

# **BEFORE THE AMERICAN ARBITRATION ASSOCIATION**

State of Washington

Employer

and

Washington Federation of State Employees

Union

By and on Behalf of Jamele Anderson

Grievant

AAA Case No. 75 – 390-00061 – 12- CEPO

## **Opinion and Award of the Arbitrator**

### **Appearances:**

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### **Neutral Arbitrator**

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Award issued at Seattle, Washington.

### **Statement of the Case.**

This matter came on for hearing on June 26 and June 27, 2012, at the Offices of the Attorney General of the State of Washington, 7141 Cleanwater Lane Southwest, Tumwater, Washington. It arises from a grievance filed by the Washington Federation of State Employees (hereinafter "Union"). It was filed on behalf of Jamele Anderson (hereinafter "grievant"). It challenges action taken by the State of Washington (hereinafter "State") to discharge the grievant. The discharge became effective on July 11, 2011.<sup>1</sup> At the time of the termination the grievant was employed as a Residential Rehabilitation Counselor 4 (RRC 4) at the McNeil Island Special Commitment Center at (SCC) at Steilacoom, Washington.

The Union and the State attempted to resolve this matter through the Grievance Procedure in the Collective Bargaining Agreement (hereinafter "Agreement").<sup>2</sup> They were unable to do so. Thereafter, the Union demanded final and binding arbitration under the auspices of the American Arbitration Association. The undersigned was selected to act as the Neutral Arbitrator. This Award is submitted to the parties pursuant to the Labor Arbitration Rules and Procedures of the American Arbitration Association.

### **Statement of the Facts.**

The grievant had been employed as a Residential Rehabilitation Counselor 4 (RRC4) for a period of nine (9) years. Grievant worked at the Special Commitment Center (SCC) on McNeil Island at Steilacoom, Washington. The grievant had no prior discipline record and had received good performance evaluations. The SCC is a state institution that houses sexually violent predators that have been civilly committed by the State. In addition to providing overall security at the SCC, the grievant had oversight responsibility for the supervision of a lead security staff person and six other subordinates. The overall responsibility of the grievant, as with all employed at the SCC, was to provide a secure and safe environment for the custody of sexually violent predators.

### **Statement of the Facts—Origins of the Discharge.**

On March 20, 2010, the grievant reported the following facts to his supervisor. In the evening of that date at approximately 5:30 pm, he was called away from his office in Redwood 1 East to respond to an emergency in the Central Control Unit. The Central Control Unit had suffered a power outage or "bump". That power "bump" had frozen Central Control Station 1 (CCR 1). A subsequent error by a staff person had rendered both CCR 1 and Control Station 2 (CCR 2) inoperative.<sup>3</sup>

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<sup>1</sup> See State Exhibit 25.

<sup>2</sup> See State Exhibit 1, at Article 29. Grievance Procedure

<sup>3</sup> Tr. Page 24, Lines 20 – 25, Tr. Page 25, Lines 1 – 5.

<sup>4</sup> See State Exhibit 21, Copy of Incident Report filed by the grievant on March 22, 2010. See also State Exhibit 23, a handwritten report signed by the grievant and dated March 20, 2010.

<sup>5</sup> See State Exhibit 23 at Article 29. Grievance Procedure

<sup>6</sup> See State Exhibit 23, Tr. Page 25, Lines 1 – 5.

<sup>7</sup> See State Exhibit 4.

<sup>8</sup> See State Exhibit 2, at Page 2 of 6.

<sup>9</sup> The regular shift of the grievant was 8:00 am to 4:00pm.

These control stations constitute the heart of the security and inmate control system at the Center. He further reported that when he returned to his office at approximately 11:30 pm, he attempted to log in to his computer and found it was logged in to a pornographic website.<sup>4</sup> The computer was frozen and the grievant was not able to create a written report of the incident.

Therefore, he created a handwritten account of the event and left the note under the door of his supervisor who worked a normal day shift.<sup>5</sup> The grievant then left the island. He returned to the facility one week later after a leave. On May 5, 2010, the grievant was notified that the SCC intended to discipline him for the events of March 20, 2010.<sup>6</sup> On May 11, 2010, the Department of Health and Social Services (DSHS) lodged a request for an Internal Investigation of these events.<sup>7</sup>

The ground for the discipline contained in the Notice of Intent was that grievant had visited “potentially pornographic, sexually explicit and inappropriate video files and images...”<sup>8</sup> The State alleged that the dates and times of these visits were as follows:

1. January 28, 2010 at 8:38 pm.
2. February 3, 2010 during his regular shift.<sup>9</sup>
3. March 4, 2010 at 2:09 pm.
4. March 7, 2010 at 6:05 pm.
5. March 9, 2010 at 11:08 pm.
6. March 13, 2010 at 4:59 pm and 7:08 pm.
7. March 20, 2010 at<sup>10</sup>

Subsequently the grievant was called into investigative interviews on November 11, 2010, November 4, 2010, December 1, 2010 and December 8, 2010.<sup>11</sup> Following the completion of the investigation, grievant was discharged on July 11, 2011.

***Statement of the Facts - The Decision to Discipline to the Grievant.***

The report by the grievant triggered a forensic examination of his computer. That examination led to the allegations in this case. The Notice of Intent to Discipline stated the following:

*“Time and attendance records verify that access to non-work related, potentially pornographic, sexually explicit and inappropriate material happened while you*

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<sup>4</sup> See State Exhibit 21, Copy of Incident Report filed by the grievant on March 22, 2010. See also State Exhibit 23, a handwritten report signed by the grievant and dated March 20, 2010.

<sup>5</sup> See State Exhibit 23.

<sup>6</sup> See State Exhibit 2.

<sup>7</sup> See State Exhibit 4.

<sup>8</sup> See State Exhibit 2, at Page 2 of 6.

<sup>9</sup> The regular shift of the grievant was 8:00 am to 4:00pm.

<sup>10</sup> A review of the Notice of Intent to Discipline reveals that while the State accuses the grievant of viewing and access pornographic and/or non-work images on March 20, 2010, it does not allege specific times in that notice. See State Exhibit 2 at Page 2 of 6.

<sup>11</sup> See State Exhibit 15.

were on shift. You stated that the power went off during the power bumps the evening of March 20, 2011. Witnesses stated there was no loss of power. You implied that someone else may have used your log – on password and accessed the non – work related potentially pornographic, sexually explicit and inappropriate videos and images while logged on to your system. All individuals with log on capability to the Redwood office computer denied having used your password to log on to your system account and residents do not have access to this computer. “

**Statement of the Facts - The State’s Notification of Reasons for Discharge.**

On July 8, 2011, the State notified the grievant in writing that he would be discharged.<sup>12</sup> The Notice of Dismissal repeated the language quoted above from the Notice of Intent to Discipline. Further, in the Notice of Dismissal, the State set forth the following basis for its decision:

*“On March 20, 2010, you reported that SCC received several power bumps which caused a loss of power to the facility. You reported you attempted to log online and also attempted to log onto Microsoft Outlook and was unable to. A short time later an emergency occurred in Central Control that required your presence. You reported that when you returned to your office you attempted to log on again and your computer was logged on to a XXX-rated porn site”.*

A grievance challenging the dismissal was filed on July 12, 2011.<sup>13</sup> The parties attempted without success to resolve this matter. On June 26 and 27, 2012, the parties presented their proofs to the arbitrator in the form of opening statements, witness testimony and documentary evidence. Both parties exercised their right to engage in the cross examination of adverse witnesses. On August 23, 2012, the parties submitted Closing Arguments in the form of Post- Hearing Briefs to the Arbitrator. The oral hearing portion of this controversy was closed by the arbitrator as of the date of receipt of the post hearing briefs. A verbatim transcript of the oral hearing was transcribed.

