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OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN

OHIO DEPARTMENT OF ADMINISTRATIVE SERVICES
-AND-
Ohio Civil Service Employees Association AFSCME Local 11

Appearing for the Department of Administrative Services
Richard G. Corbin, Advocate
Carol Nolan Drake, Chairman, SERB (Former DAS Assistant Director)
Thomas Landoll, Business Continuity Analyst
Samuel Van Schoyck, Technical Services Administrator
Anne Van Scoy, DAS Representative
Allison N. Shaeffer, Interim Human Resources Administrator
Andrew Shuman, Second Chair
Joyce Tyler, Assistant Deputy Director

Appearing for OCSEA
Jeffery Hodges, DAS 2570 Steward
Angela Noggle, Grievant
John T. Porter, Project Director
Karen Vroman, Union Advocate

CASE-SPECIFIC DATA
Grievance No.
Grievance No. 02-02-20021122-078-01-14
Hearing Held
June 12, 2003
Case Decided
July 30, 2003
Subject
Removal for Failure of Good Behavior

The Award
Grievance Denied

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

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I. The Proceedings

This dispute involves the Ohio Department of Administrative Services ("DAS" or "the Agency"), the Ohio Civil Service Employees Association AFSCME Local 11("OCSEA" or "the Union"), and Ms. Angela Noggle ("the Grievant").[1] DAS terminated the Grievant on November 8, 2002.[2] The Union grieved that decision on November 19, 2002,[3] and the Agency denied that grievance on January 3, 2003.[4]

The Parties failed to resolve the dispute and ultimately elected to arbitrate it before the Undersigned on June 12, 2003. At that hearing, the Parties agreed that the dispute was free of procedural issues and was properly before the Undersigned. Both Parties were duly represented by their advocates throughout the hearing. The Parties made opening statements and introduced documentary and testimonial evidence. All documentary evidence was available for proper and relevant challenges, and all witnesses were duly sworn and subjected to both direct and cross-examination. The Grievant was present throughout the proceedings and testified in her own behalf. The Parties elected to submit Post-hearing Briefs, which were to be postmarked on or about June 27, 2003. The Briefs were e-mailed to the Undersigned on that date, and the arbitral record was officially closed.

II. The Facts

DAS hired the Grievant on February 15, 1998, as a Network Administrator 3 in its Computer Services Division.[5] On March 2, 1998, the Grievant signed a document containing the following provisions:

> Security, ***confidentiality***, . . . is a matter for concern of ***employees of the Division*** . . . . The Division is a repository of information in computerized data files for the agencies of the State of Ohio. Each person in the Division holds a ***position of trust relative to this information*** and recognizes the responsibilities entrusted to him and to the Division in preserving the ***security and confidentiality of this information*** and safeguarding State assets. The employee's conduct either on or off the job may

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[1] Collectively referred to as "the Parties."

[2] Joint Exhibit No. 2.

[3] *Id.*

[4] Joint Exhibit No. 2, at 2.

[5] Joint Exhibit No. 3B, at 2. Between 1989 and 1998, the Grievant was employed elsewhere with the State of Ohio.

> ***threaten the security and confidentiality*** of this information. Therefore, an employee of the Division . . . : is not to make . . . ***unauthorized use*** of ***any*** information in files maintained by the Division; is not to ***abuse*** . . . the Division's system communications capabilities . . . must take all reasonable precautions to prevent the inadvertent ***dissemination*** of anyone else's information via the internet, electronic mail, or online services. . . . For State employees, violation of the Code will result in disciplinary action, such as a reprimand, suspension or dismissal, consistent with civil service rules and regulations.[6]

DAS uses Lotus Notes as the e-mail and calendar system for all of its employees and for the Ohio Governor's office. As a Network Administrator 3 for the Computer Services Division, the Grievant was one of three employees who:

> Configures, installs, and maintains Lotus Notes services and software. Performs Lotus Notes administrative tasks on Windows NT servers. Configures, tests, and maintains Lotus Notes client software. Installs, tests, and implements new versions of Lotus Notes software. . . . Provides Lotus Notes technical support. . . . Provides support to Lotus Notes users via phone or direct interaction. . . .[7] To perform her job, the Grievant needed full access to the Lotus Notes e-mail accounts of all employees in the Agency.[8]

When servicing e-mail accounts, the Grievant usually responded to users' requests to troubleshoot problems. Sometimes the Grievant would have access to the content of users' e-mail messages for legitimate business reasons, where, for example, the nature of a service request required the Grievant to actually open an e-mail message. Still, the Grievant lacked authority simply to rummage through users' e-mail messages for personal or nonbusiness reasons.

The Agency first learned that the Grievant was opening and reading users' emails shortly after Mr. James McAndrew, employed with the Ohio Department of Taxation, sent Mr. Gregory Jackson, DAS' Chief Information Officer and Assistant Director an e-mail and got a return receipt, stating that the Grievant had read the e-mail. Mr. McAndrew duly alerted Mr. Jackson, who inquired about the situation. That inquiry eventually filtered through the Agency to Ms. Allison Shaeffer, DAS' Interim Human Resources Administrator. Ms. Shaeffer suggested a review of other managers' e-mail accounts to ascertain the extent

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[6] Joint Exhibit No. 3B (emphasis added).

[7] Joint Exhibit No. 4.

[8] These employees are hereinafter referred to as "users."

of the Grievant's intrusions. Responsibility for the review was ultimately assigned to Mr. Brant Thomas, Supervisor of the Lotus Notes System. Mr. Thomas consulted Mr. Landoll about how to conduct the review. At that point, Mr. Landoll presented a report, containing a detailed account of all the e-mails the Grievant had accessed and/or read from approximately July 12, 2002 to October 4, 2002.[9] Apparently, Mr. Landoll had become suspicious of the Grievant after a supervisor alleged that the Grievant had been reading his e-mail. Mr. Landoll investigated the matter, became increasingly suspicious, and decided to compile the report that he presented to Mr. Thomas.

