance that their competitors are not gaining an unfair advantage by selling a lesser amount than advertised.

As with most inspectors, grievant worked from home and generally alone on a “four-ten” work schedule that normally began at 7 AM and concluded at 5:30 PM.<sup>1</sup> With a geographic area that generally covered Skagit and Whatcom counties, grievant seldom enjoyed person-to-person conduct with either his colleagues or his supervisors. Although the supervisory structure over grievant changed a few times during his employment, then Program Manager Jerry Buendel (Buendel) supervised all the inspectors from late 2010 until mid-January 2015. On January 16, 2015, Tahis McQueen (McQueen) was appointed as the supervisor for grievant and other inspectors.

With no physical monitoring of his work, grievant submitted weekly reports of his activities, intended to disclose the amount of time he had spent on enumerated tasks. The Department reviewed the weekly reports and expected that they accurately reflected each inspector’s work activity, especially their inspections. Accuracy in the inspections and the reports is particularly important, as errors or deficiencies can undermine the position of the Department in appeals by businesses, who have the right of due process if they disagree with a finding.

#### Grievant’s Work Record

At the time of his discharge grievant was a 17-year employee with a satisfactory work record. For instance, in his 2012 evaluation grievant was described as “an asset to the program” and “a capable and competent inspector.” Further, he had received no prior discipline for the specific conduct on which the Employer based his discharge. However, grievant did receive various counseling and reprimands, including:

- An April 30, 2009 Memorandum of Counseling from Kirk Robinson (Robinson), program manager of the Weights and Measures Program, in which grievant was reminded of the Standards of Ethical Conduct and informed that he was continuing to load unauthorized software and personal information on his state-issued computer. The memo explained that continuation of improper use of his state-issued computer “may result in disciplinary actions.”

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<sup>1</sup> Grievant, as all inspectors, enjoyed substantial flexibility in establishing the schedule of his inspections.

- A March 15, 2010 reduction in pay of 5% for three months for having disobeyed the April 30, 2009 memorandum by continued and excessive use of unauthorized software and personal information on his state-issued computer.<sup>2</sup>
- A November 5, 2013 Performance and Development Plan that included the expectation of completing his inspection reports and worksheets in a professional and legally adequate manner, and to make effective use of the time and equipment available.
- A 2015 expectations memo from McQueen that emphasized his weekly reports needed to be clear and concise, including an explanation of the businesses visited and the job duties performed at each location. In addition, when using certain categories for time tracking, grievant needed to explain clearly the duties he was performing during those hours.
- An August 11, 2016 written reprimand for inappropriate and disrespectful behavior toward McQueen.

### The Weekly Reports

The Department has used the weekly report form since before 2000. According to the Employer, grievant received training on how to complete the report at the time of his hire and during at least two subsequent staff meetings. Further, McQueen testified that grievant was one of the three inspectors who trained her upon her hire about 10 years ago as an inspector. According to McQueen, grievant and the others explained that an inspection begins when one arrives at the facility and ends when one has completed the related paperwork and left the facility. In addition, she testified that grievant explained that inspectors track time by recording the time they are in their vehicle traveling to and from facility in one location and the time at the facility in another. Further, anything other than the actual inspection and associated travel, including telephone calls and computer work, would be recorded as other or administrative time.

Since becoming grievant's supervisor, McQueen has been engaged in various ways in attempting to assist grievant in properly completing the reports. In particular she exchanged numerous emails with him concerning what was needed on the report and worked with him in a one-on-one training

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<sup>2</sup> At hearing Dr. Brad White (Dr. White), the appointing authority, testified that he did not rely on the 2010 reduction in pay for purposes of progressive discipline.

session regarding the reports, in addition to submitting the 2015 expectations memo described above. Also, on one occasion both she and Shane Snyder (Snyder), supervisor of the inspectors in the Eastern portion of the State of Washington, met with grievant to explain what was required in the reports.

In addition, Buendel testified that the long-standing practice was that inspection begins when the inspector arrives and ends when he or she leaves the business. He further testified that the “end” occurs when the inspector has completed the required paperwork and placed information into the database known as the PISCES system. Upon conclusion of these activities, the inspector presents a copy of the report to the person in charge. In particular, Buendel asserted that grievant’s training would have included instruction consistent with the practice he described. McQueen corroborated Buendel’s description of the beginning and ending determinants for an inspection. Similarly, Snyder testified that inspections begin when the inspector arrives at the business and end when the inspector leaves, and that the inspectors under his supervision follow that rule.