**The Issue for Decision.**

The parties have agreed that the issue for decision by the Arbitrator is “was there just cause to terminate the grievant, and, if not, what is the appropriate remedy?”<sup>14</sup>

**Pertinent Provisions of the Agreement, Department Regulations and the Code of Conduct.**

*DSHS Administrative Policy 15.15 “Use of Electronic Messaging Systems and the Internet”.*

***Pornographic Materials: (Defined)***<sup>15</sup> *The explicit representation of the human body or sexual activity with the goal of sexual arousal and/or sexual relief. These materials connote the more direct, blunt, or excessive depiction of sexual acts, with little or no artistic value, intended for mere entertainment.*

***Sexually Explicit Materials:(Defined)*** *Video, photography, creative writing, films, magazines, or other materials intended to primarily arouse sexual desire or cause sexual arousal.*

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<sup>12</sup> See State Exhibit 25.

<sup>13</sup> See State Exhibit 30.

<sup>14</sup> Tr. Page 10, Lines 21 -25.

<sup>15</sup> Emphasis added by the arbitrator.

*C (3). Prohibited Uses - Employees are prohibited from using state-provided electronic messaging systems and the Internet in any of the following ways:*

- a. Personal use of state – provided electronic messaging systems or Internet access that does not meet the conditions found in C. 2. a - e above is prohibited.*
- b. Employees must not derive personal benefit or financial gain from the use of State provided email, voice mail, copying, imaging, or Internet access.*
- c. Employees must not use state –provided email, voice mail, copying imaging, or Internet access to conduct activities that support outside employment.*
- d. Employees must not use state – provided electronic messaging systems, faxing, scanning, or Internet access to create, access, post, send, print or any pornographic material unless the material is necessary for the performance of the employee’s job – related duties (e.g., when necessary for conducting an investigation. ). If such use is necessary for the performance of job- related duties, employees must get written permission from their supervisor authorizing such use.*

*E. Disciplinary Action for Noncompliance*

- 1. Violations of this policy may result in disciplinary action, up to and including termination from state employment. In addition, there may also be separate actions against an employee for violation of the state’s ethics laws such as letters of reprimand, fines, civil actions, and criminal prosecution.*
- 2. Pornographic Materials: DSHS has a zero tolerance regarding pornographic material in the workplace. If, after an investigation, it is found that an employee **used state resources to create, access, post, transmit, print, or store pornographic materials not appropriate for the workplace, the most stringent disciplinary action will be taken.***
- 3. Sexually Explicit Materials: If, after an investigation, it is found that an employee **used state resources to create, access, post, transmit, print, or store sexually explicit materials not appropriate for the workplace, appropriate disciplinary action will be taken, up to and including termination from DSHS employment.** The administration’s highest – level appointing authority will consult with the Senior Director of DSHS Human Resources to determine the level of disciplinary action taken. **DSHS Administrative Policy No. 18.64, “Standards of Ethical Conduct for Employees”.***

**Policy.**

**A. Required Standards of Behavior and Conduct.**

*All DSHS employees, contractors, and volunteers are required to perform their duties and responsibilities in a manner that maintains standards of behavior promoting public trust, faith, and confidence as described below:*

- 1. Serve the public with respect, concern, courtesy and responsiveness, recognizing that service to the public is the primary mission of state government.*
- 2. Promote an environment of public trust free from fraud, abuse of authority,*

and misuse of public property.

3. Strengthen public confidence in the integrity of state government by demonstrating the highest standards of personal integrity, fairness, honesty, and compliance with law, rules, regulations, and DSHS policies. ....

6. Comply with the requirements of this policy. Failure to comply with the requirements of this policy **may result in disciplinary action up to and including discharge from employment.**

**Special Commitment Center Policy 109 “Programs, Policies, Procedures and Work Instructions”.<sup>16</sup>**

**Policy**

.....10. New and revised policies shall be made known to all management and staff.

A. All staff members are required to be knowledgeable regarding policies bearing their duties and responsibilities. Failure to follow an established policy or required procedure may result in disciplinary action.....<sup>17</sup>

**Special Commitment Center Policy 926, “Internet Use & Electronic Messaging.” Policy.<sup>18</sup>**

**II.** Employees are responsible to know that the SCC electronic mail (sent and received) is turned over to the Office of the Attorney General. SCC employees are **strictly** forbidden from using the state electronic mail system for purposes other than department business.

**III.** Employees are specifically prohibited from using their assigned log-on and ID and password in order to allow any other person access to the SCC/DSHS network.

**VI.** Permitted personal use of SCC Computer Equipment.

The definitions of “ **permitted personal use,**” included in DSHS Administrative Policy 15.15 (Section B.1, and Section E, Examples 1 and 3), and WAC 292-110- 010, **do not apply** to SCC employees using SCC computer resources **except as otherwise permitted below** in subparagraph (a. & c. below) of this policy.

a. SCC employees may access the Internet using state owned or state- managed computers only for the purpose of conducting official DSHS business.

b. SCC employees are **strictly prohibited** from using a state computer to access the internet for personal use or communication other than as described (c.) below...

c. Employees may use state provided Internet for personal use to access state provided benefits on Department of Retirement Systems, Deferred Compensation Plan, Health Care Authority or Department of Personnel Web sites.....

**VII.** Personal use may not interfere with an employee’s official duties.

**IX. Non-Compliance with this policy.**

Any SCC employee who fails to comply with this policy and DSHS Administrative Policy 15.15 (and other policies or requirements referenced in Policy 15.15) may be subject to disciplinary action, up to and including dismissal from employment. Any SCC employee who violates these policies also may be subject to separate actions for state ethics law violations and possible criminal prosecution.

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<sup>16</sup> See State Exhibit 8.

<sup>17</sup> See State Exhibit 8.

<sup>18</sup> See State Exhibit 9.

*Per DSHS Policy No. 15.15...there is zero tolerance for pornographic and sexually explicit materials... Employee use of state provided electronic messaging and/or the internet to create, access, post, send, or print any sexually explicit or pornographic material in violation of this policy, it will result in termination of an individual's employment or contract with the Department. Additionally, the individual may be subject to other legal consequences for violating the state's ethics laws.*

***Special Commitment Center Policy 927, Data Access, Hardware and Software Purchase, Installation, Use and Maintenance.***<sup>19</sup>

*Purpose*

*This policy establishes rules for access, use and maintenance to ensure that computers owned by or leased to the SCC, and the information therein, are protected from theft, loss, damage, and misuse.*

*5. Computer Safety and Security.*

*A. Employees are subject to disciplinary action if DSHS or SCC IT Security policies or standards are not followed.....*

***Computer Screen Pop Up Warning***<sup>20</sup>

***!!! WARNING!!!***

*By accessing and using this system you are consenting to possible system monitoring for staff ethics, policy compliance, law enforcement and other purposes.*

*Any unauthorized use of this computer system may subject you to criminal prosecution and penalties, or other disciplinary action.*

*Examples:*

*Listening to Web Radio Stations. Playing games either online or on the local PC.*

*Checking your personal email – hotmail/AOL/MSN or other email accounts.*

*Per SCC Policy 926: Personal use of this computer is prohibited. Use of the Internet and e-mail is for State of Washington business only.*<sup>21</sup>

**The Burden and Quantum of Proof.**

Here, the State has taken steps to discharge this grievant. As a result, it was required to shoulder the burden of proof to go forward with the evidence. It did so at the oral hearing. It must now shoulder the ultimate burden of persuading the Arbitrator that, as the State articulates in its closing argument “reasonable justification exists arising from the employee’s conduct to warrant discipline”.<sup>22</sup> With regard to the quantum of proof to be applied to this case, the State argues that most arbitrators apply the “preponderance of the evidence” standard in ordinary cases of discharge and discipline and so should this arbitrator.

