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

ASSOCIATION OF FISH & WILDLIFE PROFESSIONALS, Union, and STATE OF WASHINGTON, DEPT. OF FISH & WILDLIFE, Employer. (Craig Olds Discharge Grievance)	))) ARBITRATOR'S DECISION) AND AWARD)) No. 23150-P-10-00921))))))

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I. INTRODUCTION

The Department discharged Grievant Craig Olds, a Fish & Wildlife Biologist, after investigating two incidents occurring in the summer of 2009 in which he was charged with violations of the law. First, in June, Grievant was cited by a DFW Enforcement Officer for allegedly concealing crab on his personal vessel when approached and asked about whether he had caught anything that day. In addition, Grievant's boat, when searched, contained two undersized crabs. Second, in July, Grievant was cited for drunk driving and open container

violations in a Department vehicle near Othello in Eastern Washington. Grievant notes that neither citation resulted in a conviction. Rather, the crab citations were disposed of with an agreement that he would forfeit bail, which State law allegedly did not equate to a "conviction" until after the events at issue.[1] Nevertheless, after asserting initially that the bail forfeiture essentially constituted a guilty plea, the Department also examined the evidence against Mr. Olds and determined that he had failed to comply with the rules on cooperating with Fish and Wildlife officers as well as with the minimum size regulations for crab. Similarly, although the Eastern Washington DUI charges were dismissed, at least in part because the arresting officer did not check the box on a form that he was properly trained and certified to operate a breathalyzer,[2] the Department concluded that Grievant had transported alcoholic beverages in his Department vehicle in violation of the Drug- and Alcohol-Free Workplace Policy.[3]

[1] As background, the Governor signed legislation on May 5, 2009 treating the forfeiture of bail as an agreed final disposition of an offense as a "conviction" for the purposes of the fisheries laws, but that provision did not go into effect until July 26, 2009. Although the order of Grievant's bail forfeiture pursuant to stipulation was entered a month after the effective date of the statute, Exh. A-5, the conduct on which the citations were based occurred on June 30, 2009, prior to the effective date of the new statute. It appears to me that the law in effect at the time of the alleged offenses included bail forfeiture in the definition of a "conviction" (Session Laws, 1998 Ch. 190 § 6), but it is unclear whether that prior definition included bail forfeitures entered into by stipulation in order to resolve pending charges (as opposed to a simple failure to appear and defend). The Department had always treated *all* bail forfeitures as "convictions" for the purposes of the game laws. *See*, e.g. 2009/2010 Washington Sport Fishing Rules Pamphlet at 17 ("License Suspensions and Property Forfeitures"). Nevertheless, when the Department asked a Deputy Prosecuting Attorney for Grays Harbor County (where Grievant's alleged fisheries violations occurred) about whether his bail forfeiture constituted a "conviction," the Deputy Prosecuting Attorney informed the Department that the statute had just recently been amended to include bail forfeitures in the definition of "conviction"(perhaps he meant bail forfeitures as final dispositions, and not forfeitures generally, although that is not clear from the correspondence in the record) and thus it was an open question whether this provision of the statute was intended to be retroactive. The Association cites the prosecutor's opinion as confirmation that the forfeiture of bail by Mr. Olds should not be equated to a conviction on a guilty plea.

[2] As I view the evidence, there was also a question whether Grievant had actually driven the car while intoxicated.

[3] In the end, the Department also added charges that Grievant had violated the terms of an assignment to duty at home (where he had been directed to keep himself available to the Department within normal working hours) in that the Department called on a couple of occasions during the normal workday and was told that Grievant was "not available." In addition, the Department charged Mr. Olds with misuse of an agency vehicle for personal purposes and with lying during the investigation. For reasons that will appear, I have not found it necessary to analyze these additional charges in detail.

The Association contends that Grievant should not have been disciplined on the basis of alleged criminal conduct for which he was not convicted, and also argues that Mr. Olds was denied procedural due process because the primary investigator, even prior to conducting his investigation, had reached a conclusion that Grievant had been untruthful with the Enforcement Officer in Grays Harbor County. In addition, the Association argues that the Department improperly refused to give Mr. Olds *Garrity* warnings—or in the alternative, to delay the conclusion of the investigation until after the disposition of the criminal charges—as well as by failing to keep entirely separate the Department's law enforcement and administrative processes. Finally, the Association asserts that the Department violated principles of contractual due process by combining two separate instances of alleged misconduct into a single disciplinary proceeding. A timely grievance was filed on behalf of Mr. Olds which the parties were unable to resolve in the preliminary steps of the grievance and arbitration procedure under their Agreement. These proceedings followed.

At a hearing held January 20-21, 2011 at the offices of the Attorney General in Tumwater, Washington, the parties had full opportunity to present evidence and argument, including the opportunity to cross examine witnesses. The proceedings were transcribed by a certified court reporter, and I have carefully examined the transcript in the course of my analysis of the evidence. Counsel filed simultaneous electronic briefs dated May 19, 2011, and with my receipt of the briefs, the record closed. Having carefully considered the evidence and argument in its entirety, I am now prepared to render the following Decision and Award.

II. STATEMENT OF THE ISSUE

The parties have stipulated that the issue to be decided should be stated as follows:

> Did the Department have just cause to discharge the Grievant, Craig Olds? If not, what is the appropriate remedy?

Tr. at 3. They also agreed that the matter is arbitrable and properly before me for decision, and they asked that I retain jurisdiction of the matter, should I find that some remedy is appropriate, solely for the purpose of resolving any issues in connection with implementation of the remedy that the parties are unable to resolve on their own.

III. FACTS

Mr. Olds is a Fish & Wildlife Biologist who had worked for the Department for seventeen years at the time of his dismissal. He had no prior formal discipline on his record at the time of termination, although he had received one written disciplinary memo that had been removed from his file at his request after the passage of a period of time with no further disciplinary issues.[4] Shortly before the events at issue here in 2009, Mr. Olds had avoided a RIF by transferring from his prior assignment to one that involved environmental remediation at the Hanford Nuclear Reservation in Eastern Washington, apparently focusing on old growth sagebrush habitat. The new position, as will become apparent, became a factor in the events leading to his discharge.

A. Grays Harbor Fisheries Charges

A recitation of the necessary facts, however, begins with Grievant's trip to Grays Harbor with his adult son in late June 2009. They launched Grievant's trailered boat at Westport and dropped a single crab pot in Grays Harbor,[5] then crossed the bar to fish in the ocean under challenging conditions. Later in the day, with his son apparently seasick, they returned to Grays

[4] The details of the incident are somewhat sketchy in the record, but apparently Mr. Olds had gotten into an off-duty argument with a volunteer Department fish checker and had used inappropriate language during the confrontation.

[5] The record is not entirely clear as to who owned the crab pot, Grievant or his son, but it is my impression that it belonged to Grievant. On the other hand, there is nothing in the record to indicate precise ownership, such as whether the pot was equipped with a red and white buoy—required by the regulations if a pot is to be left unattended—and if so, whose name and address was on the buoy. See, *2009/2010 Sport Fishing Rules Pamphlet* at 133.

