#738

REVIEWED BY
JAN 16 2001
GRIEVANCE COORDINATOR

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
Ohio Department of Transportation
-AND-

OCSEA/AFSCME, Local 11

APPEARANCES

For Ohio Department of Transportation
Louis E. Kitchen, Labor Relations Officer, ODOT
Neni Valentine, LRS/OCB
Edward A. Flynn, Assistant Administrator of Labor Relations
John Hagen, District Deputy Director
Kenneth P. Parks, Business & Human Resources Administrator
Vaughn Wilson, Highway Management Administrator District 9
Larry L. Hill, Planning and Programs Administrator
Matthew Long, Investigator
Gwen L. Stauffer, Personnel Officer 2
Anthony L. Dunlop, Programer Specialist
Jacqueline F. Grubb, Computer Technician

For OCSEA
Tim Rippeth, Staff Representative
Justine Smith, Chief Steward, District 9, ODOT
Delvin Murray, Grievant
Karen Vroman, Staff Representative
Tracy L. Taylor, Account Clerk

Case-Specific Data

Date(s) of Hearing:	September 15, 2000, September 29, 2000
Date of Award:	December 27, 2000
Contract Year:	1997-2000
Type of Grievance	Discharge/Unauthorized Use of Computer/Theft
Grievance No.	31-09-(03-09-00)-09-01-13

Robert Brookins

Robert Brookins
Arbitrator, Professor of Law, J.D., Ph. D.

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II. Procedural Background

The parties to this dispute are the Ohio Department of Transportation (ODOT or the Employer) and the Ohio Civil Service Employees Association, Local 11 (OCSEA or the Union). The Grievant is Mr. Delvin Murray.

On February 10, 2000, ODOT's Meeting Officer (Mr. David Armstrong) informed the Grievant that ODOT was contemplating his termination for violating the following work rules: WR-101-I-7 Unauthorized/Misuse of State Equipment or Vehicle, and WR-101-I-22 Theft In or Out of Employment.[1] At that time, the Grievant was also notified that a predisciplinary hearing had been scheduled for February 18, 2000.[2] The predisciplinary hearing was held on February 22, 2000 and, on February 25, 2000, the Predisciplinary Hearing Officer sustained the Employer's charges and thus found just cause for discipline.[3] On March 6, 2000, Mr. Gordon Proctor (Director of ODOT) informed the Grievant that his removal would become effective on Tuesday, March 7, 2000.[4] The Union contested that disciplinary decision, on March 7, 2000, by filing Grievance No. 31-09-(03-09-00)-09-01-13.[5] On March 16, 2000, the Employer and the Union (the Parties) held a Step-III Grievance Hearing and, on April 24, 2000, the Step-III Hearing Officer denied the Union's Grievance.[6] The Union subsequently opted to take the instant dispute to arbitration, on July 7, 2000.

The Parties elected to present this dispute to the Undersigned, a member of their panel of permanent

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1 Joint Exhibit No. 3B.

2 *Id.*

3 Union Exhibit No. 8. The Union alleged violations of several Articles 2.02, 24.01, 24.02, 24.04, and 24.05 of the Collective-Bargaining Agreement.

4 Joint Exhibit No. 3A.

5 Joint Exhibit No. 2A at 5.

6 Union Exhibit No. 2A at 4.

arbitrators. Accordingly, arbitral hearings were conducted, at the District 9 Branch in Chillicothe, Ohio, on September 15, 2000 and September 29, 2000. All parties relevant to the resolution of this dispute were present at both hearings, which commenced at approximately 9:00 a.m.

During the arbitral hearings, the Parties zealously and competently presented their cases and had full and fair opportunities to present any admissible evidence and arguments supporting their positions in the instant dispute. Specifically, the Parties were permitted to make opening statements and to introduce admissible documentary and testimonial evidence, which was fully available for relevant objections and cross-examination. Finally, the Parties had a full opportunity either to offer closing arguments or to submit post-hearing briefs and selected the latter. The Undersigned received the last post-hearing brief on or about November 6, 2000 when the arbitral record was officially closed.

III. The Facts

The instant dispute arose out of an alleged violation of ODOT's policy regarding unauthorized use of its computers.[7] ODOT's employees were notified that its computers were to be used only for official business, that the Employer could monitor the use of its computers, and that unauthorized use could lead to dismissal.[8]

On Wednesday, December 22, 1999, Mr. Richard R. Rector (Administrator, Office of Computer Facility Services, a Division of Information Technology) learned that an ODOT computer in District 9 ("the Computer" or "ODOT's Computer") was being used to access unauthorized websites on the internet.[9] Mr. Rector sent an e-mail to Mr. Kenneth P. Parks (Business and Human Resources Director), apprising him of the situation.[10] Mr. Parks then asked Mr. Gary R. Towler (Programmer Specialist Supervisor) to identify the

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[7] Joint Exhibit No. 6A.

[8] Joint Exhibit No. 3M.

[9] Actually, Mr. Rector was alerted by a network computer program that monitors for unauthorized use of state computers.

[10] Employer Exhibit No. 1.

Computer and to pull its records for identification. Mr. Towler identified the Computer by its Internet Protocol Address (IPA) which never changed during the investigation in the instant dispute.[11] Based on that IPA, the Employer discovered that the Computer was assigned to the Grievant and was on in fact located on his desk in his District-9 office. The Grievant was an expert in his field, occupied a position of trust, and was not closely supervised.[12]

In response, to Mr. Parks's request, Mr. Towler also generated a copy of the Temporary Internet Report (the Report) and forwarded it to Mr. Parks.[13] Based on Mr. Rector's e-mail and a partial review of the Report, Mr. Parks concluded that the Computer contained suspicious files and, on December 22, 1999, ordered an investigation of the incident.

On December 29, 1999, Mr. Parks advised ODOT's Chief Legal Investigator (Mr. Matthew Long) that some unauthorized sites seemed to have been accessed from the Computer. Unlike the Grievant, Mr. Long could not defeat ODOT's firewall, which denied employees' computers access to certain sites. As a result, Mr. Long used an unblocked computer to access the sites and discovered that many were sexual in nature.