Contrary to the Employer’s testimony, grievant asserted that the inspection time for purposes of weekly reports was not as restrictive as the Employer claimed. Rather he includes both time spent at the business facility and time spent either at his residence or in his truck finishing either paperwork or other tasks related to the inspection, both before and after the actual visit to the facility. Moreover, those related tasks properly can consume a substantial portion of the workday.

In addition, Art Fluharty (Fluharty), an inspector for 35 years, testified that too many variables preclude the concept of a typical inspection. In particular he asserted that he generally spends from an hour to three hours at his home engaged in activities such as planning his day and researching facilities, and that he would include that time as part of the inspection.

### PISCES

PISCES is a program for time keeping that has been used by the Weights & Measures Program since March 2016. All inspectors received a four-hour training class on PISCES and Jeff Painter (Painter) of the IT Department has been available to answer questions or provide help. Further, PISCES has been the subject of two staff meetings. According to the Employer’s witnesses, at no

time during those meetings did grievant request help. However, there have been instances when Painter provided remote assistance to grievant regarding PISCES. McQueen also observed that grievant, although possessing a good grasp of PISCES generally, continued to make the same mistakes.

### Decision to Investigate Grievant

In early September 2016, Buendel and McQueen became increasingly concerned about the contents of grievant's weekly reports. In particular, Buendel considered that many of the narrative comments in the reports did not reflect the activities expected of an inspector. In addition, grievant's relatively low number of inspections and the amount of time reported on inspections presented substantial concerns.<sup>3</sup> Accordingly, in order to make an assessment based on evidence rather than speculation, Buendel arranged for two WSDA investigators to conduct surveillance of grievant's work activities.

### The Surveillance

WSDA Investigators Patrick Ditter (Ditter) and David Robinson (Robinson), both retired from the Washington State Patrol, were tasked with conducting surveillance of grievant's work activities. Each obtained an unmarked vehicle from the State and intended to begin their assignment by staking out at two (2) locations near grievant's residence at the beginning of his scheduled shift. However, on the first day, September 13, 2016, only investigator Ditter surveilled grievant's work activity, as Robinson experienced a sudden illness. The following day, both Ditter and Robinson conducted surveillance. As described below, the results of the September 13 and 14 surveillance differed sharply from grievant's weekly report. In summary, grievant documented nine hours for his September 13 inspection at Interstate Gas, whereas the Department observed him present at the station for only one and ½ hours. With respect to September 14, grievant documented 7 ½ hours for the inspection; by contrast the department concluded he was only present for two hours.

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<sup>3</sup> Although subject to many variables, Employer's Exhibit 2-7 supports the conclusion that grievant's output, as measured by the number of inspections, was low in comparison to the other inspectors.

With no prompt follow-up to the September surveillance and out of concern that those two days may not have been representative, the Employer scheduled additional surveillance for February 13 and 14, 2017. In addition to the two investigators, McQueen rode with Robinson on February 13 and with Ditter on February 14, primarily to provide context for what an inspector is expected to accomplish. With respect to February 13, the Department observed grievant at an inspection for two hours, while he documented four hours for the inspection. On February 14, grievant documented 7½ hours for his inspection, whereas the department concluded he only spent three hours. Finally, grievant did not obtain a signature from a representative of the inspected employer on February 14. Rather he “signed” the Device Examination Report. Following the February surveillance that again revealed behavior and activities substantially inconsistent with grievant’s report, the Employer scheduled an investigatory interview.

#### The Investigatory Interview

On February 23, 2017, the two investigators conducted and recorded an investigative interview of grievant. At the meeting the investigators showed grievant his weekly reports for the dates in September and February during which they engaged in surveillance and asked grievant to explain how or why his representations differed so dramatically from their observations. For example:<sup>4</sup>

- With respect to September 13, 2016, grievant had recorded that he had gotten an early start, in direct conflict with Ditter’s observation that grievant did not leave his home until shortly before 12:48 PM, approximately five hours and 48 minutes after his assigned start time. Grievant also included 43 miles of travel and one hour traveling, that conflicted with Ditter’s observation that grievant traveled no more than 9 miles, and no more than several minutes driving his vehicle.<sup>5</sup> In addition, Ditter observed that grievant spent no more than 74 minutes at the inspected facility, rather than the three (3) hours grievant claimed on his timesheet.

In response grievant initially expressed a belief that he had gotten an early start that day, and later mentioned that it takes time to hook up the trailer.<sup>6</sup> Upon further questioning,

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<sup>4</sup> This summary highlights major conflicts but does not attempt to describe every single one.

<sup>5</sup> The gas station involved on that day is approximately 5 miles from grievant’s home.