Harbor and fished for crab. In his testimony at the hearing, Grievant conceded that although his son was deploying and retrieving the crab pot while he manned the helm, he knew that some of the crabs were being retained and kept in a hold in the cockpit:

> My son had asked me for a tape measure or something so he could measure the crab. That was earlier in the day. I said "Oh, I forgot it." And I said, "Well, we'll get it when we're at the dock. Just make the best guess you could." And he was saying, "Well, a lot of these crabs are falling out because they're small as he hauled the trap over the gunwale." And I could see the crabs were falling out, and then his back was turned to me. And he'd deal with the crabpot and the hold was right of the crabpot. And so I knew there were crabs in the hold. He said, "Well, some are kind of small." At one point I asked him, "Did you catch any big ones?" And he said, "No, they were small." And so with that information we'd try to move to a different place. So I was asking him that periodically so I knew there were crab in the hold. I knew there were no big ones, and I knew I had instructed him to make the best guess he could.

Tr. at 432. Grievant testified that he planned to measure the crabs at the dock after retrieving a tape measure or ruler from his truck.[6] As they were returning to the boat ramp, he instructed his son "not to report any catch yet until we figured out what we needed to throw back." *Id*.[7]

When they arrived at the ramp, they tied up the boat at the end of the dock and Grievant went to his truck, purportedly to get a measuring device. While he was gone, Officer Klump of the Department's Enforcement Division approached Grievant's son, Leon, and questioned him about whether they had caught any fish or crabs. According to the Officer, Leon repeatedly denied that they had any catch, but his body language made the Officer suspicious. Tr. 73. It also appeared to him that a crab pot on the bow was wet as if it had been recently fished. Tr. 75. When pressed, Leon admitted that they had caught crab, and when asked why he would lie about

[6] As an aside, the appropriate tool to measure crab is a U-shaped caliper. *See*, *Sportfishing Rules Pamphlet* at 130. Because the top of a crab's shell is curved, a tape measure or ruler may not give an accurate measure of the width "at the widest part of the shell just in front of the rear-most point or tips." Although the differences in measurements obtained by caliper and a tape measure may be small, they could potentially be critical with crabs of borderline legal size.

[7] The Department contends that the rules require returning any undersized or otherwise illegal crab immediately to the water, but Grievant contends that there is no explicit regulation to that effect.

it initially, according to Officer Klump Leon said that Grievant had told him to say that if they were asked. Tr. 74. Klump asked Leon to wait by the boat and he went up the ramp to talk to Grievant who was in the process of backing the boat trailer down the ramp as if to retrieve the boat.[8] The conversation between Grievant and Officer Klump is a matter of some dispute. Klump testified that he asked Grievant if "they had caught any fish or crab," and Grievant said they had not. Tr. 77. Asked what they had been doing out on the water, Grievant told Krump they had been fishing for halibut, but Klump knew the halibut fishery was not open that day which increased his suspicion that Grievant was intentionally withholding information. He asked again about crabbing, and Grievant told him that they had crabbed, but all the crabs were small and they had to throw them back. *Id*. Asked again if he had kept any crab, Grievant said he had not. Klump asked Grievant if he wondered why he was repeatedly being asked about catching crabs, and then told him that his son had admitted to having crab aboard. Klump asked Grievant why he had lied. Grievant responded that he was not lying and that his son may have kept some crab, implying that he was not certain (contrary to his testimony at the hearing that he knew there were crabs on board). Eventually, Grievant admitted to the Officer that there were crabs on his boat, and Officer Klump, at the end of conversation, asked Grievant if he had lied to the fish checker as well. According to Klump, Grievant said "yes," under his breath. Grievant emphatically denies that part of the exchange.

In his testimony at the hearing, Grievant related that the Officer asked if *he* had caught any crab or if *he* had any crab on board, and because his son was the one handling the pot, in his view his son was the one who was crabbing and catching the crab, as well as the one "having" or

[8] There is no evidence that Grievant had a tape measure or ruler in his possession or close by when approached by the Officer.

"possessing" them on the vessel.[9] When the Officer finally asked "Are there any crab on your boat?" he responded "Well, yeah, there's crab on my boat but I don't know a whole lot about it." Tr. 380. Grievant also said that he assumed that his son had reported the crab already because he had seen Officer Klump talking to his son at the boat. Tr. 380.[10] In any event, the son was not charged, although when Klump inspected the crabs on the boat, he found an undersized Dungeness crab, and one of five red rock crabs was also smaller than the minimum size. Grievant was charged with failing to submit catch upon request to an Enforcement Officer, as well as for one of the undersized crabs.[11]

Eventually, on August 26, 2009, Grievant entered into a bail forfeiture agreement to resolve the fisheries charges, paying $540.00 plus costs. According to Grievant, he had been advised that the bail forfeiture did not constitute a guilty plea, and he would not have resolved the charges in that manner if he had thought the agreement would be treated as the equivalent of a finding of guilt.

B. Othello DUI Charges

While the Department was investigating the Grays Harbor issues, Grievant was heading to Richland on July 20, 2009 in a Department vehicle to attend an important meeting concerning the Hanford Reservation. He had asked for and received permission from his supervisor to take some extra time on the way over and/or on his return to explore old growth sagebrush habitat,

[9] On the other hand, I note that Grievant concedes that he told his son "not to report any catch yet until *we* figured out what *we* needed to throw back." Tr. at 432 (emphasis supplied).

[10] On the other hand, Grievant also confirmed that he had told his son not to report their catch until the crab had been measured and the undersized crabs had been returned to the water. Tr. 383. Therefore, it seems at least partially inconsistent that he would assume his son had reported a catch that he had been told not to report until after Grievant returned from the truck with a measuring device, which he had not yet done. I also note that Grievant conceded in his testimony that before he spoke with Officer Klump, the fish checker had asked him if he had done any crabbing or had caught any crab. According to Grievant, he told the checker "I didn't do any crabbing today." Id.

[11] Office Klump testified that he could have charged Grievant for both undersized crabs, but gave him a break by only charging one violation.

knowledge of which he had been told would be essential to his success in the new position. He spent the morning at home and headed to his office in Lacey about 12:30 or 1:00 PM.[12] Then he departed in Lacey in an agency vehicle about 2:00 PM for Hanford, intending to stop along the way in the Othello area to check for old growth sagebrush. On the way there, he stopped briefly on the west side of the Snoqualmie Summit to stretch his legs, driving off the freeway on a short gravel road to the end and taking a short hike to look for mushrooms.[13]

At just before 7:00 PM that day, a citizen reported a Chevy Blazer off the side of the road a few miles East of Othello on Highway 26, which she described as an apparent one-car accident. Exh. E-1g. The witness reported that she had stopped to check on the occupant who seemed disoriented and said he had hurt his foot, but reportedly did not want help to be called. Trooper Phil Jesse responded to the scene and found Grievant asleep in the driver's seat with his legs on the passenger seat. The Blazer was partially off the road and had grass in the grille. Also, the right front bumper cowling had come loose and was hanging near the ground. The Trooper had to reach through the open window of the vehicle and physically shake Mr. Olds in order to get a response from him. He immediately smelled the odor of intoxicants. When he asked for license and registration, Grievant fumbled with his wallet, and some of the contents fell to the floor of the vehicle. It appeared to Trooper Jesse that Grievant was unaware of the falling items.