Although no one ever directly observed the Grievant viewing inappropriate material on the Computer, circumstantial evidence together with the Grievant's admissions establish that he used the Computer to observe NASCAR information and sexually explicit material. The circumstantial evidence involves indirect observations by several managerial personnel on December 30, 1999. On that day Mr. Long visited District 9 and effected a "VCN" connection between the Computer in the Grievant's office and a computer in the office of Mr. John Hagen (Deputy Director of District 9). Mr. Hagen's office was located on the same hallway as the Grievant's. The "VCN" link allowed observers in Mr. Hagen's office to engage

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[11] Every computer has an IP address (IPA), which identifies it for purposes like downloading information.

[12] Joint Exhibit No. 3M at "A."

[13] Employer Exhibit No. 2.

in real-time observations of whatever appeared on the Computer's monitor on the Grievant's desk.

Also, on December 30, 1999, Mr. Parks visited Mr. Hagen's office to greet Mr. Matthew Long. For approximately ninety minutes, Mr. Parks observed non-work-related images on the Computer's screen through the "VCN" connection. The images included NASCAR information and sexually explicit material. During that time, Mr. Parks observed little work-related information on the Computer's screen.

The Grievant downloaded several files from the internet to the hard drive of the Computer and then to the Computer's floppy drive. "Oups.exe." is an example of a file that the Grievant downloaded from the hard drive to the floppy diskette (the floppy diskette) on the Computer. "Oups.exe." contained a cartoon in which a female wearing only high heel slippers was faced away from the viewer and bent over from the waist at approximately a ninety-degree angle, clearly displaying her genitalia. A mouse cursor clicked on her vagina causes it to pulsate. "Sandrosex" is another internet file that the Grievant copied from the hard drive to the floppy of the Computer. This file contained an image of a fully clothed female who could be slowly "undressed" by clicking on various pieces of her apparel. Targeted pieces of clothing disappear when clicked on. Both of the females in these depictions were cartoon characters.

During his visit to Mr. Hagen' office, on December 30, 1999, Mr. Parks twice walked down the hall past the Grievant's office and observed the Grievant sitting at his desk and looking at his computer monitor. However, from his vantage point Mr. Parks could not see the screen because the monitor was turned away from the doorway.

On December 30, 1999, Mr. Vaughn E. Wilson (Highway Management Administrator) also observed sexually explicit material on the Computer through the "VCN" connection in Mr. Hagen's office. Mr. Larry K. Hill (Planning and Programs Administrator and the Grievant's supervisor) also observed the "Oups.exe." file from Mr. Hagen's office, on December 30, 1999.

On December 30, 1999, Mr. Long viewed the Computer 's monitor through the "VCN" connection and witnessed sexually explicit material such as the "Sandrosex" file and the "Oups.exe" file. While

watching the Computer's monitor through the "VCN" connection, Mr. Long noticed the Grievant transferring files to his "A" (floppy) drive and/or deleting files from the Computer.[14] Mr. Long then entered the Grievant's office, where the Grievant was talking on the telephone. Mr. Long searched in vain for the floppy he thought the Grievant used to download files from his hard drive. Mr. Long then asked the Grievant to end his telephonic conversation and to accompany him to another office. There, Mr. Long interviewed the Grievant about the unauthorized use of the Computer. Mr. Long also interviewed the Grievant a second time, on January 10, 1999.

After examining the Computer's hard drive, Mr. Long concluded that the Computer had visited approximately 62,360 websites from September 20, 1999 to October 30, 1999[15] and that few of those websites were work-related.[16] Also, Mr. Long estimated that the 62,360 website which the Grievant allegedly "hit" costs ODOT approximately $5002.66 in lost hours.[17]

Despite the Grievant's misconduct, Mr. Hill (the Grievant's direct supervisor) could find little fault with the Grievant's job performance. In fact, Mr. Hill stated that because of the Grievant's organizational efforts, a Quality Assurance Team was able to inspect District 9 in one day, even though the Team had originally allotted two days for that task.[18]

Accordingly, the Grievant received strong performance evaluations. From 1997 through 1999, the Grievant received strong performance evaluations, in which he met or exceeded each and every expectation

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[14] Joint Exhibit No. 3C is Mr. Long's interview with the Grievant who admits using the Computer to view pornography, and other inappropriate material.

[15] There was some discrepancy regarding the exact number of searches conducted. The number 60, 630 was also mentioned.

[16] Joint Exhibit No. 3F, G, H.

[17] Essentially, Mr. Long concluded that ODOT paid the Grievant received an hourly wage of approximately $28.88 and assumed for purposes of calculation that the Grievant spent approximately 10 seconds at each website. With these numbers in mind, Mr. Long made the following calculation: 62360 X 10/sec. = 623600 seconds/3600 = 173.22 hrs. X $28.88 = $5002.66.

[18] Joint Exhibit No. 3M.

therein. In addition, he received complementary to highly complimentary comments for each of the evaluative criteria, which included: quantity of production, quality of production, timeliness team effort/cooperation, problem solving/decisionmaking, communication, and planning/scheduling.[19]

Based on the volume of the Grievant's alleged visits to unauthorized websites,[20] Mr. Hagen recommended the Grievant's removal for Unauthorized/Misuse of State Equipment or Vehicle, and for Theft In or Out of Employment. Apparently relying on a criminal code, Mr. Hagen defines felony theft to involve loss of property valued at $500 or more. In his mind, less valuable losses of property are simply theft.

IV. The Issue

Was there just cause for the removal of the Grievant? If not what shall the remedy be?

V. Relevant Rules and Contractual Provisions

Use of Computers (January 30, 1998)

> Ohio Department of Transportation computers and related equipment are to be used exclusively for official state business. Use of computers includes use of the Internet, electronic mail, online services and all hardware and software. Use of computers or computer equipment other than for official ODOT business activities is strictly prohibited. Prohibited use includes, but is not limited to, the following: personal use; use associated with for-profit business activities; sending chain letters. . . .[21]

"Proctor Directive"
April 18, 2000[22]
Personal Responsibility

Employees must be held accountable for their use and misuse of government resources, of which access to the Internet, electronic mail and online services are but three examples.

1 Uses that interfere with normal business activities, involve solicitation, are associated with any for-profit business activities or could potentially embarrass the state are strictly forbidden.

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[19] Joint Exhibit No. 4A-C.

[20] Joint Exhibit No. 3B.

[21] Notification to ODOT employees from Dave Fuhrman (Deputy Director, Division of Information Technology) and Robert Blair (Deputy Director, Division of Human Resources).

