

## Labor Arbitration Awards: 1986 - Present, Linn County and Linn County Deputy Sheriffs' Association , 26-2 ARB ¶9092, (Aug. 5, 2026)

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26-2 ARB ¶9092. LEE HORNBERGER, Arbitrator. Selected under Oregon Employment Relations Board procedures. Hearings held May 27-29, 2026, by Zoom in Albany, Oregon. Award issued August 5, 2026.

### Headnote

#### **Suspension: Insubordination: Personal conduct.–**

A sheriff's employee challenged a 10-day unpaid suspension for confrontational conduct during meetings with supervisors. The arbitrator denied the grievance. During a counseling meeting, the employee demanded Union representation, repeatedly interrupted supervisors, used profanity about a memorandum and told management to "take this and shove it." The employee also secretly recorded the meeting despite departmental restrictions and later acknowledged being insubordinate and disrespectful. The arbitrator credited the recording and witness testimony, found a fair investigation, and rejected unequal-treatment claims. The evidence established insubordination, disobedience and improper recording, and the 10-day penalty fell within management's reasonable disciplinary discretion under the agreement.

Diana Moffat, Attorney, for the Employer. Paige M. Chrz, Attorney, for the Union.

### [Text of Award]

#### INTRODUCTION

**HORNBERGER**, Arbitrator: This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between Linn County (Employer) and the Linn County Deputy Sheriffs' Association (Union). The Union contends that the Employer violated the CBA when it suspended Grievant. The Employer maintains that it did not violate the CBA when it suspended Grievant.

Pursuant to the procedures of the Oregon Employment Relations Board, I was selected to conduct a hearing and render a final and binding arbitration award. The hearing was held on May 27, 28, and 29, 2026, in Albany, Oregon, via Zoom. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for the introduction of relevant exhibits. The hearing was transcribed. I received the last transcript on June 10, 2026. The dispute was deemed submitted on July 28, 2026, the date I received the post-hearing submissions. I have carefully read these submissions. On occasion, I might use material from these submissions in writing this Decision. Sometimes this is done to state the position of the parties. On other occasions, I have done this after carefully considering such material and making an independent judgment of the accuracy and appropriateness of the material being used.

The parties stipulated that the grievance and arbitration were timely and properly before me and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

Both advocates did an excellent job in representing their clients. All involved in the arbitration were courteous and professional.

#### ISSUES

The Employer frames the issue as follows.

Did the Employer issue discipline to Grievant in conformance with the applicable CBA and as further described by ORS 243.808, referenced in the CBA?

The Union frames the issues as follows.

Did the Employer have just cause to discipline Grievant in the manner in which it did, specifically, the imposed ten-day suspension? If not, what is the appropriate remedy?

The parties did not agree upon the issue, and the parties agreed that I had the authority to frame the issue.

I frame the issues as follows.

Was there just cause for the Employer's discipline of Grievant? If not, what should the remedy be?

### **RELEVANT PROVISIONS OF OREGON REVISED STATUTES REGARDING JUST CAUSE DISCIPLINE**

The following provisions of the Oregon Revised Statutes (ORS) regarding the discipline of a correctional officer provide in pertinent part:

#### **ORS 236.350**

As used in ORS 236.350 to 236.370:

...

(2) "Just cause" means a cause reasonably related to the public safety officer's ability to perform required work. The term includes a willful violation of reasonable work rules, regulations or written policies.

(3) "Public safety officer" means:

...

(b) A corrections officer, ... as those terms are defined in ORS 181A.355.6.

#### **ORS 236.360**

...

(4) Disciplinary action may not be taken against a public safety officer without just cause.

...

#### **ORS 243.706**

(1) A public employer may enter into a written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in binding arbitration or any other dispute resolution process agreed to by the parties....

...

ORS 243.808

(1) For purposes of an arbitration proceeding under ORS 243.706 concerning alleged misconduct by a law enforcement officer:

(a) A law enforcement agency ... has the burden of proof by a preponderance of the evidence to show that:

(A) The officer engaged in the alleged misconduct; and

(B) Any disciplinary action taken against the officer was with just cause, as defined in ORS 236.350.

(b) In determining the reasonableness of a disciplinary action imposed by a law enforcement agency ..., including whether the level of discipline is appropriate, an arbitrator shall uphold the disciplinary action unless the arbitrator finds that the disciplinary action is arbitrary and capricious.

...

(3) The requirements described in this section are not subject to collective bargaining.

(4) As used in this section:

...

(b) "Law enforcement agency" and "law enforcement officer" have the meanings given those terms in ORS 243.812.

...

ORS 243.812

...

(15) As used in this section:

...

(c) "Law enforcement agency" means an entity that employs law enforcement officers.

(d) "Law enforcement officer" means corrections officers, ... as those terms are defined in ORS 181A.355.

**RELEVANT CONTRACTUAL LANGUAGE**

**ARTICLE 16 – DISCIPLINE AND DISMISSAL**

**16.1** Except in the case of probationary employees, who may be disciplined with or without cause, disciplinary action may be imposed upon an employee only for just cause using the principles of progressive discipline. For law enforcement officers, "just cause" for discipline shall be determined in accordance with ORS 243.808. Although disciplinary action is usually progressive in nature, it may be

imposed at any level if supported by just cause and based upon the seriousness of the offense and the particular circumstances of the employee. It is recognized by the parties that each situation calling for possible disciplinary action is unique to its particular circumstances and that appropriate disciplinary action will be considered in the context of such circumstances.

**16.2** If disciplinary action is to be taken against an employee, the County will attempt to impose such discipline in a manner that will not embarrass the employee before other employees or the public.

#### **ARTICLE 17- SETTLEMENT OF DISPUTES**

##### **17.4:**

The arbitrator shall set a hearing date and shall render a decision within thirty (30) calendar days after the conclusion of the hearing and receipt of Closing Argument Briefs. ... The arbitrator's remedy shall be limited to a period of ninety (90) days prior to the filing of the grievance. Each party shall be responsible for costs of presenting its own case to arbitration. The losing party shall be responsible for the arbitrator's fee and expenses.

## **FACTUAL OUTLINE**

### **List of participants**

**Lieutenant NB** has been an employee of the Employer for 20 years. Lt. NB was the Shift Supervisor on November 1/November 2, 2024.

**Sergeant TR** has worked for the Employer for over 18 years. He was promoted to Sergeant on October 1, 2024. Sergeant TR was the Shift Supervisor on October 31/November 1, 2024.

**Deputy PY** has been a Deputy since November 2021.

**Captain TL** was hired in 2005. He is the jail captain.

**Undersheriff MS** has worked for the Employer for 23 years. He assists in the operation of the entire Sheriff's Office.

