

IN ARBITRATION BEFORE
MICHAEL E. CAVANAUGH, J.D.

WASHINGTON FEDERATION
OF STATE EMPLOYEES,)
)
Union,) ARBITRATOR'S DECISION
) AND AWARD
and)
) AAA No. 75-390-00260-08
)
STATE OF WASHINGTON, DEPT.)
OF NATURAL RESOURCES,)
)
Employer.)
)
(Omroa Bhagwandin Grievance))

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I. INTRODUCTION

Grievant, employed by the Department of Natural Resources as a Property & Acquisitions Specialist IV, was suspended for five days without pay based on an investigation into allegations that he had misused a State vehicle. The Union does not seriously contest the proposition that Grievant violated State policies on vehicle use, but contends instead that the State's policies are complex and not fully understood by

employees. The Union adds that Grievant followed the policies about using State vehicles for transportation between work and home as they were explained to him by the person responsible for checking vehicles in and out of the motor pool. Thus, according to the Union, Grievant should at most receive only a warning.

At a hearing conducted at the offices of Attorney General in Tumwater, Washington on December 18, 2008, the parties had full opportunity to present evidence and argument, including the opportunity to cross examine each other's witnesses. At the close of the hearing, counsel chose to submit oral closing arguments, and at the conclusion of counsel's statements, the record closed. Having now fully considered the evidence and the positions of the parties, I am prepared to render the following Decision and Award.

II. STATEMENT OF THE ISSUE

The parties stipulated that the matter is arbitrable and properly before me for decision and agreed that the issue should be stated as follows:

Did the Department have just cause to suspend Grievant for five days without pay? If not, what should the remedy be?

The parties also stipulated that I should retain jurisdiction to resolve any disputes that may arise in connection with implementation in the event I find that some remedy is appropriate.

III. FACTS

Grievant, who has an undergraduate degree in Biology and a Master's in Environmental Studies, has been employed since 2000 with the Department. As a Property & Acquisitions Specialist IV, Grievant works with various governmental agencies, as well as landowners, to find lands to acquire (as well as the funds to acquire

them), in order to preserve environmentally important properties. His work frequently requires him to be in the field, and for those purposes, he utilizes four-wheel drive vehicles checked out of the Department's motor pool. In addition, during forest fire season, Grievant is sometimes called upon to act as "public information officer" on major forest fires. For those assignments, which may last for several weeks depending on the fire, Grievant also utilizes Department vehicles.¹

In approximately July of 2007, during an investigation of unrelated issues of potential misconduct by Grievant,² the Department discovered facts that suggested Grievant had possibly misused Department vehicles in the Fall of 2006. The Department contracted with Mark Andrews, a retired State employee with experience in human resources and in conducting workplace investigations, to investigate the allegations against Grievant. The investigation resulted in two findings of misconduct.³ First, the investigator found that sometime in the Fall of 2006, Grievant had given Susan Crowe, a Department employee with whom he and his wife had a social friendship, a ride to his home after work hours while using a Department vehicle.⁴ According to the investigation, the specific purpose for transporting Crowe on that occasion was so that she could

¹ Apparently, Department policy allows employees to use a private vehicle for fire duty and to be reimbursed, or to use an appropriate Department vehicle, if available. Grievant generally used a Department vehicle because, as with his field work, he needed a four-wheel drive rig for fire duty.

² The investigation into the unrelated conduct, in the final analysis, did not result in any discipline against Grievant. On the other hand, it was my impression that the Department may have initially decided to impose discipline and then later withdrew it. In any event, to the extent Grievant's prior disciplinary record might affect the issues in this case, I find that Grievant's record is free of any prior discipline.

³ The investigation did not substantiate a third issue, which involved allegations of improperly using a State vehicle to transport Grievant's children between school and home.