The arbitrator agrees with the States argument regarding how the standard is

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<sup>19</sup> See State Exhibit 10.

<sup>20</sup> See State Exhibit 11.

<sup>21</sup> See State Exhibit 12. The evidence at the oral hearing established that when an employee uses his or her password and login ID to access state owned computers; this screen warning appears in the form of a “pop up”. This warning disables access to the computer system in the absence of individual employee acknowledgement of the warning. Acknowledgement is accomplished by clicking the “Ok” icon.

<sup>22</sup> Employer’s Post Hearing Brief, at Page 5, Lines 22-25

applied. However, this is no “ordinary discipline and discharge case”. This is not a case of attendance violations, insubordination, or substandard work performance.<sup>23</sup> Accusations of the type with which this grievant is faced, whether ultimately sustained or not, raise questions about moral culpability. They carry with them a potential stigma on one’s personal character and morality. That is not the case when a grievant is found to have exceeded his or her attendance points under a “no fault” attendance plan, or to have left work early in defiance of a direct order to remain. In this case a finding sustaining the allegation that the grievant viewed pornography in the workplace would, as the Union correctly observes, “significantly impugn” this grievant’s reputation.

Given the reputational, character and moral questions raised here and given the stigma associated with accessing and viewing pornographic images on work related time, the arbitrator will not base his ruling on a conclusion that it was “more probable than not” that the grievant accessed and viewed pornography. Clearly, the State has a legitimate and highly defensible policy obligation to ensure that such conduct is eliminated from the workplace “root and branch. However, given the implications for the grievant in this case taken together with his previous good employment record, this case should turn on “clear and convincing” evidence that the grievant viewed pornography rather than whether the facts indicate a probability that the grievant did so.

This means that in this case the State must prove by clear and convincing evidence that on the dates alleged by the State, the grievant “accessed” pornographic or sexually explicit materials using state resources in violation of Department of Social and Health Services Administrative Policy No. 15.15.<sup>24</sup> The State “resource” in this case is the state owned computer that was located in the grievant’s office at the Redwood 1 East Living Unit.

**The Standard of Review by the Arbitrator.**

It is vital to the legitimacy of any award that the parties are able to ascertain the standards and limitations used by the arbitrator in reviewing the evidence and arriving at the ultimate conclusion about whether the offense was committed and the propriety of the penalty imposed. This matter is no different. It is the view of the arbitrator that the penalty determination in this case is the function of the State and not the arbitrator. In this connection, the arbitrator does not sit as a super personnel official of the State. Should I come to the belief that just cause exists but the penalty in this case should have not have been so harsh, that belief will not justify the substitution of a different penalty than that imposed by the State.

To say this does not relieve the arbitrator from assuring that the interests of the grievant are safeguarded and that the discharge is just, equitable and fair. In this

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<sup>23</sup> This does not minimize the significances of such offenses when committed. This description is comparative in nature.

<sup>24</sup> Such a finding would also constitute a violation of the SCC policies and the Code of Conduct outlined above.

context, the arbitrator can set aside the penalty where the facts demonstrate that the action of the State was discriminatory, or unfair, or capricious or arbitrary in nature. In essence, where the State has abused its management discretion, this arbitrator has the obligation – indeed the duty, to set the penalty aside. This duty also attaches should the State not be able to prove the prima facie elements of its claim in this case.

**The Position of the State.**

The Employer in this case imposed discipline for good reasons while observing proper procedure and considerations of fairness. The Employer has the burden to prove that the Grievant committed the offenses as charged and that the penalty was appropriate. The Grievant and the Union bear the burden of demonstrating the existence of any procedural irregularities. Whether the Employer met its burden in this case should be judged by the preponderance of the evidence standard.

In this case the State proved that the grievant was on notice of the existence of The Department of Health and Social Service and Special Commitment Center policies that prohibited the access and viewing of either pornographic or non-work related material on the Internet while using state owned computers. The grievant admitted to that awareness in his initial investigatory interview when he acknowledged that he signed the DSHS and SCC Internet access policies, his performance review documents, the Standards of Ethical Conduct for State employees and the relevant Special Commitment Center Policies forbidding using the workplace internet service to access pornographic or non work related materials.<sup>25</sup> The grievant was also familiar with a staff memo circulated to all employees that reiterated the zero tolerance policy. Finally, each time the grievant logs on to his computer; he encounters a “pop up” image warning all employees the personal use of the computer is prohibited. Grievant was aware of all this when he accessed pornographic and/or non-work related images.

The investigation in this case was fair and thorough. The Employer, while not required to conduct an exhaustive investigation, must gather all relevant information and must consider all sides to the dispute. The investigator for the State in this matter reviewed the IT examination report on the hard drive of the grievant and the screen shots which were saved to the temporary internet file folders in the hard drive of the grievant’s computer. Additionally, the investigator reviewed the Time and Attendance Reports for the grievant, the relevant On Site Administrative Reports and the Daily Shift reports for each date the grievant was alleged to have accessed and viewed pornographic web sites. The investigator conducted four (4) separate interviews of the grievant and reviewed all applicable policies and the computer report with the grievant.

Despite the fact that the first interview of the grievant took place seven and one half (7 ½) months after the grievant reported the pornographic incident, the delay did not prejudice the grievant. When interviewed, he provided specific information on

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<sup>25</sup> See State Exhibit 15, November 3, 2010 Investigative Interview of the Grievant.

his whereabouts on March 20, 2010. As to the remaining alleged dates, the grievant maintains that he did not access or view pornographic materials. When asked by the investigator whether he could have been more specific if asked days after the incident, he indicated that he could probably not be more specific. Moreover, the delay in this case was a direct result of the ongoing budget cycle reductions suffered by the SCC and performance problems with the original employee who would have conducted the investigation.

The grievant maintains that at the time the pornography was viewed, he was dealing with emergencies related to the power bumps. The State investigator conducted a fair and thorough investigation when he interviewed the grievant, available witnesses and reviewed time and attendance records regarding his version of the events of March 20, 2010. He was given notice of the charges against him and an opportunity to give his side of the story.

The State Investigator interviewed the grievant on four occasions. He admitted that he had been on websites unrelated to state business but when asked if he had viewed the pornographic images, he stated that he “did not think so”, or “No”, or “not to his knowledge” or “not that he could recall.” After the initial interview, the grievant remembered that he had left his password under the phone in his office. At follow up interviews he replied that he “did not recall” or “Not that I recall” when asked whether he ever viewed pornography on a state computer or.

After the interviews and investigative work, the grievant was provided a Notice of Intent to Discipline. The letter also included copies of all witness statements, IT examination reports from the grievant’s hard drive as well as time and attendance records and the policies that governed the actions by the Employer. There was a subsequent pre-disciplinary hearing at which the grievant and his representative had an opportunity to respond to the allegations against him.

With regard to the January 28, 2010 allegation that grievant viewed pornography, grievant never provided information as to his whereabouts during the investigation. At the oral hearing, the State proved that grievant was on duty at the time that the pornographic images were accessed and that his log in ID was used to access the images. The grievant offered only a logbook entry to establish that he was not at his desk when the images were accessed. Even then, he acknowledged that there are times when occurrences are not logged. A separate witness described the logbooks as “fallible.” Moreover, The Superintendent of the facility testified that he could see no need to write down an employees name to record that they remained on a unit and in his experience, to do so was not a practice.

As to the February 3, 2010 allegation of viewing pornography, the State proved that the grievant was on duty for his regular shift and during the multiple investigative interviews, the grievant did not provide information regarding why he would have not have been at his desk at the time that he was alleged to have viewed pornography. The grievant only denied that he accessed pornography

on the date in question.