The Trooper asked Grievant to step from the vehicle and noticed that he was unsteady as he did so, taking several steps backward to gain his balance. Grievant could not follow the

[12] Grievant testified that before leaving home, he had "a couple of beers" at "probably nine or ten in the morning." Tr. 400.

[13] In describing the location of this brief rest stop during the course of the investigation, Grievant offered identifying road numbers that did not match his likely route to Hanford or that otherwise seemed unlikely to be true. One was in a restricted City of Seattle watershed, and another was on White Pass between Packwood and Randle, an inefficient route to Othello. By the time of the *Loudermill* hearing, however, Grievant had identified a road off Snoqualmie Pass as the one he had taken for a break, i.e. where he drove to the end of the road and took a short hike looking for mushrooms. He repeated that testimony at the hearing.

Trooper's finger in the horizontal gaze nystagmus test, and he declined to take the remainder of the field sobriety tests ("FST's).[14] On the portable breathalyzer, Grievant blew a .170, more than double the level at which the law presumes intoxication for DUI purposes. Asked if he knew where he was, Grievant said that he believed he was on Highway 2, which appears to be approximately 80 miles away at its nearest point from where Mr. Olds was located when approached by the Trooper (according to my quick review of a Washington highway map). Asked if he had been drinking, Grievant said that he had one beer. Grievant disclosed, however, that he had gin in his backpack in the cargo area of the Blazer, and when Department Enforcement Officers arrived on scene, they retrieved a Real Lemon quart size (or perhaps larger) bottle from Grievant's backpack. The contents smelled like gin and tested positive for alcohol with the portable breath tester.[15] They also found a partially full vitamin water bottle in the cup holder on the driver's side of the console that smelled of gin and likewise tested positive for alcohol in the field.

Grievant was taken into custody and blew .170 and .165 at the station at approximately 8:47 PM, more than an hour after the portable test administered by Trooper Jesse at 7:28 PM. On the DUI Arrest Report-DUI Interview form, on which Trooper Jesse recorded Grievant's responses, Mr. Olds indicated that he did not know what city or county he was in, thought he was on Highway 2 traveling East when arrested by the officer, and guessed the time of their conversation as "about 6pm" although it was actually almost 9:00 PM (2054). Exh. E-20 at 8. He admitted that he had consumed two beers (Busch Lite) at home, that he started drinking them

[14] Grievant testified that he declined to take further tests because he had hurt his foot when the vehicle door slammed shut on him when he was changing shoes after his hike, and because of the angle of the ground, he knew he could not perform the tests with his injured foot.

[15] The contents of the Real Lemon bottle were later tested by the crime lab at the request of Capt. Chris Anderson of the Department's Enforcement Division. The test results came back 39.6% alcohol, or roughly the equivalent of 80 Proof hard liquor. Exh. A-28.

"about noon" and finished drinking them at 12:30 PM. *Id*. He told the officer that he had departed Lacey at 1:55 PM. He also said that he had worked that day, and when asked what time he got off work, he responded that he was "on a field trip." *Id*. Mr. Olds was released on his own recognizance later that evening and dropped off at a local motel. Exh. E-19 at 7.

Enforcement Division officers were called to the scene both as a courtesy and so they could arrange to take possession of the vehicle to prevent it from being towed.[16] They photographed the damage to the right front of the vehicle and field tested the two containers of gin in the Blazer. They took the Real Lemon bottle as evidence and discarded the vitamin water bottle after the field test. Before they could drive the vehicle away, they had to wire up the hanging bumper cowling, and they also had to jump start the Blazer because its battery was dead.[17]

The next morning, Grievant called his supervisor, Curt Leigh, to report that he had been arrested for DUI and that his Department vehicle had been taken into custody. He reported that he had stopped to look for old growth sagebrush and while on a hike for that purpose, he drank gin and lemonade with a meal. Mr. Olds said he was still attempting to get to Richland, where he had made hotel reservations for the meeting, but could not rent a car because his license had been hole-punched by the arresting Trooper. Leigh made arrangements to send someone else to cover the meeting and advised Grievant to return to Lacey. Once there, Mr. Olds was reassigned to his

[16] As an aside, Grievant contends that he parked in a pull-out area along the side of the highway where it was legal to be parked, and he intended to "camp out" there overnight. Department Enforcement Officer Jason Snyder testified, by contrast, that if the vehicle had been unoccupied, it would have been towed as a safety hazard. Tr. at 68. I find these two assertions at least potentially inconsistent, i.e. if an unoccupied vehicle in that location would be a hazard, it seems that a vehicle in which someone had decided to camp overnight would be a hazard as well.

[17] Grievant suggested that he may have simply left the air conditioning on, but I note that the citizen who reported what appeared to be a one-car accident at 6:52 PM told the dispatcher that the Blazer's headlights were on. Exh. E-21 at 3, line 4.

home in light of having two potentially criminal incidents within roughly three weeks' time that were still under investigation.

C. The Investigation

Grievant's Supervisor, Curt Leigh had already been assigned to investigate the Grays Harbor fishing rules violations, and he took on the process of investigating the Othello DUI issues as well. The Department considered whether the two incidents should be treated as separate disciplinary issues, but decided that to treat them consecutively could lend an impression of "game playing." During the investigation, it is clear that there was interplay between the administrative investigation being conducted by Mr. Leigh and the criminal investigation/prosecution efforts by both the State Patrol and the Department's Enforcement Division—for example, sharing of information and the use of Department law enforcement personnel to obtain information (such as testing of the Real Lemon bottle by the crime lab) that might not have been available to any other State agency without a law enforcement aspect. Thus, argues the Association, the Department violated Grievant's due process rights by commingling the criminal and administrative investigations.

In addition, the Association requested that Mr. Olds be given *Garrity* protections during the investigation, i.e. that he be afforded use immunity in connection with any investigatory interviews by the Department so that he could fully respond to the charges against him without fear that something might be used against him in the criminal prosecutions. The Department refused, and while there were some minor adjustments in the timing of the investigation, ultimately the Department declined to delay the disciplinary process until after the criminal charges against Mr. Olds had been disposed of one way or the other. This approach, says the Association, improperly deprived Mr. Olds of an opportunity to present a full defense to the

charges because he was limited in the subjects he could safely discuss in the absence of a guarantee that his statements would not be used against him.

In any event, the investigation resulted in some additional charges against Grievant—specifically, a charge that he had been untruthful during the investigation by offering changing explanations of his conduct that were inconsistent with each other; that he had misused the agency vehicle for personal purposes, specifically by using the Department vehicle to go mushroom hunting on his way to Eastern Washington; and that he had violated the terms of his assignment to work from home during the investigation because on at least two occasions, the Department was unable to reach him at his home telephone number, being told that he was "unavailable." Grievant sharply contests all of these additional allegations, *see,* e.g. Exh. E-11, and for reasons that follow, I do not find it necessary to examine the issues in detail in light of other issues that are determinative of the outcome here.

Additional pertinent facts will be analyzed in the course of the Decision that follows.