⁴ Although two of Grievant's co-workers, including Crowe herself, substantiated the allegation, they could not pinpoint the exact date.

receive a therapeutic massage from Grievant's spouse as part of the spouse's business, a business she conducted in the home.

When first approached about these allegations, Grievant stated that he could not recall giving a co-worker a ride to his home in a State vehicle in the Fall of 2006. But then in an e-mail response to the charges on October 17, 2007, Grievant said that, upon reflection, he remembered that he did on one occasion drive Crowe to his home, dropping her off at DNR the next morning on his way to work in the field. Exh.E-3. He also said he had checked with his spouse, whose records showed that Crowe had a massage appointment on October 11, 2006.⁵ Grievant defended his actions on the basis that it constituted "an incident of cost-efficiency, as ride-sharing with fellow employees is a common practice, encouraged by the State." *Id. at 2.*

Based on the investigator's report and Grievant's response, Division Manager Steve Saunders found that Grievant had violated DNR Policy P002-006 "Vehicle Use and Management" because that policy prohibits transportation of "passengers who are not traveling in the performance of official state business." Exh. E-1 at 3. Saunders also found that the conduct violated State ethics laws, RCW 42.52.160, because Grievant used the State vehicle "for the private gain of the officer, employee, or another," in this case, his spouse.⁶

⁵ On the other hand, in the next paragraph of the e-mail, Grievant asserts that he returned the State vehicle "around 2 pm" on October 11. Thus, it seems unlikely that October 11 is the date Grievant gave Crowe a ride to his home—assuming, of course, that when Crowe went to Grievant's home, she received her massage in the evening, rather than very early the next morning before being dropped off by Grievant at DNR.

⁶ There was some dispute in the testimony about whether Grievant's spouse had actually charged Crowe for the massage. Grievant suggested that his spouse's records showed that she had not charged Crowe on October 11, the date he thought it likely the services had been rendered. Crowe herself, however, testified at the hearing that she always paid for her massages.

Similarly, Saunders found that Grievant had violated policies by utilizing a vehicle that had been checked out to him for “fire duty” even after he had returned from the fire on September 14, 2006, and during a period in which he received no further fire dispatches. Between September 15 and October 11, 2006, according to the investigator, the vehicle in question was driven approximately 1366 miles, and the State-issued fuel credit card showed four gas purchases during that period, two of which were made in Onalaska, Washington where Grievant lives.⁷ Grievant first stated during the investigation that he did not recall using the vehicle for any business purpose after returning from fire duty. He said he believed the vehicle was parked at the DNR office between September 15 and October 11, 2006, and that although he had not used it for business during that period, he kept it checked out when he returned to Olympia in case he was called to work on another fire. He also specifically denied that he had used the vehicle to “commute” between home and his work.

In the October 17, 2006 e-mail, Grievant further explained that he kept the vehicle checked out at the urging of the motor pool employee, Will Broadbent, because Broadbent told him that if he returned it the vehicle would be put in “surplus status” and would no longer be available for his use should he need it again. *Id.* Grievant also said, apparently in response to questions about the miles on the vehicle between September 15 and October 11, 2006, that he had never been required to keep track of exact mileage in order to charge the correct amount to the proper program, but that a “staffer with whom [he] was unfamiliar” at the time he returned the vehicle told him that he should provide

⁷ Apparently, however, none of Grievant’s field work sites at the time were located in the Onalaska area. Rather, Onalaska is a number of miles south of the DNR building in Olympia, Washington, whereas Grievant’s active field sites at the time were primarily north of Olympia.

exact dates and mileage before turning it in. Grievant said he then reconstructed the dates and mileage the best he could. Exh. E-3.

