#849

IN THE MATTER OF THE ARBITRATION BETWEEN

OHIO ADULT PAROLE AUTHORITY
-AND-
Ohio Civil Service Employees Association AFSCME Local 11

Appearing for the Adult Parole Authority
David Burrus, Labor Relations Officer, ODRC
Dana E. Cousins, Chillicothe Police Officer
Jeffrey A. Crabtree, Parole Services Supervisor
Clifford W. Crooks, OPCS Training & Information Services Administrator
David Lomax, A&I Coordinator, ODRC
Teresa Minney, Regional Administrator
Raymond Russio, OCB
Daniel Turek, Administrative Assistant

Appearing for OCSEA
Lynn Belcher, OCSEA Staff Representative
Monica Brumfield, Parole Officer
Jennie Lewis, OCSEA Paralegal
Angela Lapsley, OCSEA AFSCME Union Representative
Charles Anthony Pritchard, Grievant

CASE-SPECIFIC DATA
Grievance No.
Grievance No. 28-07-030128-0055-01-14
Hearings Held
September 11 & 12, 2003
Case Decided
November 21, 2003
Subject
Unauthorized Use, Release or Misuse of Information
Interfering with, Failing to Cooperate in, or Lying in an Official Investigation or Inquiry
Compromising Ability Employee to Effectively Perform Duties

The Award
Grievance Sustained In Part/Denied In Part

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

Table of Contents

I. The Proceedings

The parties to this dispute are the Chillicothe Regional Adult Parole Authority ("The Agency" or "The APA") and OCSEA, Local 11, AFSCME, AFL- CIO ("The Union"), which represents Mr. Charles A. Pritchard ("The Grievant"). On August 28, 2002, Administrative Assistant, Daniel Turek, drafted a letter, notifying the Grievant of his September 5, 2002 investigatory conference.[1] Deputy Director Harry Hageman drafted a letter on November 21, 2002, notifying the Grievant that his pre-deprivation hearing would be held on December 2, 2002.[2] On December 3, 2002, Mr. Hageman concluded that the Agency had established all charges against the Grievant and that there was just cause for discipline.[3] The Union filed Grievance No. 28-07-030128- 005501-14 ("The Grievance") on January 22, 2003, claiming, among other things, that the Grievant's removal violated the Articles 24.01, 02, 03, 04, 05, and 44 of the Collective-Bargaining Agreement.[4] Mr. David J. Burrus presided over the Grievant's Step-3 Hearing on February 10, 2003, found the Grievant was removed for just cause, and denied the Grievance.[5] On June 5, 2003, the Union requested the submission of the Grievance to arbitration.[6]

II. The Facts

APA removed the Grievant on January 16, 2003 for allegedly violating Rules No. 21, 24, and 37.[7] Throughout his tenure as a Training Officer with APA, the Grievant maintained an excellent record of job performance, had no discipline, and had approximately 17 years of service, during which he received several letters of compliments and commendations for his job performance. As a Training Officer, he was generally responsible for developing, teaching, and implementing safety training for parole officers and field staff in areas such as firearms, unarmed self-defense, and field tactics.[8] The Grievant, however, was not responsible

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1 Joint Exhibit No. 3, at 17.
2 Joint Exhibit No. 3, at 1.
3 Joint Exhibit No. 3, at 52.
4 Joint Exhibit No. 2, at 3.
5 Joint Exhibit No. 2, at 7.
6 Joint Exhibit No. 2, at 1.
7 Joint Exhibit No. 3, at 61.
8 Management Exhibit No. 2, at 1.

for investigating fellow employees and was not certified to use "LEADS" documents.[9] He was trained how to report co-worker misconduct[10] and was notified of the employee standards of conduct.[11] Mr. Clifford W. Cooks, OPCS Training and Information Officer, was the Grievant's immediate supervisor when the Grievant was removed.

As set forth below, the Grievant's removal centered around his decision to secure a LEADS printout, which revealed that Chillicothe Parole Officer Larry Grant had been driving on a suspended driver's license. Sometime in July 2002, Chillicothe Municipal Court Clerk/ Police Officer Dana E. Cousins told Parole Officer Monica Brumfield that PO Grant was driving with a suspended driver's license and that police officers were aware of it but failed to take corrective action against PO Grant. Officer Cousins claimed that he broached the subject to PO Brumfield at a party on July 4, 2002. However, PO Brumfield was sure that she did not interact with Officer Cousins on July 4, 2002, since she entertained out-of-town guests and watched fireworks that day. Officer Cousins knew that PO Brumfield and PO Grant were colleagues and revealed this information to PO Brumfield with the hope that she would persuade PO Grant to correct this problem. Officer Cousins was substantially agitated because, in his view, PO Grant was violating the law with impunity, since Management did not seem to care.

Three reasons prompted PO Brumfield to report this matter of the Grievant rather than either to her supervisor–Mr. Jeffrey A. Crabtree, Parole Services Supervisor–or to PO Grant himself. First, she and the Grievant had been colleagues and friends for sometime. Second, PO Brumfield had recently been subjected to an extensive APA investigation, culminating in her receiving a two-days suspension. And, third, she simply mistrusted management. It is unclear exactly when PO Brumfield apprised the Grievant of Mr. Cousins' accusations about PO Grant.

On or about July 19, 2002, Mr. Crabtree received an anonymous telephone call from a male, stating

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[9] A LEADS machine is —

[10] Joint Exhibit No. 4, at 3.

[11] Joint Exhibit No. 6.

that PO Grant had been driving with a suspended driver's license.[12] Although Mr. Crabtree verbally reported the telephone call to Regional Administrator Teresa Minney on July 19 2002, he did not produce a Special Incident Report on the matter until August 12, 2002.[13] On July 19, 2002, Ms. Minney and Mr. Crabtree used PO Grant's Social Security number to run a BMV audit on him from the APA office. Ms. Minney also ran a LEADS audit from the public access computer in the Chillicothe Municipal Court ("The Municipal Court"). Both audits revealed that PO Grant's driver's license was valid and not under suspension at that time. Ms. Minney printed and shredded the report because it contained personal information about Mr. Grant. Also, Mr. Crabtree checked with the Lawrence County Sheriff's Department, which also verified that PO Grant's license was valid at that time.