IV. DECISION

A. Burden and Quantum of Proof

There is no dispute that the Department bears the burden of proof in this disciplinary matter, but the parties differ over the quantum of proof to which the Department should be held in determining whether the burden has been met. Noting the potential criminal aspects of Grievant's alleged misconduct, the Association contends that it would be appropriate to judge the Department's evidence according to the "beyond a reasonable doubt" standard, while the Department argues that a lesser standard is appropriate—either "clear and convincing" or a simple "preponderance of the evidence." The Department argues for the latter while recognizing that many arbitrators would apply the former.

I agree with the Association that an enhanced evidentiary standard should apply here. On the other hand, I will not apply the "beyond a reasonable doubt" test because I believe that test is inappropriate in a civil matter, even one with severe consequences. That is, while the consequences to Mr. Olds of having his discharge sustained will almost certainly significantly restrict his future employment opportunities, at least in his chosen profession,[18] those consequences pale in comparison to the loss of physical liberty inherent in a criminal conviction. For that reason, the criminal law employs the strictest burden of proof in our legal system. Those considerations simply are not present here, however. Therefore, I will employ a less stringent test and examine whether the Department's proof constitutes "convincing" evidence in support of the allegations of misconduct on the part of Mr. Olds. While it is difficult to delineate precisely what level of proof meets that test in any given case, it is sufficient to note that the barest preponderance of the evidence will not suffice, but that proof beyond a reasonable doubt is not required. In the end, the test is flexible and pragmatic as applied in any particular case—that is, the evidence required to meet it may well vary depending on the nature of the allegations and the severity of the consequences to the Grievant if they are sustained. In essence, I look for a quantum of evidence that allows me to say with a substantial degree of confidence that Grievant has engaged in serious misconduct and that based upon that proven misconduct, it is fair to severely restrict his future opportunities for equivalent employment in his profession.

B. The Fisheries Allegations

As described earlier, although Mr. Olds chose to forfeit bail in order to resolve the Fish and Wildlife charges against him in Grays Harbor County, he claims that he did so merely to

[18] I reach that conclusion even though, at the time of the hearing in this matter, Mr. Olds had found re-employment with the Cowlitz Indian Tribe as a research scientist. Tr. 374. While that may be the case, there is no evidence that his terms of employment, with respect to compensation, benefits, and projected job security, comport with those he enjoyed as an employee of the Department with seventeen years of accumulated seniority under a collective bargaining agreement.

dispose of the alleged offenses in a way that he understood would not entail an admission of guilt. I agree, under these precise circumstances at least, that it would be inequitable to treat Grievant's bail forfeiture as a concession that he had violated DFW regulations and or the relevant statutes.[19] Nevertheless, the facts as established at the hearing, primarily through the testimony of Mr. Olds himself, convince me that he acted in a manner inconsistent with the law and with his obligations to the Department. Specifically, Grievant knew that his son, a passenger on his vessel, had retained crabs that were marginally legal, if at all. That is clear from the fact that while approaching the dock, he admits that he told his son not to report *their* catch[20] until the crabs had been measured *and any undersized crab returned to the water*. Even giving Mr. Olds the benefit of the doubt on the "constructive possession" issue, i.e. Officer Klump's theory, derived from court decisions in which he had been involved, that the owner of a vessel constructively possesses illegal fish and game on board even if he did not personally catch it, Mr. Olds still intentionally advised his son not to report *their* catch to the fish checker (and by extension, to Officer Klump). Nor did Mr. Olds disclose the presence of crab on his boat until asked by Officer Klump multiple times. I find that approach violated the law—and even if it had not, it nonetheless constituted inappropriate conduct for an employee of the very State agency charged with regulating the recreational shellfish harvest in order to maintain the health and viability of the recreational crab fishery.

[19] With the changes to the statute described earlier, however, the result would no doubt be different now. Yet at the time Mr. Olds made his deal to forfeit bail to resolve the charges against him, he could reasonably believe that doing so did not constitute a guilty plea. Whether that was legally true or not is somewhat beside the point. That is, I credit his testimony that he subjectively believed he could forfeit bail and continue to maintain his innocence, and with the ambiguity in the status of the law at the time, I find it would be inequitable to treat the bail forfeiture as a conclusive admission of guilt.

[20] As noted previously, Grievant admits that he told his son "not to report any catch yet until *we* figured out what *we* needed to throw back." Tr. at 432 (emphasis supplied). In essence, Grievant's own testimony established that the crabbing was, at the very least, a joint venture between Mr. Olds and his son and that Mr. Olds knew that there were crabs of marginal size in the hold of his boat.

Mr. Olds position, expressed in his testimony at the hearing, is that he need not report any catch until all of the crabs had been measured, i.e. until he knew how many he and his son were going to keep. I would agree with Officer Klump that in using that approach, Grievant and his son "possessed" undersized crabs from the moment they were placed in the hold aboard the vessel until they were released, i.e. that the undersized crabs should have been promptly returned to the water. But again, giving Grievant the benefit of the doubt on that issue (and I agree that it is difficult to find an express direction in the rules that undersize crabs must be immediately placed back in the water), the more important point is that if Mr. Olds genuinely believed that he and his son were entitled to wait to determine the legality of their catch until they reached the dock and were able to measure the crabs, why did he not instruct his son to tell *that* to the fish checker? Why did he not himself immediately tell Officer Klump "my son kept some crabs but he said some of them were on the small side and we need to measure them to determine if they are legal"? The fact that he felt the need to construct a technical legal theory after the fact about whose catch was aboard his boat and who "possessed" the crabs convinces me that he well understood that there was at least a very substantial possibility that what he was doing was not consistent with the law or with the best interests of the Department.

And he was correct. I note, for example, that RCW 77.15.470 makes it a gross misdemeanor to unlawfully avoid a field inspection by failing to

> Produce for inspection upon request by a fish and wildlife officer (i) Hunting or fishing equipment, (ii) seaweed, fish, *shellfish*, or wildlife, or (iii) licenses, permits, tags, stamps, or catch records required by this title.

RCW 77.15.140 (emphasis supplied). I note the absence of a "possession" element of the offense, i.e. I read the statute as requiring the production of shellfish within the knowledge and nominal control of a person asked to produce them even if that person does not "possess" them

in the sense Mr. Olds used the term in his testimony. Moreover, even if Mr. Olds were technically correct about the law, and I believe that he is not, his own testimony convinces me that he knowingly resisted full cooperation with a fellow Department employee who was attempting to do his job to enforce the law and to gather information about the catch, information that could be useful in monitoring and protecting the recreational crab fishery. I would reach that conclusion even if, as Mr. Olds testified, Officer Klump asked "Did you catch any crabs?" as opposed to "Did you guys catch any crabs?" The pronoun "you" can be used either in the singular or the plural, and it was wrong of Mr. Olds to willfully interpret the question with an unreasonable narrowness so as to withhold information he had every reason to know Officer Klump was seeking. And he substantially compounded that error when he responded to Officer Klump's question "Do you have any crabs on your boat?" with the clearly misleading—if not outright false—statement, "No, I don't have any crab on my boat." Tr. 380. To reiterate, I find that Grievant's theory that he did not "possess" or "catch" the crabs in the hold at the time he made this statement is legally defective. Whatever the outcome of that technical legal argument, however, I would simply note that Grievant unjustifiably failed to cooperate with Officer Klump in a way that was inconsistent with his obligations to his Employer.