Later, however, in a meeting with Division Manager Saunders on October 29, 2007, Grievant admitted that on several occasions after September 14, 2006 he had driven the vehicle between his home, some fifty miles south of Olympia, and a worksite north of Olympia. He said he had done so because it was more efficient for him to drive home in the evening and then proceed directly from home to his work site the next morning. At the hearing, Grievant expanded on his explanation for keeping the vehicle after he returned from fire duty and for using the vehicle to travel between work and home. He testified that not only had Broadbent told him he could keep the vehicle checked out in case he needed to use it for another fire or for field work (which Broadbent essentially confirmed in his testimony), but also that he could drive the vehicle between DNR and his home at night if he judged that it would be “more efficient” to drive directly from home to his DNR field site the next morning.⁸ According to Grievant, Broadbent said that would be so even if he had to drive right past the DNR office on his way to the work site the next day.⁹ In fact, however, the DNR policy manual refers to detailed vehicle use policies contained in the State Administrative and Accounting

⁸ Grievant testified that he believed it was “more efficient” for him to drive the State vehicle home, because otherwise he would have to unload his equipment, leave the vehicle at DNR, commute home and then back to DNR the next day in his own vehicle, then re-load his equipment into the State vehicle before proceeding to his work site.

⁹ Grievant testified that this conversation with Broadbent occurred because “everyone had a different understanding” about when the policy allowed a DNR employee to drive a State vehicle home at night. Consequently, he specifically asked Will Broadbent whether it was “okay” to take the vehicle south to his home and then north past the DNR office to the work site the next morning. According to Grievant, Broadbent said it was up to Grievant to decide if that was the most efficient way for him to accomplish his work. Broadbent’s testimony at the hearing was less clear, however. He said he was aware of the “obvious no’s,” but he seemed uncomfortable attempting to describe the limits of using a State vehicle to drive between home and duty station other than to say there is “a lot of leeway” for “emergency” situations.

Manual (“SAAM”) that govern driving a State vehicle “between duty station and home.” See, SAAM § 12.20.35.¹⁰ That section provides that an *agency head* may authorize such use for any one of five specified reasons, including “when it is economical or advantageous to the state to allow such incidental travel in a state-owned or leased motor vehicle.” *Id.* at paragraph 5. There is no dispute, however, that Grievant’s use of the State vehicle between home and duty station¹¹ was never approved by an agency head or designee. Saunders concluded that Grievant had been wrongfully using the vehicle for “commute” purposes. Exh. E-1 at 3-6.¹²

Having found that Grievant violated two separate vehicle use policies, i.e. by transporting someone in a State vehicle who was not on official State business, and by using his State vehicle to travel between his home and the work site without the authorization required by Departmental Policy P002-006 and SAAM § 12.30.035, Saunders evaluated what level of discipline would be appropriate. Exh. E-1 at 5. Saunders noted his “concern” that Grievant hadn’t “taken responsibility for [his] actions when confronted with this misuse.” *Id.* Moreover, Saunders believed that Grievant had not “been truthful” about his use of State vehicles, and because the misuse covered

¹⁰ As an aside, although there was evidence that the DNR policies on vehicle usage had been distributed to employees by e-mail, and Grievant conceded that he knew there was such a policy and that he no doubt had received a copy as part of the e-mail distribution, there was no evidence as to whether the relevant portions of the Administrative and Accounting Manual had ever been distributed to employees. On the other hand, I note that, at least as of the date of this Decision and Award, the Manual is publicly available online.

¹¹ Although both parties referred to this issue as a question of whether Grievant was using the State vehicle for “commuting” purposes, it appears that the actual policy requires agency head authorization for *any* travel between home and duty station in a State vehicle, not just travel that could be described as “commuting.”

¹² Mr. Saunders, in the discipline letter dated December 21, 2007, calculated Grievant’s wrongful “commute” miles at 108 miles per day based on a distance of 54 miles between Grievant’s home and the DNR office in Olympia. While a simple Mapquest “directions” request between Olympia and Onalaska shows a distance of just under 44 miles, I understand that Grievant may live outside Onalaska proper. In any event, I did not understand Grievant to contest the Department’s assertion that he lives 54 miles from DNR headquarters.

several months and several different incidents, Saunders considered the violations “very serious.” Therefore, Saunders imposed a five-day disciplinary suspension without pay. The Union filed a timely grievance challenging the discipline, and the parties were unable to resolve the grievance in the preliminary steps of the grievance and arbitration procedure. These proceedings followed.