<sup>6</sup> Ditter did not observe grievant pulling a trailer that day; rather he was seen driving a truck.

grievant asserted that the combination of activities he listed for September 13 added up to 10 hours in connection with the inspection at Interstate.<sup>7</sup>

- Grievant's weekly report for September 14, 2016, included various activities in Blaine, WA. Among them were operation of a "graphic plotter," "laboratory duties," "socio pathology," "insurance casualty claims," and "Mathematics, Chemistry, Physics, Electronics." Grievant also claimed that he traveled 180 miles that day and spent 5 ½ hours on L-FM, two hours on fuel quality and 2 ½ hours on travel, for total of 10 hours. Further, grievant also mentioned that he presumed that with an assignment such as that of September 14, he would leave his house at about 9 AM. He also stated that he conducted a survey that day at the Blaine Cost Cutter, in order to determine if there was anything new for future inspections.

Contrary to grievant's weekly report and representations at the interview, he was first observed leaving his home about 4 hours and 18 minutes after the beginning of his shift. Subsequently he was observed at a gas station where he appeared to be inspecting gas pumps for a total of 2 ½ hours, a figure in sharp contrast to his weekly report that asserts he spent 7 ½ hours that day engaged in inspection activities. As with the other days of the surveillance, the investigators concluded that the time grievant recorded was significantly inflated.

- During the surveillance of February 13, 2017, McQueen rode with Robinson, while Ditter rode alone. Among the most significant discrepancies was that grievant claimed to have used the Internet to engage in substantial study time before 10 AM. However, according to Painter, grievant did not log in until 9:55 AM that morning. Also, at approximately 11 AM that morning McQueen received a notice on her phone that grievant allegedly had a dead battery. After several unsuccessful attempts to reach grievant, at approximately 12:40

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<sup>7</sup> As Ditter left his post sometime after 3 PM in order to help take care of Robinson, it is possible that grievant also traveled to Mt. Vernon later that day as he claimed. However, in his weekly report grievant asserted that the trip to Mount Vernon was to organize and execute non-routine technical data or statistical analysis, to conduct chemical or biochemical field tests or to investigate commodities. By contrast, during the interview he asserted that the purpose of the trip to Mount Vernon was to get rid of his gas-soaked rags.

PM she received a text from grievant who stated that he had jumper cables and a battery box. By the time of the text, grievant had been on the road for nearly an hour and had been followed to the Arlington Post Office by McQueen and Robinson. Grievant's weekly report made no reference to Arlington as a destination.

Further, grievant represented that he spent four hours conducting an inspection in Maple Falls, whereas he was visually observed spending only two hours at that location. Finally, his report indicated that he had been driving very cautiously that day because of a lot of snow on the ground. By contrast, the inspectors observed that the roads were bare and dry and that grievant's high rate of speed caused them to lose contact on occasion. Further, although grievant represented that he visited the "Deming Quick Stop" at the request of McQueen, the investigators did not see him stop at that facility.

- Grievant's weekly report regarding February 14, 2017 reflected 7 ½ hours inspecting, with the remaining two hours spent in travel. His verbal representations during the investigatory interview concurred that his day at a 7-Eleven was a 10-hour day. Grievant also asserted that he tested the entire facility because there were complaints and that he gave a notice of correction to the facility. He then further explained that he "just scribbled something" on the bottom of the notice where the customer is supposed to sign. He then stated that the owner or person in charge had asked whether he needed to sign something and that grievant told him, "Well, I signed it for you because you were busy." Finally, he mentioned that he arrived home about 6 PM and that the next day the customer contacted him about the inspection, although grievant made no record of that call.

Contrary to grievant's written report and verbal representations that he left his home at about 8:30 or 8:45 AM, and arrived at the Bellingham gas station at 10:00 AM, he was not observed leaving the vicinity of his residence until 12:48 PM. Indeed, he was on a conference call for weights and measures for about one-half hour beginning shortly after 9 AM. Further, he was observed arriving at the gas station at approximately 1:34 PM, and was seen leaving the facility less than three hours later. Thus, grievant claimed more than twice the time at the facility than he was observed spending there.

At the conclusion of the interview Ditter asked what grievant was doing at home on the mornings of September 13 and 14. Grievant's initial response was that he did not have an answer, and later expressed that he had no idea. Further, with specific respect to February 13, 2017, grievant referenced studying and a conference call and claimed that he was following instructions to roll time spent going through his records into time spent during his inspection at a facility. Ditter then expressed the opinion that given the times that grievant left his home, one can conclude that he was spending almost 2 of his 4 working days at home. Grievant agreed and acknowledged that would not be acceptable. As described below, the results of the surveillance and interview led to issuance of a pre-disciplinary letter.