Nevertheless, PO Grant's license was suspended on or about March 31, 1999.[14] On March 29, 2002, Officer Moore ticketed the Grievant for a seatbelt violation.[15] Officer Morris also ticketed PO Grant on June 30, 2002 for an unspecified second violation.[16] After PO Grant failed to pay the March 29 ticket, the Municipal Court notified BMV on July 31, 2002 that PO Grant was in forfeiture.[17] So PO Grant's driver's license seems to have been suspended between March 29, 2002 and July 31, 2002, when PO Grant suffered a forfeiture for dragging his feet in addressing the March 29 ticket from his record. Ms. Minney's audits, therefore, should have listed PO Grant's license as suspended on July 19, 2002. Finally, it is possible that either the March 29 or the July 5 ticket was cleared on 9/6/02.[18]

On or about July 22, 2002, the Grievant approached Mr. Crabtree and asked if he knew that one of his parole officers had been driving with a suspended license. Mr. Crabtree asked the Grievant how he obtained that knowledge, but the Grievant refused to reveal this source. Mr. Crabtree then informed the

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[12] Management Exhibit No. 5.
[13] Management Exhibit No. 5, at 1.
[14] Management Exhibit No. 8-9.
[15] Management Exhibit No. 16, at 1.
[16] Management Exhibit No. 16, at 2.
[17] Management Exhibit No. 16, at 1.
[18] Joint Exhibit No. 3, at 47. The foregoing description is based on Officer Cousins's testimony and the exhibits cited.

Grievant that PO Grant's driver's license was in fact valid, whereupon the Grievant assured Mr. Crabtree that PO Grant's driver's license had been suspended. Mr. Crabtree advised the Grievant that he (Mr. Crabtree) needed documentation to pursue the matter.[19]

Acting on Mr. Crabtree's advice, the Grievant decided to obtain the necessary documentation by asking PO Brumfield to reveal her informational source. She told the Grievant that Officer Cousins had informed her about PO Grant's suspended license. On or about July 24, 2002, the Grievant telephoned Officer Cousins at the Municipal Court, identified himself as Charles Anthony Pritchard, and said he was investigating the status of PO Grant's driving privileges. Although Mr. Cousins did not know the Grievant, he accommodated him by leaving a LEADS printout[20] of PO Grant's driving record in the Ross County Sheriff's Department. However, Officer Cousins removed the header from that printout before delivering it to the Sheriff's Department.[21] After identifying himself to the proper officer at the Sheriff's Department, the Grievant retrieved the LEADS printout and erased the key number from the top right corner of the document to protect Officer Cousins' identity.[22]

On or about August 6, 2002, the Grievant gave Mr. Crabtree the edited LEADS printout, which clearly stated that PO Grant's driver's license was suspended.[23] Mr. Crabtree asked the Grievant where he had obtain the printout, but the Grievant again refused to reveal his sources.

Mr. Crabtree presented the printout to Ms. Minney, who simply ignored that the document plainly stated that PO Grant's license had been suspended. Instead, Ms. Minney focused on the erased key number and header in the document.[24] As it turned out, the key number was relatively unimportant and could easily be duplicated by running a new DS.[25] Ms. Minney closed the LEADS machine in the Municipal Court,

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[19] Management Exhibit No. 5, at 2.
[20] Management Exhibit No. 8.
[21] The header of a LEADS document contains information identifying the court from which it originated and other identifying data.
[22] Management Exhibit No. 8.
[23] *Id.*
[24] *See* Management Exhibit No. 8 with key number removed and Management Exhibit No. 9 with the key number.
[25] Management Exhibit No. 7.

fearing that the Grievant's LEADS printout came from that machine.

On or about August 13, 1999, PO Grant signed a certification that his license was valid at that time and that he would "immediately notify . . . [his] supervisor of any change in . . . [his] license status . . . ."[26] On or about August 6, 2002, PO Grant assured Mr. Crabtree and Ms. Minney that his driver's license was valid, ran a LEADS audit on himself to substantiate his claim, and showed his license to Mr. Crabtree. Significantly, however, he never bothered to report that his driver's license had been suspended–as established by the LEADS printout that the Grievant had submitted to Mr. Crabtree–and that his driver's license had in fact been forfeited on July 31, 2002.[27]

Upon receiving the LEADS printout from the Grievant, the Agency launched an official administrative investigation that primarily focused on the Grievant. On August 28, 2002, a letter was drafted, notifying the Grievant that he would be subjected to an investigatory conference on September 5, 2002 at 9:00 AM.[28] One paragraph of the letter stated: "It is expected that since you are given advance notice of this interview, any need to consult *with your representative* will occur *prior to* the scheduled date and time of the interview."[29] However, the last paragraph in the letter stated: "I understand that I have been afforded the opportunity to have union representation *during* the investigatory interview. . . ."[30]

Before the interview began on 9/5/02, the Grievant asked Mr. Daniel Turek if he knew whether a union representative was available. Mr. Turek said he did not know. The Grievant then said he would not waive his right to union representation during the investigatory interview. Accordingly, sometime before the interview began, the Grievant crossed out the section of a written waiver, saying that he voluntarily waived his union representation, and then fully participated in the interview.

The Grievant was interviewed by Mr. Turek and Mr. Lomax, with several other members of

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[26] Union Exhibit No. 9, at 1.
[27] Management Exhibit No. 16, at 1.
[28] Joint Exhibit No. 3, at 17.
[29] Joint Exhibit No. 3, 17 (emphasis added).
[30] *Id.* (emphasis added).

management observing. On or about September 24, 2002, A & I Coordinator-DPCS, David Lomax and several other managers interviewed Officer Cousins and told him that the Grievant was not an investigating officer. The Grievant's removal letter was drafted on January 15, 2003,[31] and he was terminated on January 16, 2003.

III. Relevant Contractual and Regulatory Provisions

Contractual Provisions

Article 24

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

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

24.03- Supervisor Intimidation
An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass, or coerce an employee. . . .

24.04-Pre-Discipline
An employee shall be entitled to the presence of 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.