IV. DECISION

A. Burden and Quantum of Proof

As in all discipline cases, the Department, as the Employer, bears the burden of establishing just cause. In determining whether an Employer has carried that burden, I look for “convincing” evidence that the Grievant is guilty of the misconduct relied upon in imposing the discipline. That is, I must examine the Department’s evidence to determine if it convincingly substantiates the reasons in support of discipline contained in Division Manager Saunders’ discipline letter dated December 21, 2007. Exh. E-1.

B. Whether the Department Established the Alleged Violations

I find that Grievant did violate important State rules designed to ensure that public property—specifically, in this case, State vehicles—are used only for official State business. There are a number of legitimate reasons for such a rule, not the least of which is that the State Constitution prohibits the “gift” of public assets, such as by using those assets for private gain. Constitution, Article VIII, Section 7. There can be no doubt that Grievant violated Department policies designed to comply with that constitutional imperative when he gave a co-worker a ride to his home after work, a trip which was in no way related to “official State business.” Similarly, Grievant clearly violated Department policies by driving his State vehicle between his home and his work site

without the required authorization of the “agency head.” The former action violates DNR Policy P002-006 and SAAM § 12.10.30 (“passengers who are not traveling in the performance of official state business such as family members, relatives, friends, pets, etc. are prohibited from department vehicles”)(emphasis in original).¹³ The latter is prohibited by SAAM § 12.30.035 because even if Grievant’s use of the vehicle to travel between home and the work site fell within the established exception for situations in which “it is economical or advantageous to the state” to allow such travel (a matter I need not decide), it is undisputed that the exception applies only when the Department head has granted approval.

Grievant argues that the vehicle use rules are complicated and often misunderstood by employees, but Grievant is an intelligent man with a post-graduate degree. He certainly is capable of understanding a rule that only passengers on official business are allowed to ride in State vehicles. Nor can I find that it would be difficult for Grievant to understand that the clear application of that rule would prohibit giving a co-worker a ride to his home in order to receive a massage from his spouse, whether or not his spouse charged for the massage. Moreover, Grievant concedes that he knew there were Departmental policies concerning use of State vehicles, and he concedes that he has no reason to believe that he did not receive a copy of the policies via e-mail shortly after they were revised October 31, 2005 (just a year or so prior to the events at issue here). Therefore, it is somewhat beside the point whether Grievant actually understood in the Fall of 2006 that the rules of the Department prohibited passengers in State vehicles

¹³ I also agree with Division Manager Saunders that transporting a co-worker in a State vehicle for the purpose of enabling that co-worker to receive a massage from Grievant’s spouse potentially violated the State ethics law, RCW 42.52.160. I credit the testimony of Susan Crowe that she always paid for her massages, but even if that were not the case, Crowe received a “private benefit” from the ride in Grievant’s State vehicle, even if Grievant’s spouse had not.

unless they were traveling on official business. Grievant had every opportunity to inform himself about that rule, and if he failed to do so, he must accept the consequences.