#### Employer Notice of Expectations

Various policies provided to grievant during his career included notice that failure to comply could lead to discipline. For example, on several occasions grievant received a copy of the following policy:

##### ESTABLISHING AND MAINTAINING STANDARDS OF ETHICAL CONDUCT

(HR Policy 212). That policy requires and warns:

- “ALL STATE OFFICERS AND EMPLOYEES ENSURE THE PROPER STEWARDSHIP OF STATE RESOURCES”<sup>8</sup>
- EMPLOYEES WHO VIOLATE THIS POLICY MAY BE SUBJECT TO DISCIPLINARY ACTION

Further, on July 15, 2015, McQueen met with grievant and among other things discussed the expectation that grievant would inspect no less than one business every workday and that he would work to increase the number of inspections completed each month. She also explained that his weekly reports needed to be clear and concise, listing the business visited and the job duties performed at each location. She further mentioned that he should take no more than four hours of administrative time each week. In addition, when using the “other” and “equipment/vehicle maintenance” categories for time tracking, he needed to explain clearly the duties performed during those hours.

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<sup>8</sup> That section explains that the “resources” include “employees and their time.”

Further notice to grievant is reflected on his February 1, 2016 personal Performance and Development Plan, that among other things mentioned completing inspection reports and other worksheets in a professional and legally sufficient manner. The plan incorporated the above comments from the July 15, 2015 meeting, as well as others such as the expectation that he “make the best use of the time and equipment available.”

#### Other Concerns about Grievant’s Weekly Reports

On several occasions McQueen counseled grievant either in person, by email or on the telephone regarding the proper completion of the weekly reports. She expressly informed grievant that his explanations were not clear. For instance, immediately prior to the second set of surveillance, on February 9, 2017, McQueen asked:

“Exactly what I/O functions, disks, computers, plotter or scanners did you backup, on what equipment/computer and why? I would like to know specifically what you did, in plain English, and what it is related to (specific job function). Please do not send me another definition from Wikipedia for your answer.”

Grievant responded, using “your prescribed Yes or No Answer Method” with “No.” In addition, grievant answered that he did not know what equipment he needed to set up or adjust for the individual inspections he conducted. Moreover, grievant agreed that some of the material in his weekly reports were merely copies from other state documents.

#### The Pre-Disciplinary Letter

On June 13, 2017, the Employer informed grievant that it was considering disciplinary action against him, up to and including possible dismissal. The bases of the charges were the conflicts between the observations of his activities on the four days of surveillance and his allegedly false claims in his weekly report for those days. In addition, the charges included his alleged forgery of the store clerk’s signature on February 14, 2017. The letter also referred to his April 30, 2009 memorandum of counseling for loading unauthorized software on his state-issued computer, his March 15, 2010 disciplinary letter and salary reduction for misuse of his state-owned computer, and his August 11, 2016 letter of written reprimand for inappropriate and disrespectful behavior toward McQueen. The letter also highlighted his low inspection numbers and the length of time

he claimed for travel and the completion of inspections. It then described in summary the observations of the investigators on the four days of their surveillance, as well as the fact that he signed the Device Examination Report on February 14, 2017 as the store employee.

The letter also summarized the February 23 interview with Ditter and Robinson, and asserted that grievant's falsification of information on his weekly reports for the weeks of September 12 through September 16, 2016 and February 13 through February 17, 2017 violated:

- WFSE Article 47, Workplace Behavior, that expresses the responsibility of all employees to contribute to an environment that fosters mutual respect and professionalism.
- WSDA POL-HR-212, "Ethical Conduct," that provides in subsection 2:  
"2. Employees promote an environment of public trust, (free from fraud, abuse of authority, and misuse of public property).
- The expectation that employees demonstrate the highest standards of personal integrity, fairness, honesty, in compliance with law, rules, regulations and agency policies."

The letter also noted that grievant's forging of the store employee's signature violated the Department's ethics policy. The pre-disciplinary meeting was scheduled for June 21, 2017.

Grievant did not attend the pre-disciplinary meeting, nor did he provide a written response on June 20, 2017, the deadline set by the Department. However, on July 3, 2017 grievant did provide a written response that the Employer reviewed and took into consideration.

