

IN THE MATTER OF THE ARBITRATION)	ARBITRATOR'S
)	
BETWEEN)	OPINION AND AWARD
)	
PUBLIC SAFETY EMPLOYEES)	
ASSOCIATION, PUBLIC SAFETY)	
OFFICERS UNIT)	
)	
"THE ASSOCIATION" OR "THE UNION")	
)	
AND)	
)	
STATE OF ALASKA)	
)	HAROLD (SHAW) MILLER
"THE STATE" OR "THE EMPLOYER")	GRIEVANCE

HEARING:

June 6-8, 2011
Anchorage, Alaska

HEARING CLOSED:

August 2, 2011

ARBITRATOR:

Timothy D.W. Williams
2700 Fourth Ave., Suite 305
Seattle, WA 98121

REPRESENTING THE EMPLOYER:

Elizabeth Johnston, Labor Relations Analyst
Kent Durant, Labor Relations Analyst
Cheri Cadiente, Special Assistant to the Commissioner
of Public Safety

REPRESENTING THE UNION:

Stephen Sorensen, General Counsel
Meagan Carmichael, Business Agent
Shaw Miller, Grievant

APPEARING AS WITNESSES FOR THE EMPLOYER:

Captain Burke Barrick, Captain DPS
Jake Covey, Sergeant DPS

Cheri Cadiente, Special Assistant to the Commissioner
of Public Safety

Ramin Dunford, Investigator DPS

Jeff Brown, Administrative Investigator

Craig Allen, Investigator

Dewey Eager, Complainant

Colin Taylor, Complainant

David DeCoeur, Sergeant

APPEARING AS WITNESSES FOR THE UNION:

Jess Carson, Investigator

Jason Woodruff, AST Trooper

Sam Webber, AST Trooper

Maurizio Salinas, AST Trooper

David Jones, Court Service Officer

Danny Ward, Princess Lodge Security Guard

Randy Hancock, Probation Officer

Darrel Christensen, AST Trooper

Shaw Miller, Grievant

Tim Schoenberg, AST Trooper

EXHIBITS

Joint

1. Collective Bargaining Agreement 2008-2011
2. Grievance File

Union

1. Meritorious Performance Memo dated 12/18/2007
2. Meritorious Performance Memo dated 3/24/2008
3. Criminal History of Eager
4. Complaints against Officers
5. F-4 Personnel Action Form dated 1/7/2011
6. Miller's Field Notebook for 8/4/2009
7. Miller's Field Notebook for 8/26/2009
8. Colin Taylor's Criminal History

Employer

1. Administrative Investigation File, AI 09-11
2. Department of Public Safety, Operating Procedures Manual, Chapter 101

3. Department of Public Safety, Operating Procedures Manual, Chapter 107
4. AS 11.41.230, Assault in the fourth degree
5. Charts related to polygraph examination of Colin Taylor, October 23, 2009
6. Charts related to polygraph examination of Dewey Eager, May 4, 2010
7. Charts related to polygraph examination of Dewey Eager, May 5, 2010
8. Letter certifying Ramin Dunford's completion of a Forensic Psychophysiological Examiner Curriculum; and Certificate of Completion for the Forensic Assessment Interview Technique, Integrated Interrogation Technique & Forensic Statement Analysis
9. Harold C. Miller, Personnel File
10. Alaska CTA Directive 98-7, Record Access, Use and Dissemination
11. Letter to Trooper Miller from Colonel Audie Holloway dated July 23, 2010
12. Summons & Complaint, 4BE-10-389
13. Complaints against Miller
14. E-mail from Miller to DeCoeur 9/2/2009

BACKGROUND

The State of Alaska (hereafter "the State" or "the Employer") and the Public Safety Employees Association (hereafter "the Association" or "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Timothy Williams in Anchorage, Alaska on June 6-8, 2011. At the hearing the Parties had full opportunity to make opening statements, examine and cross examine sworn witnesses, introduce documents, and make arguments in support of their positions. The Arbitrator made an audio recording of the hearing in a digital format as a part of his notes. A copy of the recording was sent to each Party as an attachment to an e-mail message.