As to the March 4, 2010 allegation that he viewed the You Tube website at 2:09 pm, the State proved that the grievant was working his regular shift from 8:00 am to 4:00 pm and his presence at the facility is proven by the On Site administrator's report and the Shift Assignment Roster. The grievant failed to provide a reason that he would not have been at his desk at the Redwood Office even though he denies the allegation.

With regard to the March 7, 2010 allegation, the IT Report proves that the grievant accessed a video at 6:05 pm. Based on the Daily Shift Report, the Time and Attendance records and the Overtime Request and Authorization forms, the State proved that the grievant began work at 3:00 pm and worked overtime to 8:45 pm. Grievant alleges that he was on a walking tour of the facility from 4:45 pm when he left Redwood East for a period of 95 minutes. However, the Fir and Dogwood Unit logbooks indicate that the grievant completed his tour of the two units from 6:20 to 6:21. That means that the grievant would have had ample time to view the video at 6:05 pm and walk back to the Fir Unit at 6:20 pm. Even the grievant acknowledges that at most, it would take 5 to 6 minutes to walk from the Redwood Unit to the Fir Unit.

As to the events of March 9, 2010, The IT report of the screen shots shows that he accessed a video at 11:08 pm while working his regular shift. The Daily Shift Report proves his presence at the facility that day in the capacity of Redwood Supervisor. The grievant insists that at 11:08 there were two RRC's using his computer to complete a report following a residential room search. The Redwood Logbook reflects that the room search began at 9:55 pm. and was completed at 10:18 am. Thereafter, according to the grievant, the administrative process of completing reports on the search could take 90 minutes or more, bringing the time to 11:48, which encompasses the 11:08 pm video viewing. Interestingly, the grievant did not share this information on his whereabouts during the investigative interviews nor did he share this information during the pre-disciplinary hearing process.

The IT report for March 13, 2010 revealed that grievant viewed *hmtl* files while working overtime at 4:59 pm and 7:08 pm. The Daily Shift Report and the time and attendance sheet proves that grievant was working overtime and was present at the facility. Nevertheless, during the investigative interviews and the Pre: Disciplinary Hearing, the grievant did not say where he was at 4:59 pm. At the oral hearing, he said that he was working as Security 1 and the images were viewed while he was on a room search. Nevertheless, the grievant testified at the hearing that supervising room searches was part of the duties of the Residential Supervisor and not those of Security 1.

The grievant alleges that he was not in his office at 4:59 pm or 7:08 pm. He maintains that he was on Alder Unit at 7:08 pm. The grievant relies on the Fir

Logbook that indicates that the grievant came on the Fir Unit at 6:30 pm and left at 6:49 pm. The grievant also relies on the video recording report that indicates he signed it in the capacity of supervisor of the room search. However, none of this information was provided to the investigator during the investigation and none of this information was given to management during the pre-disciplinary hearing. The video recording report shows that grievant signed the report but does not indicate that the grievant was on Alder during the search at a *particular* time although he testified that he was present for most of the search.

On March 20, 2010, the grievant accessed multiple pornographic images between 5:43 pm and 10:30pm. Also, based on an IT Report, which was not available at the time of discipline, the State proved that the grievant accessed additional images on that same date. Despite the grievant's testimony about the time of the power bumps in the Central Control, the failure of Central Control Room 2 did not occur until 7:45 that evening. The grievant argues that someone else viewed the images. However, for that to be true the log-in on the grievant's computer would have had to take place before 5:30 pm, when he was notified that Central Control 1 power was down both **before and after he returned to the office at the end of his shift. This would have to happen without the grievant witnessing anyone at his computer.**

Additionally, the grievant testified that he was the Security Supervisor on the date in question. However, the On Site Supervisor, Steve Wilson, testified that he assigned the grievant as Residential 1 and a witness; Shunta Sinclair recalled that he was assigned to Redwood 1. Although staff testified that they saw the grievant in Central Control, the evidence at the hearing established that one could walk from one facility on the grounds to any other facility within 3 to 4 minutes. His presence in Central Control did not prevent him from returning to his desk at Redwood 1 and accessing the pornographic images. Moreover, there were breaks in the time that the pornography was viewed "under his login". These break times would have allowed the grievant the opportunity to leave and return to his office.

The grievant's statement that he kept his password on a post-it note was unpersuasive. First, the grievant did not mention having the password under his phone until twenty minutes after the first investigatory interview ended. Then the grievant called the investigator and told him that he had just found his password on the bottom of the Redwood East telephone. Later, in his second interview, he admitted that he did remember the note during the first interview but wanted to make sure that the note was there before he disclosed its existence. This "after the fact" disclosure was unpersuasive and conveniently connected to the "discovery" that someone had logged into his computer to view pornography. Additionally, based on his previous role as manager at the facility, it is difficult for the appointing authority to believe that he would keep his password under his phone.

### **Position of the Union**

The State admits that its decision to discharge the grievant was based exclusively on its finding that the grievant was present at the facility on the dates and times that pornography was viewed and that the log-in ID of the grievant was used to open the computer in question. It also concedes that it would not be inconceivable that someone other than the grievant learned his password. The State agrees that supervisors such as the grievant move around the facility and it's difficult to ascertain the actual location of the person from moment to moment during the shift.

The State examined the grievant's responses to its investigative questions in November 2010 and arrived at the conclusion that he was guilty but concedes that he was either being honest when reporting discovering pornography or covering his tracks after being discovered.<sup>26</sup> Finally, the Union was able to establish that if the grievant walked away from his computer without logging out, someone other than the grievant would have a ten minute window to enter his unlocked office and search the internet using the grievant's log-in ID.<sup>27</sup>

These concessions by the State make it obvious that the State would want to explore the possibility that the grievant was not in his office during the times and dates in question. The State had the exact times the images were viewed and the State had "myriad" records to ascertain the whereabouts of the grievant. Despite not doing so, the State's investigator stated at the oral hearing that this would have been a "probative and "relevant" inquiry to undertake.<sup>28</sup>

On March 20, 2010, the grievant found a frozen pornographic image on his screen upon returning to his office at approximately 11:30 pm after being away from his office for multiple hours reacting to a power outage that occurred that evening at or around 5:30 pm. Because his computer was frozen, and he had a short time to take a boat off of the island at the end of his shift, he drafted a note informing his supervisor of his discovery, slipped that note under her door and left a voice message for her. For the next week, the grievant was on leave.

Upon his return from leave, the State made no mention of his report to the grievant until early November of 2010, some eight months later when he was summoned to an investigative meeting with no knowledge of what he was to be asked.<sup>29</sup> The State emphasizes that during the meeting, the grievant did not immediately disclose that his password was kept on a post-it note under his telephone and that he had shared his password with a co worker on a previous occasion.

This is not noteworthy given the fact that the grievant had no knowledge of the

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<sup>26</sup> Tr. P 154, Lines 14-17.

<sup>27</sup> Tr. P. 76, Lines 7 – 18.

<sup>28</sup> Tr. P. 53-54.

<sup>29</sup> Tr. P. 237 – 238.

subject matter of the meeting when he entered. The real issue is the effect of the eight month delay between the time the grievant reported the frozen computer image and the investigatory interview which denied to the grievant the opportunity to prove his whereabouts in the facility on March 20, 2010, the date that he was alleged to have accessed and viewed pornographic images.

The evidence at the oral hearing demonstrated that it was very likely that the grievant was not in his office during the times his computer was used to access pornography. Had the employer done timely interviews of the grievant and the other co-workers on shift that evening in close proximity to the date in question, everyone involved could have been specific about the whereabouts of the grievant and the Union could have obtained statements from employees with specific recall of the grievant's whereabouts.