[22] Joint Exhibit No. 6B, promulgated by Mr. Gordon Proctor, Director of ODOT.

* * * *

3 ODOT employees shall not use the Internet, electronic mail and online services to transmit or download material that is offensive, obscene, pornographic, threatening or racially or sexually harassing.

* * * *

8 Access to the Internet shall only be made by *approved connection* via OAR/NET which is ODOT's official connection. Use of other connections by modem shall not be permitted by network-connected personal computers.

GENERAL POLICY:

To enforce the appropriate use of ODOT computers, the Assistant Director of Business Management or designee will monitor computer use and the actual computer hard drives. The department will maintain monitoring software to view each computer from a remote location and will exercise the right to enforce appropriate use. *There is no expectation of privacy for anyone using an ODOT computer.* Anything done on the computer is open for public review. Employees are advised to use ODOT's computers as if their use were to be published in a monthly newsletter.[23]

ODOT employees are allowed to use an *assigned ODOT personal computer only during non work hours*, provided the use is permitted under the "Personal Responsibility" section of this policy. Non work hours include only the scheduled lunch break and before and after work hours, within reason. All files opened during lunch or before and after work should be saved and closed before work hours. During work hours it is acceptable to listen to real audio or radio station broadcasts, as long as this use does not infringe on employee productivity.[24]

Article 2.02

"No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this agreement. . . ."

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."[25]

24.02 — Progressive Discipline

"The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense."[26]

24.04

"An employee shall be entitled to a union steward at an investigatory interview upon request and if he/she

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[23] Emphasis added.

[24] Emphasis added.

[25] *Id.* (emphasis added).

[26] *Id.* (emphasis added).

has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her. . . ."[27]

24.05 – Imposition of Discipline

"Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment."[28]

VI. Summaries of the Parties' Arguments

A. Summary of Union's Arguments

1 The Grievant did not visit 62,360 unauthorized websites on ODOT's computer.
2 The record lacks direct evidence of the Grievant's alleged misconduct.
3 Errors plague the Employer's investigation.
4 The charge of theft is wholly subjective and unfounded.
5 The Grievant is a victim of disparate treatment.
6 Although the Grievant visited NASCAR websites in violation of ODOT's policy, that violation hardly warrants removal.
7 If the Grievance is sustained. The Arbitrator should retain jurisdiction of this case for at least 120 days after rendering the award.

B. Summary of Management's Arguments

1 The Grievant was fired for misuse of ODOT's computer for self gratification of prurient interest, personal use and non-work-related internet surfing from September 20, 1999 through December 30, 1999.
2 The Grievant's misconduct constitutes theft.
3 The Employer thoroughly investigated this matter.
4 The Grievant is not a victim of disparate treatment.
5 Given the nature of the Grievant's offense and the balance of aggravating and mitigating factors, removal is a reasonable and otherwise fitting penalty in this case.

VII. Discussion and Analysis

A. Burden of Persuasion

As usual in disciplinary disputes, the Employer shoulders the burden of persuasion regarding its charges against the Grievant. In this case, however, a separate statement about the measures of persuasion for each charge is indicated. If established against the Grievant, the charge of "Unauthorized/Misuse of State Equipment or Vehicle" carries no obvious stigma. Therefore, the measure of persuasion for that charge is the customary preponderance of the evidence. In contrast, the charge of theft, if established, carries an

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[27] Joint Exhibit No. 1.

[28] *Id.* (emphasis added).

obvious, heavy stigma. Accordingly, to establish theft, the Employer must adduce clear and convincing evidence to support that charge. This higher measure of persuasion helps to protect against inadvertently stigmatizing the Grievant and unnecessarily burdening his career efforts in the future. The task now is to assess the validity of the charges against the Grievant.

B. Grievant's Right to Union Representation in the December 30, 1999 Interview

Article 24.04 provides in relevant apart: "An employee shall be entitled to a union steward at an investigatory interview upon request . . . if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her. . . ."[29] On December 30, 1999, Mr. Long and the Grievant made the following exchange at the beginning of an investigatory interview:

Mr. Long: "You have the right [to] be represented by a union steward, do you [want] one before we begin?"
The Grievant: "Probably should."[30]

Under these conditions, Mr. Long clearly should have resolved any doubts in favor of terminating the interview until the Grievant secured union representation. Nevertheless, as set forth below, Mr. Long continued to question the Grievant about his accessing unauthorized websites.

The core of the Employer's case is the accusation that the Grievant used the Computer to access blocked or unauthorized websites. Virtually all the corroborative evidence connected to that charge revolves around Mr. Long, a key witness for the Employer. Specifically, the Employer's case turns on the probative value of Mr. Long's Report,[31] Mr. Long's interviews with the Grievant,[32] daily Webtrends Reports on which Mr. Long relied during his investigation,[33] as well as the "Murray Web Activity Summary" ("Activity

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[29] Joint Exhibit No. 1.

[30] Joint Exhibit No. 3C.

[31] Joint Exhibit No. 3J.

[32] Joint Exhibits Nos. 3C & 3D.

[33] These documents are not a part of the record.

Summary").[34] During the arbitral hearing, however, the Union subjected Mr. Long to a searching cross-examination, exposing significant weaknesses in some areas of the Employer's case. As a result, a careful discussion of those weaknesses is indicated in order to assess the probative value of the Employer's evidence against the Grievant.

C. Mr. Long's Report

When cross-examining Mr. Long, the Union largely discredited his Report, thereby casting a cloud over Mr. Long's testimony in general and his report in particular. During that cross-examination, the Union turned first to Mr. Long's assertion that, on December 30, 1999, the Grievant began surfing the internet at 9:04 in search of a web site entitled "Grasport." In contrast, the "Activity Summary" sates that, on December 30, 1999, the Grievant began surfing the internet at 9:05 a.m.[35] Furthermore, although the Employer charged the Grievant with downloading pornographic material, Mr. Long could not firmly state whether images in an internet file that the Grievant allegedly downloaded—"Camptrans.com"—were pornographic. The most that he could offer was "it depends on what you consider to be pornographic."[36] Mr. Long could only characterize "Camptrans.com" as "inappropriate."

While cross-examining Mr. Long, the Union also noted that his Report states that, on December 30, 1999, the Grievant stopped using the Computer at 9:41 and began using it again at 9:55. In the same paragraph, however, the Report also states that the Grievant downloaded "undress.exe." at 9:43. Mr. Long offered no satisfactory explanation of how the Grievant could download a file without using the Computer.