When Ms. Shaeffer learned of the report, an administrative investigation was launched and all of the Grievant's rights to the Lotus Notes System were revoked. During the investigation, Ms. Shaeffer interviewed the Grievant on October 11, 2002, [10] and Mr. Richard G. Corbin, Labor Relations Officer, interviewed her on October 30, 2002. Those interviews together with Mr. Landoll's report revealed that between July 12, 2002 and October 4, 2002, the Grievant opened and read the following users' e-mails, among others, without their consent and without a business-related justification:[11]

First Name	Last Name	Assesses
Don	Barbee	56
Allison	Shaeffer	54
Sam	Van Schoyck	26
Ann	Van Scoy	18
Mike	Carroll	09
Joyce	Tyler	06
Terry	Crawford	05

[9] Joint Exhibit No. 3A.

[10] Also present at this interview were Mr. Sam Van Schoyck, Derek Talib (Interim Employee Relations Administrator of the Computer Services Division), and the Grievant's Union Representative.

[11] Joint Exhibit No. 7.

Although the chart does not state why the Grievant read the e-mails, her testimony, during the arbitral hearing, revealed that she was partly motivated by undue curiosity about Mr. Barbee's personal life. And during her interview with Ms. Shaeffer, the Grievant claimed that anxiety about impending layoffs, and boredom also founded her misconduct.[12] For example, without his permission or any other type of authorization, the Grievant read: Mr. Barbee's e-mail fifty-six times, primarily to glean information about his private life. She read Ms. Shaeffer's e-mail fifty-four times either to identify the names of employees slated for layoffs and/or to determine if she (the Grievant) would be laid off. Finally, the Grievant accessed and/or read the e-mails of Ms. Joyce Tyler, DAS' Assistant Deputy Director, approximately sixteen times. On one occasion, while reading Ms. Tyler's e-mail, the Grievant accidently dispatched a return receipt, which notified the sender that the Grievant had read Ms. Tyler's e-mail. Realizing that she had been exposed, the Grievant quickly apologized to Ms. Tyler for that single event but never mentioned that she had read Ms. Tyler's e-mail numerous times.

Also, during her October 11 interview with Ms. Shaeffer, the Grievant initially sought to conceal her conduct. During the first half of that interview, the Grievant flatly denied having read any users' e-mails, even though Ms. Shaeffer continually stressed the importance of honesty and forthrightness in this matter.[13] The Grievant admitted her conduct only during the last half of the interview, and only after Ms. Shaeffer confronted her with Mr. Landoll's report, containing irrefutable proof that she had accessed and read users' e-mails.[14] Before she admitted that she read those e-mails, the Grievant stonewalled about the circumstances under which she read the e-mails and why she actually read them.[15]

The same type of evasiveness surfaced during the Grievant's October 30 interview with Mr. Corbin. There, again, the Grievant was initially elusive about whether she read users' e-mail messages for other than

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[12] Appendix A, at 20, Lines 25-35.

[13] *Id.* at 19, Line 28; 20, Lines 4 & 25.

[14] *Id.* at 20, Lines 11-19.

[15] *Id.* at 19, Lines 24-34; 20, Lines 1-10.

business reasons, explicitly admitting her conduct only after Mr. Corbin bore down with explicit, pointed inquiries about why she read the e-mails.[16] The interview with Mr. Corbin also established the Grievant's belief that users reasonably expected privacy with respect to their e-mail accounts.[17]

In light of the Grievant's conduct, the Agency elected to remove her on November 8, 2002 for "Failure of Good Behavior," approximately five years after she joined the Agency.[18] Because the arbitral record contains no evidence of the Grievant's job performance as a Network Administrator 3,[19] the Arbitrator gives her the benefit of the doubt by assuming that she performed satisfactorily in that position. Finally, when she was terminated, the Grievant had a clean disciplinary record.

III. Relevant Contractual and Regulatory Provisions

ARTICLE 24-DISCIPLINE

24.01- Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action.

24.02- Progressive Discipline

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

Memorandum

From: Peter J. McGeoch, Assistant Director DAS/Division of Computer and Information System Services
To: Employees and All Other Authorized Users of the Ohio Data Network Facilities
Subject: Code of Responsibility for Security and Confidentiality of Data Files and Safeguarding State Assets

Division of Computer and Information System Services

Security, ***confidentiality*** and safeguarding of State assets is a matter for concern of ***employees of the Division*** and of all other persons who have access to the Ohio Data Network's facilities whether they are employees of vendors, employees of user agencies or others. The Division is a repository of information in computerized data files for the agencies of the State of Ohio. Each person in the Division holds a ***position of trust relative to this information*** and recognizes the responsibilities entrusted to him and to the Division in preserving the ***security and confidentiality of this information*** and safeguarding State assets. The employee's conduct either on or off the job may ***threaten the security and confidentiality*** of this information. Therefore, an employee of the Division or a person authorized access to the Ohio Data Network:

is not to make or permit ***unauthorized use*** of ***any*** information in files maintained by the Division;

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[16] Appendix B, at 21, Lines 21-33.

[17] *Id.* at 21, Lines 9-19.

[18] Joint Exhibit No. 2.

[19] *Id.*

* * * *

is not to ***abuse*** or permit abuse of the Division's system communications capabilities (e.g., inappropriate/personal messages);

* * * *

must take all reasonable precautions to prevent the inadvertent ***dissemination*** of anyone else's information via the Internet, electronic mail, or online services;

* * * *

For State employees, violation of the Code will result in disciplinary action, such as a reprimand, suspension or dismissal, consistent with Civil Service rules and regulations.