What we have is a record that is "inconsistent" and "speculative". The grievant maintains that he left his office after sending an email at 6:20 pm and did not return until 11:30 that evening after responding to the facility power bump. Earlier, at 5:30 pm, when notified of the power bump, he left the office to be briefed and returned to his office after approximately 30 minutes. The pornographic images were accessed at 5:43 p.m., and again at 8:55 p.m. If his testimony is to be believed, he could not have been in his office during the times the pornography was accessed. A timely investigation would have interviewed co-workers who could specifically confirm whether or not they saw the grievant in the Control Center, or other areas of the facility. The failure to do so meant that eight months later, no one could, with any degree of certainty, recall the events of that evening.

Additionally, when the State did conduct its investigation it took no steps to discover what the grievant's actions were on March 20, 2010 or any of the other alleged dates in order to match the location of the grievant to the dates and times that the images were alleged to have been viewed. In light of this, the State's investigator now concedes that looking back, doing these things was "probably important."<sup>30</sup> At the oral hearing, The State's representative attempted to assert that such an investigation was carried out but then conceded that he could not describe who performed that investigation.<sup>31</sup>

Instead the grievant, through the Union, was required to make discovery requests for information that might shed a light on where he was on the dates in question. At a time far removed from the events in question, the grievant was able to demonstrate from the discovery records obtained that he could not have been sitting at his computer when the State alleges the images were viewed. The grievant made an immediate report of the discovery of pornography. This gave the State the opportunity to conduct a timely investigation. Instead it waited eight months.

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<sup>30</sup> Tr. P. 54, Lines 13-17.

<sup>31</sup> Tr. P 127, Lines 13 – 20.

This delay deprived the grievant of the ability to provide a definitive answer to whether he could have been near the computer at the times in question. It must be remembered here that the State concedes that it is difficult to ascertain where someone is within the facility at any given moment. This failure to commence a timely investigation resulted in limiting the grievant's ability to assert a defense to the allegations.

**Discussion.**

The position of the State can be best summarized by a very important exchange between Counsel for the State and Mr. Mark F. Davis, a witness for the State. Mr. Davis is the Administrative Services Chief of the Special Commitment Center, where the grievant was employed. Mr. Davis had the responsibility to represent the Superintendent of the Commitment Center at the Pre-Disciplinary hearing for the grievant. The exchange between Mr. Davis and Counsel for the State went as follows:

A. I wanted to find an error on our part, or a mistake. I  
20 truly sincerely wanted to find a problem with our  
21. investigation.

22 Q (By Ms. Asch) And based on your review of the  
23 investigation and documents obtained, in your opinion,  
24 did Mr. Anderson view these images on the days in question?

A In my opinion, Mr. Anderson was present at the  
2 institution on the dates and the times that the images  
3 were viewed, and the images were viewed with his password  
4 and his login ID connected to them. That is my opinion.

5 MS. OESCH: No further questions at  
6 this time.<sup>32</sup>

Thus, the State argues that as to each date and time that the grievant was accused of viewing pornography, its claims are supported and proved by the admitted fact that (1). The grievant was present at the institution for work on the dates and times in question, and (2), that the images were viewed with his password and his login ID "connected" to them. Moreover, the grievant could not account for his whereabouts and therefore could have either been at his desk or could have gone back to his desk. Additionally, the grievant did not share information as to his whereabouts at the investigative stage of these proceedings or at the Pre-disciplinary stage. The logic of the State is that because of these circumstances an inference is warranted that the grievant viewed or accessed pornographic images at the dates and times alleged.

Thus, the sole question presented to the arbitrator is whether, based on clear and convincing evidence in the record, the grievant accessed pornographic images on January 28, February 3, March 4, March 7, March 9, March 13 and March 20, 2010, in violation of Department of Social and Health Services Administrative Policies 15.15, 18.64 and Special Commitment Center Policies 109, 926 and 927.

The facts of this case are respectfully, but vigorously disputed. There are few if any, undisputed facts available to the arbitrator in this case. The arbitrator can say that

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<sup>32</sup> Tr. Page 119, Lines 19-25, Tr. Page 120, Lines 1 – 6.

by inference he has reached a conclusion on a contested point that would allow certain inferences to be drawn. At the oral hearing the parties contested whether or not the grievant was working in the capacity of Security Supervisor 1 or Residential Supervisor 1, on March 20, 2010, at about 5:30 pm, which is the date and time that the grievant was notified of the first power bump, or outage.

The answer to this question has some inferential significance. First, the parties readily acknowledge that the RRC4 position in which the grievant functioned contained general flexibility with respect to the duties to be performed from day to day. One such flexibility was the ability to work either in the capacity of Supervisor 1 or Residential Supervisor 1. The difference is mobility or movement by the employee. In the capacity of Supervisor 1, the employee would be expected to move around the entire facility for the purpose of conducting inspections and supervising security of the entire facility. The principal location for the Security Supervisor 1 would be in the office of Central Control. This is the office where the power outage originated on March 20, 2010.

If the RRC4 's were working in the capacity of Residential Supervisor they would be assigned to one Residential Unit, and would not roam. They would work out of the Residential office on the Unit where they were assigned to work. In the case at hand, when the grievant was assigned to Residential Supervisor duties, he worked out of the Redwood Unit 1 office. That office contained a computer that was designated for the grievant. The grievant had a login and Password that he used to access the computer.

The State contends that on the evening of March 20, 2010, the grievant was working as a Residential Supervisor at Redwood 1 Unit. The inference to be drawn from that contention is that the grievant would not have been roaming and would have been in his office at his desk that evening. The Union argues that the Grievant was working in the Capacity of Security Supervisor 1 on that evening and therefore, would have been roaming the facility and not at his desk. If accepted, that fact carries with it an inference that someone other than the grievant was assigned as Residential Supervisor to Redwood 1 Unit on the evening of March 20, 2010, was working out of that office and had access to the computer in Redwood 1 during the time period that the State contends that the grievant accessed pornographic images.<sup>33</sup>

This comes down to a determination of credibility. The arbitrator begins with the notion that both sides testified in as credible and truthful a fashion as they could unless the facts and testimony demonstrate prevarication on either side. The arbitrator does not conclude that that is the case here. With this conclusion in mind the arbitrator looks to any independent facts that exist and asks, "What version of

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<sup>33</sup> This does not warrant an inference that this "someone" accessed the computer on that night and viewed pornography. The question becomes whether the possibility existed that "someone" other than the grievant **might** have done so.

the events enjoys greater support by the independent facts?" The arbitrator has arrived at the conclusion that the independent facts support the grievant's version that he was working in the capacity of Security Supervisor 1 on the evening of March 20, 2010, was not assigned to the Redwood One Unit office and was roaming the facility on the third shift.

This conclusion is based on Union Exhibits 17 and 5. Union Exhibit 17 is the Daily Shift Report for March 20, 2010. That report shows that the grievant was signed as the Redwood 1 Supervisor for the first shift from 8:00 am to 4:00 pm. The Grievant contends that he continued to work the third shift from 4:00pm to 12:00pm but that his assignment changed to Security Supervisor for the reason that the Security Operations Manager on the previous day asked him to work over on the swing shift and have Sue O'Leary shadow him as Security 1.<sup>34</sup>

The On – Site Supervisor for that swing shift testified that someone other than the grievant was assigned to Security 1 for that shift and that the Grievant was Residential 1.<sup>35</sup> Union Exhibit 5 was an Incident Report filed on the evening of March 20, 2010 at approximately 7:45 in the evening. An employee who was working in the Control Center that evening and attempted to unfreeze CCR 1 filed the report and accidentally disabled CCR 2 making both CCR's inoperative. The Incident report documented the mistake. It was submitted to the grievant. It was signed by the grievant as received in the ordinary course of business. The grievant signed the report in the capacity of "Security 1" and not "Residential 1" as testified to by the On-Site Supervisor.<sup>36</sup>

Additionally, that report was sent by the grievant to the On-Site supervisor, The On – Site supervisor signed the report as received by him in the ordinary course of business at the facility. That report recorded that the grievant was acting in the capacity of "Security 1". It is clear that the On–Site supervisor saw that report and had the opportunity to inspect that report before he signed it. Although the On-Site supervisor testified at the oral hearing that the grievant was **not** working as Security 1, he may not now deny this in the face of a document signed by him that that confirms the grievant's version of the events. The arbitrator must add here that he believes that the denial by the On-Site Supervisor was not the result of prevarication, but of lack of memory.