Finally, and perhaps most important, the Union thoroughly cross-examined Mr. Long about the veracity of the passage in his report stating that he interviewed the Grievant "with Charlie Johnson the

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[34] Employer Exhibit No. 5 and Joint Exhibit No. 7.

[35] Joint Exhibit No. 7.

[36] This only underscores the difficulty in defining and applying this term.

Union's Representative present. . . ."[37] Under the pressure of cross-examination, Mr. Long found himself inextricably enmeshed in several contradictions regarding this assertion. First, he flatly admitted that the question-answer section of page one of his interview with the Grievant, on December 30, 1999, occurred in the absence of a union representative. Yet, at the beginning of that interview, Mr. Long explicitly asked the Grievant if he wanted a Union Representative present and the Grievant answered "probably should."

Mr. Long offered several conflicting explanations about this situation. He first testified that two union representatives were present when he was about to interview the Grievant, and he (Mr. Long) feared that the Union Representatives would "double-team" him during the interview.

At that point in the cross-examination, the Union produced a tape recording of Mr. Long's conversation with the union representatives, on December 30, 1999. Mr. Long clearly advised the representatives that his interview with the Grievant was administrative in nature and that nothing the Grievant said, during the interview, could be subsequently used against him.[38] Therefore, in Mr. Long's view, the Grievant was not entitled to union representation in that interview, despite explicit contractual language affording him that right.[39]

The record suggests that Mr. Long understood that his interview with the Grievant on December 30, 1999 was not administrative in nature. Observe, for example, that at the inception of that interview, Mr. Long advised the Grievant of his right to union representation during the interview. Also, what the Grievant said during that interview is now a part of this arbitral record and is being used against him.

Third, Mr. Long testified that he gave the Grievant an opportunity to have a Union Representative

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[37] Joint Exhibit No.3K, at 2,¶ 4.

[38] The Union objected to the introduction of this tape as surprise evidence because the Union surreptitiously taped the conversation. Before admitting the taped conversation into evidence, the Arbitrator offered the Union an opportunity to study the tape in order to develop any response it could.

[39] Article 24.04 of the Collective-Bargaining Agreement provides, "An employee shall be entitled to a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her. . . ."

present. But, according to Mr. Long, the Grievant "went on" and they briefly discussed some matters after which Mr. Long suspended the interview to secure other evidence, and when Mr. Long resumed the interview a short time later, the Grievant had secured a union representative. At that time the recorded conversation establishes that Mr. Long meticulously reviewed the question-answer session he and the Grievant had completed prior to the arrival of the union representative.

Cursory examination shows that Mr. Long's three explanations conflict with one another. First, he told the union representatives that the interview was administrative and therefore the Grievant was not entitled to Union representation. Yet, Mr. Long advised the Grievant of his right to have a Union Representative present during the interview.[40] Second, if the interview was administrative, then according to Mr. Long's own words, the Grievant's statements offered therein would not be used against him. Those statements are part and parcel to the arbitral record, in this case. Third, Mr. Long suggests that he and the Grievant simply drifted into the interview after the Grievant sought to exercise his contractual right to union representation. Yet, he was able to recite almost verbatim the questions he asked and the answers the Grievant offered before the Grievant obtained union representation on December 30, 1999. Apparently, more than a casual conversation occurred.

Finally, the Union pointed out that Mr. Long's Report also suggests that the Grievant's preoccupation with surfing the internet adversely affected his job performance. Specifically, the Report asserts that the Grievant failed to remain current in his assignments and offered excuses for failing to perform his job. However, the arbitral record flatly contradicts this proposition, showing that on November 28, 1997, 1998, and 1999, the Grievant received excellent performance evaluations.[41] Nor is there testimony or other evidence in the record to even suggest that the Grievant was somehow incompetent or derelict in his job performance. Finally, during cross-examination, Mr. Long admitted that his adverse inferences about the

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[40] Joint Exhibit No. 3C at 1.

[41] Joint Exhibit No. 4 A-C.

Grievant's job performance was at least partially premised on the hours that the Grievant allegedly spent accessing unauthorized websites on the internet. Given the record before the Arbitrator, however, Mr. Long's inferences are wide of the mark.[42]

Ultimately, the foregoing inconsistencies in Mr. Long's report and in his testimony severely compromise his credibility and render his testimony or statements largely unacceptable, absent independent, corroborative evidence.

D. Probative Value of the Employer's Documentary Evidence

While cross-examining Mr. Long, the Union revealed several inconsistencies and errors in other documentary evidence on which the Employer premised it removal decision. The Employer relied on daily Webtrend Reports to show that the Grievant frequently accessed sex-based web sites. Consequently, the Union requested the Employer to make the Webtrend Reports available for the Union's inspection. The Employer responded by submitting three Webtrend Summaries: December 13, 1999 through December 19, 1999,[43] December 20, 1999 through December 26, 1999,[44] and December 28, 1999 through January 3, 1999.[45] While cross-examining Mr. Long, the Union brought out several problems with these Webtrend Summaries that tend to undermine their reliability as measures of the Grievant's internet activity.[46] First, all three Webtrend Summaries indicated that the Grievant had exactly the same number of "hits" (5655) during the same number of sessions (5) and periods of time (01.54.58). Commonsense suggests the high improbability of this duplicative outcome on different days. Second, the Webtrend Summary for December 28, 1999

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[42] As discussed elsewhere in this opinion, however, the Arbitrator is aware that Mr. Hill, the Grievant's supervisor testified that he had lost confidence in the Grievant as an employee, given his unauthorized use of the Computer.

[43] Union Exhibit No. 6A.

[44] Union Exhibit No. 6B.

[45] Union Exhibit No. 6C.

[46] Union Exhibit No. 6A-C.

through January 3, 1999[47] shows the Grievant had a total of 6940 "hits" (5655 + 1285) for December 28 and 30, 1999. However, for those same days, the Activity Summary generated by Mr. Long shows that the Grievant had only 1147 "hits." Although he admitted that the foregoing Webtrend Summaries were inaccurate, Mr. Long blamed the Y2K bug for the discrepancies. Furthermore, he insisted that such flaws did not plague Webtrend Reports prior to the year 2000 and, hence, did not influence the daily Webtrend Reports on which he relied in the instant case.