**Sheriff MD** is the elected Sheriff of Linn County.

**Grievant** is a Corrections Deputy at the jail. He has been employed by the Employer for 11 years.

### **Testimony of Lieutenant NB**

Lieutenant NB has been an employee of the Employer for 20 years. He is in the Corrections Division. He supervises one of four teams. There are 12 hour shifts. He worked the October 31, 2024, shift from 5:40 p.m., October 31, 2024, to 6:00 a.m., November 1, 2024.

Grievant was scheduled to work both October 31/November 1, 2024, and November 1, 2024/November 2, 2024. On October 31, 2024, Lieutenant NB was not the Shift Supervisor. Sergeant TR was the Shift Supervisor. Sergeant TR was a brand new Sergeant then, with only one or two weeks as a Sergeant. On November 1, 2024/November 2, 2024, Lieutenant NB was the Shift Supervisor.

During the October 31, 2024, briefing period, Lieutenant NB was sitting at a table in the Briefing Room. There was a change of shift. He was approached by Grievant who had medical paperwork from Grievant's doctor. Grievant stepped behind Lieutenant NB. Grievant was behind Lieutenant NB's right shoulder. Lieutenant NB looked at the paperwork. NB did not look at Grievant. There was a brief discussion about the medical paperwork.

Central Control has no direct contact with the inmates. There are no stairs in Central Control. Central Control is close to the briefing area. Central Control employees would have contact with the outside public.

On October 31, 2024, Lieutenant NB was assigned to work a post. He was bringing in new internees. Lieutenant NB had no other contact with Grievant during that shift.

Sergeant TR mentioned nothing to Lieutenant NB concerning Grievant's dress. According to Lieutenant NB, Grievant's dress at that time violated Employer Rule 1046. Rx. 17.

At the end of the October 31, 2024/November 1, 2024 shift, Lieutenant NB was in the Briefing Room. This was the first time he had seen Grievant dressed the way that Grievant was dressed at that time. Lieutenant NB discussed this with Sergeant TR. Sergeant TR confirmed Grievant dressed in shorts while on shift duty.

Lieutenant NB chose to talk with Grievant in the hallway. There is a kitchen door in the hallway. There was no other person present. The only people present were Lieutenant NB and Grievant. Lieutenant NB advised Grievant about the uniform policy. Grievant told Lieutenant NB that he did not have time to change. The conversation got heated. They both might have raised their voices. Grievant continued to argue with Lieutenant NB.

Lieutenant NB talked with the Captain. The Captain and Lieutenant NB reviewed the policy. Lieutenant NB wrote a memo ahead of the counseling session.

At 5:45 p.m., November 1, 2024, Sergeant TR came on duty. Lieutenant NB included Sergeant TR into this conversation with Grievant as a teaching point with Sergeant TR. Lieutenant NB has a history with Grievant becoming argumentative. Therefore Lieutenant NB also wanted a witness in case things got off track.

At approximately 5:45 p.m., November 1, 2024, Grievant arrived for work. He was not wearing shorts at that time. He started his shift. He worked with Sergeant TR. Grievant was still in Central Control. At approximately 10:00 p.m., November 1, 2024, Lieutenant NB and Sergeant TR met with Grievant to present the counseling memo to Grievant. The counseling session was not intended to be discipline. They met with Grievant in Central Control at approximately 9:45 p.m. A copy of the memo and Policy 1046 were in Lieutenant NB's hand. The three of them were there. Grievant saw the paperwork in Lieutenant NB's hand. Grievant appeared agitated pretty quickly. Grievant wanted a Union representative present. Grievant got more agitated. Deputy PY is one of the Union representatives. Grievant got on the radio and requested Deputy PY to leave W tower and come to Central Control. A replacement at W tower was then needed for relief for Deputy PY. It turned out that Grievant had secretly audio taped this meeting. The recording is approximately five minutes long. Rx. 12. The recording indicates that Grievant referred to the "fucking memo." Grievant never advised anyone until the very end of the meeting that he was recording the conversation. Grievant told Lieutenant NB that he could take his memo and shove it. Grievant was unprofessional and disrespectful. Grievant was agitated. Lieutenant NB was concerned about what might happen if Grievant stayed and worked. The appropriate thing to do was to send Grievant home to cool down.

Lieutenant NB had safety concerns. Grievant was the only employee at Central Control. Lieutenant NB told Grievant to go home. The Jail was short staffed that night. Lieutenant NB wanted someone else to cover Central Control. Grievant and Deputy PY left the room. They went out into the main hallway. Lieutenant NB saw Grievant go alone toward the Briefing Room.

Lieutenant NB was still in Central Control. Grievant said he was gathering evidence. There was radio chatter.

Lieutenant NB got a copy of the recording sometime later.

Lieutenant NB was subsequently interviewed by Captain TL. Rx. 25. The recording was played again. Rx. 12. Grievant saying "fucking" during the meeting is on the tape twice. Lieutenant NB the believes counselling memo is one hundred percent accurate. According to Lieutenant NB, the totality of Grievant's behavior, including the failure to exit the facility, was insubordinate.

The hallway is not private. There was a conversation in the hallway. Lieutenant NB has an office. He could have asked Grievant to go into the office.

Lieutenant NB looked at the medical paperwork that was given to him by Grievant on October 31, 2024. He did not look behind himself.

Lieutenant NB brought Sergeant TR with him as a teaching tool. Lieutenant NB was aware that Grievant could be argumentative.

There was no policy requiring Grievant to sign the memo. Grievant threw the memo on the floor. Grievant said Lieutenant NB could take the paperwork and shove it.

### **Testimony of Deputy PY**

Deputy PY works for the Employer. He has been a Deputy since November 2021. He works in the corrections facility. On October 31, 2024, he was working the night shift. The night shift goes from 5:45 p.m./6:00 p.m. until 6:00 a.m. on November 1, 2024. He had contact with Grievant.

The next shift was November 1/2, 2024. Deputy PY heard from Grievant requesting PY's assistance. Grievant asked Deputy PY to come down then be a representative for him. Deputy PY had a perspective of the situation. He would have to be replaced. There were three employees in the tower at that time.

It did not take long for Deputy PY to get to Central Control. He walked into Central Control. Present were Sergeant TR, Grievant, Lieutenant NB, and Deputy PY. Deputy PY was not aware that Grievant was recording the conversation.