24.05- Imposition of Discipline
Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

Article 44

44.01-Agreement
To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

44.02-Operations of Rules and Law
To the extent that State statutes, regulations or rules promulgated pursuant to ORC Chapter 119 or Appointing Authority directives provide benefits to State employees in areas where this Agreement is silent, such benefits shall be determined by those statutes, regulations, rules or directives. . . .

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[31] Joint Exhibit No. 3, at 61.

Performance-Based Standards Track- Disciplinary Grid

Rule 21	Unauthorized use, Release or Misuse of Information
Rule 24	Interfering with, Failing to Cooperate in, or Lying in an Official Investigation or Inquiry
Rule 37	Actions that Could Compromise or Impair the Ability of an Employee to Effectively Carry Out His/Her Duties as a Public Employee.[32]

Statutory Provisions

Section (A)(1)(b) (3)
If an employee becomes aware in the course of the employee's employment of a violation by a fellow employee of any state or federal statute . . . or any work rule or company policy of the employee's employer and the employee reasonably believes that the violation either is a criminal offense that is . . . a hazard to public health or safety . . . the employee orally shall notify the employee's supervisor or other responsible officer of the employee's employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation.

(B) Except as otherwise provided in division (C) of this section, no employer shall take any disciplinary or retaliatory action against an employee for making *any* report authorized by division (A)(1) or (2) of this section, or as a result of the employee's having made any inquiry or taken any other action to ensure the accuracy of any information reported under either such division. No employer shall take any disciplinary or retaliatory action against an employee for making any report authorized by division (A)(3) of this section if the employee made a reasonable and good faith effort to determine the accuracy of any information so reported, or as a result of the employee's having made *any inquiry or taken any other action* to ensure the accuracy of any information reported under that division. For purposes of this division, disciplinary or retaliatory action by the employer includes, without limitation, doing any of the following:

(1) Removing or suspending the employee from employment. . . .

IV. Summaries of the Parties' Arguments

Summary of the Agency's Arguments

1. The Grievant's conduct involved unauthorized use, release or misuse of information.
   a. When Mr. Crabtree advised the Grievant that he and Ms. Minney had determined that PO Grant's license was valid, the Grievant should have ended his quest to show that the license was in fact suspended.[33]
   b. The Grievant obtained and altered a confidential document without authorization.
   c. Investigating parole officers and handling LEADS reports are not a part of the Grievant's job description.
2. The Grievant interfered with, failed to cooperate in, or lied in an official investigation or inquiry
3. The Grievant engaged in conduct that could compromise or impair a public employee's ability to perform his/her duties.

Summary of the Union's Arguments

1. Mr. Crabtree advised, and thereby implicitly authorized, the Grievant to obtain the LEADS printout,

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[32] Joint Exhibit No. 3, at 61.
[33] Agency Post-Hearing Brief, at 2.

which the Grievant slightly altered but otherwise properly used to verify his accusations about PO Grant.

2. The Grievant did not use deceit or misrepresentation to obtain the LEADS printout from either Officer Cousins or the sheriff's department as evidenced by his willingness to readily and accurately identify himself on both occasions.
3. The Grievant fully cooperated with management once the formal administrative investigation began.
4. The Grievant's conduct did not compromise employees ability to perform his or her job, especially PO Grant's ability, since he was already compromised.
5. The Grievant's motives were proper. Rule 25 of the "Performance-/Based Standards Track" specifically required the Grievant to report PO Grant's misconduct. Moreover, the Grievant's whistleblowing was covered by ORC 4113.52.
6. The Grievant was a victim of remedial disparate treatment, which is clearly established when one considers that:
   a. PO Grant received no discipline for failing to notify the Agency of a status change in his driver's license, even though he explicitly promised to do so when the Agency hired him.
   b. PO Grant received a two-days suspension for violating Rules 5,7, and 28.
   c. PO James L. Watson received a two-days suspension for violating Rules 7 and 39.
8. If the Grievant is reinstated, then any attempt by the Agency to transfer him to a new region because of allegations against him in this dispute with constitute retaliation in violation of the Collective-Bargaining Agreement.

V. The Issue

The stipulated issue is: whether the Grievant was removed for just cause. If not, what shall the remedy be?

VI. Discussion and Analysis

A. Unauthorized Use, Release or Misuse of Information

1. Whether the Grievant Obtained the LEADS Printout Through Misrepresentation

The Agency argues that the Grievant accessed and possessed the LEADS printout through misrepresentation and deceit. APA attempt to support this allegation with Officer Cousins' representation that the Grievant claimed to be, "an investigator investigating the status of Larry Grant."[34] Conversely, the Union asserts that neither misrepresentations nor deceit was used to obtain the LEADS printout because the Grievant quickly identified himself as Training Officer Tony Pritchard and announced that he was "investigating" PO Grant's driver's license."

The Union's position is more persuasive because the Grievant is a more credible witness than Officer Cousins whose credibility is tarnished by conflicting statements. First, during Mr. Turek's interview of

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[34] Joint Exhibit No. 3, at 12.

Officer Cousins on September 24, 2002, the Officer stated that "Pritchard indicated he was an *investigator investigating* the status of Larry Grant."[135] Subsequently, however, during the pre-disciplinary hearing on December 3, 2002, Officer Cousins was specifically questioned as to whether the Grievant had said "investigating or "investigator," when he first telephoned Officer Cousins about PO Grant's driving record. Officer Cousins then stated that "[H]e [Officer Cousins?] did not say that he [the Grievant] was an investigator but he [Officer Cousins] said that Mr. Pritchard stated he was investigating Mr. Grant."[136] There are but two explanations here, neither of which advances the Agency's case: Either Mr. Turek misinterpreted what Officer Cousins said, or Officer Cousins contradicted a rather crucial part of his statement to Mr. Turek. The latter explanation is more plausible on the face of the matter.

Second, during the pre-deprivation hearing in response to a question from Mr. Turek, Officer Cousins stated that "*more likely than not*" he would have left the document for the Grievant if he knew the Grievant was a Training Officer.[137] However, Officer Cousins apparently thought better of his position when Mr. Lomax subjected him redirect examination in the arbitral hearing:

Mr. Lomax:	"If Mr. Pritchard had advised you of his position as a Training Officer, would this have affected his being granted assess to the printout?
Mr. Cousins:	"Yes sir."
Mr. Lomax:	"Would he have received the document?"
Mr. Cousins:	"*Not from me.*"[138]

Clearly, between the Pre-disciplinary hearing on December 3, 2002, and the arbitral hearing on September 11, 2003, Mr. Cousins migrated from a position where he "more likely than not" would have given a LEADS printout to a training officer to a position of "Not from me," a rather dramatic change of heart.