* * * *

I have read and understand the Division's Code of Responsibility for the Safeguarding of State Assets and Use of the Internet, Electronic Mail, and Online Services.

Signed: Grievant's Signature
(employee)
Date: 03-02-98 [20]

Signed: Supervisor's Signature
(supervisor)
Date: 3/2/98

DAS Directive

Purpose

The purpose of this directive is to provide *agencies* with guidelines regarding the statewide coordination of Internet activities, responsibility of *agency management* with regard to building and managing Internet servers and electronic mail services, and personal responsibility of state employees using the Internet, electronic mail services and online services.

* * * *

Personal Responsibility

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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.

* * * *

6. State employees shall not *use* an Internet, *electronic mail* or online service account or signature line *other than their own*.

* * * *

9. State employees are also reminded that access to and use of the Internet, including communication by *e-mail, is not confidential*. Internet access can and will be monitored. Web browsers leave traceable "footprints" to all sites visited.[21]

STATE OF OHIO CLASSIFICATION SPECIFICATION
CLASSIFICATION SERIES: Network Administration

SERIES PURPOSE

The purpose of the network administration occupation is to provide local area and/or wide area computer network support services to agency uses. . . .[22]

Selected Issues Concerning the Impact of Criminal Law on the Discipline of the Public Employee

Sometimes public employees can be involved in situations where they can be criminally prosecuted, as well as punished by their employer for their actions.

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[20] Joint Exhibit No. 3B.

[21] Joint Exhibit No. 6, at 1 & 4 (emphasis added).

[22] Joint Exhibit No. 5, at 1.

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Ohio Highway Patrol Investigations

Any time the police or the Ohio Highway Patrol (OHP) are involved, there is a potential for criminal action. . . . [E]mployees are urged to contact a private lawyer for representation when either the police or the OHP are involved. The employee should request that the investigation be postponed until the private lawyer is available.

In any case, except for cases involving the Garrity Warning explained below, employees do not have to give up their constitutional rights to be free of self-incrimination. Employees do not have to give details about an incident that may incriminate them with respect to criminal prosecution.

Garrity Warnings

Only if the Employer states that what is said in a meeting will not lead to criminal charges, then the employee no longer has the right to silence. This is known as the "Garrity Warning." Therefore, if the employer does not provide a Garrity warning, ask for one. As a result, the employee must answer the questions put to him/her.[23]

IV. The Issue

Was the Grievant removed for just cause? If not, what shall the remedy be?

V. Summaries of the Parties' Arguments

A. Summary of the Agency's Arguments

1. Any lack of communication between Mr. Hodges and Grievant during her interview with Ms. Shaeffer occurred because Mr. Hodges never asked to speak with the Grievant before the interview.
2. The Garrity Warning is inapplicable to this case because:
   a. The Union never invoked the Garrity warning.
   b. The Garrity Warning is nowhere referenced in the Contract.
   c. The Grievant offered her statements under the threat of discipline.
   b. No law enforcement officials were present at either of the Grievant's interviews. Nor was the Grievant likely to face criminal prosecution.
   e. The Grievant did not refuse to answer any questions and law-enforcement is unlikely to use her testimony.
3. Mitigation of Discipline is Unwarranted because:
   a. The Grievant's concern about layoffs is not a viable mitigative factor in the penalty decision. Article 18.03 of the Contract requires management to notify the union of layoffs before or when management notifies the DAS Division of Personnel about layoffs.
   b. The Grievant lacked authority to access or read the Agency's e-mail.
   c. The Grievant's misrepresentation and concealment.
   d. The Grievant actively sought to conceal her access to users' e-mails.
   e. The Grievant's reasons for accessing and reading e-mails were unrelated to any departmental OCB project.

B. Summary of the Union's Arguments

1. The Grievant did not violate the Ohio Revised Code 124.34, the Agency code of conduct, or its work rules.
   a. There is no work rule, prohibiting network administrators from reading users' e-mails, and even if there were such a rule, it is ambiguous.
   b. The Grievant had authority to access and read users' e-mails because that was part of her job duties.
   c. The content of e-mails falls within the scope of public records under Ohio's Sunshine Statute. Therefore, users have no reasonable expectation of privacy with respect to their e-mails being read by network administrators.
2. The Agency ignored the following relevant mitigating factors:
   a. The Grievant fully cooperated with the Agency during both investigations.

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[23] Union Exhibit No. 1.

b. The Grievant's misconduct only offended sensibilities, since she disseminated no e-mail information and subjected the Agency to no negative impact.

c. The Grievant accessed and read users' e-mail messages because, as the primary wage earner with two sick kids, she was anxious about the likelihood of being laid off.

d. Confusion and concern about possible criminal charges caused the Grievant to be initially less than forthright during the interviews.

e. The Grievant has 14 years with Ohio and a clean work record.

f. The Agency ignored its own precedent.

g. Historically, the Agency has only progressively disciplined employees for electronic technical abuse.

h. The Agency violated Article 24.02 of the Contract, requiring the Agency to discharge only for just cause, to discipline progressively, and to ensure that the severity of discipline imposed is commensurate with the egregiousness of the established misconduct.

3. Remedy

a. Reduce the discharge to a suspension or fine, and reinstate the Grievant to her former or a new position with the same pay and step within DAS. Reimburse the Grievant for all expenses.

d. Award all leave balances that would have accrued, and have all seniority restored to the level it was when the Grievant was terminated.

VI. Discussion and Analysis

A. Evidentiary Standards

Because this is a disciplinary dispute, the Agency has the burden of proof or persuasion with respect to its case against the Grievant. Ordinarily, that means that the Agency must adduce preponderant evidence in the arbitral record as a whole that: (1) The Grievant engaged in the alleged misconduct; (2) The conduct constitutes "failure of good behavior"; and (3) The penalty imposed is neither unreasonable, arbitrary, nor capricious. In this case, however, the Grievant admits that she engaged in the alleged conduct, therefore, the Agency has satisfied the first component of its burden. The remaining issues are whether the established conduct constitutes "Failure of Good Behavior" and, if so, whether that conduct warrants removal or a lesser measure of discipline.