My analysis of the “commuting” issue is slightly different, however. It is clear that the SAAM prohibited travel between home and work in a State vehicle without the authorization of the agency head—essentially, the SAAM requires the agency head to “certify” that the proposed use legitimately falls within one of the enumerated exceptions. Nevertheless, unlike the policy prohibiting passengers not traveling on official business, the *Departmental* policy on use of a State vehicle for travel between home and the duty station does not explicitly set forth the details of the rules contained in the SAAM, including the requirement that the agency head approve any such use. *Cf.* Policy P002-006 *with* SAAM § 12.30.035. Instead, the Departmental policy simply references the SAAM section involved and provides that if those “criteria” (unstated in the Departmental policy) are not “satisfied,” a request for an exception must be approved by the Director of OFM. P002-006 at 4. Thus, on its own, the Department’s policy does not explicitly inform employees of the precise standards that will be applied to travel between work and home in a State vehicle. Nor is there any evidence in the record that the SAAM itself, which *does* contain those details, had been distributed to Grievant.¹⁴ Therefore, while I am comfortable in concluding that Grievant had a clear opportunity to inform himself about the provisions of Departmental policies on passengers in State vehicles, it is less clear to me that the Department adequately notified Grievant of the rules governing travel between home and duty station.

¹⁴ As previously noted, however, it appears that the full text of the SAAM is publicly accessible via the internet.

At the same time, it is clear that Grievant knew that using a State vehicle to drive 50 miles south from DNR to his home in the evening, and then driving the vehicle past DNR¹⁵ the following morning on his way to a work site north of the DNR office raised an issue of possible violation of the Department's policies. Grievant in fact testified that he had discussed that issue with co-workers, and everyone seemed to have a different understanding about what was allowed. For that very reason, Grievant asked Will Broadbent in the motor pool to clarify when it would be permissible to drive his assigned State vehicle home. According to Grievant, Broadbent told him it was acceptable to drive home fifty miles south even if he would have to turn around the next morning and drive back, so long as he determined that it would be "more efficient" to do so.

Although Broadbent failed to confirm this advice to Grievant in his testimony at the hearing, I am willing to accept (at least for the purposes of this proceeding), that Grievant received the advice he described.¹⁶ What I do not understand, however, is why Grievant believed it was sufficient to rely on the information he received from Broadbent rather than investigating the matter for himself, either by obtaining the text of SAAM § 12.30.035, whether in hard copy form or online, or simply by asking his manager about the rules. That is, Broadbent is not a supervisor or manager. He performs an important task in coordinating the availability of State vehicles for DNR use and in tracking the mileage to charge to various programs.¹⁷ But there is nothing in the record to support the

¹⁵ As I understand the testimony, the Olympia DNR office is approximately one-quarter mile off I-5, the freeway Grievant would necessarily utilize to travel efficiently between his home and his field work site north of Olympia.

¹⁶ Had Broadbent provided erroneous advice to Grievant about State vehicle use policies, I can certainly understand why he might be reluctant to admit it.

¹⁷ Although, as the evidence in this case seems to demonstrate, some of the mileage records have perhaps not been kept as carefully as one would hope.

notion that Broadbent would necessarily be an authority on the intricacies of the rules governing the appropriate use of State vehicles.¹⁸ Yet Grievant accepted his advice on the subject at face value and made no attempt either to confirm for himself the content of the applicable policies, or perhaps even more appropriately, to consult with his manager about the specifics of DNR's vehicle use expectations.

The State argues that Grievant *purposely* refrained from asking these questions of the people who would know the answer because he did not want to be told "no." I cannot say that the record necessarily supports that conclusion, but I do believe that Grievant should not have relied on the opinion of a nonsupervisory employee in the motor pool about the limits of driving between home and work site, especially when the issue was apparently a matter of some dispute among Grievant's co-workers. Under those circumstances, a reasonable employee, particularly an intelligent and highly-educated one, should have pursued the matter further.

Grievant testified that he was surprised (or at least thought it was somewhat strange) that Department rules would allow him to drive an extra 100 miles or so in his State vehicle in order to work in the field the next day. Yet he simply accepted Broadbent's word that the Department's vehicle use policies allowed it so long as *Grievant* (the person who stood to benefit by not having to drive his own vehicle between work and home) judged it "more efficient."¹⁹ It seems to me that Grievant's recognition that it seemed out of the ordinary that the State would allow an employee to travel between home and work in a State vehicle was a warning signal, a signal that should have

¹⁸ In fact, Broadbent clearly stated in his testimony at the hearing that he is not an expert on such matters.