These internal inconsistencies about crucial facts reveal the difficulty with Officer Cousins' credibility and, hence, the problem Officer Cousins–one of APA's key witnesses– poses to its case.

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135 Union Exhibit No. 3, at 12 (emphasis added).
136 Joint Exhibit No. 3, at 55 (emphasis added).
137 Joint Exhibit No. 3, at 55 (emphasis added).
138 Tape recording of the hearing. (Five minutes, 20 seconds into Index No. 13) (emphasis added).

In addition, the diminution of Officer Cousins' credibility leaves his testimony vulnerable to external contradictions. For example, contrary to Officer Cousins' account, the Grievant insists that he identified himself to Officer Cousins as Training Officer Tony Pritchard and stated that he was investigating PO Grants driving record. The Arbitrator finds the Grievant's account more credible. Similarly, Officer Cousins' diminished credibility makes it easier to credit the testimony of PO Brumfield, which conflicts with Officer Cousins' on two points. First, during cross-examination in the arbitral hearing, PO Brumfield testified that Officer Cousins was agitated and frustrated because PO Grant was flouting APA's work rules by using a suspended license with impunity. But Mr. Cousins testified that he liked to help people out from time to time and that he was simply trying to help PO Grant to correct the status of his driver's license. Finally, Officer Cousins testified that he first informed PO Brumfield of Mr. Grant's suspended license at a party on July 4, 2002. But PO Brumfield flatly denied that she saw Officer Cousins that day because she spent the entire day entertaining some out-of-town guests. Given Officer Cousins diminished credibility, PO Brumfield's accounts are more believable and are hereby adopted as unrebutted credible testimony on these points.

B. Foreseeable Impact of Officer Cousins' Agitation

Finally, the fact that Officer Cousins was agitated by PO Grant's behavior suggests that Officer Cousins very well could have been somewhat predisposed to accommodate the Grievant's request for Mr. Grant's driving record. Another piece of corroborative evidence on this point is that Officer Cousins elected to remove the header from the LEADS before giving it to the Grievant. Moreover, during cross-examination Officer Cousins failed to adequately explain that action, even though the Union afforded him a full and fair opportunity to do so.

Given these established inconsistencies in Officer Cousins' statements, the Arbitrator finds that both the Grievant and PO Brumfield are more credible than Officer Cousins and, therefore, the Arbitrator credits the Grievant's and PO Brumfield's testimonies over Officer Cousins.

C. State of the Grievant's Knowledge

The Agency argues that the Grievant knew or, as a seventeen-year employee, should have known that he lacked official authority to obtain or process a LEADS printout. Evidence in the record does not establish that the Grievant either knew or clearly should have known about that prohibition. First, the record contains no evidence of either a written or verbal rule, notifying the Grievant that, as a Training Officer, he was forbidden to obtain or process LEADS documents. Evidence in the record mentions the duty to *shred* such documents and that only *some* employees are LEADS certified.[22] Also, during cross-examination, neither Ms. Minney nor Mr. Turek could articulate a discernible difference between information in LEADS reports and that in BMV audits. And insofar as the public access computer contains information about Chillicotheans' driving records, it may be yet a third source of information very similar to that in LEADS reports.

The lack of regulations governing LEADS documents together with obvious confusion about the differences, if any, between information in LEADS documents and information available through less restricted channels effectively rebut APA's contention that the Grievant either knew or should know that he was prohibited from obtaining and possessing the LEADS printout in this case, especially given his whistleblower status. Furthermore, another piece of evidence tends to corroborate this actual conclusion. If the Grievant had actual or constructive knowledge of the alleged prohibition, one could reasonably assume that he hardly would have boldly identified himself and his position to Officer Cousins and to the Ross County Sheriff's Department. Nor is it likely that he would have personally presented the LEADS printout to Mr. Crabtree, a member of management. Under these circumstances, there is no supportable basis for charging the Grievant with either actual or constructive knowledge that it was improper for him to obtain a LEADS printout of PO Grant's driving record.

D. The Grievant's Alleged Misuse of the LEADS Printout

Also, the Agency claims that the Grievant impermissibly altered and, thus, misused an official

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[22] Joint Exhibit No. 8.

document, the LEADS printout, by blotting out the key number from the upper right corner of that document. The Union retorts that erasing the key number was inconsequential, readily rectifiable, and not explicitly prohibited.

APA's position is more persuasive. The Grievant admittedly removed the key number from the LEADS printout to protect Officer Cousins' identity. The Union correctly points out that the record contains no rule either implicitly or explicitly prohibiting the alteration of an official document and the removal of the key number from the LEADS printout is readily rectifiable.[40]

Nevertheless, a well-settled and widely accepted principle of the common law of the shop is that some types of conduct are so obviously inappropriate as to require no notice, declaring their unacceptability or impropriety. Such as the case with altering official documents. Commonsense and reason manifestly suggest that no employer is likely to condone the alteration of an official document, especially where, as here, the alteration is perpetuated to conceal a relevant fact such as the identity of the document's source. If, as the Union suggests, the presence of the key number on the LEADS printout was wholly inconsequential, then, presumably, the Grievant would not have taken pains to erase it. Even though the key number was obviously irrelevant to the *substance* of the Grievant's allegation against PO Grant, the motive for removing it is relevant to the Grievant's state of mind, though this is the only credible evidence that the Grievant intended to conceal any evidence in this dispute. Therefore, the Arbitrator holds that the Grievant's decision to erase the key number from the LEADS document constitutes misconduct.