Lieutenant NB said this was a counseling session for Grievant. He said it was not a discipline. Lieutenant NB started to read the paper. Grievant did not agree with part of the paper. Grievant interrupted Lieutenant NB. Lieutenant NB tried to calm Grievant down. Deputy PY did not say anything. Lieutenant NB read his paper. He asked Grievant to sign it. Grievant said he was not going to sign it. Lieutenant NB signed it and made a copy. Grievant told Lieutenant NB to shove it. Lieutenant NB told Grievant to leave. Deputy PY heard Grievant say the F word on the recording. Deputy PY does not hear his own voice in the recording.

At the end of the meeting, Grievant said he had been recording the meeting. This surprised Deputy PY a little bit.

Lieutenant NB gave Grievant an order to go home. It was still mid-shift.

The F word was used by Grievant. Grievant argued with Lieutenant NB. Grievant was insubordinate.

Deputy PY went with Grievant. Grievant said he wanted to pull a video. Grievant went to pull a video. He went to the computer downloading room. Deputy PY did not see Grievant go into the Briefing Room.

On camera Deputy PY could see Grievant leaving the jail facility escorted by Sergeant TR.

Deputy PY said to Grievant "just let him read it."

Sergeant TR was a new Sergeant at the time.

There is a photograph with Deputy PY at work with his hat on backwards. He was in full uniform. Ux. 125.

Lieutenant NB was arguing back with Grievant. Deputy PY has gone to Lieutenant NB for guidance. Lieutenant NB sometimes responds with a question. Those interactions are pleasant. They sometimes force Deputy PY to think.

### **Testimony of Sergeant TR**

Sergeant TR works in the Corrections Division on Charlie Team. The work is 24/7. There are four Teams. The number of Deputies on each Team varies. Sergeant TR has worked for the Employer for over 18 years. He has been a Sergeant for one and a half years. He was promoted to Sergeant on October 1, 2024.

Sergeant TR did a memo to Captain TL on November 1, 2024. Rx. 11. Lieutenant NB instructed Sergeant TR to write this memo. The goal was to have documentation.

There was a pre-shift meeting on October 31, 2024, in the Briefing Room. Lieutenant NB was there. Grievant came in. Grievant handed paper to Lieutenant NB. Then Grievant went to his post at Central Control.

Grievant was standing behind Sergeant TR. Grievant handed a document to Lieutenant NB. Lieutenant NB did not look up. Grievant was wearing cargo shorts and a black jacket. Rx. 18.

The Employer has a uniform policy. Rx. 17.

Sergeant TR was newly promoted as a Sergeant. Grievant's uniform did not conform with policy. Sergeant TR was not sure how the uniform policy read. His goal was to read the policy later and talk with Lieutenant NB. Grievant would be working in Central Control. Sergeant TR was the shift supervisor on October 31, 2024. He saw Grievant later on the shift. Grievant was wearing a t-shirt and cargo shorts.

Sergeant TR relieved Grievant for a break. It was a busy night that night. There was an end of shift briefing in the Briefing Room. Lieutenant NB, Grievant, Sergeant TR, and others were there. Lieutenant NB was next to Sergeant TR. Lieutenant NB saw Grievant's attire. Lieutenant NB asked Sergeant TR if Grievant had worn that clothing that day. Sergeant TR confirmed it was so. Lieutenant NB said that was not acceptable. Grievant had already left the room.

Sergeant TR did not hear the conversation between Lieutenant NB and Grievant.

Prior to returning from the shift on November 1, 2024, Lieutenant NB had drafted a counseling memo. It was a proper procedure to do a counseling session memo. Sergeant TR has not experienced negative experiences between Grievant and Lieutenant NB. Lieutenant NB is a reasonable, respected lieutenant.

When Sergeant TR went into intake, he heard commotion in the hallway. That commotion was from Grievant.

On November 1, 2024, Sergeant TR was back on shift. Grievant was back in Central Control. Sergeant TR reviewed the policy. Lieutenant NB and Sergeant TR went to Central Control to talk with Grievant. They got to Central Control. Lieutenant NB asked Grievant to turn the music off. Grievant got on the radio and called 536 for Deputy PY to come

to Central Control. Grievant said he wanted a Union representative present. Lieutenant NB said that was okay but this is a counseling session. Grievant insisted on having representation. Deputy PY arrived at Central Control. Lieutenant NB said the counseling was not discipline.

Grievant said there is a memo with my name on it. Lieutenant NB started reading the memo. Grievant addressed the date of 10/31. Lieutenant NB continued reading the memo. Grievant said Lieutenant NB had to have seen him at the start of the shift. Lieutenant NB wanted to continue with the reading. Lieutenant NB told Grievant to "be quiet" or "shut up."

Grievant refused to sign the memo. Lieutenant NB signed Lieutenant NB's name. Grievant threw the memo into the recycling box. Grievant continued to argue. Both persons' volumes increased. Lieutenant NB told Grievant he had to go home. Sergeant TR did not hear "shove it" then. But he heard it on the tape.

Lieutenant NB then told Grievant, "you need to go home." Grievant then said "Deputy PY followed Grievant out of CC."

They walked to intake across the hall. Sergeant TR watched through the camera as Grievant walked into the Briefing Room. The Briefing Room is not the way to exit the facility. Grievant on the phone said "I'm just gathering evidence." Sergeant TR told this to Lieutenant NB. Lieutenant NB told Sergeant TR to tell Grievant to leave the facility. Grievant did this.

Sergeant TR told Grievant he needed to go home. Grievant said "I'm off duty and just getting evidence." Sergeant TR told Grievant to go home. Grievant left the room. Sergeant TR believes Grievant was insubordinate.

Grievant was on light duty at that time. At various times on October 31, 2024, Grievant was seen still wearing shorts.

The night of October 31, 2024, Sergeant TR was the shift supervisor.

The conversation in the hallway was not private.

Sergeant TR was fine with having Deputy PY being there. Sergeant TR allowed it to happen. After a direct order, Grievant stopped talking. Grievant said "shut up." Both were raising their voices. According to Sergeant TR, based on the recording, Lieutenant NB did not say "shut up." Based on the recording, Grievant said "shut up."

### **Testimony of Captain TL**

Captain TL was hired in 2005. He is the jail captain. He is the only jail captain. He is familiar with the situation. Captain TL was on vacation on October 31, 2024. He was at home on November 2, 2024. He saw the email from Lieutenant NB. Lieutenant NB emailed Captain TL the memo.

Captain TL then talked with the Undersheriff. Captain TL returned to work on November 4, 2024. Captain TL then met with the Sheriff and the Undersheriff. Captain TL then did an investigation. He did interviews. Exhibit 14. He did an interview with Grievant. Captain TL asked for a copy of the recording that Grievant had taken. The Grievant had a doctor's appointment prior to work. There was a second interview on November 26, 2024. Rx. 22.