¹⁹ In other words, even though the policy that Broadbent described seemed too generous to be plausible, as Grievant essentially conceded in his testimony, Grievant made no effort to confirm with his manager precisely what was allowed and not allowed.

spurred Grievant to seek confirmation from someone with more authority than Broadbent. Thus, I cannot excuse Grievant's misuse of the vehicle simply because Broadbent allegedly said it was consistent with Department policy. Consequently, I find that Saunders appropriately determined that Grievant should be held responsible for both policy violations, i.e. that the Department had just cause to impose discipline.

C. Appropriate Penalty

It does not necessarily follow, however, that a five-day disciplinary suspension is an appropriate penalty for the misconduct the Department has proved here. The Department contends that Grievant violated clear policies limiting the use of State vehicles to "official business." Moreover, as noted above, Saunders concluded "I do not believe you have been truthful about your use of state vehicles." This judgment, in essence an allegation of dishonesty, appears to have been based primarily on what Saunders perceived as Grievant's changing story over time. Similarly, Saunders thought Grievant had failed to "take responsibility" for his actions in violation of policies, which is one of the "core competencies" the Department expects of its employees. As a result, Saunders concluded that Grievant's policy violations were "very serious" and justified a five-day disciplinary suspension without pay in order to "draw [Grievant's] attention to the seriousness of [his] misconduct" and the importance, in the future, of "mak[ing] every effort to comply with DNR policies and to meet all core competencies." December 21, 2007 Discipline Letter at 5.

The Union, by contrast, asserts that Grievant was not untruthful in his responses to the allegations. By the time the investigator interviewed Grievant, approximately one year had passed, and Grievant honestly could not remember exactly when and how he

had used the vehicle in question. Later, as a result of the investigation, he supplemented his responses as he remembered more, but he never intended to deceive anyone or to be untruthful. Grievant also notes that the vehicle regulations are detailed and are understood differently by individual employees. Because he was concerned about the propriety of driving the vehicle home at night on those occasions when he wanted to facilitate using his time efficiently in the field the next day, he specifically asked Will Broadbent of the motor pool to explain the State's policies on driving his State vehicle between home and the work site. Broadbent told him it was up to Grievant to determine if it was most efficient to drive the vehicle home and then proceed to directly to the work site the next morning. Grievant testified that he thought Broadbent was the "expert" on vehicle use policies, so he had no reason not to rely on Broadbent's explanation of the rules. Finally, the Union contends that even if Grievant violated the rules, he did not do so deliberately and thus should receive only a warning.

As noted, Division Manager Saunders imposed a five-day suspension, for what he labeled a "very serious violation," based on a matrix of three considerations: 1) the violations "covered several months and included several specific incidents"; 2) Saunders believed that Grievant had not been "truthful" about his misuse of State vehicles; and 3) Grievant failed to "take responsibility" for his actions when confronted about his policy violations.

In analyzing the appropriateness of the penalty imposed, I agree that the violations involved more than one specific incident. That is, on one occasion, Grievant violated policy by giving a co-worker a ride to his home in his assigned vehicle. On several other occasions, he used his State vehicle to travel between his home and the

work site without managerial approval. But in one sense, these latter instances of noncompliance with policy all comprise a single “violation.” That is, Grievant should not have accepted Broadbent’s advice about Departmental vehicle policies without confirmation, but it would be fair to say that each time he acted on the basis of that advice was essentially part of the single offense of having wrongly accepted Broadbent’s advice at face value in the first place.