E. Interfering with, Failing to Cooperate in, or Lying in an Official Investigation or Inquiry

Here the Agency argues that the Grievant violated Rule No. 24 of the Performance-Based Standards Track by "Interfering with, Failing to Cooperate in, or Lying in an Official Investigation or Inquiry." In support of this allegation, the Agency correctly points out that the Grievant twice refused to reveal his

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[40] Management Exhibit No. 7. Letter from Debra Hearns, stating essentially the same.

sources to Mr. Crabtree: once on July 22, 2002 when he apprised Mr. Crabtree of the PO Grant's suspended driver's license; and once on August 6, 2002 when he produced the LEADS printout. Also, correctly asserts that the Grievant misinformed Mr. Crooks by indicating that someone from Ross County Municipal Court had informed him that PO Grant's license was suspended but neglected to mention that PO Brumfield was the original source. In contrast, the Union argues that the Grievant did not violate rule No. 24 because he fully cooperated with APA during its official administrative investigation on August 13, 2002.

Although the Agency's accusations are not entirely groundless, preponderant evidence supports the Union's position that the Grievant did in fact fully cooperate with management *during* the official administrative investigation. Rule No. 24 specifically sanctions uncooperativeness *during* "an official investigation or inquiry."[61] The parties make no attempt to distinguish "investigation" from "inquiry." But irrespective of any relevant difference(s) between those terms, the record demonstrate that before the Agency launched the official administrative investigation, there was no "official" effort ("inquiry" or "investigation") to obtain information from the Grievant about his conduct. "Official" is defined here as and effort that bears the imprimatur of higher management, as was the case with the administrative investigation and consequent investigatory interview with the Grievant on September 5, 2002. Unlike the alteration of an official document, it is not obvious that Mr. Crabtree or Mr. Crooks' extemporaneous queries were made pursuant to an "official" inquiry or investigation. Furthermore, assuming arguendo that those questions constituted an official inquiry, then Mr. Crabtree and Mr. Crooks should have clearly notified the Grievant that he was the subject of an official inquiry pursuant to Rule No. 24. Yet, no where in the record does the Agency even posit let alone establish such a claim. Finally, the Grievant's failure to inform Mr. Crooks that PO Brumfield was the Grievant's original source was at most a misrepresentation, since Mr. Crooks did not specifically asked the Grievant for an original source and the Grievant did in fact obtain the LEADS printout from Officer Cousins in the Municipal Court. Accordingly, the Arbitrator holds that at most this *de minimis*

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[61] Joint Exhibit No. 3, at 74.

misrepresentation *arguably* violated the spirit of Rule No. 24.

F. Compromising or Impairing Employees' Ability to Perform Their Duties.

Here APA argues that the Grievant's conduct: (1) hampered his own ability to perform his job; (2) denigrated PO Grant's reputation, by falsely portraying him as a problematic employee; and (3) eroded APA's relationship with the Chillicothe Police Department and the Municipal Court. Specifically, APA argues that these consequences flow from the Grievant's surreptitious and deceptive behavior through which the Grievant secured the LEADS printout from Officer Cousins, conduct which, according to the APA, portrays a lack of integrity. Furthermore, APA argues that the Grievant failed to follow proper reporting procedures when he apprised Mr. Crabtree of PO Grant's suspended driver's license.

The Union rejects the proposition that the Grievant's job performance was adversely affected by his having blown the whistle on PO Grant or that the Grievant somehow smudged PO Grant's reputation. The Union argues that, except for Management's unsubstantiated testimony, the record contains no evidence to establish a strained relationship between APA and either the Chillicothe Police Department or the Municipal Court.

The Arbitrator agrees. First, nothing in the record suggests that the Grievant's whistleblowing somehow diminished his job performance. Second, if the Grievant denigrated PO Grant's reputation it was a factual, and hence warranted, denigration because the Grievant produced palpable evidence that PO Grant's driver's license was in fact suspended for a period of time.[42] Third, evidence in the record does not establish a nexus between the Grievant's conduct and the APA's relationship with the two cited agencies.

As a general proposition, no employer needs to tolerate the adverse effects of an employee's misconduct on its operational efficiency or the quality of its products or services. Indeed, those types of effects plainly constitute just cause for discipline. Nevertheless, an employer must establish the alleged misconduct as well as a nexus between the established misconduct and the resultant erosion of its legitimate

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[42] Management Exhibit No. 8.

interests. Such a nexus may be established through either of two avenues. Where the adverse impact has yet to materialize, a nexus may be established through testimony and argument that constitutes a basis for inferring a reasonably foreseeable link or nexus between established misconduct and the predicted diminution of the employer's legitimate interests. Where the adverse impact has in fact occurred, an employer can simply demonstrate that its legitimate interests have already been adversely affected.

Other than Ms. Minney's generalized testimony, the record is devoid of evidence that the Grievant's conduct somehow eroded APA's relationship with either the Chillicothe Police Department or the Municipal Court. This is not to imply that APA's relationship with these agencies is not fundamental to its operational efficiency and the quality of its services, inasmuch as APA's staff, including parole officers, heavily depend information and other assistance from those agencies. The difficulty is that the APA alleges an existent rip in its relationship with those agencies. Yet, Ms. Minney's testimony, standing alone, fails to establish either the *existence* of that diminished relationship or a logical or reasonable nexus between the Grievant's whistleblowing and that relationship. Having heard and carefully evaluated Ms. Minney's testimony on this point, the Arbitrator is left with the substantial and nagging question of why and how the Grievant's established conduct reasonably or logically caused a breach in the relationship. The answer to that question is not apparent from Ms. Minney's testimony; yet, the Agency has the burden of persuasion with respect to that claim. As a result, the Arbitrator holds that the Grievant's conduct did not violate Rule No. 37.

G. Authorization to Investigate and Obtain LEADS Printout

1. Scope of the Grievant's Job Duties

The Agency maintains that the Grievant lacked authorization either to investigate co-workers' driving records or to possess LEADS documents. In support of this position, the Agency stresses essentially two points. First, it correctly states that the job description of a Training Officer does not include either conducting investigations or handling LEADS documents and that the Grievant was not LEADS certified. The Agency's arguments on this issue are unpersuasive simply because the Grievant was not performing his regular job duties. Instead, he was playing the role of whistleblower, which clearly is not in his job

description but which is a legitimate role under both the ORC Section 4113.52 ("Whistleblower's Statute or "The Statute") and APA's Rule 25.[43] Thus, simply underscoring the scope of the Grievant's job description sheds no light on his authority to collect evidence to support his whistleblowing accusations against PO Grant.