By e-mail dated June 17, 2011 the State requested that the Arbitrator reopen the record for the purpose of admitting an additional document containing an e-mail message from the Grievant to Sgt DeCoeur. PSEA filed an objection to the State's request. Ultimately the Arbitrator ruled that good cause had been shown for the admission of the document and it was admitted to the record as State's exhibit 14.

At the close of the hearing, the Parties were offered an opportunity to give closing oral arguments or to provide arguments in the form of post-hearing briefs. Both parties chose to submit written briefs and the briefs were timely received by the Arbitrator. By e-mail dated August 10, 2011 PSEA informed the Arbitrator that it had inadvertently omitted the fact statement from its brief. The State informed the Arbitrator that it had no objections to the corrected copy of PSEA's brief and the Arbitrator substituted the new copy for the old. Thus the award, in this case, is based on the evidence and arguments presented during the hearing and on the arguments found in the written briefs.

SUMMARY OF THE FACTS

The grievance in this case is between the State of Alaska and the Public Safety Employees Association representing the Public Safety Officers Unit. The Parties are bound by a

collective bargaining agreement (CBA), effective July 1, 2008 through June 30, 2011, under which the present grievance arose. The following is a brief summary of the events that led up to the filing of the grievance. It is based on both documentary and testimonial evidence presented during the hearing.

The Grievant began his employment as a State Trooper for the State of Alaska on August 11, 2002. Beginning around July or August of 2007 and until his termination, he was based out of the Healy Post in Healy, Alaska. His direct supervisor was Sergeant David DeCoeur. Captain Burke Barrick commanded the Healy Post. Prior to his termination, the Grievant had received a one-day suspension for use of excessive force with a Taser in January 2006.

On August 5, 2009 the Grievant arrested Mr. Dewey Eager for violating parole. Mr. Eager filed a complaint on August 13, 2009 alleging that the Grievant assaulted him, repeatedly punching him in the face. The Grievant denies any wrongdoing in relation to Mr. Eager's arrest.

On August 26, 2009 the Grievant conducted a traffic stop and issued several citations to Mr. Colin Taylor. Mr. Taylor filed a complaint on September 15, 2009 alleging that the Grievant assaulted him, kicking him in the buttocks. The Grievant denies any wrongdoing in relation to Mr. Taylor's traffic stop.

On September 8, 2009 Captain Barrick requested that an Administrative Investigation be conducted into the complaint filed by Mr. Eager. Sgt. Covey was assigned to the investigation. Investigator Brown of the Office of Professional Standards was assigned to shadow Sgt. Covey.

On September 16, 2009 Lt. Piscoya, who had been informed of Mr. Taylor's complaint by Sgt. Covey, requested that an Administrative Investigation be conducted into that complaint. On the same day, Colonel Holloway requested that the two complaints be combined into one investigation.

On October 1, 2009 the Departmental investigation conducted by Sgt. Covey, shadowed by Investigator Brown, was suspended pending the outcome of a criminal investigation conducted by the Alaska Bureau of Investigations.

Investigator Brown resumed the Departmental investigation on April 13, 2010 upon notice that the criminal case was complete. The State declined to prosecute the Grievant on criminal charges.

On June 16, 2010 Investigator Brown completed his investigative report. According to his findings, the Grievant had violated the following Department policies:

- Use of Force and Deadly Force
- Use of Force Must be Justified
- After Force is Used
- Coarse Language

Truthfulness

Failure to Perform Duties Properly

Unbecoming Conduct

Conformance to Laws

Improper Use of Departmental Records

The investigative report was reviewed by Captain Barrick, Major Glick, Colonel Holloway and Special Assistant to the Commissioner Cadiente.

On July 7, 2010 an employee conference was held to advise the Grievant of the outcome of the investigation and provides him an opportunity to present any additional information.

A second employee conference was held on July 23, 2010. All decision-makers who reviewed the investigative report concluded that the evidence established the veracity of the complaints and called for termination.