On the other hand, I cannot agree with the appointing authority that his conduct in that regard merited summary dismissal from State employment on its own. I agree that it would justify a significant disciplinary penalty,[21] but standing alone, I would not find that summary

[21] During the investigation, Mr. Olds apparently told Mr. Leigh that he assumed that failing to submit his catch to a fish checker or Enforcement Officer would not be a serious violation because the "penalty" for failing to return a crab catch record card (required for Puget Sound, but not for the ocean where Mr. Olds was crabbing) is only $10.00. Exh. E-3 at 3. First, I assume that Mr. Olds was presenting an "after the fact" argument for mitigating the seriousness of what he had done, i.e. if he *knew* that he was required to report his catch but intentionally failed to do so, that would have been inconsistent with the defense that he need not report because it was his son, rather than Grievant, who had "caught" and who "possessed" the crabs on board his boat. But even as an after the fact mitigating circumstance, I do not find the argument persuasive. Failing to return the catch record at the end of the season—which according to the Department's website is very common—is simply not the same thing as concealing

dismissal was warranted for a long-term employee with no existing disciplinary history in his record. Thus, I must examine the remaining allegations against Grievant to determine whether they have been convincingly established in the record and, if so, whether those offenses, either singly or in combination with the fisheries issues, justified the termination of Mr. Olds.

C. The Othello DUI Charges/Alleged Violation of State Policies

The Association points out that Mr. Olds was not convicted of DUI—in fact, those charges were dismissed by the prosecutor prior to trial—nor did the Department of Licensing suspend Grievant's driver's license. In addition, says the Association, there is no evidence that Mr. Olds was trained on the "nuances" of the Department's workplace drug and alcohol policy. In any event, Mr. Olds argues, that policy has not been uniformly enforced, and the Department has not imposed the penalty of summary termination on other employees found to be in violation.

I begin with the policy (which Grievant, on several occasions, had acknowledged receiving and had certified that he had read and understood). The policy clearly states that

> Employees may not use or *possess* alcohol while *on duty*, including standby, *in state vehicles*, on WDFW premises, or other governmental or private worksites where employees are assigned to conduct official state business.

Exh. E-1b (Policy 2002, eff. 07/01/05) (certain exceptions omitted) (emphasis supplied). Grievant testified to facts at the hearing that clearly fall within this prohibition, i.e. that he possessed gin in a Real Lemon bottle in his backpack placed in the rear cargo area of the Chevy Blazer on his way to represent the Department at an important meeting in Richland. Despite this clear prohibition contained in Policy 2002, however, Grievant testified—with what I would

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catch in the field from an Enforcement Officer who is attempting to deter and detect poaching of illegal recreational fish and shellfish. Thus, I find that Grievant's conduct was in fact a serious violation of the fisheries regulations, as well as a serious failure to meet his obligations to the Department to comply with the rules the Department applies to all recreational fisherman.

describe as a remarkable lack of insight—that his possession of alcohol in an agency vehicle was "of no interest to the State of Washington" because "it was within my private property," i.e. his backpack. Tr. 402. Similarly, former Assistant Director Greg Hueckel, the hiring authority, testified without contradiction that Mr. Olds had told him in the pre-termination meeting that it would be "legal" for him to possess alcohol on Department premises so long as it was contained in his private belongings, such as in his lunchbox. Grievant also asserted that he would be legally entitled to keep that lunchbox with him in his work cubicle—*and to consume alcohol on the Department's premises so long as he did so on his break*. Tr. 366.

Precisely where Grievant obtained these wholly unreasonable and mistaken impressions is not clear from the record. A simple reading of Policy 2002—and as noted, Grievant acknowledged that he had received, read, and understood the policy—would have disclosed that he was not entitled to possess alcohol in an agency vehicle, irrespective of whether he actually consumed it while driving (or even while parked). Nor do I find this clear prohibition to require any detailed training or an understanding of "nuance." Under the plain language of the policy, possession of alcohol in an agency vehicle is prohibited, period. I suspect that Mr. Olds understood that prohibition, because his account of his conduct appears to have been carefully constructed[22] so as to avoid any admission of a possible violation of the policy *other than* possessing alcohol in the vehicle—which, of course, he could not very well deny. For example, Grievant claimed that he had two beers *at home* between 9:00 and 10:00 AM before leaving for the office at 12:30 or 1:00 PM on July 20, 2009.[23] Putting aside, for a moment, why

[22] In that respect, it is similar to Mr. Olds' carefully constructed arguments about who "possessed" the undersized crabs at Westport.

[23] I note that Mr. Olds told Trooper Jesse, on the other hand, that he had two beers *between* Noon and 12:30 PM before leaving for the office. Exh. E-20 (DUI Interview, Questions 26A and 29). If that is the case, it is unclear whether the alcohol would have been fully metabolized prior to leaving Lacey in a Department vehicle at approximately 2:00 PM.

someone is drinking beer at that time of the morning and whether it might be indicative of a problem with alcohol,[24] the timing he described during the investigation (as opposed to what he told the Trooper)[25] would allow Grievant to avoid a charge of driving a Department vehicle after consuming alcohol, i.e. it presents a fact pattern in which any alcohol he had consumed would have been fully metabolized before he left Lacey in the agency vehicle at approximately 2:00 PM.

Similarly, Mr. Olds testified that when he stopped the car along Highway 26 and went for a hike, it was after "normal hours" and that he did not drink his gin and lemonade[26] until the far end of his hike, when he took a meal break and ate a sandwich about 6:00 PM. Then he returned to the Blazer and felt "tired" so he decided to sleep in the vehicle overnight along the road. The implication is that Mr. Olds did not actually consume alcohol in the vehicle, either before or after the hike, as well as that the alcohol he *did* consume was on his personal time, and even then as a casual accompaniment to a sandwich. I have several difficulties with this characterization of his activities, however. First, he did not begin his workday, as I understand it, until 1:00 PM or so. Consequently, his "normal" quitting time is of limited relevance. Moreover, he had been granted permission to leave for Richland early precisely so he could familiarize himself with old growth sagebrush habitat. That is, in fact, what he claims he was doing on his hike. Therefore, it seems to me that there is a strong argument that Mr. Olds was

[24] In his testimony at the hearing, Grievant did not claim to be an alcoholic or recovering alcoholic, nor did he attempt to explain his conduct as a product of that disease. I do note, however, that he apparently told Mr. Leigh during an interview that he was in treatment at St. Peter Hospital for substance abuse.

[25] Because Grievant had already told Trooper Jesse that he drank before leaving home that morning, it would seem he had no choice but to admit that fact during the investigation. On the other hand, I find it significant, for the reasons outlined in the text, that he changed the timeline of his drinking at home when he responded to questions from the Department.

[26] As an aside, Grievant testified that he consumed a 50/50 mix of gin and lemonade. The lab tests showed that the alcohol in the Real Lemon bottle was essentially 80 Proof liquor, however, as is most gin, and there is no evidence in the record of a separate bottle of lemonade.