B. Propriety of Opening and Reading Users' E-mail Messages

The Union raises several affirmative defenses to support its general position that removal is punitive rather than corrective in this case and, therefore not for just cause. Those arguments together with the Agency's responses are discussed below.

1. Absence of Applicable Work Rules/Ambiguous Work Rules

First, the Union stresses that the Grievant's discharge is not for just cause, since the Agency promulgated no rules that flatly forbid employees (or network administrators) to read users' e-mail messages. The Union then argues in the alternative that any rule addressing the reading of e-mails is ambiguous. The Agency retorts that work rules in the arbitral record prohibit the Grievant from reading users' e-mail messages. Although no rule in the arbitral record specifically prohibits employees from *reading* users' e-mails, the scope of some rules may be reasonably interpreted to cover those subjects.

a. The McGeoch Memorandum

First, there is the memorandum from Mr. McGeoch ("Memorandum"), which the Grievant read, presumably understood, and signed. The preface of that memorandum broadly declares its general purpose: "Security, *confidentiality* . . . is a matter for concern of *employees of the Division*. . . . The Division is a repository of information in computerized data files. . . . Each person in the Division holds a *position of trust relative to this information* and recognizes the responsibilities entrusted to him . . . in preserving the *security* and *confidentiality* of this information. . . ." [24]

The second part or body of the Memorandum specifies both required and prohibited conduct, consistent with the prefatory intent. The most relevant guideline regarding users' e-mails prohibits all employees from making or permitting "*unauthorized use* of *any information* in files maintained by the Division. . . ."[25]

A reasonable interpretation of the Memorandum covers situations in which a network administrator reads users' e-mail messages without their consent and for a nonbusiness purpose. The prefatory purpose of the Memorandum is to apprise employees of: (1) the sensitive nature of computer information in the Agency; (2) the trust placed in them relative to the protection of that information; and (3) their responsibility to protect the security and confidentiality of information on file. Even though neither provision specifically mentions e-mail messages, the second provision's broad reference to "any information in files maintained by the Division" logically covers users' e-mail messages, which exist in computer files. Equally important, the second provision specifically prohibits employees form making "unauthorized use" of information in the Agency's files. These two provisions, read together, evince a general intent to prevent breaches in the security and confidentiality of computer information by denying "unauthorized use" thereof. Reason suggests that this responsibility is particularly acute with respect to network administrators, whose job duties afford them ready and unsupervised access to information in the Agency. Their broad and unsupervised access to computer data facilitates abuse. The upshot is that "unauthorized use" of the content of e-mails, constitutes a breach of security and confidentiality as reflected in the intent–if not the precise letter– of these two provisions.

The Grievant made unauthorized use of users' e-mails when she read them. First, the Grievant made use of those e-mails when she read their content to learn about prospective layoffs, the nuances of Mr. Barbee's personal life, and to relieve her boredom. More important, the use was unauthorized because the

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[24] Joint Exhibit No. 3B, at 31.

[25] *Id.*

users never authorized the Grievant to read their e-mail messages, and she had no business purpose for doing so. In addition, the Grievant's use remained unauthorized even though she did not disseminate any information in the e-mails. The breach of security and confidentiality, in violation of the Memorandum, arises from the unauthorized use–the unauthorized reading of the e-mails. The Arbitrator therefore, holds that the Grievant violated the foregoing provisions of the Memorandum by reading users' e-mail messages without their prior consent and without a business justification.

b. The DAS Directive

The DAS Directive ("Directive") explicitly provides "agencies with guidelines regarding . . . [the] personal responsibility of state employees using . . . electronic mail services. . . ."[26] To that end, the Directive then holds employees "accountable for their use and abuse of . . . electronic mail." Then the Directive specifically prohibits employees from using *electronic mail* . . . to provide access to *confidential* information. . . . [and from using] "electronic mail . . . other than their own." Finally, the Directive notifies employees that "communication by e-mail is not confidential."[27]

On its face, the Directive holds employees personally responsible for their "use and abuse" of e-mail and prohibits them from using e-mail to "provide access to confidential information." Clearly the phrase "provide access" addresses situations in which an intruder makes confidential information available to unauthorized individuals. However, that phrase is also reasonably intended to cover situations where an intruder, such as the Grievant, reads the confidential information in users' e-mail messages solely for her own personal purposes and agendas. In doing so, the Grievant thereby used e-mail to provide herself access to confidential information. If the prohibition against using e-mail to provide access is to have full deterrent effect, it must be interpreted broadly, unless there is explicit contrary language. Furthermore, the Grievant's reading of users' e-mail messages constituted abuse of electronic mail because she lacked authority to do so. Indeed, during her interview with Ms. Shaeffer, the Grievant flatly admitted that she abused her authority:

"Ms. Shaeffer: Again I am going to ask you for your honesty and support, have you ever ***abused*** your authority as a Lotus Notes Administrator by getting into people's accounts?

The Grievant: Yes."[28]

Nor does Provision No. 9, in the Personal Responsibility Section of the Directive, undercut or rebut the foregoing interpretation. Provision No. 9 declares that "communication by e-mail is not confidential and

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[26] Joint Exhibit No. 6.

[27] *Id.* at 4.