By letter dated July 23, 2010, Colonel Holloway informed the Grievant that his employment with the Department of Public Safety was terminated based on the findings that his conduct towards Mr. Eager and Mr. Taylor violated a number of Departmental Policies (J 2, E 11).

On August 2, 2010 PSEA, on behalf of Mr. Miller, filed a grievance per the requirements of Article 10 of the CBA contesting his discharge. That grievance was processed through the steps of the negotiated grievance procedure and ultimately submitted to arbitration.

STATEMENT OF THE ISSUE

The Parties were not able to agree on a statement of the issue. The Union proposed the following:

1. Did the Employer have just cause to terminate the grievant, Mr. Harold Miller?
2. If not, what is the appropriate remedy?

The Employer proposed the following:

1. Did the State of Alaska violate Article 7, Section 2 of the Collective Bargaining Agreement between the State of Alaska and the Public Safety Employees Association when it dismissed the grievant?
2. If so, what is the appropriate remedy?

As part of his award, the Arbitrator frames the issue as follows:

1. Did the Employer terminate the grievant for just cause and in accordance with Article 7, Section 2 of the Collective Bargaining Agreement?
2. If not, what is the appropriate remedy?

The Parties stipulated that the grievance was timely and properly before the Arbitrator, and that the Arbitrator may retain jurisdiction for sixty (60) days following issuance of his Award to resolve any issues over remedy, if one is provided.

APPLICABLE CONTRACT LANGUAGE

COLLECTIVE BARGAINING AGREEMENT, 2008 - 2011

Article 7 - Member Rights and Disciplinary Procedure

Section 2 - Rights of Members

Members are entitled to a fair and impartial investigation when in the course of the member's scope of employment, the Employer deems an investigation is necessary. The member may request and receive Administrative Investigation after receipt of notification of an Inquiry. The member shall be presumed innocent unless a complaint or allegation is sustained and the burden of proof shall be on the Employer.

Egregious misconduct which may result in discharge includes, but is not limited to, gross disobedience or insubordination, dishonesty, chemical or alcohol intoxication in the workplace, physical misconduct, criminal conduct, abusive or lewd behavior, or abandonment of duties. Nothing in this paragraph shall abridge the member's rights under the Collective Bargaining Agreement.

If it becomes necessary for the Employer to initiate disciplinary actions against any member for just cause, such actions shall be administered in a fair and impartial manner with due regard for the circumstances of the individual case.

Upon receipt of an allegation, except criminal, against a member, the Employer shall notify the member and the Association that a complaint has been received within two (2) days. When a complaint is received against a member that is likely to result in an investigation, the Department shall normally require a written, signed statement by the complainant. In the event no signed statement can be obtained from the complainant, the individual receiving the complaint shall prepare a full signed statement of his/her own with regard to the complaint. A copy of the signed statement or the complaint shall be furnished to the member and Association at the time of notification that there is an investigation initiated.

Association representation is mandatory at any disciplinary employee conference and the employee interview unless the member specifically waives his or her rights to representation in writing. However, the member continues to have all appeal rights provided in the CBA in order to contest any disciplinary

action that may be taken, excluding Letters of Warning or Reprimand.

Article 10 - Grievance-Arbitration Procedure

Section 5 - Arbitration

...The decision of the Arbitrator shall be final and binding upon all parties. The Arbitrator shall not be empowered to rule contrary to, to amend or add to, or to eliminate any of the provisions of this Agreement. The arbitrator shall furnish his/her findings of fact and rationale for his/her decision. Expenses incident to his/her services shall be assigned by the arbitrator to the losing party. If, in the opinion of the Arbitrator, neither party can be considered the losing party, then such expenses shall be apportioned as in the arbitrator's judgment is equitable.

POSITION OF THE EMPLOYER

The Employer's position is that the Grievant was terminated for just cause based on sustained allegations of assault and coarse language. The allegations were thoroughly and fairly investigated and the Grievant was found to have been dishonest in his denials of wrongdoing. Termination was the only appropriate penalty in this case due to the egregious nature of the Grievant's misconduct.