"on duty" during the hike, i.e. he was engaged in activities for the Department's benefit, and despite being on duty, he nevertheless both possessed and consumed alcohol in violation of Department Policy 2002.[27]

I also find it difficult to believe that Mr. Olds confined his drinking to such a short period of time, i.e. from roughly 6:00 PM until 6:30 or 6:45 PM when he returned to his vehicle. That is so because if Mr. Olds blew a .170 at 8:44 PM after not drinking anything between the time he returned to the vehicle and the time of the BAC test, he had to have consumed a lot of alcohol between 6:00 and 6:45 PM, at least half a bottle of 80 Proof gin—and probably more according to several online BAC calculators I have used to get a rough idea of what a person's BAC would be under these circumstances. A precise BAC calculation, of course, depends on too many variables that are unknown to me, but applying average figures for weight, rate of metabolism, etc. to the facts as Mr. Olds described them, it would have at least involved very heavy drinking, not simply a drink with a meal. That sort of drinking, of course, while in possession of a Department vehicle away from a safe and secure parking spot, would have been thoroughly irresponsible behavior. And in fact it was irresponsible of Mr. Olds to get himself in a condition in the field in which his blood alcohol level was twice the lower limit at which intoxication is presumed.

There is no direct proof, of course, that Mr. Olds actually consumed alcohol in the Department vehicle, but there is indirect evidence that suggests that conclusion. In addition to the alcohol in his system, which was very high for the amount of time he admitted to have consumed alcohol, there was also the open vitamin water bottle in the driver's side cup holder in the vehicle. The presence of the vitamin water bottle with alcohol that smelled to the

[27] I also note that when Trooper Jesse asked Grievant what time he got off work on July 20, Mr. Olds responded that he was "on a field trip," not that his work day had ended prior to his hike. In fact, so far as the record discloses, Mr. Olds never told Trooper Jesse that he had taken a hike away from his vehicle.

Enforcement Division Officers just like the gin in the Real Lemon bottle, strongly suggests an inference that Grievant was consuming gin in the vehicle—if not while actually driving, then upon his return from the hike. Mr. Olds' suggestion that the bottle was not his (but had been left by a prior user of the Department vehicle) and that any alcohol present in the bottle must have been the product of fermentation of sugar in the liquid is unsupported by any evidence, either that someone left the bottle in the Blazer or that it would be possible for natural fermentation of sugar in such a bottle to produce alcohol that would smell just like gin to experienced Officers.

For these and similar reasons I find Mr. Olds' description of the events of July 20 less than fully credible, to say the least. Whether the evidence has convincingly established that he consumed alcohol while on duty and/or while in the Department vehicle, however, is an issue I need not decide. Rather, under these specific circumstances, I believe it is somewhat beside the point. That is so because the facts to which Mr. Olds himself has testified are conclusive proof that he *possessed* alcohol in his Department vehicle in violation of the policy. Nor is that concession simply an admission of a minor misdeed. The Department has every right to protect the citizens of the State from the potential liability, as well as the danger of significant adverse publicity to the Department, posed by the use of alcohol in a publicly owned vehicle, not to mention the danger of severe injury or death from drunk drivers. And to lessen the chances that a public employee might *consume* alcohol in such a vehicle, the Department is entitled to categorically prohibit the *possession* of alcohol. Thus, I find that Mr. Olds violated an important rule that is reasonably related to a vital public purpose.

As noted, however, Mr. Olds contends that he was not sufficiently trained on the requirements of the rule to understand its "nuances" and that he had personally witnessed State

employees drinking in hotel rooms while on State business. Tr. 403. With all due respect, Mr. Olds is an educated man, and it should take little or no training for him to be able to understand the import of the following language of the policy:

> Employees may not use or possess alcohol *while on duty*, including standby, *in state vehicles*, on WDFW premises, *or* other governmental or private worksites where employees are assigned to conduct official state business.

Policy 2002 (emphasis supplied). There is little "nuance" here. Possession of alcohol in state vehicles is prohibited, and even if the phrase "while on duty" could be read as limiting the effect of "in state vehicles"—which I do not believe is an appropriate reading of the rule in light of the use of the disjunctive "or"—there is no question that Mr. Olds possessed alcohol "while on duty" and while he was "in a state vehicle."[28] Nor do any of the examples he gave at the hearing of situations in which he had witnessed use of alcohol remotely equate to the situation here. Mr. Olds transported liquor in a State vehicle in direct violation of a clear prohibition of the rule, carried that alcohol with him on a hike during which he was conducting Department business (attempting to educate himself about old growth sagebrush habitat), and drank heavily enough that he incapacitated himself from operating the vehicle so as to be able to continue safely to his destination—or even to remove the vehicle from a parking place in which it constituted a

[28] Moreover, Mr. Olds testified that he understood that it was against Department policy to use a State vehicle to obtain alcohol, even after hours. Thus, his own understanding, as reflected in his testimony, was that the "possession of alcohol in state vehicles" prohibition was not limited to times at which the State employee is "on duty."

hazard.[29] That is very different from having social drinks in a hotel room in the evening after conducting Department business during the day.[30]

In sum, I find that Grievant committed a serious violation of Policy 2002.

D. Miscellaneous Disciplinary Charges

During the course of the investigation, the Department asked Mr. Olds about the damage to the right front bumper of the Blazer. He expressed surprise when shown the photographs, and Mr. Leigh testified that the surprise appeared to be genuine. In responding to a question about how the damage might have happened, Mr. Olds volunteered that he had driven off the freeway for a rest break to go mushroom hunting and that when he turned around at the end of the road, he might have unknowingly snagged something on the bumper.[31] When asked what road, he gave a couple of USFS road numbers that appeared to be inconsistent with his story. At the hearing, he testified that it was a short spur gravel road off I-90 on the west side of the summit in Snoqualmie Pass. When asked to fill out an accident report (after the Department interviewed the driver who had checked out the vehicle immediately prior to Grievant who said there was no damage when she returned the vehicle), however, Grievant refused to fill out the report because he said he had no knowledge of any "accident."

[29] To the extent Grievant argues that he had parked legally in a place where he was entitled to "camp out for the night," I credit instead Officer Snyder's testimony that the vehicle would have been towed as a safety hazard had it not been occupied. I understood this testimony to mean that while Grievant might have been entitled to park in that location temporarily, he would not have been allowed to park there overnight and would have been asked to move the vehicle had he been capable of operating it safely.

[30] In addition, Grievant provided no details about the use of alcohol he had observed that apparently formed the basis of his belief that he had acted appropriately. For example, he did not place them in time, i.e. whether before or after the adoption of the current policy in 2005. Without that information, it is impossible for me to give his examples much weight.

[31] The Department viewed this potential explanation with great suspicion, however, not only because of the discrepancies between the locations Mr. Olds first described as the places he had taken a break, as well as their view that it was highly unlikely that Grievant could have driven the Blazer from west of the mountains, whether on Snoqualmie Pass or elsewhere, to the Othello area with the bumper cowling hanging near the ground as it was when the Blazer was retrieved in Eastern Washington. As noted, the Department's Enforcement Officers on the scene had to wire up the bumper cowling in order to drive the vehicle.