[28] Appendix A, at 20, Lines 25-26.

will be monitored."[29] This Provision reflects an obvious intent to limit the scope of confidentiality for e-mail messages in order to preserve the Agency's right and authority to monitor how employees use their e-mails, including the content of e-mail messages. For example, Provision No. 9 could be used to allow the Agency to monitor e-mail messages for purely personal content about employees' "affairs" or for sexually harassing content. Absent Provision No. 9, employees could use their e-mails in ways that could embarrass the Agency, subject it to liability, or both. The result is that Provision No. 9 constitutes a *limited waiver* of or exception to the general confidential nature of employees' e-mails and applies only to employees authorized to monitor e-mail messages. To all other employees, *like the Grievant*, the confidentiality of e-mail messages stands as a barrier, absent users' consent or a business reason for reading the messages.

Finally, the Directive disallows employees to use "electronic mail other than their own." Again, the key term here is "using," which reasonably encompasses sending or receiving messages through another person's e-mail as well as reading another's e-mail. An employee who avails herself of a user's e-mail for any of these purposes is "using" that person's e-mail in violation of the spirit, if not the letter, of this provision. Again, the Grievant made use of the users' e-mail messages when she read them.

The foregoing analysis establishes that the Grievant violated several provisions of the Directive. First, the Grievant provided herself access to the e-mail messages to gain information which was confidential relative to her. Second, by reading users' e-mail messages, the Grievant used e-mails other than her own. And, third, these violations by the Grievant constituted abuse of "electronic mail" as set forth in the preface of the Personal Responsibility section of the Directive.

c. Impact of the Grievant's Knowledge and Other Circumstances

At least four other considerations also support the conclusion that the Agency intended for e-mail messages to be confidential and that both the Grievant and users viewed that content as confidential. First, the existence of specific passwords and personal identification codes for each individual user supports a reasonable inference that the Agency intended to preserve the confidentiality of e-mail messages. Passwords and identification codes are, in this instance, closely analogous to electronic padlocks. Why would the Agency go to such lengths but for a strong desire to preserve confidentiality?

Second, the Grievant flatly admitted that she acted inappropriately by reading users' e-mail messages.[30] In addition, the Grievant's initial efforts to conceal that she read users' e-mails support a reasonable inference that she clearly recognized the impropriety of that conduct. Nor is the Arbitrator

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[29] Joint Exhibit No. 6, at 3.

[30] Joint Exhibit No. 3B, at 26.

persuaded by the Union's argument that fear of criminal prosecution caused the Grievant to initially deny having read users' e-mails. If the Grievant were convinced, in her own mind, that reading users' e-mail messages was entirely proper and acceptable, she would have had little to fear from criminal prosecutions and nothing to conceal in an administrative investigation. Moreover, the transcript of the October 11 interview between Ms. Shaeffer and the Grievant shows that Ms. Shaeffer mentioned criminal proceedings only toward the end of the interview, after the Grievant had initially denied and then admitted that she read the e-mail messages.[31]

Third, evidence in the record suggests that users probably believed (and had reason to believe) that their e-mail messages were confidential. Indeed, the Grievant conceded that point during her interview with Mr. Corbin.[32] The Grievant further conceded that passwords and identification codes afforded users a basis for reasonably expecting that the content of their e-mails was confidential.[33] Finally, the credible testimonies of five Agency witnesses[34] together with Mr. Barbee's decision to discuss his personal life through his e-mail constitute additional evidence that users viewed their e-mail messages as confidential.

C. Privacy

The Union contends, in its Post-hearing Brief, that users had no reasonable expectation of privacy with respect to a network administrator reading their e-mails. In support of this proposition, the Union argues that e-mails are classified as public records under Ohio's Sunshine Statute. Four difficulties plague this argument. First, the argument constitutes an affirmative defense for the Union which means that the Union has the burden of persuasion as to establishing its contention regarding the Sunshine Statute. And reasonable doubts about the persuasiveness of those contentions are resolved against the Union. Second, because no provisions of the Sunshine Statute were introduced into the arbitral record, the Arbitrator lacks a basis from which to examine the Union's argument. Third, it is not clear from evidence in the record that a public agency is prohibited from protecting the privacy of its employees' sensitive e-mail messages by declaring those messages to be confidential. Fourth, assuming, arguendo, that a public employer's e-mail is statutorily

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[31] Appendix A, at 20, Lines 52-53.

[32] Appendix B, at 21, Lines 9-19; During her interview with Mr. Corbin, the Grievant pointed out that users' passwords and identification codes were not as secure as commonly thought and, in fact, passwords and identification codes were at one time readily available to unauthorized personnel under certain circumstances. Joint Exhibit No. 3B, at 16-17.

[33] Joint Exhibit No. 3B, at 17.

[34] *See* Testimonies of: Mr. Landoll, Ms. Shaeffer, Ms. Tyler, Mr. Van Schoyck, Ms. Carol Nolan Drake.

classified as part of the public record, it is unclear whether it was incumbent on the Grievant to take certain steps to invoke the Sunshine Statute as a defense in this case. Also, written policies, employees' understandings, passwords, personal identification codes, and the Grievant's own admissions have previously persuaded the Arbitrator to hold that the Agency's e-mail was reasonably viewed (and intended to be classified) as confidential. Implicit in that holding is the conclusion that users' e-mail messages are also "private," since confidentiality cannot exist without some measure of privacy.

D. The Garrity Warning

During the arbitral hearing, the Union contended that, when she interviewed the Grievant, Ms. Shaeffer threatened her with criminal prosecution, without giving the Grievant the Garrity Warning. In support of that position, the Union introduced Union Exhibit No. 1 ("Exhibit 1"), which briefly discusses the Garrity Warning, and is the only document in the record to address the Garrity Warning. However, the Union's Post-hearing Brief contains no reference to the Garrity Warning. Conversely, in its Post-hearing Brief, the Agency argues that the Garrity Warning was inapplicable to the Agency's interviews with the Grievant and marshals essentially three arguments to support its position. First, the Agency asserts that neither the Union nor the Grievant ever requested the Garrity Warning, and, as a result, the Agency had no duty to give it.[35] The Union does not challenge this contention. Second, the Agency points out that no law enforcement branch was involved in the interview, and, in any event, the Grievant never refused to answer questions during the interview.[36] Third, the Agency contends that the Garrity Warning was inapplicable because no information gained during the interviews with the Grievant would find its way into a criminal prosecution.[37] Finally, the Agency observes that the Collective-Bargaining Agreement is silent with respect to the Garrity Warning.