Continuing to focus on the "Activity Summary" the Union got Mr. Long to admit that on December 4, and 11, 1999, the Grievant did not report to work. Yet the Activity Summary shows that the Computer registered 2713 "hits" and 2106 "hits" respectively for the Computer on those days. Confronted with this discrepancy, Mr. Long could only surmise that someone used the Grievant's password. In its post hearing brief the Employer correctly argued that the Grievant was responsible for the security of his password. However, there is no evidence in the record that the Employer ever discussed this apparent problem with the Grievant before disciplining him or, more important, was even cognizant of this inconsistency.

In addition to establishing the foregoing errors and discrepancies in the Employer's case, Mr. Long admitted, under cross-examination, that in totaling the number of hits in the "Activity Summary"[48] he did not distinguish authorized from unauthorized websites. Nor is the distinction clearly drawn elsewhere in the arbitral record. The obvious problem here is the difficulty in determining with any reasonable degree of certainty the percentage of unauthorized hits that can be fairly attributed to the Grievant, especially where, as here, the Employer places considerable weight on the proposition that the Grievant accumulated 62, 360 hits in a given time period.

The inconsistencies in Mr. Long's report and in documentary evidence to which he is either directly or indirectly linked cast a cloud on Mr. Long's credibility in this case. Consequently, the Arbitrator is

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[47] Union Exhibit No. 6C.

[48] Employer Exhibit No.5 & Joint Exhibit No. 7.

reluctant to credit Mr. Long's statements or testimony absent independent corroborative evidence. Also, it is unclear whether the Employer based its disciplinary decision on either the Webtrend Summaries or the daily Webtrend Reports. Because the Employer has the burden of persuading the Arbitrator of the truth of its allegations against the Grievant, that uncertainty is resolved against the Employer.

E. WR-101-I-7—Unauthorized/Misuse of State Equipment or Vehicle

Here the Employer alleges that the Grievant engaged in two specific types of misconduct that constituted Unauthorized/Misuse of State Equipment or Vehicle. First, the Grievant allegedly used the Computer to circumvent ODOT's firewall and to access websites to which ODOT had blocked access. Second, the Grievant allegedly used the Computer both to view and download pornography or sexual material from these unauthorized websites. These charges are considered in turn below.

1. Accessing Blocked Websites

The Employer adduced unrebutted and largely unchallenged testimony in the record to establish that more likely than not the Grievant used the Computer to access blocked or unauthorized websites. In other words, although the arbitral record lacks independent, corroborative evidence establishing that the Employer had officially blocked access to certain internet websites, the Employer presented witnesses who offered credible, unrebutted testimony that the Employer had blocked access to many of the websites that the Grievant allegedly visited. Furthermore, the Union neither directly challenged nor ultimately rebutted the proposition that the Employer blocked access to some or all of the websites that the Grievant allegedly visited.

Even without explicit rules, where an employer blocks access to websites with a firewall, commonsense dictates that those websites are off limits, irrespective of their content. It is axiomatic in labor management relations that not all work rules must be reduced to writing to be in effect. If an employer has locked a door to a room, it is unnecessary for that employer to publish a rule stating that employees may not

"pick" the lock to that door, much less break down the door to gain entrance to the room in question. Therefore, the Arbitrator finds that the Employer did attempt to deny its computers access to certain websites. Also, ODOT clearly notified its employees that they may use ODOT's computers to access the internet only through "approved connections." Based on this standard, the Arbitrator holds that the Grievant engaged in misconduct by circumventing the Employer's firewall to access websites, whatever their content.

2. Downloaded Information—Scope of ODOT's Computer Policy

Before the Arbitrator can determine whether the Grievant used the Computer in an unauthorized manner, he must first ascertain the permissible scope of use based on ODOT's rules and regulations. The record shows that, between January 30, 1998 and April 18, 2000, ODOT promulgated three sets of regulations or policies about the use of its computers.

(1) Fuhrman-Blair Policy

On January 30, 1998, Deputy Director of ODOT's Division of Information and Technology (Mr. Dave Fuhrman) and Deputy Director of ODOT's Division of Human Resources (Mr. Robert Blair) (Fuhrman-Blair Policy) promulgated a "Use of Computers" regulation that explicitly reserved ODOT's computers to be used "*exclusively* for *official* state business."[49] To emphasize this point, the memorandum provided further that use of ODOT's computers for other than "official ODOT business activities is *strictly prohibited.*"[50] Finally the memorandum mentioned "personal use" as one of an illustrative list of prohibited uses.[51]

(2) Directive 99-23

On November 13, 1998, ODOT's Director of Administrative Services (Ms. Sandra A. Drabik) promulgated Directive 99-23, which expressly "superseded any previously issued directive or policy and

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49 Joint Exhibit No. 6A at 5.

50 *Id.*

51 *Id.*

[would] . . . remain effective until canceled or superseded."[52] On its face, Directive 99-23 overrules or replaces the Fuhrman-Blair Policy.

More important for the instant case, Directive 99-23 relaxed the "zero tolerance" stance of the Fuhrman-Blair Policy. After holding ODOT employees "accountable for their use and misuse of government resources," including "access to the Internet, electronic mail and online services,"[53] Directive 99-23 explicitly loosened ODOT's computer-use standards in three steps. First that Directive substituted the term primarily for exclusively in the Fuhrman-Blair Policy, by providing that: "The Internet, electronic mail and online services are intended to be used *primarily* for business purposes." Requiring computers to be used "Primarily for business purposes" is very different from (less restrictive than) limiting their use "*exclusively* for *official* state business." Nevertheless, Directive 99-23 provided that "Uses that interfere with normal business activities. . . or could *potentially embarrass* the state are strictly forbidden" (embarrassment standard).[54] In addition, that Directive expressly prohibited ODOT's employees from using ODOT's computers "to transmit or download material that is *obscene, pornographic,* threatening or racially or sexually harassing.[55]

(3) The Proctor Directive

On April 18, 2000, Director of ODOT (Mr. Gordon Proctor) published a third set of regulations ("Proctor Directive") that governs the use of ODOT's computers and presumably superseded Directive 99-23.[56] The "Proctor Directive" tracks Directive 99-23 in several important respects. Specifically, the "Proctor Directive": (1) continues to hold ODOT's employees accountable for "use and abuse" of the internet among

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52 *Id.* at p. 3, § 1, Personal Responsibility.