My view is that Grievant should have filled out an accident report, even if all it said was that he had no knowledge of any accident. In part, I reach that conclusion because Grievant conceded in his testimony that he inspected the vehicle before he left Lacey and it appeared to be undamaged. Thus, whether as a result of an accident or normal wear and tear, the damage must have occurred while the vehicle was checked out to him, and he should have cooperated in providing information about what might have happened. But be that as it may, however, the Department treated Grievant's claim to have driven off the freeway to hunt mushrooms as evidence of misconduct under a couple of different theories. First, in light of his shifting stories about the location of the road, the Department believed that Grievant had not been truthful. Alternatively, one of the roads he identified initially was fifteen miles or so long. Consequently, the Department alleged that if he had driven to the end of the road and turned around, as he claimed, it would have taken him more than fifteen minutes, and consequently he would have exceeded his allotted break time *and* used his Department vehicle for personal use in violation of the ethics rules. While I agree that Grievant's difficulty identifying the location of the mushroom hunting excursion is suspicious, a suspicion of wrongdoing—even a reasonable one—is not proof of misconduct, and that is especially true in the case of a serious charge such as dishonesty. Nor do I find the Department's assumption that Grievant misused his vehicle by taking an extra-long break while mushroom hunting to be persuasive in terms of proof. In sum, these allegations add little or nothing to the Department's case. The same could be said for the Department's concerns that Grievant was not telling the truth when he claimed to have been searching for old growth sagebrush habitat when hiking off Highway 26. According to the Department's witnesses, that area is squarely within the Columbia Basin Irrigation Project and has been converted to agriculture, an area which has no old growth sagebrush habitat. Even if that is true,

however, Grievant was new to the concept of old growth sagebrush, and the fact that there was nothing of the sort present in the area he claims to have searched does not necessarily establish that Grievant lied when he said that he was *looking* for it.

Similarly, I do not find particularly helpful to the Department's case in support of termination the fact that Department officials were unsuccessful in two attempts to reach Grievant at home by telephone. The fact that someone who answered the phone said that he was "unavailable" at that time does not necessarily mean that he was not there, and at least one of the calls was placed within a reasonable time frame for someone in Grievant's position to be at lunch, an express exception to the requirement that he be available at home. Again, I understand the Department's suspicions, but this allegation, too, adds little to the Department's case.

E. *Garrity* Issues

The Association makes a procedural argument on Mr. Olds' behalf, as previously noted, that his *Garrity* rights were violated when the Department refused to offer use immunity with respect to any information he might provide in his own defense during the investigatory process. That approach, says the Association, deprived Mr. Olds of a fair opportunity to defend himself because anything he said could (and very well might have been) shared with the authorities who were processing the related criminal charges against him. Thus, that information could have been used to convict him. A public employee's *Garrity* rights, of course, are constitutional in dimension, and thus I treat this issue with the utmost seriousness. In the end, however, after careful consideration I find no violation of Grievant's due process rights, either under *Garrity* itself, or under the broader contractual principles of due process embodied in concepts of just cause for discipline.

Garrity protects public employees from being forced to abandon their Fifth Amendment rights as a condition of continuing in public employment. The most familiar cases arise in the law enforcement context, but all public employees are entitled to *Garrity* protections. Ruben, ed., *Elkouri & Elkouri's How Arbitration Works* at 1264 (6th Ed., BNA, 2003). The classic *Garrity* issue arises when a public employer calls an employee in for an interview and demands answers to investigatory questions on pain of dismissal for insubordination if the employee refuses to answer. *Id*. at 1265. "There is no absolute requirement that *Garrity* immunity be offered in every potentially incriminating interrogation," however. *Id*. In fact, as one leading commentator has explained:

> an employer has the right to refuse to compel an employee to make any statements in the disciplinary process, and to merely allow the employee to make voluntary statements if the employee chooses to do so. This interplay between the *Garrity* rule and principles of due process means that an employee facing a pre-disciplinary hearing may be faced with a choice of making no statement whatsoever at the hearing, or making a statement which could be used against the employee in a subsequent criminal proceeding. Such a choice does not violate the employee's constitutional rights.

Aitchison, *The Rights of Police Officers* at 169 (5th Ed., LRIS, 2004). Moreover,

> if the employee is not offered *Garrity* immunity and chooses to exercise Fifth Amendment rights, there is no prohibition against a public employer using evidence other than the employee's silence as a reason for his or her termination.

Elkouri, supra, at 1265.

Here, the Association demanded that the Department arrange for use immunity so that any statements Mr. Olds offered in attempting to persuade the Department not to terminate him could not be used in the pending criminal prosecutions for the alleged Fisheries violations and the DUI/Open Container charges in Eastern Washington. The Department refused—and according to the testimony of the Association President, the Department's HR Manager affirmatively indicated an intention to share with the authorities any information provided by Mr.

Olds during the disciplinary process. Nevertheless, as the authorities cited above make clear, the Department was not precluded from declining to give Mr. Olds *Garrity* warnings so long as he was not "compelled" to answer the questions or punished for failing to do so.

Mr. Olds chose to provide some information "voluntarily," however, apparently because he believed it was his only hope for salvaging his job. I do not believe that difficult choice implicates the constitutional principles, at least so long as his refusal to answer specific questions was not treated as insubordination justifying his termination, or his silence treated as an admission of wrongdoing. In my view, neither of those occurred here. Rather, the Department viewed a number of Grievant's express statements as admissions of certain elements of the alleged misconduct, e.g. transportation of alcoholic beverages in a Department vehicle. As noted above, that mode of analysis does not violate *Garrity*. To the extent the Association argues that the Department's refusal to give a *Garrity* warning to Mr. Olds nevertheless prejudiced his ability to offer an effective defense to the disciplinary charges, and thus should be regarded as a lack of due process under just cause principles, I disagree—at least on the facts of this case. Mr. Olds had full opportunity to present a defense at the hearing in this matter, and the record does not disclose any new material facts presented before the Arbitrator that Mr. Olds had felt constrained to withhold during the disciplinary process itself. Therefore, I would not find any prejudice to Mr. Olds or to the Association on this record.

F. Whether the Department Had Just Cause For Discharge

I turn, then, to the crux of the matter. The Department has convincingly established significant violations of Policy 2002 regarding a drug- and alcohol-free workplace, and I find that Mr. Olds, in his lack of candor and cooperation with Officer Klump at Westport, also failed to live up to the fisheries laws and to reasonable Department expectations. The issue remaining,

however, is whether the Department had just cause for summary dismissal. I have already disposed of some of the Association's arguments to the contrary, e.g. the *Garrity* issue and the contention that Grievant was not properly trained on the workplace drug and alcohol policy. The Association also argues, however, that the Department improperly combined these two independent disciplinary incidents into a single investigation, especially when Mr. Leigh had allegedly concluded prior to the investigation of the first issue that Mr. Olds had engaged in dishonesty in dealing with Officer Klump. I disagree.