The statute was not introduced into the record, and, thus, the Arbitrator cannot evaluate the accuracy of the Agency's arguments. Still, based solely on the information in Exhibit 1, the Arbitrator holds that the Garrity Warning is inapplicable to the Grievant's interviews. First, contrary to the Union's contention, Exhibit 1 does not provide that the Garrity Warning is triggered when an interviewer merely mentions the prospect of criminal prosecution, as Ms. Shaeffer did toward the end of her October 11 interview with the Grievant. Instead, Paragraph Four of Exhibit 1 states that a potential criminal action is associated with an investigation whenever the Ohio Highway Patrol or the police are involved. An employee who is subjected

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[35] Agency's Post-hearing Brief, at 3.

[36] *Id.*

[37] *Id.*

to such an investigation should request a postponement thereof, until he or she can retain private legal counsel.[38] Then Exhibit 1 explicitly states:

> Only if the employer states that what is said in a meeting will not lead to criminal changes, then the employee no longer has the right to silence. This is known as the Garrity Warning. Therefore, if the employer does not provide a Garrity warning, *ask for one*. As a result the employee must answer the questions put to him/her. An employee or steward *should insist* that the Garrity Warning be provided in writing so that the employee has documentation that it was provided.[39]

In summary, Exhibit 1 sets forth two preconditions that must be satisfied before an agency is affirmatively required to render the Garrity Warning. First, Exhibit 1 refers to situations involving a potential for a criminal prosecution.[40] Second, given the existence of the first precondition, the Garrity Warning saddles either the Union or the Grievant with an affirmative duty to request the Warning. Once those preconditions are met, an employer becomes affirmatively bound to deliver the Garrity Warning, and the employee who is the subject of the investigation or interview must answer the employer's questions.

Evidence in the record does not show that either of the above-mentioned preconditions was satisfied in this case. Neither the Ohio Highway Patrol nor the police was involved in either of the Grievant's two interviews. Nor did the Grievant or the Union affirmatively request the Garrity Warning, during either of those interviews. Based upon these facts and the provisions of Exhibit 1, the arbitrator holds that the Agency did not violate any duty with respect to delivering the Garrity Warning, during its interviews with the Grievant October 11 & 30, 2002.

VII. The Penalty Decision

Because the Agency has established that the Grievant engaged in the alleged misconduct, some measure of discipline is indicated. Assessment of the proper quantum of discipline requires an evaluation of the mitigative and aggravative factors in this dispute as well as an ultimate determination of whether the penalty imposed, removal, is unreasonable, arbitrary, or capricious under the circumstances of this case.

A. Aggravative Factors

Several weighty, aggravative factors plague the Grievant in this dispute. First, the Grievant engaged in misconduct that she admittedly knew was inappropriate. And even if she lacked such knowledge, she could find no safe harbor because she should have recognized the impropriety of her conduct. The Grievant signed and dated the Memorandum, which specifically stressed the need to maintain confidentiality and

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[38] Union Exhibit No. 1, at 1.

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

[40] *Id.*

security with respect to computer data and then specifically prohibited employees from making or permitting "unauthorized use" of such information.[41] Also, the Grievant admitted that the mere existence of users' passwords and identification codes manifested an intent to recognize and maintain the security and confidentiality of the Agency's computer data.[42] In addition, on a second page of the Memorandum, directly above the Grievant's signature is the following declaration: "I have read and understand the Division's Code of Responsibility for the Safeguarding of State Assets and Use of the Internet, *Electronic Mail* and Online Services."[43]

Second, although fully cognizant of her misconduct, the Grievant stoutly denied it, until Ms. Shaeffer finally confronted her with irrefutable proof thereof.[44] This pertinacious effort at concealment further eroded whatever vestiges of trust the Agency had in her. And, as discussed above, the arbitral record does not support the Union's proposition that confusion and fear of criminal prosecution sparked the Grievant's evasiveness because Ms. Shaeffer raised the prospect of criminal prosecution only toward the end of the interview, then the Grievant had already denied and subsequently admitted her wrongdoing.[45]

In any event, the Grievant fares no better if one assumes, arguendo, that she stonewalled due to fear of potential criminal prosecution. As a general proposition, misrepresentation of material facts in an administrative investigation hardly warrants disciplinary mitigation. To the contrary, such conduct might very well enhance disciplinary measures, especially where plausible alternatives exist. For example, if she genuinely feared criminal prosecution, the Grievant or her Union Representative might have requested the Garrity Warning.

Third, the nature of the Grievant's job duties also aggravates her situation. As a Network Administrator 3, she has total access to files in the Lotus Notes system and perhaps elsewhere in the Agency's computer system. That level of access to confidential data undoubtedly demands a corresponding level of trustworthiness. Yet, it is difficult to comprehend how the Agency could rekindle any embers of trust it might have had in the Grievant, given the nature and extent of her misconduct, her position of trust and access, and her fervent effort to conceal conduct that she knew was wrong and highly invasive.

Fourth, the Grievant offered no acceptable reason for violating the confidentiality and privacy that

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[41] Joint Exhibit No. 3B, at 31.

[42] Appendix B, at 21, Lines 16-19.

[43] Joint Exhibit No. 3B, at 32 (emphasis added).

[44] Appendix A, at 20, Lines 11-19.