Thus, the issue becomes whether the Grievant complied with statutory law and Rule 25, the Agency's own whistleblower work rule, when he obtained the LEADS document from Officer Cousins.[44]

H. Ohio Revised Code, Section 4113.52

Although Ohio Revised Code, Section 4113.52 ("The Whistleblower's Statute" or "The Statute") does not saddle employees with an affirmative duty to report coworkers' misconduct, it protects employees who report such misconduct. However, the Statute does affirmatively require that whistleblowers satisfy the *statutory criteria* and make a *good faith effort* to verify their accusations. Set forth below are the statutory criteria, the Parties' arguments, and an application of the statutory criteria to the facts in this case.

I. The Parties' Whistleblower's Arguments

APA argues that the Whistleblower Statute does not cover the Grievant because he violated its intent and standards. Specifically, the Agency contends that the Grievant did not discover PO Grant's misconduct "by legitimate avenues prior to reporting a violation."[45] APA further contends that the Grievant used deception to establish PO Grant's alleged violation and altered the LEADS document to conceal his source, which, according to APA, fatally compromises the integrity of the document. The Agency, finally, argues that the Grievant knew his conduct was improper as evidenced by his effort to alter the LEADS printout to prevent the perception that Officer Cousins is "a snitch."[46]

The Union does not offer a detailed argument, addressing whether the Whistleblower's Statute

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[43] Joint Exhibit No. 3, at 76.

[44] During the arbitral hearing, the Parties stipulated that there was no issue as to whether the Grievant followed the proper chain of command when he reported PO Grant's misconduct to Mr. Crabtree and other members of Management.

[45] Management's Post-Hearing Brief, at 3.

[46] Management's Post-Hearing Brief, at 3.

actually covered the Grievant in this case. Instead, it argues generally that the Grievant reported PO Grant in an attempt to fulfill his duty under Rule No. 25 and to further the socially desirable purpose of the Whistleblower Statute. Then the Union contends that once the Grievant reported the misconduct, Section 5(C) of the Statute required him to make a good faith effort to verify the accuracy of the information he reported or risk discipline from the Agency. In addition, the Union contends that the Grievant neither knew nor had reason to know that he was prohibited from contacting law-enforcement officials for documentary verification, since the Agency failed to duly notify him of any work rules or policies that prohibited such conduct by a statutory whistleblower or a whistleblower under Rule 25. Before applying the actual statutory criteria to the facts of this case, the Arbitrator will discuss those portions of the Parties' arguments that do not specifically address the applicability of the Whistleblower's Statutory criteria.

Again, the Union's position is more persuasive. First, as set forth elsewhere in this opinion, by contacting Officer Cousins to obtain the LEADS printout, the Grievant did not violate any work rules cited in the arbitral record because no rules relevant to his conduct were included therein.[47] Furthermore, the Arbitrator has held that the Grievant did not procure the LEADS printout through deceptive or underhanded tactics. Instead, upon contacting Officer Cousins, the Grievant forthrightly stated his name, this job title, and his investigative purpose. With respect to the removal of the key number from the LEADS printout, the arbitrator has held that although improper, the removal of the key number is de minimis but not necessarily free of disciplinary consequences.

J. Application of the Whistleblower's Statutory Criteria[48]

The ensuing discussion establishes that the Grievant satisfied the criteria set forth in the Whistleblower's Statute. To invoke the protection of the Whistleblower's Statute:

1. In the course of his employment, the Grievant must have learned of PO Grant's misconduct. This criterion is satisfied because the Grievant first learned of PO Grant's misconduct while conversing with PO Brumfield at work. Information that

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[47] DPCS 5112.06 ("APA Shredding Policy") is the only exhibit in the record that references LEADS documents. However, DPCS 5112.06 focuses solely on rules for shredding LEADS materials, and the last sentence in that document states that "Only certified operators may use the LEADS machine and shredders." Joint Exhibit No. 8.

[48] The relevant statutory criteria fully quoted in Section III of this opinion.

one obtains through on-the-job conversations is clearly acquired in the course of one's employment.

2. PO Grant's misconduct must have violated a state or federal statute or an APA work rule or policy. Here, PO Grant was allegedly driving state vehicles with a suspended driver's license, which would violate state law if not APA's work rules or policies.
3. The Grievant must have reasonably believed that PO Grant's misconduct was criminal in nature and was hazardous to public health or safety. In the instant case, there is only evidence that a concern for public health and safety motivated the Grievant to blow the whistle on PO Grant.
4. The Grievant must have verbally notified either a supervisor or other responsible officer of the co-worker's misconduct. The Grievant notified PO Grant's supervisor, Mr. Crabtree, that PO Grant either was or had been driving with a suspended license.
5. After verbally notifying Mr. Crabtree, the Grievant must have afforded him a written report, adequately identifying and describing PO Grant's misconduct. In fact, the Grievant gave Mr. Crabtree the LEADS printout, which explicitly stated that PO Grant had been driving with the suspended license.

Finally, the Whistleblower's Statute requires the Grievant to "make a reasonable and good faith effort to determine the accuracy of any information reported under . . . division (A)(1) or (2). . . ."[49] The Grievant satisfied this criterion by securing the LEADS printout.

The foregoing discussion establishes that the steps the Grievant took to report PO Grant's misconduct satisfied the explicit criteria of the Whistleblower's Statute. And, contrary to APA's assertions, the record does not establish that the Grievant somehow violated the spirit or intent of the Statute through either deception, misrepresentation of a material fact, or substantial alteration of an official document (the LEADS printout). Finally, once the Grievant satisfies the foregoing criteria, Section (B) of the Whistleblower's Statute shields him from discipline in the form of either suspension or discharge.[50]

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[49] Section 5 (C).

[50] Section (B) states, in this respect

> No employer shall take any *disciplinary* or *retaliatory* action against an employee for making *any report* authorized by division (A)(3) of this section if the employee made *a reasonable and good faith* effort to determine the accuracy of any information so reported, or as a result of the employee's *having made* any inquiry or *taken any other action* to ensure the accuracy of any information reported under that division. For purposes of this division, disciplinary or retaliatory action by the employer includes, without limitation, doing any of the following: (1) Removing or suspending the employee from employment. . . . (emphasis added).