First, the contention that Leigh had reached a preordained decision as to guilt rests primarily on an email Leigh sent to Klump's supervisor asking for the Officer's report. Exh. A-6. Mr. Leigh said "the lack of honesty you describe is particularly troubling." *Id*. But the fact that Mr. Leigh found an allegation of dishonesty to be "particularly troubling" does not establish that he had already reached a conclusion that the allegation was *true*. In context, I understand Mr. Leigh simply to be saying that an allegation that a Department employee has been dishonest with a Department Enforcement Officer is a serious one, and I do not disagree with that assessment. After reviewing the entire record, I credit Mr. Leigh's testimony that he reached a conclusion after examining the evidence, but even if he had not, I note that I have now examined the evidence independently and have made my own determination as to the level of wrongdoing committed by Mr. Olds in that incident.

Nor do I agree that Mr. Olds was necessarily disadvantaged by the Department's decision to combine the two incidents into a single investigation. Whether viewed together or separately, these incidents would both be relevant considerations as to the appropriate level of discipline here. That is, had Mr. Olds been found to have committed misconduct in the fisheries incident, he presumably would have received a disciplinary penalty which would then be part of the

record on which I would have to evaluate the appropriate level of discipline for the Policy 2002 violations. For example, had Mr. Olds received a written warning or even a brief suspension for the fisheries misconduct, I would have been inclined to uphold it. Thus, that prior disciplinary record would have become part of the calculus as to the appropriate penalty with respect to the established violations of the Department's alcohol policies whether the two issues were considered separately or in a single proceeding. There is one potential difference, of course. If the incidents had been treated separately, Mr. Olds would have been the beneficiary of notice of the Department's expectations and would have been given an opportunity to demonstrate the "rehabilitation" that lies at the core of progressive discipline principles—that is, he might have been given a chance, after clear notice from the Department as to its expectations, to demonstrate that he could modify his behavior to conform to the Department's reasonable rules. That aspect of due process, of course, would be most relevant if the alleged offenses were of the same nature, i.e. if both involved Policy 2002 or both involved lack of candor with a Department Enforcement Officer. Because the offenses established by the record are quite different, however, it seems to me that the notice issues are less relevant, and thus the Department must demonstrate that one or the other of the offenses would justify summary discharge.[32] Thus, combining the incidents into one disciplinary proceeding has not disadvantaged Mr. Olds.

As noted, I do not believe that Mr. Olds' lack of candor and cooperation with Officer Klump would merit summary discharge. I cannot say the same about his extremely irresponsible behavior in violating the clear prohibitions of the Department's drug and alcohol policy. Transporting alcohol in a Department vehicle is expressly prohibited and is a very serious matter.

[32] In reaching this conclusion, I recognize that the Department alleged dishonesty in both incidents, but I do not find that "dishonesty" was convincingly established in the Othello case (although I certainly understand the Department's suspicions). Thus, I do not find that Mr. Olds was improperly denied notice and an opportunity to demonstrate truthfulness when the Department combined the two investigations.

Drinking to a level twice the legal limit while doing Department field work is an even more serious violation, especially when Grievant returned to his Department vehicle and remained in physical control of it while extremely intoxicated. Mr. Olds is to be commended, of course, for deciding that he should not drive in that state, but given his impaired abilities and the very real possibility that he might not always make the right choice under those circumstances, it was an extremely serious lapse in judgment to put himself in that condition in the first place. Moreover, he parked his damaged vehicle with exempt plates at an odd angle along a public highway, under circumstances that called enough attention to the situation that a member of the public, thinking he might have had been in an accident, stopped to check on his well-being. That encounter resulted in a report to the authorities that he was unresponsive and perhaps intoxicated. Because Mr. Olds' DFW vest was hanging on the passenger seat according to Trooper Jesse, a member of the public would reasonably conclude that Mr. Olds was affiliated with the Department. The entire circumstances, needless to say, do not reflect well on State employees.

The Association argues, at least implicitly, that Mr. Olds should have received a Last Chance Agreement and that the Department's failure to offer one constitutes disparate treatment. I disagree for two reasons. First, the only case of comparative discipline offered in support of that result is not truly comparable. An employee was reported by a member of the public to be possibly intoxicated at an after-hours event she attended in connection with her work. She drove her own vehicle or a Department vehicle (the record is not entirely clear) home from the event where the authorities approached her and gave her a breathalyzer. She registered below the legal limit. In a meeting with Assistant Director Hueckel, she recognized her error, expressed remorse, crying constantly during the meeting, and she agreed to get treatment. Under those circumstances, Mr. Hueckel took a risk and agreed to a Last Chance Agreement.

Frankly, had Mr. Olds followed the same course here, either during the Department's investigation or even at the hearing before me, I would have been inclined to consider reinstatement (most likely without back pay) subject to an agreement to undergo substance abuse treatment. Had he been successful, I would have been open to returning him to work with the Department under a strict Last Chance Agreement, including random drug and alcohol screens for a reasonable period of time. It appears to me that Mr. Olds has (or at least had) a serious problem with alcohol,[33] and it is my belief that under many circumstances, employees who recognize that fact (even if belatedly) and who commit to making a change in their lives should be given a chance, under principles of just cause, to salvage their jobs. *See*, e.g. St. Antoine, ed., *The Common Law of the Workplace*, Ch. 6, Subchapter IV ("The Troubled Employee") at 239 *et seq*. Here, however, Mr. Olds has not identified himself as a person troubled by substance abuse, and therefore I must look simply to the facts of the case in evaluating just cause.

To reiterate, Grievant transported alcohol in a Department vehicle in violation of an express Department policy, he drank to severe intoxication while on a Department field trip, he left himself incapacitated at the side of a public highway (in a damaged vehicle with exempt plates and a DFW vest hanging on the passenger seat) in a manner that aroused concern, with the result of damaging the public's perception of State employees given that Grievant appeared to a member of the public to be "drunk or in a daze." Exh. E-21 at 4. The record establishes that Mr. Olds had recently been transferred to a position with the Department, in lieu of a RIF, that involves extensive driving alone in Department vehicles. In light of Mr. Olds' demonstrated behavior on July 20, 2009, as established by his own testimony and/or by uncontroverted facts

[33] If I am mistaken in my judgment about Mr. Olds' alcohol problem, then I apologize. If he does not have a substance abuse problem, however, there would simply be no mitigating circumstances sufficient to lessen the severity of his extremely irresponsible behavior on July 20, 2009.

contained in the police file, as well as in light of his apparent inability to acknowledge that he did anything wrong on July 20, 2009 (and to accept responsibility for his actions), the Department and the public are simply not required to accept the risks associated with returning him to the State's public highways in Department vehicles.

The Department had just cause to discharge Grievant Craig Olds. Therefore, the grievance must be denied.

AWARD

Having carefully considered the evidence and argument in its entirety, I hereby render the following Decision and Award:

1. The Department had just cause to discharge Grievant Craig Olds; therefore,
2. The grievance must be denied; and
3. Consistent with the terms of their Collective Bargaining Agreement, the parties shall bear the fees and expenses of the Arbitrator in equal proportion.

Dated this 7th day of June, 2011

Michael E. Cavanaugh, J.D.
Arbitrator