[45] *Id.*, at 20, Lines 52-53.

users reasonably expected in their e-mail messages. Actually, two of the Grievant's reasons for breaching users' confidentiality and privacy–boredom and unwarranted curiosity about Mr. Barbee's personal affairs–border on the frivolous. Nor does the Grievant's financial condition, which understandably escalated her anxieties about potential layoffs, justify her surreptitious intrusions. As a Network Administrator 3, the Grievant, more than other employees, was duty bound to respect rather than to circumvent the Agency's system of reporting layoffs.

B. Mitigative Factors

Contrary to the Union's contentions, there are essentially four substantial mitigative factors in this case, three of which are immediately discussed, and the fourth discussed below. The first mitigative factor is that the Grievant served approximately nine years with the State of Ohio and five with the Agency. Second, the Grievant's five years with the Agency were discipline-free. Third, the Arbitrator assumes that the Grievant had a satisfactory record of job performance with the Agency.

The fourth substantial mitigative factor arises under Article 24.02 of the Collective-Bargaining Agreement, which provides in relevant part: "The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense."[46] The Union argues that the Agency violated Article 24.02 by failing to progressively discipline the Grievant and by failing to insure that the discipline imposed was commensurate with the seriousness of her established misconduct.

The Arbitrator finds that, under the circumstances of this case, the Grievant's removal does not violate Article 24.02. First, because progressive discipline is embraced does not mean that termination for a first offense is thereby enjoined. Whether a first offense deserves termination depends upon the nature of the offense and the surrounding circumstances. Indeed, many types of misconduct warrant termination on the first occasion. The fatal factor for the Grievant is that the Agency no longer trusts her. More important, that loss of trust is wholly justifiable, in this case, given the nature and scope of her invasive conduct, her persistent denial of that misconduct, the scope of authority, access, and trust associated with her former position as a Network Administrator 3, and the absence of any justification for her continual violations of users' reasonable expectations of privacy.

Next, the Union correctly points out that the Grievant did not disseminate any information she gained through reading the content of users' e-mails, but that is not a substantial mitigative factor in light of the

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[46] Joint Exhibit No. 1, at 65.

number of times she improperly accessed and/or read users' e-mails.[47] The Union further contends that the Grievant's misconduct merely offended sensibilities. To the contrary, the foregoing discussion reveals that the Grievant's misconduct and mendacity left a justifiably tattered employer-employee relationship in its wake. And, the Agency's justifiable loss of trust in an employee who held a strategic position of trust would very likely hamper operational efficiency. Finally, the Arbitrator lacks the authority (and, in this case, the inclination) to order the Agency to transfer the Grievant to a less sensitive position, especially in this atmosphere of layoffs, bumping, and transfers within Ohio's public sector.

The Union argues that the decision to terminate the Grievant ignores the Agency's own precedent. Specifically, the Union asserts that, before the instant case, no employee was ever terminated for electronic technical abuse. Instead employees who committed those types of infractions were progressively disciplined. This is essentially a claim of disparate treatment, which, again, is an affirmative defense. To prevail on disparate treatment, the Union must prove (not merely assert) that the Agency disciplined the Grievant more harshly than it disciplined similarly situated employees. Specifically, the Union must establish that comparable employees were similarly situated to the Grievant with respect to: (1) the scope of authority an access associated with their jobs or positions; (2) the pervasiveness, frequency, and seriousness of their abuses; and (3) their honesty and forthrightness after being exposed. The record, In the instant case, contains no such evidence. In the final analysis, an unsupported affirmative defense ultimately suffers the same terminal fate as an employer's unsupported charges against an employee.

VIII. The Award

For all of the foregoing reasons, the Arbitrator holds that removal of the Grievant for "Failure of Good Behavior" was for just cause and was neither unreasonable, arbitrary, nor capricious. Accordingly, the Grievance is hereby **DENIED** in its entirety.

Appendix A

Ms. Shaeffer:	Have you ever gone into anyone's account without a reason, such as a problem being called in?
The Grievant:	No . . . Except Greg Jackson's. . . .
Ms. Shaeffer:	Have you ever read any of Greg's documents
The Grievant:	No. . .Well. . .
Ms. Shaeffer:	Angie [the Grievant] your honesty is imperative in this investigation.
The Grievant:	A few weeks ago, I accidentally hit Windows Viewer and kicked off a return receipt to Jim McAndrew. The cursor just fell on it. I have never, ever made a habit of just sitting and reading people's e-mail.
Ms. Shaeffer:	Any other occasions where you have opened another person's e-mail?
The Grievant:	No . . . Except a couple of weeks ago I tried to go into Joyce Pickens account . . . and I accidentally put the cursor on Joyce Tyler because I had Windows Viewer open, it kicked off a return receipt. . .

[47] Joint Exhibit No. 3A.

I was horrified. . . . I immediately apologized to Joyce for opening it.

Ms. Shaeffer: Anyone else you can remember?

The Grievant: Not to my knowledge . . . You take so many calls over the years. . . .

Ms. Shaeffer: I stress to you again the importance of your honesty and your cooperation could have on you and this investigation. Have you ever been in Sam's account?

The Grievant: I don't think so.

Ms. Shaeffer: Would you ever have opened a document?

The Grievant: No.

Ms. Shaeffer: Where you ever in my account?

The Grievant: No, you name doesn't sound like anything I've worked on.

Ms. Shaeffer: If I told you I have actual proof you have been in various accounts and documentation to support the claim that you have abused your rights and authority as a Lotus Notes Administrator. (30 seconds of silence)

The Grievant: Don't know . . I feel set up. What is this authority and when did it come down to me? There were no rules ever quoted to me. There is no direction on what were supposed to do and not do.

Ms. Shaeffer: Again I asked you if you have been in my account?

The Grievant: Don't know, maybe.

Ms. Shaeffer: Yes or no.

The Grievant: Yes.

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Ms. Shaeffer: Any reason you would be in my account on a regular basis?