Grievant understood the uniform policy.

Captain TL interviewed Deputy PY. Captain TL does not recall interviewing Sergeant TR.

Captain TL concluded Grievant violated policy. Captain TL did not make a recommendation concerning penalty.

Captain TL's memo went to the Undersheriff.

Captain TL is "open minded" when going into an investigation. Captain TL interviewed Lieutenant NB.

Captain TL did not ask Grievant if Grievant felt disrespected or demeaned. Captain TL agrees there is a difference between this "fucking person" and "you fucker." Grievant's reaction to Lieutenant NB "was out of character completely."

The use of profanity in the workplace is not acceptable conduct. Captain TL was tasked to investigate Grievant's conduct. Captain TL testified that "people use profanity" and "context matters."

### **Testimony of the Undersheriff**

The Undersheriff has worked for the Employer for 23 years. The Undersheriff assists in the operation of the entire Sheriff's Office. This includes reviewing the policies.

The Undersheriff knew Grievant had been sent home. Captain S contacted the Undersheriff. An employee had been sent home. This was the first time that it had happened during the Undersheriff's time with the Employer.

Grievant continued to get paid.

The Undersheriff testified that "I need[ed] to know more." The creation of a counselling document means there would be no "no ambiguity." The counseling document is to prevent a disciplinary process from occurring.

A surreptitious audio recording is very rare. The Undersheriff has never had it occur with the Employer.

The Undersheriff assisted Captain S in drafting the Notice of Paid Administrative Leave. During the investigation, there was paid administrative leave. This was not an IA investigation.

The Undersheriff listened to the interview recordings. He referred to the transcripts.

There was a *Loudermill* hearing. Rx. 27. At the *Loudermill* hearing, Grievant said "I apologize. It won't happen again." The *Loudermill* hearing was on February 4, 2025.

The Undersheriff did not have issues with Captain TL's interview style. The Undersheriff did not find Lieutenant NB's conduct to be inappropriate.

The Undersheriff made a judgment call.

The discipline decision was ultimately the Sheriff's decision.

The Undersheriff looked at comparative decisions. A written warning would not serve that purpose. A suspension without pay would get a person's attention. The Undersheriff took into consideration Grievant's record. There are comparative disciplines. Rx. 31 to 37. There was a request for information from the Union for like policies notifications.

Rx. 31 and 36 were the same investigation. There was a drinking policy violation. There was a five day suspension without pay. This was a unit employee. There had been no prior similar conduct.

In the Deputy V situation, there was no insubordination. The penalty was a five day suspension without pay. Rx. 36.

In the Deputy W situation, the penalty was a five day suspension without pay. The employee was not impaired. There

was no insubordination. Rx. 37.

In the Patrol Deputy B situation, the penalty was a five day suspension without pay. There was a marked vehicle. The employee's spouse was at the hospital. The employee drove at a high speed in a marked vehicle. The vehicle lights were on. There was no insubordination.

In the Deputy N situation, the penalty was a ten day suspension without pay. There was furnishing liquor to minor. The employee had a prior written reprimand. Rx. 35.

In the Deputy C situation, the penalty was a two day suspension without pay. The employee was in uniform in patrol vehicle. He threatened a person with arrest. Rx. 33.

In the Deputy H situation, there was a one day suspension. The employee had a confrontation with a judge. Rx. 34.

The Undersheriff stands by the ten day suspension without pay given to Grievant. After a great deal of consideration of the whole case by the Undersheriff, the Undersheriff believed that "insubordination and disregard of a direct order is a terminable offence."

The discipline for Grievant required anger management training and a PIP for Grievant. The discipline was comparative and fair. Grievant has complied with all of the PIP. He had served suspension time the suspension time.

In conjunction with the Sheriff, the Undersheriff decided on the punishment. Having an outside third party doing an investigation would have been inconsistent with prior practice.

Grievant's conduct did not occur in front of the public or inmates.

The Undersheriff did not author any of the evaluations.

### **Testimony of the Sheriff**

The Sheriff has been in law enforcement for almost 30 years. She has worked for Linn County for 29 years. Concerning Grievant she looked at the severity of the offense, prior disciplinary record, type of behavior, remorsefulness, comparable employees, and violations of public or employee trust. There was insubordination.

She consulted with the Undersheriff. She did not conduct any investigation. She reviewed the entire investigation file. The Sheriff listened to all of the interviews. She did not have apples to apples comparisons.

She talked with other sheriffs in other departments. There was insubordination. There was a secret audio recording. She was considering a potential discharge of Grievant. Part of the reason there was not a discharge was Grievant's acceptance of responsibility. Grievant was well liked in the office. Grievant could be saved down the road.

In the Sheriff's mind, it was a dischargeable offense. It could not be taken lightly. There needed to be a strong message. "Grievant secretly recorded a supervisor in his office." Grievant "would have been allowed to do the recording if the employee asked." "Our employees need to trust each other."

### **Testimony of Grievant**

Grievant testified that he has been employed by the Employer since 2015 and has been a Deputy for 11 years. As of October 31, 2024, he had been on light duty for approximately three months. The injury that created the need for the light duty was not work related. The October 31, 2024, situation was three weeks after the surgery. He was working the graveyard shift. His afternoon appointment with his doctor on October 31, 2024, ran late. After the appointment,

Grievant did not have time to go home. He went straight to work.

The appointment with the doctor was scheduled for approximately 2:00 p.m. Grievant actually got with the doctor at 4:45 p.m. Grievant chose to wear clothing inconsistent with the uniform policy. He chose not to tell Lieutenant NB or Sergeant TR of his clothing situation in the Briefing Room.

Grievant was assigned to Central Control. There are windows to Central Control. Grievant would not have had contact with the public that day. He was wearing shorts.

Grievant arrived at work at approximately 5:46 p.m., October 31, 2024. He intended to go to work. He went straight to the Briefing Room to see Lieutenant NB. He spoke with Lieutenant NB and Sergeant TR. Grievant likes to come in cheerful. He handed paperwork to Lieutenant NB. Grievant talked with Lieutenant NB and Sergeant TR. Grievant testified "I believe they both saw me."

Lieutenant NB and Sergeant TR did not say anything to Grievant. Grievant would have done what they told him to do. Later in the shift Sergeant TR gave Grievant a break period. Grievant got food and ate in Central Control. There was the end of shift and then a debriefing session.