#### Grievant's Written Response

Grievant's 48-page written response denied that his weekly reports for the four days under surveillance exaggerated the time he actually spent conducting inspections and essentially mirrored many of his statements to the investigators during their interview. Rather, grievant attributed much of the unobserved time at his residence to the Employer's failure to account for numerous unanticipated circumstances that frequently arise and require close attention. Among those contingencies, he asserted that the Employer mistakenly made no accommodation for safety, health, buildup and detoxification periods both prior to and after inspections. He also asserted that the times the investigators were unable to observe his work activities are illustrated by the various records such as the work area data and the historical research undertaken working in the quasi-

legal arena of code enforcement in Civil Law applications. Other time may be attributed to chronic PISCES issues (often the result of alleged insufficient training), lockouts, freeze ups, loss of data, and a variety of other matters that had not been resolved.

Among his specific comments, grievant asserted that the September 13, 2016 inspection had actually begun the day before and that he experienced chronic PISCES issues, as well as an inspection anomaly. He further asserted that the device registration numbers were off by three devices and that therefore numerous activities that could only be performed either prior to the physical entry onto the premises or at the end of the day consumed numerous hours. By analogy he observed that a prize-fighter who wins a championship match in the first round hasn't "worked" for three minutes; rather, that individual spent months in advance to prepare.

With regard to the alleged forgery of the rejection form, grievant asserted that he struggled with this because he had been locked out on the "correction date" and subsequently abandoned the "correction date" as he found the form would not print without a signature. He then went inside to obtain a signature, but the manager was swamped with customers. Standing there, while reeking of gasoline, he therefore scribbled in the "receipt of Report Acknowledged" form. According to grievant, he marked the form as incomplete because of his frustration with PISCES. He then had a brief discussion with the store personnel and left. He denied that there was any known requirement to have anyone sign such forms. Finally, he denied any intent to defraud and asserted that he was simply trying to resolve a problem efficiently and expeditiously. In support of grievant, Fluharty testified that on two occasions he had similarly initialed forms for station clerks out of convenience and efficiency.

### The Decision to Terminate

Dr. White was responsible for the termination decision. In the discharge letter he concluded that grievant had exaggerated his work time on the following inspections by the amounts set forth below:

1. On September 13, 2016 by 7 ½ hours.
2. On September 14, 2016 by over 4 ½ hours.
3. On February 13, 2017 by 2 hours.

4. On February 14, 201 by 4 ½ hours.

Further, on February 14, 2017, grievant signed the Device Examination Report form rather than obtaining the signature of the clerk.<sup>9</sup>

In his detailed assessment of the observations of the investigators as contrasted with grievant's Reports and statements, Dr. White emphasized the critical importance of trust for employees out in the field, including reliance on honesty and accuracy regarding the reporting of time spent conducting inspections. Further, by receiving his full salary when not working the required hours, grievant essentially engaged in a "theft of state funds and a misuse of state resources." Determining that grievant broke the critical trust required of all inspectors by claiming inaccurate, excessive amounts of time on inspections when he was actually at home, Dr. White concluded that dismissal was necessary.

## **V. PARTIES' POSITIONS SUMMARIZED**

### Employer

1. Legitimate concerns regarding how grievant was spending and reporting his work time led to the surveillance.
2. The investigation revealed major discrepancies between what grievant represented he did, and the visual observations for each of the days of surveillance.
3. Grievant was on notice of the importance of "Ethical Workplace Conduct" and understood he could face disciplinary action, including termination, for failing to adhere to such standards.
4. The Employer provided grievant with abundant training in PISCES, the data system.
5. Grievant's supervisor put him on notice that his weekly reports were incomprehensible and needed to change.
6. Grievant's inability to explain his time at home each morning compelled discharge.
7. Grievant's conduct was egregious and warranted termination, as dishonesty cannot be tolerated in a position that is crucial to the public trust and that by its nature requires honest reporting of time.

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<sup>9</sup> At hearing Dr. White conceded that this alleged forgery, standing alone, would not provide grounds for discharge.

## Union

1. The Employer has the burden of proving just cause for the termination on the basis of the clear and convincing evidence standard.
2. Among the elements of just cause is whether the punishment of discharge fits the nature of the alleged offense.
3. Just cause also incorporates the principle of progressive discipline.
4. In the absence of the most egregious offenses, for which termination may be appropriate for the first offense, notice and an opportunity to improve, together with increasingly stiffer penalties, constitutes the essence of progressive discipline.
5. Grievant received no prior warnings that the time he was spending on inspections was allegedly excessive.
6. Grievant acknowledged he had initialed the form for the station personnel, but explained he had no intent to defraud anyone.
7. Grievant completed each inspection described in the August 23 disciplinary letter.
8. Any conclusion that grievant exceeded the time required for the inspections or misrepresented his time is not supported by the evidence.
9. There is no policy or standard that defines when an inspection starts and when one is finished.
10. The discharge of grievant violated just cause.