The Grievant: No . . . I mean . . . I don't know.

Ms. Shaeffer: Ever been in Scott Johnson's account?

The Grievant: Well there was this problem with him inadvertently deleting things, so I ran an agent.

Ms. Shaeffer: Again I am going to ask you for your honesty and support, have you ever abused your authority as a Lotus Notes Administrator by getting into people's accounts?

The Grievant: Yes.

Ms. Shaeffer: Why?

The Grievant: Bored at the moment, have no real reason why.

* * * *

Ms. Shaeffer: How often?

The Grievant: I don't know . . . . If you have the log you know. With layoffs and everything. . . .

* * * *

Ms. Shaeffer: What was your motivation for these actions?

The Grievant: With layoffs and everything I have anxiety . . . fear of what's ahead . . . With the layoffs people talk.

* * * *

Ms. Shaeffer: Anything else you want to add?

The Grievant: I don't know what to say.

Ms. Shaeffer: I have logs here from Lotus Notes back to July, which tells whose accounts you've been in, and how many documents you have looked through. You will receive a copy of this. This run the gamut of virtually every managers account who has decision authority[. . . .] this is almost daily abuse. . . .

The Grievant: . . . (Interrupting Allison) Allison, we don't need to go over it. If you guys want to fire me, then go ahead. I have been anxious, I have had depression, my husband is a farmer and we have a 30K mortgage and two kids.

Ms. Shaeffer: Do you admit to these findings?

The Grievant: Yes.

* * * *

The Grievant: Are you going to fire me?

The Shaeffer: It is not my decision. Do you admit you should not have been doing this?

The Grievant: I probably shouldn't have, but there are no rules for administrators to what we can and can't do. I thought e-mails were a matter of public record.

Ms. Shaeffer: [Places the Grievant on administrative leave, and then says:] I will share with you that our legal counsel is viewing this matter to determine if it should be looked into for *criminal investigation*. This

is not an issue we take lightly. You have been trusted with access to very confidential information and you have violated that trust. . . .[48]

Appendix B

Mr. Corbin: As a user, if I want to allow someone access to my account, there's a away to do that I assume.

The Grievant: Yes. . . .

Mr. Corbin: And unless I do that on my machine, under my password, basically that's off-limits, unless someone is in a clandestined way doing it?

The Grievant: Unless someone, exactly. . . .

Mr. Corbin: Do most of the users know what you know about the fact that these passwords are out there? Would you say that most users have an idea that they're reasonable private?

The Grievant: Probably.

Mr. Corbin: Yeah.

The Grievant: I mean, I would think you know, you know. No, I'm sure that they don't know it.

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The Grievant: . . . since there is virtually is no security, people should use Lotus Notes in a, you know. . . .

Mr. Corbin: Other than you agree that that people have some expectation of privacy because they've got passwords and so forth. I mean they don't know what you know, is the bottom line.

The Grievant: No, probably not. Nor were they ever given any directive or policy or procedures on it. So I guess whatever their assumptions would be, would be their assumption.

* * * *

Mr. Corbin: Angie I'm gonna ask you flat out here, were you in a habit of perusing other people's E-mail?

The Grievant: Not in the habit, no. I'm mean sometimes when you go in and out of something, you'd see something. And I have never, I mean that's just part of the job.

Mr. Corbin: Angie outside of your job duties, were there times when you went in other people's E-mail?

The Grievant: [Here, the Grievant gave a long-winded, rambling answer about going into users' e-mail for job-related reasons.]

[At this point, Mr. Corbin continued to question the Grievant about entering users' e-mails for other than business reasons, and the Grievant continued to reference situations where she entered users e-mails primarily for business related reasons. Mr. Corbin then allowed the Grievant to take a break and think about his questions and her answers thereto. The following exchanges between Mr. Corbin and the Grievant occurred after the break:]

Mr. Corbin: Again, Angie were there times when you simply looked at other people's E-mail?

The Grievant: Yes.

Mr. Corbin: For what purpose?

The Grievant: I don't know.

Mr. Corbin: Were you bored?

The Grievant: Maybe.

Mr. Corbin: You know. I mean. . . .

The Grievant: Ah, ah, yes, maybe that's what it was boredom, or anxiety.

* * * *

Mr. Corbin: And again we are talking about people that you might have looked at for no real business purpose. Have you ever done that for . . . Joyce Tyler?

The Grievant: Not with Joyce. . . . None that I can think of with Joyce. I mean I don't any reason to.

* * * *

Mr. Corbin: Have you ever looked at Joyce's outside of business?

The Grievant: Yes, I guess, I don't remember, I don't honestly remember. I guess, yes. Maybe when I went through the Don Bishop tabacle [sic], she was one of them that I went through too.

Mr. Corbin: Angie, this is critical. What was your purpose of looking at people's E-mail that you didn't have

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[48] Joint Exhibit No. 3B, 10-12.

business reasons for doing? You know. I don't know. No one else knows.

The Grievant: Like I said, I guess it was just boredom and with Allison; anxiety about the layoffs. Other than that there's no. . . .

Mr. Corbin: Other than that, I mean there were times that you were just nosey if you will?

The Grievant: Ah, yes, yes.

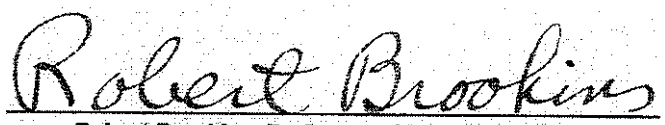
* * * *

Mr. Corbin. You knew that wasn't appropriate, right?

The Grievant: We don't have any policy. There's no policy for anything.

Mr. Corbin: Let me ask you again. You knew that was not appropriate, correct?

The Grievant: Yes.[49]



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

[49] Appendices A & B are derived from Joint Exhibit No. 3B, at 9-28.