At the end of the shift, Grievant walked to the Briefing Room. He left the Briefing Room towards the kitchen. He heard Lieutenant NB's voice. Lieutenant NB was saying "you cannot be wearing shorts. Don't wear that again." Grievant responded "Okay. I won't." Grievant attempted to explain to Lieutenant NB why he was wearing shorts. Lieutenant NB said "I do not care for your excuse. Do not wear shorts." Grievant tried to explain again. Lieutenant NB then said "now you are arguing with me." Lieutenant NB was passive. Lieutenant NB did not care what Grievant said. Lieutenant NB followed Grievant into the kitchen. Lieutenant NB pressed the issue. Both voices were raised in the kitchen. Grievant then went home. Grievant considered this to be a counseling session.

The next shift for Grievant was the night of November 1, 2024. Grievant was dressed okay that day. He went to Central Control. Lieutenant NB approached Grievant in Central Control. Lieutenant NB seemed a little irritated. Lieutenant NB said he had paperwork. Grievant asked Deputy PY to join the meeting. Grievant called Deputy PY on the radio. Grievant has a "medium" level of trust with Lieutenant NB. No one told Grievant that he could not call Deputy PY. The memo that Lieutenant NB had was incorrect. Grievant pointed out the inaccuracies in the document. The paperwork was important. Lieutenant NB ordered Grievant to sign. Lieutenant NB said "this is a direct order from your supervisor to stop talking."

Grievant asked Lieutenant NB to rewrite the memo. Lieutenant NB wanted Grievant to sign the memo "as is." Grievant would not sign it if Grievant did not agree with it. Grievant believed if he signed it meant he agreed to what was in the memo.

Grievant had his leg propped on a box. Lieutenant NB did not listen to Grievant.

Lieutenant NB said Grievant could not wear Crocs. That was very new to Grievant.

Lieutenant NB's voice was raised. Grievant felt that Grievant was being bullied by Lieutenant NB.

Lieutenant NB gave a copy of the uniform policy to Grievant. Grievant said "same fucking policy." Grievant agrees this was "not a good choice of words" but this is common language spoken in the jail.

Lieutenant NB slid the counseling document to Grievant. As Grievant was reaching to grab the document, Grievant took the memo and let it float into the recycle bin.

Grievant agrees that he should not have said what he said. Lieutenant NB said "go home." Grievant said "I have this conversation recorded." Lieutenant NB said "okay fine."

The policy says one has to notify the other person of the recording. According to Grievant, he did this notification after the recording. The audio recording mechanism is an App on Grievant's Smartphone. Grievant opened the App and hit the record button. Grievant started recording after Deputy PY walked in. Grievant has not recorded other conversations in the workplace.

It was more important to Grievant to not be late for work.

This is the kind of thing that Lieutenant NB does.

Grievant left the Control Room with Deputy PY. Grievant did not leave the building. He went to the Briefing Room. There is access to camera footage in the Briefing Room.

Grievant explained what he was doing. Sergeant TR then walked into the room, indicated Grievant could not record, and would have to leave. Grievant then went to the supervisor's desk.

According to Grievant, Grievant is not argumentative with Lieutenant NB. Grievant does not have problems with the other supervisors.

According to Grievant, Grievant never had an opportunity to tell things from his perspective. He did not agree with the document. Grievant felt it was demeaning when Lieutenant NB read the document.

Grievant has arrived late for work before and not been disciplined for it. He was already late on October 31, 2024, by a few minutes.

## **CONTENTIONS OF THE PARTIES**

### **For the Employer**

The date of the incident was October 31, 2024/November 1, 2024. The discipline was issued in July 2025. There are two CBA's which are virtually identical. There are the relevant OSA statutes and the LESC.

Grievant is a Corrections Deputy at the jail facility. There is a 200 inmate capacity. Four Lieutenants oversee the facility. There are various Sergeants and Captains. In addition, there are Deputies. Grievant is one of the Deputies.

On October 31, 2024, Grievant was on graveyard shift. The hours of the graveyard shift are 5:45 p.m. - 6:00 a.m.. It is a 12 hour shift. Because of a prior off the job injury, Grievant was on light duty. This meant Grievant could not climb stairs. Central Control is on the ground level. There is an Employer policy concerning how employees can dress. On October 31, 2024, Grievant arrived in the briefing room with shorts and clogs. He was coming to work from a doctor's appointment. Sergeant TR was a new Sergeant. Sergeant TR reports to Lieutenant NB.

On the morning of November 1, 2024. Lieutenant NB saw Grievant in shorts and clogs. Lieutenant NB talked with Grievant. The conversation did not go well. There was excuse after excuse from Grievant.

On November 1, 2024, Lieutenant NB consulted with the Captain about the uniform situation. The Captain told Lieutenant that a counseling session would be appropriate. Lieutenant NB and Sergeant TR went to Central Control in order to provide Grievant with the counseling document. Grievant got on the radio and called Union Rep. Deputy PY to come to Central Control. Grievant secretly tape recorded the counseling session. Grievant used the F word twice during the session. Grievant was ordered to go home. Instead of going home, Grievant went to another room.

Grievant was put on paid administrative leave for a couple of weeks. There was a *Loudermill* hearing. The discipline was imposed in July 2025.

The Employer requests that the grievance be denied and under CBA Art. 17.4 that the Union be required to pay my fees.

### **For the Union**

According to the Union, the Employer illegally economically disciplined Grievant in violation of the provisions of the CBA and Oregon law. Grievant was hired by the Employer on December 29, 2014. Grievant grieved his economic discipline through the steps set out in the CBA and the Employer refused to adjust the grievance.

The Sheriff could not accurately describe the standard yet upheld the discipline. "Q: ... I mean there must have been some sort of standard you used to decide upon. A: Again, I looked at our previous disciplines. I looked at the egregiousness of the offense and policy violations. I looked at the DPSST website on economic sanctions for other agencies..." Tr. III. 105. Grievant was suspended without pay for 10 days because the Sheriff does not understand the standard that is to be applied is the preponderance of the evidence.

The Employer's investigation was not conducted fairly and objectively. The Employer imposed discipline not reasonably related to conduct proved to have occurred. The Employer has not applied its rules evenhandedly and without discrimination to its employees. The degree of discipline was not reasonably related to the seriousness of Grievant's proven offense and Grievant's length of service with the Employer.

The Employer has failed to meet its burden of proof that Grievant's discipline was for just cause. The Undersheriff imposed a severe penalty: 10 days without pay. Because the Employer did not have just cause to economically sanction Grievant the economic sanction should be reversed and he should awarded back pay and any other remedy to make him whole.