The overarching fact this case is that the passage of time dimmed the crispness of memory. This is portrayed starkly by a review of the witness statements taken by the State. When asked who worked in the position of Security 1 that evening of March 20,2010, the names given by the five witnesses were the grievant, Darius Mark,<sup>37</sup> Sue O'Leary. "Anderson, I think" and "I don't recall".<sup>38</sup>These interviews

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<sup>34</sup> Tr. P. 222, Lines 1 – 8.

<sup>35</sup> Tr. P. 85, Lines 13 – 19.

<sup>36</sup> See also, State Exhibit 21 at Page 1 of 2 and Page 2 of 2.

<sup>37</sup> According to Wilson, the On Site Supervisor.

were conducted in December of 2010, some nine (9) months after the events in question. It is understandable that they might not recall the events of that day with precision.

**Finding of Fact.**

The arbitrator concludes that the grievant worked the first shift from 8:00 am to 4:00 pm as Residential 1 and for the swing shift from 4:00 pm to 12:00 pm as Security 1. **Therefore, the grievant would have been roaming the Special Commitment Center working out of Central Control and not Redwood One.** Further, the arbitrator concludes that someone other than the grievant was assigned as Residential 1 for that March 20,2012 swing shift and that the person as Residential 1 had access to the computer which was assigned to the grievant. Thus, it cannot be argued that the grievant had exclusive access to the computer during the times that the State alleges that pornographic images were downloaded and viewed. With this in mind, the arbitrator must examine the substance of the allegations in this case.

**The March 20, 2010 Allegations.**

On this date the State alleges that the grievant viewed pornographic images at 5:43 pm and at 8:55 pm. The grievant testified that at 5:30 pm, he was notified that the first of the two central control panels had been compromised. The grievant immediately reported to Central Control to be briefed. Steve Wilson, the On Site Supervisor recalls conducting that briefing and recalls telling the grievant to check on Unit Security.<sup>39</sup> The grievant testified that he returned to his office from that briefing at 6:00 pm. Thereafter, the grievant sent an email using his computer at 6:20 pm.<sup>40</sup>

Immediately thereafter, according to the grievant, he left his office and did not return until 11:30 that evening. The State did not directly rebut this evidence that was designed to show that the grievant could not have been at his desk at the times alleged. Moreover, the fact that the grievant was working as Security 1 that evening warrants the inference that the grievant would have been roaming the facility. The arbitrator is well aware that when the grievant was summoned to the Control Room area that evening, he was at his desk in Redwood 1. When this is balanced against the fact that the grievant was working Security 1 that evening, was likely roaming the facility, and the lack of evidence rebutting the Union's presentation on this issue, the arbitrator is not clearly convinced that the grievant was sitting at his desk viewing pornography at the times argued by the State.

**The January 28, 2010 Allegations.**

Here the State alleges that the grievant viewed pornographic images at 8:38 pm. The grievant testified that he was working as a Security Supervisor that evening. The presumption here is the grievant would be assigned to the Shift Office where the On-Site Administrator is located. He would also roam for the shift and not be

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<sup>38</sup> See State Exhibit 15.

<sup>39</sup> Tr. Page 92 – 95.

<sup>40</sup> See Exhibit 39.

assigned to Redwood 1, where the accessed computer was located. Unit Supervisors would have occupied that office. The inference here is that others would have access to the computer assigned to the grievant.

The Union submitted a logbook from the Fir Residential Unit.<sup>41</sup> The Unit Log Book tracks the movements of personnel assigned to the Unit or who come onto or leave a unit. The Log Book reflected that the grievant entered the Fir Unit at 7:50 pm. The Log Book gives no indication that the grievant left the Fir Unit and the last recordation shows the grievant on the Fir Unit at 9:05. The Grievant testified that when personnel are on a unit for extended periods of time, the Log Book notes the continued presence of the personnel.

Thus, argues the Union, at 8:38, when the State alleges that the grievant was viewing pornographic images at his computer in Redwood 1, the grievant was on Fir Unit. The Union argues additionally that as a Security Supervisor that evening, the grievant would have been working out of the Shift Office and someone else would have been assigned to the Redwood office. To counter this proof the State argued that the personnel who kept the Log Books were “fallible”.<sup>42</sup> Additionally, when Mark Davis, the Administrative Services Chief at the SCC testified on **cross** examination, he stated that he looked to see if there was any clear evidence that the grievant **was not** at work or **would not have been able to access his computer** “during that period of time”. He found no evidence that this would have been the case.<sup>43</sup>

When he was asked whether he looked at the Log Book entries for all of the dates and times to compare them with the dates and times that the pornography was accessed, he stated that he did not and he could not say whether anyone associated with the investigation had done so.<sup>44</sup> The arbitrator noted that this testimony applied to the entirety of the States investigation and not just to the allegations of January 28, 2010. Thus, the State reasoned that since there was no evidence that the grievant **had not accessed his computer** and that **he was not at work** during these periods, therefore, he must have accessed the images. This is not clear and convincing proof that the grievant was at his desk viewing pornographic images as the State alleges.

### **The March 7, 2010 Allegations.**

Here, the State alleges that the pornographic images were viewed at 6:05 pm. The grievant testified that he was working as a Security Supervisor on that date and the he was required to conduct a tour of the facility. The Union presented Union Exhibit 5 which indicates that the grievant entered the Redwood East Unit at 4:45

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<sup>41</sup> Union Exhibit 1. The Special Commitment Facility is composed of eight (8) residential units, each titled Alder, Birch, Cedar, Dogwood, Elm

<sup>42</sup> Tr. Page 126, Line 2.

<sup>43</sup> Tr. Page 122.

<sup>44</sup> Tr. Page 127, Lines 15 – 20.

pm and then entered the Fir Unit at 6:20 pm. Further, counters the Union, Employer Exhibit 42 establishes that the grievant went from the Fir Unit to the Dogwood Unit at 6:21.

According to the Union and the Grievant, from 4:45 pm to 6:20 pm, the grievant was completing his facility tour on the remaining residential units.<sup>45</sup> The Union argues that logbook entries for the remaining units are missing. These log books, according to the Union, would have been able to demonstrate that the grievant was in a “continuous process of facility inspection” during the time he is alleged to have viewed pornography. The State could have provided these documents but failed to do so.

The Union bases its defense on evidence from the Log Books and the testimony of the grievant. It was the burden of the State to establish by evidence that the grievant was at his desk at 6:05 pm and that he accessed pornographic images. To meet this burden the State relied on evidence that showed that the grievant was at work at the time the images were accessed and that his log in ID was used to access the images. This evidence did not meet the prima facie burden and it was rebutted by evidence and testimony from the Union to the contrary.

**The March 9, 2010 Allegations.**

The State alleges that the pornographic viewing took place at 11:08 am. The grievant was working as Supervisor of the Redwood Unit. The Union offered Exhibit 6. This exhibit records that the grievant was supervising a search of resident’s room in the Redwood Unit. Exhibit 6 records that the search began at 9:55. The search concluded at 10:18 am. The Grievant testified that upon finishing the search, he allowed access to the Redwood 1 office for the employees involved in the search to allow them to use his computer to complete the paperwork involved with the search. The grievant testified that this process took “up to “ninety (90) minutes to complete.