With respect to truthfulness, I understand the Department’s skepticism about Grievant’s explanations of his conduct. First, Grievant said that he could not recall giving Susan Crowe a ride to his home. Then, in his e-mail of October 17, 2007 he said that “upon reflection,” he remembered a single occasion on which he had done so and he gave a probable date, but that date seems inconsistent with the date on which he claimed to have returned the vehicle. Then, at the hearing itself, he reverted to the claim that he did not recall giving Crowe a ride, but specifically said that he would not claim that the two witnesses who confirmed that he had done so, including Ms. Crowe herself, were “liars.”

Similarly, with respect to using the vehicle for travel between home and work site, Grievant initially said that he did not recall using the vehicle for any business purpose after he returned from fire duty. Instead, he said he left it parked at DNR in case he was dispatched to fire duty again. Then, when Grievant met with Division Manager Saunders in October 2007 to discuss the investigator’s findings, Grievant described having used the vehicle to drive between home and work because it was “more efficient” than pulling off the freeway and loading his equipment into the State vehicle. Exh. E-1 at 3. At the hearing, Grievant amplified this latter explanation and clarified that he had specifically asked Will Broadbent if State policies allowed him to use the State vehicle in

that manner. Broadbent, however, did not confirm that alleged conversation in his testimony.

Despite these inconsistencies, it would be inappropriate for me to conclude that Grievant was intentionally dishonest in responding to the allegations without the clearest evidence to support that finding. *See, e.g. Brand and Biren, Discipline and Discharge in Arbitration* at 432 (2nd Ed., BNA, 2008). That is so because of the devastating effect a finding of proven dishonesty could have on an employee's career and his future livelihood. Many employers, both in the public and private sectors, view proven dishonesty as a disqualifying attribute in a potential employee, and thus it is unfair to saddle an employee with that record unless it is fully justified by the evidence.

In evaluating this aspect of the case, I note that the Department, in response to a direct question from the Arbitrator during closing argument, seemed reluctant to label Grievant's actions "dishonesty." I am reluctant to do so as well. While I am somewhat skeptical, I cannot say that it is out of the question that Grievant, when first approached on the subjects under investigation, might not remember specific details relating to his use of vehicles a year or more prior to talking to the investigator and to his manager. It also seems plausible to me that the process of hearing the details of the allegations against him, and attempting to respond to them, might jog Grievant's memory, causing him to recall events and details that he might not have remembered specifically when first asked about the issues. That would be particularly true, of course, where Grievant examined documents, such as the motor pool records, in the process of responding to the allegations.

In sum, while I understand the suspicions that led Mr. Saunders to conclude that Grievant had been less than fully truthful in his responses to the allegations, I cannot say that the record necessarily establishes intentional deception. I agree that Grievant's responses seemed to be evolving as he learned the details of the State's investigation into the incidents. But that fact is simply not inconsistent with improvements in recall that occur naturally, a year or more after the events, as human beings review contemporaneous documents and/or respond to increasingly specific questions. Therefore, I cannot find that the State has convincingly established that Grievant was deliberately untruthful.²⁰

Finally, Division Manager Saunders noted his concern that Grievant had failed to take responsibility for his misuse of State vehicles. I think that is true in some sense. For example, even at the hearing, long after he should have been aware of what the Department's vehicle policies allow and what they do not, it seemed to me that Grievant continued to attempt to deflect responsibility for his policy violation because Will Broadbent allegedly told him travel between home and work site was allowed if he judged it a more efficient way to accomplish his work. On cross examination, Grievant continued to assert that he was not using the State vehicle for "commuting," and that he needed to decide "for himself" whether it was more efficient. Similarly, Grievant initially defended giving a ride to his co-worker on the clearly mistaken—in fact, I would say frivolous—contention that he was merely engaging in the kind of "ride sharing" between employees that the State encouraged.

²⁰ As an aside, with respect to the travel between home and worksite issue, Grievant must have known that the Department would have access to the records of gas purchases he made with the State credit card, including purchases made in Onalaska and for which he entered the vehicle mileage into the electronic pump. It would make no sense for Grievant to consciously lie about that use given the fact that he would almost certainly be caught if he did so.