## **DISCUSSION AND DECISION**

### **Introduction**

The CBA provides that an employee cannot be disciplined without just cause. It is well established in labor arbitration that where, as in the present case, an employer's right to discipline an employee is limited by the requirement that such action be for just cause, the employer has the burden of proving that the discipline was for just cause. "Just cause" is a term of art in CBAs. "Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which the employee was disciplined. Other elements include a requirement that an employee know or could reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline; the existence of a reasonable relationship between an employee's misconduct and the punishment imposed; and a requirement that discipline be administered evenhandedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

For the following reasons, I conclude that the Employer did not violate the CBA when it disciplined Grievant.

### **Discipline**

Grievant was disciplined for violating Employer rules concerning disobedience, insubordination, and secret recordings while attending a counseling meeting.

The Employer contends that Grievant violating Employer rules concerning disobedience, insubordination, and secret recordings. The Union contends that the Employer did not have just cause for the ten day non-paid suspension of Grievant.

CBA Art. 16.1 provides:

Except in the case of probationary employees, who may be disciplined with or without cause, disciplinary action may be imposed upon an employee only for just cause using the principles of progressive discipline. For law enforcement officers, "just cause" for discipline shall be determined in accordance with ORS 243.808. Although disciplinary action is usually progressive in nature, it may be imposed at any level if supported by just cause and based upon the seriousness of the offense and the particular circumstances of the employee. It is recognized by the parties that each situation calling for possible disciplinary action is unique to its particular circumstances and that appropriate disciplinary action will be considered in the context of such circumstances.

The Employer's rules proscribe disobedience, insubordination, and secret recordings. Employer Policy 340 provides that it is a violation of conduct to engage in "disobedience of any legal directive or order issued by any office member of a higher rank" and 340.5.8 (f) lists the use of "discourteous, disrespectful or discriminatory treatment of any ... member of this office", and (g) use of profane or derogatory language ..." as misconduct. Rx. 5.

### Burden of proof

The Employer has the burden of proof in a discipline case. [B] & [B], *How Arbitration Works* (8<sup>th</sup> ed.), pp. 15-26 to 15-32; Abrams, *Inside Arbitration* (2013), pp. 206-209.

Oregon law provides:

#### ORS 243.808

(1) For purposes of an arbitration proceeding under ORS 243.706 concerning alleged misconduct by a law enforcement officer:

(a) A law enforcement agency ... has the burden of proof by a preponderance of the evidence to show that:

(A) The officer engaged in the alleged misconduct; and

(B) Any disciplinary action taken against the officer was with just cause, as defined in ORS 236.350.

(b) In determining the reasonableness of a disciplinary action imposed by a law enforcement agency ..., including whether the level of discipline is appropriate, **an arbitrator shall uphold the disciplinary action unless the arbitrator finds that the disciplinary action is arbitrary and capricious.** [Emphasis added.]

### Grievant knew of the insubordination, disobedience, and secret recording policies

Grievant was aware of the Employer's that insubordination, disobedience, and secret recording policies. *First Transit*, 128 LA 586 (Goldberg, 2010) (denying grievance when the grievant received adequate notice of the rule).

Grievant knew or could reasonably be expected to know that insubordination, disobedience, and secret recording could result in discipline. Nolan, *Labor and Employment Arbitration* (1998), p. 319. Grievant was on notice of the need to follow Employer rules or face disciplinary action.

### **The policy was a reasonable work rule**

Management has the right to establish reasonable work place rules not inconsistent with the CBA. [B] & [B], pp. 13-144 to 13-145. Assuming there is a proven violation and the other requirements of just cause, the Employer's insubordination, disobedience, and secret recording policies are reasonable. See generally, [A] 261.

The Sheriff testified:

... I would be a little bit apprehensive as a supervisor or even a fellow employee around [Grievant] of whether he's going to continue to record me when I don't know and whether, you know, I think there would be this feeling of you're trying to catch me in something. And again, our employees need to trust each other and our supervisors need to trust their deputies. Tr. III 98.

### **There was a fair and objective investigation**

There was an appropriate investigation.

"Industrial due process ... requires management to conduct a reasonable inquiry or investigation before assessing punishment." [B] & [B], p. 15-49. It is a fundamental principle of employment law that the issue of due process and following correct procedures can impact on the issue of just cause and the amount of discipline, if any, that should be approved or imposed. *Id.* at 15-47 to 15-50. *Federated Dep't Stores v. Food & Commercial Workers Local 1442*, 901 F.2d 1494 (9th Cir. 1990) (arbitrator appropriately determined due process to be component of good cause for discharge); *Teamsters Local 878 v. Coca-Cola Bottling Co.*, 613 F.2d 716, 718 (8th Cir.), cert. denied, 446 U.S. 988 (1980) (appropriate for arbitrator to interpret just cause as including requirement of procedural fairness).

[A] 211, states:

... [T]he concept of "due process" is inherent in the just cause provision.

... [a]rbitrators prefer seeing evidence that management ... offered the accused employee the opportunity to contribute before the investigation hardened into a decision. A discharge followed by an investigation obviously puts the cart before the horse. An employer need not keep an employee at work, but there is no obvious reason why it cannot suspend the employee pending investigation.

Arbitrators "often overturn otherwise valid discharges where the employer has denied the employee those [due process] protections." Nolan, *Labor and Employment Arbitration* (1999), pp. 205 to 206.

Arbitrator Goldstein indicated at *State of Illinois*, 136 LA 122, 129-130 (2015), that:

[A]n employer's obligation to a predisciplinary investigation is determined by context. ... [T]he level of discipline involved is an important consideration ... in determining whether the underlying investigation by the employer was fair and reasonable.

The Employer provided Grievant with a comprehensive *Loudermill* hearing. The Grievant was given a meaningful opportunity to tell Grievant's side of the story before discipline was imposed. There were in depth interviews of all witnesses. There was an adequate check against the possibility of an incorrect decision.

Grievant testified:

During my Loudermill hearing, the objective approach was to accept responsibility for my actions, which I did. I explained in very different detail of how I acted, how I am remorseful of those actions, and the steps that I would do and the things that I would take care of from there. Tr. III 200.

### **The rules were applied evenly and without discrimination**

Other employees have received unpaid suspensions. These prior disciplines to other employees did not involve comparable situations. They did not involve insubordination, disobedience of a direct order, or secretly recording a meeting with a Lieutenant and Sergeant.

The Union has the burden of proof concerning the similarly situated issue. "Discrimination is an affirmative defense and, therefore, the union generally has the burden of proving that the employer improperly discriminated against an employee." [B] & [B], p. 15-84.