## **V. ANALYSIS**

### **A. Burden of Proof and Just Cause**

It is well established that the employer bears the burden of proof in discharge cases. It is also well accepted that “just cause,” that is not defined in the CBA, has acquired a special meaning in labor arbitration and that the following factors generally predominate in any analysis:

- Did the employer establish by adequate proof that the grievant committed the misconduct or dereliction of duty on which the discipline was based?
- If the above is established, is the penalty imposed reasonable in light of the nature and severity of the offense and in consideration of any mitigating circumstances?

Numerous opinions refer to the so-called “seven tests” set forth by Arbitrator Carroll R. Daugherty.<sup>10</sup> Although these tests have been relied upon for decades, arbitrators increasingly reject a mechanistic or automatic application of them.

Ultimately, the employer has the burden of establishing that the penalty of discharge is “just.” In that regard, arbitrators commonly examine whether there is reasonable proportionality between the offense and the penalty. Among the many factors that determine the relative seriousness of the offense are:

- The nature and consequences of the individual’s misconduct.
- The clarity of the rules allegedly violated and the employee’s knowledge of the rules and resulting penalties.
- Whether the violations were repetitive.
- How similar offenses were treated.

Just cause also anticipates that an employee will perform satisfactory work and that discipline must support at least one of the following interests of the employer:

- Deterrence of similar misconduct
- Rehabilitation of a potentially satisfactory employee
- Protection of the employer’s ability to operate the business successfully.

*“Toward a theory of Just Cause in Employee Discipline Cases”* 1985 Duke L.J. 594 (1985).

## B. Quantum of Proof

With respect to the standard of proof, I consider the clear and convincing standard advocated by the Union more appropriate to the circumstances here than the “preponderance of evidence” standard that is generally applied to ordinary discipline cases. As described in a leading treatise:

When the employee’s alleged offense would constitute a serious breach of law or would be viewed as moral turpitude sufficient to damage an employee’s reputation, most arbitrators require a higher quantum of proof, typically expressed as “clear and convincing evidence.” Gershenfeld, *The Common Law of the Workplace*, 192 (St. Antoine, ed., BNA 2d. ed., 2005).

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<sup>10</sup> *Enterprise Wire Co.*, 46 LA 359 (1966).

As grievant was a 17-year veteran of the Department with no discipline for closely related misconduct prior to the events in question, and as the nature of his alleged offenses, alleged dishonesty, could impact grievant's reputation, I find the reasoning of the above Opinion persuasive.

With regard to the penalty, it is well settled that an employer has substantial discretion in determining the appropriate level of discipline, particularly where proof of serious misconduct has been established. However, it is equally settled that adherence to fundamental notions of arbitral due process and/or fairness requires analysis of the reasonableness of the penalty. Thus, a decision that is arbitrary, discriminatory or capricious may be modified or rescinded in arbitration. In particular, arbitrators will generally consider discipline 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 if mitigating circumstances were ignored.” Brand & Biren, *Discipline and Discharge in Arbitration*, 103 (2d. Ed., 2008).

In accord with these principles arbitrators must assess each case on its individual merits. Here I must therefore determine whether the Department has met its burden of demonstrating by clear and convincing evidence that it had sufficient evidence of misconduct and whether the nature and severity of the offense make discharge a reasonable and just remedy, evaluated in light of relevant mitigating circumstances.

## C. Proof of Misconduct

### 1. Notice

A fundamental concept of just cause is that employees must be put on clear notice of what kind of conduct would subject them to discipline or discharge, including the obligation to inform employees “...of both what the employer expects as well as the range of penalties that may be imposed for failing to meet the employer's expectations.” Elkouri & Elkouri, *How Arbitration Works*, at 15-77. (8<sup>th</sup> Ed, 2016). In that regard the Union asserts that the Employer failed to provide notice to grievant regarding the amount of time grievant should allocate to inspections or precisely what constitutes an inspection for purposes of accurate timekeeping.

Although the Union relies on a generally accepted principle, I also recognize an equally established exception for circumstances “...where the conduct was clearly wrong, it has been held that

employees need not be notified of rules.” Id at 15-78. Here, I am persuaded that receipt of pay based on intentional misrepresentation of work activities is a form of dishonesty that employees would be expected to understand as a fundamental breach of trust. Significantly, arbitrators have generally treated similar dishonest conduct as a dischargeable offense. See, *Merck-Medco*, 110 LA 782, 788 (Baroni,1998). In light of the foregoing, I am persuaded that the nature of grievant’s alleged offense, if established, constitutes a form of dishonest theft of time, and is sufficiently egregious that it would traditionally support termination, even without either specific notice disseminated in the workplace or progressive discipline.