K. APA's Performance-based Standards Track

Unlike the Whistleblower's Statute, Rule No. 24 of APA's Performance-Based Standards Track ("Performance Standards") affirmatively required the Grievant, as an APA employee, "to immediately report a violation of any work rule, law, or regulation."[151] And failure to report PO Grant's misconduct, could have subjected the Grievant to discipline ranging from a written reprimand to a two-days suspension.[152]

L. The Union's Affirmative Defenses

1. Violation of the Grievant's Weingarten Rights

As an affirmative defense, the Union claims that Mr. Turek violated the Grievant's Weingarten rights by conducting an investigatory interview with the Grievant on September 5, 2002 after the Grievant asserted rather than waived his right to union representation during the interview. APA responds that the Grievant waived his right to union representation and voluntarily participated in the interview.

a. The Grievant's Reasonable Fears

In NLRB v. Weingarten, Inc.,[153] the United States Supreme Court announced the general standards for invoking Weingarten rights:[154] First, an employee must establish that he reasonably feared that the investigatory interview may result in his being disciplined[155] In the instant case, the Grievant entered the interview fully aware that it was triggered because of his whistleblowing conduct. Therefore, he obviously knew that the interview could very well result in disciplinary action against him.

b. The Grievant's Request for Union Representation

Second, *Weingarten* announced that "the right [to union representation] arises only in situations where the employee *requests* representation."[156] Decisions of the National Labor Relations Board ("The

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151 Joint Exhibit No. 3, at 76.

152 *Id.*

153 420 U.S. 251 (1975).

154 Section 7 of the National Labor Relations Act NLRA") is the source of an employee's entitlement to a union representative in an investigatory interview that he reasonably fears may result in discipline. Section 7 prohibits an employer from interfering, restraining employees in the exercise of their rights under Section 8 of the NLRA. Denial of the right to representation during an investigatory interview reasonably tends to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act. *Id.* at 254.

155 *Id.*

156 *Id.*

Board") have further delineated the scope or range of statements that constitutes requests for union representation. In *Southwestern Bell Telephone Co.*,[57] for instance, the Board held that as a general proposition, employees must request union representation in a manner that reasonably notifies their employers of that desire.[58] And *New Jersey Bell Telephone Co*[59] further defined the types of statements that constitute effective requests by holding that an employee who asked whether she should have union representation did not, thereby waive her Weingarten rights, even though she participated in the investigatory interview. In the Board's view, that question was sufficiently forthright to notify the employer of the employee desire for union representation.

These decisions establish that the Grievant properly requested union representation because, shortly before the investigatory interview began on September 5, 2002, he asked Mr. Turek if he knew whether a union representative was available. Mr. Turek responded that he did not know. Standing alone, that question should have alerted Mr. Turek to the Grievant's desire for union representation during the investigatory interview. But if that statement failed to notify Mr. Turek, the Grievant's subsequent *actions* surely did. Before the interview began, the Grievant was given the opportunity to sign a statement waiving his right to union representation. Before writing anything on the document, he emphatically stated that he would not waive his right to union representation during the investigatory interview. Then the Grievant underscored his desire by crossing out the section of the written waiver that said that he voluntarily waived his union representation, and did the interview.[60] Relevant portions of the content and format of the document are set forth below:

> I understand that I have been afforded the opportunity to have union representation during the investigatory interview to be conducted on 9/5/02 by Danny Turek. I hereby willingly ~~waive union representation and agreed~~ to willingly answer questions/give a statement.

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[57] 227 NLRB 1223 (1977).

[58] *Id.*

[59] 300 NLRB 42, 49 (1990) (citing Bodolay Packaging Machinery, 263 NLRB 320, 325-326 (1982) (employee asked if he needed a witness); Postal Service, 256 NLRB 78, 80-82 (1981) (employee asked if he needed his union representative).

[60] Joint Exhibit No. 3, at 18.

Grievant's Signature 9/5/02
Employee's signature Date

The Grievant's statements and behavior manifestly notified Mr. Turek that the Grievant desired union representation during the investigatory interview. In other words, by asking Mr. Turek where to locate a union representative, emphatically refusing to waive his Weingarten rights, and emphasizing that refusal by striking through key language and a waiver statement, the Grievant, by any measure of reasonableness, gave adequate notice of his desire for a union representative during the investigation.

c. Whether the Grievant Waived his Weingarten Rights

APA's waiver argument relies entirely on the Grievant's decision to answer questions in the interview, suggesting that such a decision to participate poses a discussion on waiver. Third, the Board has held that an employee may waive his right to union representation. The general rule, announced in *Airco Alloys*,[61] is that a waiver of Weingarten rights will not be "lightly inferred" and indeed must be "clear and unmistakable."[62] And *New Jersey Bell Telephone Co*, stands for the proposition that mere participation in the investigatory interview does not constitute a waiver of Weingarten rights. In *New Jersey*, the employee merely raised a question about union representation and proceeded to participate in the interview. The Board found her inquiry constituted proper request for union representation and that her participation in the interview did not waive her right to union representation. Furthermore, decisions about the waiver of Weingarten rights must be premised on the totality of the circumstances surrounding the alleged waiver, rather than on one circumstance or event, however salient. In the instant case, the Grievant's statements and actions hardly constitute a "clear and unmistakable" intent to waive his right to union representation during the September 5 investigatory interview. As a result, the Arbitrator holds that the Grievant properly requested a union representative before the investigatory interview and manifested no intent to waive his right to union representation.

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[61] 249 NLRB 524 (1980) (citing Gary Hobart Water Corporation v. N.L.R.B., 511 F.2d 284 (7th Cir. 1975).
[62] *Id.*

2. Disparate Treatment

Also as an affirmative defense, the Union claims that the Grievant was a victim of disparate treatment because other employees received much lighter discipline than the Grievant even though that misconduct was very similar to the Grievant's. In support of this position, the Union produced two cases where employees received substantially less discipline than the Grievant for similar infractions. First, Mr. Watson was charged with misusing LEADs information for personal reasons by running a LEADs report on his son. APA establish that Mr. Watson violated Rules No. 7 and 39, for which he received a two-days suspension. Rules No. 7 sanctions a, "Failure to follow post orders, administrative regulations, policies or directives."[63] Rule No. 7 provides for discipline ranging from an oral reprimand to a two-days suspension for the first offense.[64] Rule No. 39 sanctions, "Any act that would bring discredit to the employer" and for a first offense permits discipline ranging from a written reprimand to a two-days suspension or removal.[65] APA opted to subject PO Watson to the lightest available discipline.