53 *Id.* at 3

54 Emphasis added.

55 *Id.* at § 3.

56 This promulgation is labeled the Proctor Directive because the Arbitrator's copy of that directive (Joint Exhibit No. 6B) lacks an official label.

other electronic resources,[57] (2) provides that ODOT's computers are intended to be used "*primarily* for business purposes,"[58] and (3) bans "Uses that interfere with normal business activities. . . or [that] could potentially embarrass the state are strictly forbidden."[59]

The "Proctor Directive" goes further, however, by explicitly broadening the scope of proscribed, downloadable material and warning ODOT's employees that their use of ODOT's computers will be subject to electronic surveillance.[60] With respect to the former, the "Proctor Directive" not only continues to ban the downloading of "material that is *obscene, pornographic. . . .*" but also prohibits downloading of material that is merely "offensive. . . ."[61] In short, the "Proctor Directive" bans explicitly "offensive" material; Directive 99-23 did not. While broadening the scope of material that may not be downloaded, the "Proctor Directive" arguably allows ODOT's employees to use ODOT's computers for other than "official business," providing:

> ODOT employees are allowed to use an assigned ODOT personal computer *only during non work hours*, provided the use is permitted under the *"Personal Responsibility"* section of this policy. Non work hours include *only* the *scheduled lunch break and before and after work hours, within reason.* All files opened during lunch or before and after work should be saved and closed before work hours. During work hours it is acceptable to listen to real audio or radio station broadcasts, as long as this use does *not infringe on employee productivity.* [62]

Although it is not entirely clear, this passage *suggests* that ODOT's employees may use their assigned computers for personal use, so long as they observe the perimeters of Personal Responsibility and limit their use of to non-working hours.

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57 *Id.*

58 *Id.* at p. 2, Personal Responsibility, § 1.

59 *Id.*

60 Joint Exhibit No. 6B.

61 *Id.* at § 3.

62 *Id.* p. 3, General Policy.

Finally, the "Proctor Directive" offers the following explicit notification to ODOT's employees regarding privacy and surveillance: "ODOT employees are advised that access to and use of the Internet, electronic mail and online services is not confidential. Internet access can and will be monitored. Web browsers leave traceable 'footprints' to all sites visited."[63] Then the "Proctor Directive" states:

> To enforce the appropriate use of ODOT computers, the Assistant Director of Business Management or designee will monitor computer use and the actual computer hard drives. The department will maintain monitoring software to view each computer from a remote location and will exercise the right to enforce appropriate use. There is no expectation of privacy for anyone using an ODOT computer. Anything done on the computer is open for public review. Employees are advised to use ODOT's computers as if their use were to be published in a monthly newsletter.[64]

To summarize for purposes of the instant dispute, the Arbitrator holds that ODOT's employees are accountable for their "use and abuse" of the internet when using ODOT's computers. Furthermore, ODOT's computers:

- Are intended *primarily* for business use.
- Must not be used so as to interfere with "normal business activities."
- Must not be used in ways that "could potentially embarrass the state."
- Must not be used to download "material that is *offensive obscene" or "pornographic.*"
- May be used for personal employee business during *non work hours—scheduled lunch break and before and after work hours, within reason*—strictly within the guidelines of *"Personal Responsibility"* and so as not to *"infringe on employee productivity."*

3. Standard for Evaluating the Downloaded Material

As previously mentioned, the "Proctor Directive" explicitly forbids ODOT employees to download internet material that is "offensive," "obscene," "pornographic," or potentially embarrassing to ODOT. Violation of any one of these standards violates the "Proctor Directive." The Employer charged the Grievant with using the Computer to download pornographic material. However, nowhere does the Employer define "offensive," "pornographic," or "obscene." Yet, none of these terms have self-evident definitions, especially

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[63] Joint Exhibit No. 6B at p. 2, Personal Responsibility

[64] *Id.* at p. 3, General Policy.

"pornography" and "obscenity." The United States Supreme Court as well as lower federal and state courts continually struggle to articulate a clear, workable definition in this area of the law.[65] Nevertheless, even judicial definitions of pornography and obscenity are fraught with ambiguity, uncertainty, and subjectivity, with boundaries that are stoutly debated, constantly changing, and highly amorphous. Furthermore, since the Parties did not address external law during this dispute, it is unclear whether they intended for the Arbitrator to look beyond either the Collective-Bargaining Agreement or of legitimate work rules.

Fortunately, both the "offensive" and "embarrassment" standards afford less problematic avenues for assessing the propriety of the files. What is "offensive" is less controversial and generally easier to define because it has roots in reasonableness. Therefore, the issue here can be satisfactorily resolved by determining whether material that the Grievant downloaded violated the "offensive" standard. Finally, and obviously, the Arbitrator can apply these standards only to material that he has actually examined. As mentioned above, the Arbitrator viewed two files from a diskette confiscated from the

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[65] For an example of the United States Supreme Court's struggle with terms like pornography and obscenity See the following

1. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502, 10 Media L. Rep. 1625 (U.S.Mass., Apr 30, 1984) (NO. 82-1246)
2. New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113, 8 Media L. Rep. 1809 (U.S.N.Y., Jul 02, 1982) (NO. 81-55)
3. McKinney v. Alabama, 424 U.S. 669, 96 S.Ct. 1189, 47 L.Ed.2d 387, 1 Media L. Rep. 1516 (U.S.Ala., Mar 23, 1976) (NO. 74-532)
4. Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, 1 Media L. Rep. 1441 (U.S.Cal., Jun 21, 1973) (NO. 70-73)
5. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446, 1 Media L. Rep. 1454 (U.S.Ga., Jun 21, 1973) (NO. 71-1051)
6. A Book Named ""John Cleland's Memoirs of a Woman of Pleasure"" v. Attorney General of Com. of Mass., 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1, 1 Media L. Rep. 1390 (U.S.Mass., Mar 21, 1966) (NO. 368)
7. Ginzburg v. U. S., 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, 1 Media L. Rep. 1409 (U.S.Pa., Mar 21, 1966) (NO. 42)
8. Mishkin v. State of N. Y., 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (U.S.N.Y., Mar 21, 1966) (NO. 49)
9. Manual Enterprises, Inc. v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (U.S.Dist.Col., Jun 25, 1962) (NO. 123)
10. Roth v. U. S., 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, 1 Media L. Rep. 1375 (U.S.N.Y., Jun 24, 1957) (NO. 582, 61)

Grievant—"Oups.exe." and "Sandrosex."