On the other hand, I had the sense that Grievant primarily resisted “taking responsibility,” as Saunders put it, because he sensed that his manager wanted him to admit that he had been “untruthful” about his vehicle use. And even if Saunders did not intend it, the context of the discussions might reasonably have given Grievant that impression. For example, at page 5 of the discipline letter, Saunders noted that failing to take responsibility for vehicle misuse “is contrary to one of DNR’s core competencies, which state it is expected that all DNR employees demonstrate ‘integrity, honesty and ethical behavior; personally acknowledges and accepts responsibility for meeting expectations and correcting mistakes.’” Discipline Letter, December 21, 2007 at 5. Thus, the discipline letter could reasonably be read as confirming a close relationship in the Department’s mind between Grievant’s alleged “dishonesty” and not accepting responsibility to correct his “mistakes.” Therefore, while I think Grievant should have openly accepted responsibility for his mistake in using vehicles contrary to Department policies, I can understand his resistance to doing anything that might be seen as admitting that he had been deliberately untruthful.

In sum, I cannot find that the record fully supports each of the specific factual judgments relied upon by Division Manager Saunders in choosing a five-day suspension. Nevertheless, as I have found, the record does support a conclusion that Grievant violated important policies and that he did not take appropriate steps—steps that were readily available to him—to clarify whether his questionable uses of State vehicles complied with Department policies. Thus, the Department had just cause to discipline. Because I find that the Department has failed to prove that Grievant was untruthful, however, and because I find that there are somewhat extenuating circumstances in Grievant’s

reluctance to fully accept responsibility for his violations of policy, I cannot say that the Department had just cause to impose a five-day disciplinary suspension without pay. At the same time, I find that a mere documented oral warning, which is essentially what the Union contends would be appropriate, would be insufficient to impress upon Grievant the importance of two obligations central to his ultimate success as a State employee, i.e. 1) the obligation to understand and comply with important Department policies, such as policies designed to ensure that public assets are used solely for appropriate public purposes, and 2) the obligation to accept personal responsibility when he fails to live up to the Department's legitimate expectations. Had Grievant violated only one policy concerning vehicle use, on only one occasion, or even if he had more readily taken responsibility, I might find a written reprimand sufficient. Because Grievant violated multiple policies, however, and because he has persisted too long in a refusal to accept accountability for his policy violations, I find that the record supports a one-day disciplinary suspension without pay even though it is the first instance of discipline in Grievant's record.

The grievance is sustained in part. Grievant's five-day suspension will be reduced to a one-day disciplinary suspension without pay, and he shall promptly be reimbursed for any lost wages and benefits beyond the one-day suspension appropriate to his misconduct.

AWARD

Having carefully considered the evidence and argument, I hereby render the following AWARD:

1. The Department had just cause to discipline Grievant, but did not have just cause to impose a five-day disciplinary suspension without pay; therefore,
2. The grievance must be granted in part;
3. Grievant's five-day suspension is hereby reduced to a one-day disciplinary suspension without pay, and references to Grievant's alleged lack of truthfulness shall be removed from the "Level of Discipline" section at page 5 of the December 21, 2007 discipline letter; and,
4. Grievant shall promptly be made whole for any loss of pay and benefits beyond a one-day suspension; and,
5. The Arbitrator will retain jurisdiction, solely to resolve any disputes that may arise in connection with implementation of the remedy awarded; either party may invoke this reserved jurisdiction by fax sent or letter postmarked (original to the Arbitrator, copy to the other party) within sixty (60) days of the date of this AWARD or within such reasonable extensions as the parties may mutually agree (with prompt notice to the Arbitrator); and
6. Pursuant to the terms of their Agreement (Article 29.3(E)), the parties shall bear the fees and expenses of the Arbitrator in equal proportion.

Dated this 6th day of January, 2009



Michael E. Cavanaugh, J.D.
Arbitrator