A recognition that not every employee is treated exactly the same does not justify a charge of discrimination. To show disparate treatment strong enough to overcome the Employer's decision requires the Union to show by clear and convincing evidence purposeful discrimination. *Ohio Department of Rehabilitation and Corrections*, 93 LA 1186 (Rivera, 1990) (denying grievance and explaining that each employee's total work record, longevity, and past discipline are important considerations, particularly where there is no indication that the employer was out "to get" the employee). *City of Alton*, 121 LA 1288 (Pratte, 2005) (denying grievance and rejecting instances of alleged disparate treatment lacking evidentiary support and without evidence regarding the prior disciplinary records of others).

### **There was a preponderance of proof that there was a violation**

Neither Employer nor Union witnesses should be given higher deference. "[S]upervisors should not necessarily be given greater credibility .... [It has been suggested that] neither the discharged employee, the steward, nor the supervisor who made the [discipline] decision [is] inherently more credible ...." [B] & [B], p. 8-97.

I have considered all the circumstances of all the witnesses when assessing testimony. I have considered the totality of the circumstances. Abrams, pp. 189-192; [B] & [B], pp. 8-93 to 8-98.

Furthermore:

The arbitrator's decision in discharge and discipline cases must reflect the parties' values and interests, not the arbitrator's personal conception of how the workplace should be run." [A] 202.

An arbitrator may require a high degree of proof in one discharge case and at the same time recognize that a lesser degree may be required in others. Similarly, where the burden of proof was not strong enough to justify a discharge, some arbitrators have found it strong enough to justify a lesser penalty. [B] & [B], pp. 15-28 to 15-29.

One of my duties is to decide how credible each witness was. It is up to me to decide if a witness's testimony was believable, and how much weight I think it deserves. I started my credibility analysis with the viewpoint that all witnesses are equal and deserving of equal deference concerning their recollections. At the onset, neither Employer nor Union witnesses should be given higher deference. "[S]upervisors should not necessarily be given greater credibility .... [It has been suggested that] neither the discharged employee, the steward, nor the supervisor who made the [discipline] decision [is] inherently more credible ...." [B] & [B], p. 8-97.

Here are some things I consider in evaluating witness testimony. (A) Was the witness able to clearly see or hear the events in question? Sometimes even an honest witness may not have been able to see or hear what was happening and may have an incorrect recollection. (B) How good the witness's memory seemed to be? Did the witness seem able to accurately remember what happened? (C) Was there anything else that may have interfered with the witness's ability to perceive or remember the events? (D) How did the witness act while testifying? Did the witness appear honest? Or did the witness appear to be mistaken? (E) Did the witness have any relationship with any party, or anything to gain or lose from the case that might influence the witness's testimony? Did the witness have any bias, prejudice, or reason for testifying that might cause the witness to testify incorrectly or to slant the testimony in favor of one side or the other? (F) Did the witness testify inconsistently while on the witness stand, or did the witness say or do something or fail to say or do something at any other time that is inconsistent with what the witness said while testifying? If I believe the witness was inconsistent, I ask myself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. I consider whether the inconsistency was about something important, or about some unimportant detail. I ask myself if it seemed like an innocent mistake or if it seemed deliberate. (G) How believable was the witness's testimony in light of the other evidence? Was the witness's testimony supported or contradicted by other evidence that I found believable? If I believe a witness's testimony was contradicted by other evidence, I realize people sometimes forget things, and even two honest people who witness the same event may not describe it exactly the same way. These are some of the things I consider in deciding how believable each witness was. I consider other things that I think shed light on the witness's believability. I use my common sense and my everyday experience in dealing with other people. Then I decide what testimony I believe and how much weight I think it deserves. Abrams, pp. 189-192; [B] & [B], pp. 8-93 to 8-98. I have considered all the circumstances of all the witnesses when assessing which testimony is the most credible. I have considered the totality of the circumstances. "[T]he employee has the burden of proving the validity of the defense or excuse that the employee asserts in justification for his ... conduct." *Id.* at 15-25 fn 118.

Grievant testified that:

I told [Lieutenant NB], policy is policy. I'm okay with following policy. But as for this memo and I—and I'm quoting myself, he — listening to the device, the memo you can take it and shove it. Tr. III 140. ...

Q. Do you also remember in the Loudermill recording where you agreed that, "You were insubordinate, you were disrespectful, and you had a lapse in judgment?"

A. Yes. Tr. III 205-206.

Lieutenant NB testified:

Q. Do you believe that based on the totality of [Grievant]'s behavior — including his failure to exit the facility as directed — do you believe that his behavior qualified as being insubordinate?

A. I do. Yes. Tr. 71.

Deputy PY testified:

[Lieutenant NB] read his piece of paper, asked [Grievant] to sign it. He said that he wasn't going to sign it. [Lieutenant NB] and [Sergeant TR] signed the piece of paper, made a copy on the copier in that room, and handed a piece — that piece of paper to [Grievant]. [Grievant] crumpled it up and told them they could shove it, threw it in the bin. I — there — there were — I'm sure there was some other words exchanged, and then he was told to leave. Tr. 110. ...

Q. Based on all of that behavior that you witnessed, would you characterize that behavior as insubordinate?

A. Yes. Tr. 112.

Sergeant TR testified:

Lieutenant [NB] again told [Grievant] he needed to go home and he wait — he needed to wait to hear from a captain in the morning. [Grievant] at that point responded saying something along the line of, this whole conversation has been recorded. Tr. 163-164. ...

Q. Do you believe, based on your training and experience, that [Grievant]'s conduct that evening in central control with Lieutenant [NB] was insubordinate?

A. Yes. I do. Tr. 170. ...

Q. Okay. And isn't it true that [Grievant] is actually the person who uses the term "shut up"?

A. Based off of the recording I reviewed, that is what I recall. Tr. 189.

I have carefully listened several times to the five and a half minute audio recording that Grievant surreptitiously took of the counseling session at which Lieutenant NB, Sergeant TR, Deputy PY, and Grievant were present. The recording reflects that Grievant said "I'm not signing it. ... The same fucking standard. ... I'm not signing that fucking memo. ... You can take this and shove it. ... This entire thing is recorded too."

The Union argues that Grievant was “subjected to being told to shut up six times ....” Union Post-Hearing Brief, pp. 11-12. The audio tape does not substantiate that Grievant was told to “shut up.” The audio tape substantiates that Lieutenant NB was trying to read the Counseling Memorandum to Grievant. Grievant kept interrupting Lieutenant NB. Initially Lieutenant NB said “just let me finish.” When Grievant continued to interrupt, Lieutenant NB said “stop talking.”

Grievant's violations of the Employer's insubordination, disobedience, and audio recording rules are evidenced by:

- .1. The credible testimony of Lieutenant NB, Sergeant TR, and Deputy PY;
- .2. The audio recording taken by Grievant; and
- .3. Grievant's statements during the *Loudermill* hearing.