Next, the Union cites a case involving PO Grant, whose established misconduct is cited in excerpts from the foregoing letter: "[Y]ou transported an offender *without* being in possession of your firearm. During this transport, you *borrowed the firearm* of another Parole Officer. . . . and *informed* your Regional Administrator (Teri Minney) that your firearm was located inside a state vehicle, when in fact, your firearm was located in an *unsecured personal vehicle.*"[66] For these serious infractions, APA charged PO Grant with violating Rules No. 5, 7, and 28.[67] Rule 5 provides discipline for, "Purposeful or careless act(s) which result in one or more of the following: . . . . . D. Unsafe Act," with penalties for a first offense ranging from oral reprimand or two-days suspension or removal.[68] The language of Rule 7 and the discipline associated with a first violation of that Rule are set forth above under the discussion of Mr. Watson's infraction. Rule 28

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[63] Joint Exhibit No. 3, at 74.
[64] *Id.*
[65] Joint Exhibit No. 3, at 78.
[66] Union Exhibit No. 8, at 1 (emphasis added).
[67] *Id.*
[68] Joint Exhibit No. 3, at 74.

addresses the, "Loss of control of any instrument that could result in a breach of security or jeopardize the safety of others, to include but not limited to weapons. . . ."[169] A first violation of Rule 28 can result in discipline ranging from a written reprimand to a two-days suspension or removal.[170] PO Grant either lost his firearm or left it in an unsecured location, borrowed a fellow employee's firearm, and then misrepresented these facts to Ms. Minney. Nevertheless, he received a two-days suspension, the lightest measures of discipline associated with the three foregoing established charges.

In stark contrast, the Grievant received the maximum penalty of discharge for allegedly violating Rule No. 21, which provides for discipline, ranging from a written reprimand to a two-days suspension or removal for first offense; Rule No. 24, which provides for discipline, ranging from a two-days suspension to removal for first offense; and Rule No. 37, which carries discipline, ranging from a written reprimand to a two-days suspension or removal for first offense. In other words, unlike PO Watson and PO Grant, the Grievant received the *maximum* measure of discipline for a first violation of each of the Rules he allegedly violated, despite his: (1) seventeen years of tenure, (2) discipline-free work record, (3) highly satisfactory performance record, and (4) receipt of several commendations and complementary letters. Furthermore, it appears that PO Watson and PO Grant received two-days suspensions for misconduct that lacked any redeeming value and/or benefit for anyone, save themselves, while the Grievant was fired for attempting to satisfy his duty under Rule 25 and perform his civic responsibility under the whistleblower statute, conduct which on its face offers no evidence of any selfish motives but instead reflects a concern for the safety and well-being of others and a concern for shielding the Agency from potential liability and embarrassment.

PO Grant misled Ms. Minney with respect to the location and status of his state-issued weapon. The egregiousness of the Grievant's alleged misconduct pales in comparison to that of PO Grant's, and the disparateness in the measures of discipline imposed on the two employees defies reasonable and logical

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169 Joint Exhibit No. 3, at 76.
170 *Id.*

explanation. Nor has the Agency introduced any evidence that would reasonably bridge that disparate disciplinary gap. Under these circumstances, the Arbitrator holds that the Agency did subject the Grievant to disparate treatment.

VII. The Penalty Decision

The Agency established a part of one of the three charges it leveled against the Grievant, and therefore, some measure of discipline is indicated. Assessment of the proper quantum of discipline requires an evaluation of the mitigative and aggravative factors as well as an ultimate determination of whether the penalty of removal is unreasonable, arbitrary, or capricious under the circumstances of this case.

A. Aggravative Factors

There are few, if any, aggravative factors in this case. The one action taken by the Grievant that could possibly warrant discipline is his decision to erase the key number from the LEADS document.

B. Mitigative Factors

In contrast, the mitigative factors are numerous. First APA did not establish all of the infractions that it leveled against the Grievant. Second, as set forth above the one infraction that APA did establish–erasing the key number–was de minimis. Third, the Grievant is a seventeen-year employee with no active discipline, and an outstanding work record which includes several commendations and complementary letters. Fourth, the Grievant's conduct complied with Rule 25 and provisions of the Whistleblower Statute, thereby advancing the explicit and desirable goals of APA and the State of Ohio. Fifth, the Whistleblower's Statute specifically prohibits the removal or suspension of an employee that satisfies the relevant provisions of that Statute. Sixth, the Union established that the Grievant was the victim of disparate disciplinary treatment as compared to the seriousness of the infractions committed by PO Watson and PO Grant and unjustifiably slight measures of discipline imposed upon those employees relative to the unjustifiably harsh measure of discipline imposed upon the Grievant.

C. Propriety of the Penalty

This balance of mitigative and aggravative factors prompt the following holding: Termination of the Grievant in this case was unreasonable, arbitrary, and capricious and not for just cause. The maximum reasonable measure of discipline warranted by the Grievant's decision to erase the key number from the LEADS is a two-days suspension.

VIII. The Award

For all the foregoing reasons, the Grievance is hereby **Sustained in Part and Denied in Part**. The Grievant's removal shall be reduced to a *two-days* suspension, and he shall receive backpay from the date of his removal until the date of his reinstatement, less pay for the two-days suspension and less any income he earned or with due diligence could have earned during the period of his removal. Furthermore, the Grievant shall be made whole with respect to all benefits to which he would have been reasonably entitled but for his unjust removal. Finally, the Grievant's seniority and the benefits that flow therefrom shall not be affected by his unjust removal.

Notary Certificate

State of Indiana)

)SS:

County of _____

Before me the undersigned, Notary Public for _____ County, State of Indiana, personally appeared _____, and acknowledged the execution of this instrument this _____ day of _____, 2003

Signature of Notary Public: _____

Printed Name of Notary Public: _____

My commission expires: _____

County of Residency: _____

_____

Robert Brookins

Robert Brookins

Robert Brookins, Labor Arbitrator, J.D. Ph.D.