## 2. The Alleged Misconduct

With respect to whether grievant “misrepresented” his location and his activities during work hours and submitted “inaccurate time and information” on his weekly reports, I must evaluate the relative reliability of conflicting evidence. In assessing credibility, I recognize there are no easily established standards and no clear formula. However, among the many factors I may properly consider are inconsistency with established facts, impressions based on my observations of the witnesses, the interests and motivations of witnesses, any inconsistencies in their testimony, and the reasonableness of their testimony in consideration of the entire evidence. No single factor is dispositive; however, together they contribute to a judgment that one party’s position is more believable than that of the other.

As a threshold matter, I find the testimony of the investigators to be credible. Thus, although Bitter and Robinson were not familiar with the duties of the inspectors, they are trained investigators, with no apparent motive to fabricate or exaggerate. Further, on at the last two days of surveillance, they were accompanied by McQueen, thereby increasing the likelihood of accuracy. In light of the foregoing I am persuaded that Bitter and Robinson accurately reported their observations of grievant’s activities during the surveillance.

Further, McQueen, Buendel and Snyder all testified consistently that the policy restricts “inspection time” to the time an inspector arrives at the facility, conducts the inspection and then leaves the facility after having completed the appropriate paperwork. Indeed, grievant did not contradict McQueen’s testimony that he provided such training to her as she began her career.

Based in particular on the consistency of their testimony, and the reasonableness of their position, I am persuaded that McQueen, Buendel and Snyder taken together accurately described the Department's expectations for the inspectors' reports of their work time.

With respect to grievant, when offered the opportunity during the investigatory meeting to explain the difference between his weekly report and the investigators' observations, grievant initially expressed an inability to do so. His subsequent responses included a variety of explanations, many of which were extremely difficult to reconcile with the duties of his position. For instance, his references to various equipment and activities that serve no apparent relationship to his work duties are highly puzzling at best and strain credulity. Also, his written response to the pre-disciplinary letter continued to assert seemingly inexplicable rationalizations. His relatively low output also provides objective evidence that his weekly reports misrepresented the amount of time he actually spent on work-related activities. In light of the foregoing, I am persuaded that grievant's testimony and written responses fail to provide reasonable or accurate explanations for his time during the workday.

On the other hand, I acknowledge that Fluharty's testimony that he generally spends one to three hours planning his day at home before beginning his inspections, and that he would include that time as part of his inspections lends some support to grievant. Further, Fluharty had no problem attributing four hours to an inspection where only two were spent on site. However, Fluharty also conceded that 9 hours on an inspection could be a "stretch" and that 7 ½ hours could be a little "grayer" and "a little bit on the outside." In assessing the import of Fluharty's testimony I initially recognize that he is a highly experienced inspector and one of the most prolific in the State. Further, there is no evidence that Fluharty engaged in any misrepresentations on his weekly reports. Based on these observations, as well as Fluharty's long seniority and his mixed observations about grievant's claims, I consider Fluharty a credible witness. On the other hand, Fluharty lacks any personal knowledge of grievant's work activities or the substance of his weekly reports. In light of this crucial shortcoming, I am persuaded that Fluharty's testimony taken as a whole cannot provide convincing support for grievant's position.

In sum, although it would be a better practice for the Department to have a written policy that establishes the elements of an inspection for purposes of time recording, in consideration of all the above factors I am persuaded that the Department's version of the expectations for how the inspectors' time is to be reported is more believable than that of grievant. I am also persuaded that on numerous occasions grievant was made aware of the Department's expectations. Moreover, grievant knew or should have known that violation of a bedrock principle such as honest and accurate reporting of time could be cause for termination. Accordingly, I am compelled to conclude that the Department established that grievant's dishonest misrepresentation of his work activities on his weekly reports was knowing and deliberate.

### 3. Reasonableness of the Penalty

It is well established that arbitrators possess inherent authority to modify the penalty imposed by management. However, in exercising this function, I do not possess the authority to decide what penalty I would consider most appropriate as if I were the initial decision-maker. Rather, my authority is limited to determining whether the penalty of discharge was arbitrary or discriminatory, contrary to any similar past practice, in violation of any progressive discipline rules, or harsh under all the circumstances. See *Interstate Brands*, 97 LA 675, (Ellmann,1991).