Thus, according to the grievant, he could not have accessed pornography at 11:08 am for the reason that his staff to complete the room search paperwork was using his computer. This evidence tended to establish that while the grievant might have been at his desk, others had access to his computer. Thus, there is no direct evidence that the grievant accessed pornography, nor is there circumstantial evidence that proves that the grievant, and **no one else**, had access to his computer at 11:08 am on the morning of March 9, 2010. What remained constant, as prima facie proof was the State’s assertion that grievant was at work and that his access ID was used. This falls short of clear and convincing direct evidence of the State’s allegations.

**The March 13, 2010 Allegations.**

The State alleges that the grievant viewed pornographic images on this date at 7:08 pm. The Union produced Exhibit 2. That exhibit records that the grievant was on Fir Unit conducting a facility tour from 6:30 pm to 6:49 pm. Exhibit 2 also reflects that at 7:15 pm, the grievant was at the Alder Unit responding to a room search request.

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<sup>45</sup> Tr. Page 252, Lines 19 – 25.

The grievant testified that he was called directly from the facility tour on the Fir Unit to the Alder Unit and therefore, could not have been at the Redwood Unit at 7:08 pm viewing pornographic images.

The State argues that in view of the short periods of time that it took to access any of the facilities of the unit, the grievant would have had time to return to his computer to access pornography. To accept this argument, the arbitrator would have to infer that since the grievant would have had time to return to his computer, then he must have done so. Since he must have done so, it becomes fact that he did. The inference is tenuous and the argument is not clear and convincing evidence that the grievant accessed pornography at 7:08 pm on the evening of March 13, 2010. Moreover, The Union offered un rebutted evidence tending to show the grievant was responding to a room search request at that time.

As to each allegation of a date and time of viewing pornography or non-work related images, The State argues that the grievant could not account for his whereabouts, and therefore a strong inference arises that he could have been at his desk viewing pornography when the State says that he was. Additionally, the grievant did not share information as to his whereabouts at the investigatory interview process nor did he share this information at the Pre-Discipline stage of the case.

There are several difficulties with these arguments. First, they shift the burden of proof to the grievant to prove or establish that he was not at his desk, as the State alleges. To do this, the grievant would have to prove his whereabouts during the time periods alleged by the State. A basic burden of proof principle applies to this argument. Before an examination of the grievant's version of the events, including whether or not he produced proof of his whereabouts, the State must carry its burden to prove by clear and convincing evidence that the grievant was at his desk at the alleged dates and times and that during each of those dates and times he accessed and viewed pornography or non - work related websites.

This is the hurdle for the State. On the facts, it is difficult to surmount that hurdle for these reasons. First, as outlined above, as to each allegation the State did not present evidence to clearly and conclusively establish that the grievant was at his desk when the pornographic images were viewed. The State asks the arbitrator to reach its asserted conclusions based on inference. Second, when asked by Counsel for the State to categorically testify that the grievant viewed pornography as the state alleges, the State witness could not do so and would only go so far as to opine that the grievant was at work on the dates and times in question and that his login id was used to access the images.

The colloquy between Counsel for the State and the witness evidencing this opinion is outlined above. Stated plainly, despite the use of the grievants log in ID, the States witness would not embrace the key factual conclusion that the grievant was at his desk viewing pornography on the dates and times in question. The arbitrator

respectfully submits that he cannot do what the witness for the State would not do.

The arbitrator believes that this witness testified honestly and credibly. What we have is a State witness who honestly cannot confirm the very proof proposition that forms the core of the States case against the grievant. He declined to do so because in good conscience, he could not. At this stage in the burden allocation process, whether or not the grievant proved his whereabouts is a question that cannot be reached for the reason that the State, did not establish, through clear and convincing direct evidence or through clear and convincing circumstantial evidence, that on the dates and times it alleges, that the grievant was at his desk accessing and viewing pornography.<sup>46</sup>

There is an additional difficulty with this case. When the arbitrator inspected the forensic screen shot images the grievant was alleged to have viewed, his attention was directed to the file paths for the images as he followed the testimony of the State witness who inspected the hard drive on the Redwood East Computer<sup>47</sup>. The file path contained the words "Documents and Settings/" followed by a Log In ID belong to an employee of the SCC.

All told there were 145 images. In addition to the grievant's log in ID, the arbitrator noted that at least seven (7) additional logins were contained in the file path for the images. Two of the images, numbered Image 141 and 141, were non pornographic website images named "EZ Recipes.net" and "Eurovision Contest". These were not pornographic sites but were clearly in violation of the policy against accessing non-work related websites. These logins indicated that the login ID "SCCAAdmin" was used to access these sites.

As the arbitrator interpreted these files, at least six (6) additional log in ID's revealed access to a pornographic site in the same fashion as the grievant was alleged to have done. This information was taken from the hard drive of the grievant's computer. This indicates that the grievant's login ID was not the only ID under which pornographic images had been accessed and that in fact, others had access to grievant's computer during the relevant investigatory periods relied upon by the State.

Additionally, there was no evidence in the record that the State had either

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<sup>46</sup> Clear and convincing circumstantial evidence would have been evidence that, while not establishing directly that the grievant was at his desk viewing pornography, would have excluded any possibility other than the grievant was at his desk viewing pornographic images at the dates and times alleged by the State. This is the time honored "footprints in the snow" analogy. The evidence did not effectively discount such possibilities as other coworkers having access to the computer at the dates and times alleged or others having accessed the grievants password and log in ID.

<sup>47</sup> See State Exhibit 14, Pages 5 through 25.

commenced discipline against those employees whose log in ID's had been used or had declined to discipline such employees. The State made it clear that these files were all taken from the grievant's computer. This matter was not raised by either the Union or the State and this arbitrator should not decide an issue not presented to him for resolution. Therefore, this arbitrator expresses no opinion on whether the grievant was the subject of disparate treatment as a matter of due process.

However, this sequence of events raises persuasive doubts about a circumstantial argument that it could only have been the grievant, **and no one else** who used his login ID to access pornographic images. This information underscores that others could, and did have access to the grievant's computer for the purpose of accessing both pornographic and non-pornographic, non-work related images. Moreover, the State did not produce documents or testimony that directly rebutted the testimony and documents presented by the Union intended to show that the grievant could not have been where the State alleges that he was on the dates and times in question. To contest this evidence and testimony, the State relies on inference. First, given the short travel time distances between the residential units, it would have been quite possible for the grievant to return to the Redwood Unit computer, access the pornographic images and then return to the Units reflected in the Log Book records.

Second, when first questioned about these events, grievant could not produce proof of his whereabouts. Further, his "story" about reporting the pornographic image, the lax protection of his password and the use of his password by others is inconsistent. The problem with this inferential argument is that these inferences only become viable once the State has produced clear and convincing prima facie evidence that the grievant was at his computer at the dates and times alleged. This the State did not do. These inferential arguments give no support to the prima facie burden of the state.

There is no direct evidence in the record proving that the grievant was at his desk viewing such images. The evidence that the grievant was at work during the time that the images were accessed and that the grievant's ID and login information was used to gain access is circumstantial in nature. It does not exclude other possibilities of access by someone other than the grievant. In fact the record evidence shows that others actually had, or might have had access to the grievant's computer.

Examples of that evidence is contained in the review of the forensic images<sup>48</sup> and the un rebutted testimony of the grievant that he allowed access to the Redwood 1 computer to complete room search reports. These facts do not prove that someone other than the grievant accessed the pornographic images that concerned the State. However, these facts severely weaken the argument that it could have been the grievant and no one else who accessed the pornographic images.

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<sup>48</sup> State Exhibit 14.