Although what is "offensive" to one person may be perfectly acceptable to another, one can, nevertheless, fashion a reasonable definition that serves ODOT's concerns and does not unduly burden employees. To achieve this goal, one must base the definition on the perspectives of a reasonable person. Accordingly, the Arbitrator views "offensive" material as that which a reasonable employee or person of ordinary sensibilities would find disagreeable.

4. Propriety of the Downloaded Material

Here the task is to apply this standard to material that the Grievant clearly and convincingly downloaded, such as material that the Grievant admits having downloaded. The most damaging evidence against the Grievant regarding Unauthorized/Misuse of State Equipment or Vehicle is his statements and admissions to Mr. Long.

a. Excerpts From First Interview (December 30, 1999)[66]

(1) Passages Establishing that the Grievant downloaded and viewed "adult" or sexual material:

Q We have documented extensive misuse of your time on the state-assigned computer, what can you tell me about your use of work hours for non ODOT related items?
A It is not very good by I was doing searches originally that were not *adult material.* But as I saw *them* on I became *curious* as to what they were.

Q Did you misuse the state's computer this morning?
A Yes, because the *pop up cartoons* I was going to *take home and e-mail some friends.*

Q When did you obtain these cartoons'?
A This morning, I don't remember the exact link I went thru.

Q Was it done on the state assigned computer using the states Internet connection?
A This morning, yes.

Q Did you do searches that were *adult related* last week?
A They *probably would but were pointed to cartoon jokes.*

Q Do you feel these files inappropriate for the work place?
A No, the reason I say that is they are not pornographic, they are *funny little things*

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[66] Joint Exhibit No. 3C Q = questions from Mr. Long; A = answers by the Grievant..

that take the tension off the day.

Q Would you be proud to arrive at work if this was published in the local paper with the headline this is what Delvin Murray does at taxpayers expense?
A *No.*

Q Did you delete a notation called *Sandrosex* this morning?
A *Yes and I had no idea where it came from* and I just happen to see it.

Q Why did you delete it?
A Be, same reason I probably would have deleted the naked sexy girl one. I am anti, I would say, I don't know. Clarify, I don't think women should be used as a flesh market type thing, therefore I am not for it.

Q But *you have seen it on your ODOT computer*?
A *If it pops up on the screen* that is when I try to get rid of it, and when you click off of it a multitude of other screens pop up and you have to get rid of those.

(2) Passages Establishing Grievant's Computer Checking Account

Q What is your understanding of the computer use policy?
A I know that pornographic material is illegal, that is obvious. My *checking account* I did not know that was a big deal.
Q Have you keep you personal financial records on the state computer drive?
A I keep track of my checking.

(3) Passages Establishing Grievant's Accumulation NASCAR Information

Q I have documentation in your W: drive that shows this misuse goes back to 1996, how can you explain this?
A *A little misuse,* I'm a NASCAR fan. I am under the impression that I may have looked at the work place wrongly, joking lessens the stress of the job, *granted it is wrong in the strictest sense of the word* but has its advantages.
Q Did you attempt to access blocked sites this morning?
A Yes it did come up but I did not know what it was. I do know the policy on sexual harassment and do not display anything on my computer that might be offensive, unless they are a *anti-ford fan.* I do not knowingly keep anything on my computer that is offensive.

b. Excerpts From Second Interview (January 10, 1999)[67]

(1) Passages Showing Adult/Sexual Material

Q What ODOT searches do you do, that bring up other sites as you described in the previous question?

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[67] Joint Exhibit No. 3D.

A Obviously if you do searches *for adult* that is going to bring up an untold number of sites.

Q Bring up sites is not the same as visiting them, correct?
A *They are something I clicked on* but not the majority of them?

Q Did you *misuse the state's computer and Internet access* that morning [December 30, 1999]?
A Yes.

Q How did you misuse the Internet access?
A I was looking for the *jokes and cartoons and stuff* and that would not be ODOT related.

Q Did you download a program called *Oups.exe?*
A Not that I am aware of. [I recalled the download] I did not know what it was. Yes unaware of what it was.

Q Why did you delete that file from your drive?
A For the same reason I get rid of anything, I normally don't keep things on my drive.

Q What did you do with it prior to deleting it for your drive?
A Put it on a floppy.

Q Do you feel this file is inappropriate for the work place?
A Yes and it is *inappropriate for me, I downloaded it thinking it was a cartoon item.*
Q Are you in ODOT searches or websites when these multiple screens appear?
A Cartoon related sites. That is why the time is not correct, the sum of your time.

Q Do you find this also occurs during searches that are *adult related*?
A. The adult related are for the *adult related cartoons.*

Q Have you ever visited such sites that are in your favorites?
A I don't know, Wolfes hot list I think because of graphics and Corel on the web. Funny sites if I think I know that.
Q The funny site ODOT related?
A *No.*

These passages clearly show that, during his two interviews with Mr. Long, the Grievant admitted that he downloaded "adult" or sexual cartoons. Furthermore, the Arbitrator flatly rejects as wholly incredible the Grievant's allegation that sexual images somehow innocently popped up on the Computer's screen. The clear thrust of the foregoing passages is that the Grievant actively searched for sexual material.

Therefore, the issue becomes whether that material meets the definition of "offensive." To make

that determination, however, one must usually view the material in question. In this case, the Employer presented samples of the "adult" material in question, to the Arbitrator during the September — hearing. The Employer obtained these samples from a floppy diskette that Mr. Long obtained from the Grievant during the first interview, on October 30, 1999. One such sample was the image of the female, in "Oups.exe." Another sample was a cartoon image of a woman that the computer operator could "undress" with a mouse cursor. The prominence of the blond's "genitalia" and its vulnerability to "stimulation" by a mouse cursor would undoubtedly offend a reasonable person of ordinary sensibilities and therefore satisfy the definition of "offensive."[68] Finally, the interviews also establish that the Grievant did in fact use the Computer to maintain his personal checking account and to access and store NASCAR data.