I find that Grievant violated the insubordination, disobedience, and audio recording rules.

The Undersheriff testified that:

The issuance of the 10-day suspension without pay was after great consternation and consideration for the investigation, the statements of [Grievant] and his attorney during the *Loudermill* and extensive analysis of our comparator and past discipline, and more importantly, it fell what I believe to be in a fair realm given that most organizations that I'm aware of insubordination and disregard for direct orders is a terminable offense. Tr. III 37.

The Sheriff testified:

... I looked at our previous disciplines. I looked at the egregiousness of the offense and policy violations. I looked at the DPSST website on economic sanctions for other agencies. I spoke which – with other executives at other agency sheriffs and chiefs. So we had not in this office had a set of circumstances that rose to this level that I was aware of.

And so in looking at all those things and looking at other disciplines that we've given, again, termination was very seriously considered. But in trying to give an opportunity to [Grievant] we – I decided 10 days. Tr. III 105.

Concerning insubordination, the general standard is that employees must “work now, grieve later,” with the main exception being demonstrable health and safety problems. The supervisors order must be clear. The order need not be in the form of a military-type command. A mere inquiry or question regarding an employee's preference is probably insufficient. The employee's refusal to carry out a directive must be shown, not mere grumbling. Supervisory abuse of authority may provide a basis for mitigation.

FMCS, *Becoming a Labor Arbitrator* (2006), pp. 26-27.

It has been said that, when an employee “has violated a rule or engaged in conduct meriting disciplinary action, it is the function of management to decide the proper penalty.” *Park Geriatric Village*, 81 LA 306, 311 (Lewis, 1983). The fact that the employer may have imposed a somewhat different or more severe penalty than the arbitrator might have fixed “had he had the decision to make originally is not justification for [the] arbitrator to change the penalty.” SA

*Slenk and Co.*, 26 LA 395, 396 (Stouffer, 1956). An arbitrator "should not substitute his personal judgment for that of management because he does not agree with management in its disciplinary decision." *Parkview-Gem Inc.*, 59 LA 429, 431-432 (Dugan, 1972). *Emerson Electrical Co.*, 89 LA 512, 515 (Traynor, 1987) (once "the evidence demonstrates just cause exists for discipline, an arbitrator is not warranted in overruling its decision to discharge unless the evidence shows management acted in an arbitrary, capricious, discriminatory or inequitable manner"). [B] & [B], pp. 15-32 to 15-35. [A] 212. *Rabanco Ltd*, 137 LA 328, 337-338 (Latsch, 2017). It has been said that arbitrators should not alter the employer's choice of penalty unless the employer's actions have been arbitrary or in violation of a statute or the CBA. This principle is summarized in *Davison Chemical Co.*, 31 LA 920, 924 (McGuire, 1959), as follows:

Where proper cause for a disciplinary action exists, a penalty imposed in good faith by management should not be disturbed by the arbitrator. It is not for the arbitrator to substitute his judgment for that of one having proper authority to discharge, where there has been no abuse of discretion or no conduct forbidden by statute or the labor agreement.

Arbitrator Whitley P. McCoy summarized management's discretion to determine the appropriate level of discipline. Where an employee has violated a rule or engaged in conduct meriting disciplinary action, it is primarily the function of management to decide upon the proper penalty. If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it. The mere fact that management has imposed a somewhat different penalty or a somewhat more severe penalty than the arbitrator would have, if he had had the decision to make originally, is no justification for changing it. The minds of equally reasonable people differ. A consideration which would weigh heavily with one person will seem of less importance to another. A circumstance which highly aggravates an offense in one person's eyes may be only light aggravation to another. If an arbitrator could substitute his judgment and discretion for the judgment and discretion honestly exercised by management, then the functions of management would have been abdicated, and unions would take every case to arbitration. The result would be as intolerable to employees as to management. *Vertex Aerospace, LLC*, 120 LA 767, 768 (Kilroy, 2004) (quoting *Stockham Pipe Fitting Co.*, 1 LA 160 (McCoy, 1945)).

ORS 243.808 provides that " **an arbitrator shall uphold the disciplinary action unless the arbitrator finds that the disciplinary action is arbitrary and capricious.**" [Emphasis added.]

### Just Cause and the Seven Tests

The Union argues that I should "look to the seven criterial questions advanced by [Arbitrator] Carroll Daugherty ... See [ *Marion County* (Marr 2019)], pp. 29-30...." Union Post-Hearing Brief pp. 6-7.

According to the Union,

These [seven] questions are intended to be analyzed sequentially; if one of the seven cannot be answered in the affirmative an arbitrator can find a failure of "just cause." If more than one of the seven cannot be answered in the affirmative an arbitrator should find the discipline was not based on just cause. Here questions (4) [fair investigation], (6) [equal treatment], and (7) [penalty] cannot be answered in the affirmative and therefore the employer has failed to establish "just cause" for the Grievant's 10 day suspension without pay. *Id.* at 7.

I have found that there was a fair investigation, there was equal treatment, and the degree of discipline was appropriate and reasonable especially in light of the ORS 243.808 provision that “an arbitrator shall uphold the disciplinary action unless the arbitrator finds that the disciplinary action is arbitrary and capricious.”

[C], *The Common Law of the Workplace* (2005), p. 171, indicates:

The “seven tests” of just cause enunciated in several of [D] Daugherty's cases (notably *Enterprise Wire Co.*, 46 LA 359 (1966)) have provoked a great deal of comment, including the Koven & Smith book cited above. For an alternative, and critically convincing, view of Daugherty's approach, see Dunsford, John E., *Arbitral Discretion: The Tests of Just Cause: Pt. I*, in 42 NAA 23 (1990).

Nolan, p. 317, states “... Daugherty's tests are simplistically mechanical; they take no account of the flexibility needed in real world employment relations.”

According to [A] 205, “There are serious problems with some of Daugherty's simplistic tests.”

### **Arbitrator's Fee**

CBA Art. 17.4 states “[t]he losing party shall be responsible for the arbitrator's fee and expenses.” The Union is the losing party and is responsible for my fee.

### **Conclusion**

The crucial points in this case include:

- .1. The Employer has the burden of proof;
- .2. Grievant's statements during the *Loudermill* hearing;
- .3. The disciplinary action was not arbitrary and capricious;
- .4. The existence and contents of the audio recording of the counseling session;
- .5. The situation was adequately investigated;
- .6. The totality of the circumstances; and
- .7. The CBA.

This decision neither addresses nor decides issues not raised by the parties.

### **AWARD**

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I deny the Grievance.

August 5, 2026

***Lee Hornberger***

[E]

Arbitrator

[F]

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