### **The Actions of the Grievant during the Investigative Phase.**

The State insists that when the grievant responded to questions from the he acted in a culpable manner by not immediately disclosing that his password was kept on a post – it note under his telephone and not disclosing that he had shared his password with another employee. Additionally culpable was his failure to provide proof of his whereabouts during the dates and times he was accused of accessing pornography.

The Union counters that there was a lapse of eight (8) months between his act of reporting the incident and his being suddenly confronted with an investigation. His behavior, argues the Union should seen as a function of uncertainty and the inability to prove his whereabouts because of the fading of his recollection with the passage of time. Moreover, argues the Union, that lapse of time deprived the grievant of the ability to access evidence to mount an effective case for his whereabouts during the investigatory period.

The Union has the better argument. The witnesses, and the evidence to prove or disprove the case against the grievant were in control of the State and not the grievant. It was not evasive for the grievant not to crisply recollect all the facts surrounding his behavior after an eight-month time lapse during which there was absolutely no indication that the grievant was under any suspicion for reporting the offending image. Additionally, the investigation by the State had its shortcomings. The States never interviewed a witness whom the Union alleges was assigned to “shadow” the grievant in his capacity as Security 1 on the night of March 20, 2010 in order to determine the whereabouts of the grievant on that night. This witness did testify at the oral hearing but stated at the outset that her memory of that day was “not very good”.<sup>49</sup>

Although the investigator considered that it would have been important to ask available witnesses about the whereabouts of the grievant on March 20, he did not explore that question with the staff on duty that night.<sup>50</sup> Additionally, in hindsight, the investigator conceded that he should have asked questions of the staff regarding whether the grievant was in the Central Control Office rather than in his Redwood 1 office when the pornographic images were allegedly viewed.<sup>51</sup>

Moreover, the investigator could not recall whether the grievant worked a double shift on the night of March 20, 2010, a fact that the grievant testified to and that was reflected in the record evidence. The State could also not establish that someone actually compared the dates and times that that the grievant was alleged to have accessed pornography with Log Books in the possession of the State that might have established the actual whereabouts of the grievant.

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<sup>49</sup> Tr. 200, Line 6

<sup>50</sup> Tr. Page 53, Lines 18 – 24.

<sup>51</sup> Tr. Page 54, Lines 6 – 21.

Additionally, various aspects of the testimony of the investigator were based on “I think” responses rather than specific memory. The arbitrator must emphasize here that his estimation of the testimony of the investigator had nothing to do with a belief that the investigator evaded. Rather, the effect of time reduced the overall credibility of his testimony. The sum and substance of these observations shed doubt on the central issue of whether there was just cause to find that the grievant accessed pornography on the dates and times alleged by the State.

**The Grievant’s Log - in ID.**

This is the most difficult factual issue in this case. Does the record evidence showing that the grievant’s Log-In ID was used establish that it was the grievant and no one else who accessed these images? This is a prima facie burden of proof conclusion. The grievant denied that he used his access authority to view pornography on the dates and times that the State alleges. No one saw the grievant sitting at his desk viewing the images. The evidence of the Union tending to show that the grievant was not at his desk during these dates and times was not rebutted effectively by the State nor was it seriously considered and investigated by the State.<sup>52</sup> The witnesses for the State could not embrace the prima facie proposition that the grievant was at his desk viewing pornography. The unrebutted evidence of the Union on the whereabouts of the grievant left the prima facie case of the State unproven. Finally, the forensic examination of the hard drive of the grievant established access by others to the grievant’s computer.

The undisputed fact is that it was the grievant who timely reported the presence of the offending image on his computer. The State argues that the grievant was either honest about his denial or that he was simply “covering his tracks”. This argument captures the dilemma. One may only infer that the grievant was being honest or dishonest in his denial. The arbitrator finds it difficult to arrive at the conclusion that the grievant would knowingly act against his interest and jeopardize his employment by the act of self reporting unless the grievant had an honest belief in his innocence and felt that the act of self reporting would not result in his being implicated. An inference that the grievant was merely attempting to “head off” accusations that he knew would target him is tortured at best.

The record evidence makes it clear that the grievant was aware of the “zero tolerance” policies of the State and of the severe disciplinary consequences that attended such accusations. The self reporting by the grievant in the face of such knowledge warrants the inference that the grievant was “honest” in his denials and not attempting to cover his tracks.<sup>53</sup> Make no mistake about it; the State was faced

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<sup>52</sup> Tr. Pages 54 and 55.

<sup>53</sup> The State argues that when it interviewed the grievants co-workers none of them admitted that they had access to the grievant’s password. It not is unusual for such denials to be made when to acknowledge such access could lead to implicating them in the investigation? Moreover, **these coworkers did not testify at the oral**

with a difficult burden in this case. The investigation did not begin until nine (9) months from the date that the grievant brought the issue of pornography to the attention of the State. It took two years and three months to convene the oral hearing. As to the interim period, the arbitrator takes judicial notice of the fact that the State administrative structure in general, and the SCC in particular, underwent punishing economic dislocation that affected its ability to prosecute this discipline. These circumstances led to the delay in this matter and also substantially “frayed” the memory of witnesses on both sides. The result was to jeopardize both the cases of the State and the Union.

Competing recollections of the events including the whereabouts of the grievant differed substantially not due to prevarication but to the passage of time. The arbitrator is mindful of these circumstances. Is the reason for the delay in this case understandable? Yes. Is it justification for the arbitrator to relax the proof obligations of the State? The arbitrator must answer in the negative. **On the central question of just cause, this arbitrator finds that the record does not contain clear and convincing evidence that the grievant accessed pornography on the dates and times in question as alleged by the State. Therefore, the arbitrator finds that no just cause existed for this discharge.**

This does not end the inquiry. As to the question of the appropriate remedy in this case, the evidence establishes that the grievant admitted to using the State owned computer to access MSN, a - non-pornographic but nevertheless, prohibited website access. Moreover, the evidence establishes that the grievant was lax with regard to computer security procedures by placing his log in ID on a posted note under his telephone and by stating to investigators that he gave his Log In ID to another employee.

The risks attendant to lax computer security are rising exponentially. No enterprise or individual can afford lapses in computer security. The loss of State assets can be damaging and the prospective loss of public confidence can be an enormous setback. In large part the State’s legitimate and defensible interests in absolute compliance to its prescribed security provisions stems from these considerations. The grievant’s admitted laxness should be seen in this light. Although the grievant was not charged with these violations, they are serious enough to warrant that the grievant be reinstated without back pay.

**Holding.**

**Clear and convincing evidence of just cause does not exist** where the decision making witnesses of the State cannot attest to the States proof assertion that the grievant viewed pornography on a State owned computer and the Union presented direct and un rebutted evidence that the grievant was not at his computer at the dates and times alleged by the State and that other employees had access to his computer. The State presented a **prima facie** assertion of proof that the grievant

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**hearing. That meant that their memory, narration and perception could not be tested under cross-examination.**

was on duty within the facility at the date and times alleged and that his Log-In ID was used to access the prohibited images and therefore he must have downloaded and viewed the images. This prima facie assertion is weakened by the fact that record evidence established that other employee Log – In Id’s were used at the computer to access pornographic and non pornographic but prohibited images, thereby precluding circumstantial proof that the grievant and only the grievant could have used the State owned computer to download pornographic images.

**Remedy.**

The grievant is **reinstated without back pay** where the evidence established that grievant admitted the use of the State owned computer to download a non - pornographic but prohibited non-work website, was lax with computer security procedures and the State has a legitimate and defensible interest in strict adherence to its computer security provisions.

**It Is So Ordered**

A handwritten signature in black ink, appearing to read "Richard M. Humphreys". The signature is written in a cursive style and is positioned above a horizontal line.

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Richard M. Humphreys JD

Labor Arbitrator – Mediator

Award Issued at Seattle, Washington this 24th day of September, 2012