Thus, the issue is no longer whether the Grievant accessed unauthorized internet but how often he did. The Employer insists that from September 20, 1999 to October 30, 1999 the Grievant accumulated over 62,000 internet "hits," approximately 12,300 of which contained "sex" as a word in their URL addresses. Alternatively, the Employer concedes that the Grievant probably was not at his work station for 16 of the 153 hours that he allegedly spent observing non-job-related, internet work sites. However, the Employer takes the position that someone used the Grievant's computer account or password to access unauthorized websites from the Computer and that the Grievant is, nevertheless, responsible for the security of his password. In contrast, the Union argues that had the Grievant spent as much time on the internet as the Employer claims, he would have had little time to perform his regular duties. Although the Employer makes a point, the nagging concern here is how could the Employer have thoroughly investigated this case and yet have overlooked the foregoing discrepancy?

Ultimately, however, the problems of credibility with Mr. Long's testimony and statements and with the Employer's documentary evidence linked to Mr. Long preclude the Arbitrator from sustaining the

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[68] One can even imagine a persuasive argument that this particular cartoon could reasonably be classified as either "obscene" or "pornographic."

Employer's position that the Grievant effected 62,360 "hits" on the Computer. Consequently, the Arbitrator can hold only that the Grievant accumulated an indeterminate number of "hits" on the Computer.

F. Propriety of the Employer's Allegation of Theft

The Employer also argues that by browsing unauthorized websites while on duty, the Grievant effectively stole money from the Employer as if he had raided the Employer's petty cash drawer. The Union argues that the Grievant stole nothing from the Employer. Historically most arbitrators have reserved the charge of theft for situations in which employees have obtained unlawful or unconsented possession of an employer's tangible, personal property with the intent of permanently depriving the Employer of possession of that property. More recently, theft has been defined to include electronic property, reflecting society's increasing dependency on computers, software, and electronic commerce.

In the Arbitrator's view, however, the Employer, in this case, is reaching for much more. Clearly there is something of a *logical, conceptual* connection employees who steal time from employers by loafing or otherwise engaging in non-work-related activities while on the "clock" and employees who steal expensive tools from employers. In either case, employers ultimately suffer monetary losses. The difficulty is that theft—as opposed to loafing in the restroom or *on the internet*—carries a heavy stench of social stigma that is and historically has been reserved for traditional thieves rather than for the lazy, the unmotivated, or the curious computer geek. This conclusion does not address whether employers should impose penalties for loafing equal to those for traditional theft.

Whatever conceptual, seductive appeal such an approach may have is offset by a woeful lack of functionality to employers and fairness to employees. Ultimately, how is it fair to artificially extend an oppressive charge like theft to include the loafer who clearly lacks the moral reprehensibleness of the traditional thief. With respect to functionality, employers who insist on extending the concept of theft to include malingerers should expect arbitrators to impose the same burdensome evidentiary standards reserved

for traditional theft. The foregoing reasoning persuades the Arbitrator that the Grievant's misconduct in this case is wholly distinguishable from rather than synonymous with traditional theft.

G. Disparate Treatment

Article 2.02 of the Collective-Bargaining Agreement provides, "No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this agreement. . . ." In the instant dispute, the Union alleged that the Grievant is a victim of disparate treatment and, therefore, has the burden of proving that allegation. In support of its allegation, the Union cites two reference cases. First, Mr. Parks used ODOT's computers on his own time to make financial points to fellow employees and to log onto websites at the University of Louiseville Kentucky. Mr. Parks is not authorized to give business advice, especially on ODOT's computers. Also, Mr. Parks viewed the University of Kentucky home page, which is also unauthorized.

Second, although Mr. Parks was willing to terminate the Grievant, he did not terminate another employee who viewed sexual material on ODOT's computer for approximately one and one half hours.[69] Mr. Parks admitted that the employee engaged in theft but imposed only a written reprimand.

Mr. Parks's behavior may raise concerns, but without more detail the Arbitrator lacks a basis for making the level of comparisons necessary to determine whether the Grievant in this case is truly similarly situated either to Mr. Parks or to the other employee in question. Therefore, the Arbitrator cannot sustain or even thoroughly analyze the Union's affirmative defense here.

VIII. Penalty Decision

The Grievant has been found to have violated the "Proctor Directive" by downloading material that is "offensive" and that has the potential for embarrassing ODOT. The Grievant also accessed unauthorized websites in violation of ODOT's standards. Finally, the Grievant violated ODOT's standards by keeping his personal checking account and NASCAR information on the Computer. However, as the Arbitrator

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[69] Index 10.

discussed above, the Grievant is not, thereby, guilty of theft. In short, based on a preponderance of evidence in the record as a whole, the Employer sustained its charge under WR-101-I-7 of "Unauthorized/Misuse of State Equipment or Vehicle." According to the Employer's penalty table (excerpted below), a reprimand or suspension is the proper measure of discipline for this strain of misconduct.

Excerpt From ODOT's penalty Table			
Violations	Progression	Progression	Progression
Unauthorized/misuse of State Equipment or Vehicle	Reprimand/Suspension	Suspension/Removal	Removal
Theft, In or Out of Employment (Nexus Established)	Removal		

To determine what measure of discipline within that disciplinary continuum is reasonable, one must assess aggravative and mitigative circumstances. Mitigative circumstances include the Grievant's unblemished performance and disciplinary record as well as his twenty-plus years of service in ODOT. The major aggravative factor is the adverse impact the Grievant's behavior might have had on the Employer's trust and confidence in him and the time lost surfing the internet. On balance, the Arbitrator holds that the Grievant should incur a stiff penalty to leave no doubt in his mind—and to send a strong message to other employees—that such misconduct will not be tolerated.

IX. The Award

Accordingly, the Grievant is to be reinstated without backpay to the position of Environmental Specialist I that he held before his dismissal. Furthermore, his seniority, seniority-related benefits and wage shall remain undisturbed. Finally, the Arbitrator will retain jurisdiction of this case until this order is fully implemented.

Notary Certificate

State of Indiana)

)SS:

County of Marion

Before me the undersigned, Notary Public for Marion County, State of Indiana, personally appeared Robert Brookins, who swears under oath and under penalty of perjury that the contents of this document are true and accurate and were prepared solely by Robert Brookins who hereby acknowledges the execution of this instrument this 8 day of January, ~~2000.~~ 2001

Signature of Notary Public: Linda Melton

Printed Name of Notary Public: Linda Melton

My commission expires: 9-22-08

County of Residency: Marion

Robert Brookins

Robert Brookins