It is also considered "...axiomatic that the degree of penalty should be in keeping with the seriousness of the offense." *Huntington Chair Corp.*, 24 LA 490, 491 (McCoy, 1955). Expressed simply, does the penalty fit the crime? In that regard dishonesty regarding time recording has been generally recognized as an offense of such magnitude as to constitute 'just cause' for a severe disciplinary response, including termination, even for a first offense, whether or not there has been progressive discipline. See, *Goodmark Foods*, 112 LA 1191, 1194 (Nolan, 1999).

In explaining the selection of discharge as the appropriate penalty, Dr. White relied on the Department's expectation for a high level of trust in inspectors who work remotely and the conclusion that grievant had breached that trust. In particular Dr. White noted that on the days grievant was followed, he was at his residence "a large portion" of his work shift rather than in the field performing inspections. Further, grievant's dishonesty regarding his weekly reports caused the Department to lose trust that grievant would accurately follow procedures during inspections.

In light of the foregoing and my credibility resolutions, I must conclude that the Department had a firm basis to consider grievant's weekly reports as unreliable and untrustworthy, thereby creating a loss of trust. In addition, I consider it noteworthy that the grievant has failed to admit his misconduct and to accept responsibility for his activities, thereby indicating that he would continue his former pattern of dishonest weekly reports.

On the other hand, important mitigating factors that are commonly considered in assessing the fairness of any level of discipline include the overall quality and length of the employee's work record. As explained by one arbitrator:

[B]efore invoking terminal discipline the Company must consider the employee's entire past record with respect to work performance, attendance, and "discipline" and give it appropriate weight in determining whether discharge, or some lesser discipline, should be meted out to the employee for the proven act of misconduct in which he engaged. *Olin Corp.*, 86 LA 1096 (Seidman, 1986).

Consistent with the above principles I am particularly mindful that grievant's approximately 17 years of service merit my careful attention and sympathetic consideration. However, as one respected arbitrator has observed:

Even long seniority counts only for so much. It buys extra consideration, it merits the benefit of any reasonable doubts, and it obliges an employer to view the employee's record as a whole rather than treating events in isolation." *Carolina Tel. & Tel. Co.*, 97 LA 653, 655 (Nolan, 1991).

Ultimately, I must balance the mitigating considerations, including grievant's right to individualized treatment based on his long service and the lack of progressive discipline, against the gravity of his offense.<sup>11</sup> With regard to the misconduct, I recognize that dishonesty is commonly considered an egregious offense, particularly when it involves reporting of time worked. Such misconduct frequently warrants discharge for a first offense. Significantly, grievant gave no reason to believe that if reinstated he would attempt to comply with the Department's expectations.<sup>12</sup> Moreover, I am persuaded that the Department's decision was based on a fair and objective investigation, that furthered its obligation to provide the public with assurance that its

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<sup>11</sup> Although grievant's prior counseling or warnings were based on ethical considerations, I find that they cannot serve as a basis for progressive discipline, as the nature of the misconduct at issue here is substantially distinct from that subject of those observations.

<sup>12</sup> As discipline is intended to be constructive rather than punitive, the likelihood that a grievant has learned a lesson and is committed to avoiding similar misconduct in the future is a significant factor in determining whether reinstatement is appropriate.

work is accurate and truthful. In light of the foregoing, I am persuaded that the above aggravating factors preclude me from assigning decisive weight to grievant's seniority and other mitigating considerations. Finally, I am unable to find a basis to determine that discharge was arbitrary, discriminatory, or unduly harsh.

## **CONCLUSION**

Although the Union made the strongest possible argument on behalf of grievant, my evaluation of the exhaustive record and the arguments and authorities set forth in the Parties' well-written briefs have persuaded me that the Department met its burden of demonstrating that grievant engaged in acts of willful dishonesty. Specifically, his weekly reports misrepresented his time spent on inspections and many listed activities bear no rational connection to his duties. I am also persuaded the discharge was a reasonable and fair penalty under all the circumstances. In that regard arbitrators generally find such dishonesty sufficient cause for termination, even absent progressive discipline. Moreover, I am persuaded that any mitigating circumstances fail to overcome the determination that termination is a fair and appropriate penalty. In light of the foregoing I am compelled to conclude that the Employer has demonstrated by clear and convincing evidence just cause to discharge grievant and that the grievance must be denied. In reaching my conclusions, I addressed only those matters I deemed necessary for a proper resolution but did consider all the well-expressed arguments of the Parties, including the authorities and evidence on which they relied, even if not specifically addressed in this Opinion.

## AWARD

Based on my conclusions above, I award the following:

1. The grievance is denied.
2. Per Article 29.3 of the CBA, my fees will be shared equally by the Parties.

Respectfully submitted,



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Richard L. Ahearn

Arbitrator

August 13, 2019