The Employer opens its arguments with the assertion that the evidence on the record demonstrates that the Grievant was guilty of using unjustifiable language and physical force against two members of the public while on duty. While there is no direct evidence in this case, the evidence which was discovered in the course of the Employer's investigation

establishes that the Grievant's denials of his behavior are not credible.

When two serious complaints were filed against Mr. Miller the legitimacy of which he denied, Captain Barrick and Colonel Holloway determined that an investigation was appropriate. Sergeant Covey and Investigator Brown began the process presuming the Grievant innocent. After conducting a thorough investigation, however, they came to the conclusion that the complainants were the ones telling the truth. They were the only ones who interviewed Mr. Eager and Mr. Taylor shortly after the incidents and were able to gauge their credibility based on a close study of body language and other behaviors. Their determination that the complaints were legitimate formed the basis of the termination decision.

The investigators cited a number of reasons as to why they credited the complainants' statements and these reasons were found persuasive by the decision makers. First, Mr. Eager and Mr. Taylor did not know each other and had no reason to find one another. The incidents were physically far apart and they testified that they had never met. Second, both complainants described very similar yet abnormal conduct. Both state that the Grievant appeared out of control, running, using foul language and physical force. Then, suddenly, his demeanor changed completely - he was still insulting, but appeared calm.

Mr. Eager said it was like a switch going off. Mr. Taylor said it was like Jekyll and Hyde. Third, the complainants' stories were consistent, believable and detailed. And ultimately, they had no motive to fabricate their statements.

For over a year and a half, Mr. Eager has told everyone he could get to listen that he was assaulted by Mr. Miller, including the officers who were present when the Grievant adjusted his handcuffs, the officers who transported him to Fairbanks, the booking officer and nurse at the Correctional Center, the officer who transported him to Anchorage, the investigators and the Arbitrator. In no aspect did his story waiver, including such details as his phone conversation with Mr. Miller, going to the Princess Lodge, telling off Mr. Ward, getting arrested, the cigarette butts, the breathalyzer, the breaking of his phone, and the stops on the way to Fairbanks. While Mr. Eager was admittedly intoxicated when he was arrested, none of the details other than the breaking of his phone are in dispute. If he was able to remember all of this, his memory of the assault is likewise reliable.

The Association may argue that Mr. Eager is not credible because he has a criminal history. And some witnesses did testify that they did not initially believe Mr. Eager's story. However, almost all citizens with whom the police interact have some criminal record - this does not constitute grounds for the

dismissal of a complaint. Nor is there any evidence that Mr. Eager has ever made a similar complaint.

The Association may also argue that Mr. Eager could not have been hit because he did not have immediate noticeable signs. However, Nurse Harrison did find signs of swelling when she conducted her physical examination and Trooper Schoenberg testified that it was possible Mr. Eager was hit as he described but without sufficient force to sustain damage such as cracked teeth or outwardly visible tissue damage.

In addition, the Association may argue that Mr. Eager had a motive to lie. The fact is that Mr. Eager has nothing to gain from fabricating such a story because he knew he was going to jail regardless for violating probation whether or not his complaint was believed. Neither did he lie for money - otherwise he would not have testified at the arbitration hearing as advised against by his attorney in a civil suit against the Grievant.

Lastly, Mr. Eager is to be believed because he has repeatedly requested the audio of the arrest, which appears implausible if the audio would not have supported his story. He has also voluntarily submitted to a polygraph and had his written statement analyzed by Investigator Dunford. Investigator Dunford's conclusions were that neither the

polygraph nor the handwritten statement had indications of deceit.

Mr. Taylor has also told his story on numerous occasions including to his father immediately after the incident, to Sergeant DeCoeur when he made his complaint, when interviewed by Investigators Covey and Brown, when interviewed later by Investigator Carson and at the arbitration hearing. Mr. Taylor has remained consistent in all details of his account including, notably, the Grievant's blue moose lights. The Association may argue that Mr. Taylor had a motive to lie in order to retain his SR 22 insurance. It is simply not plausible that someone would make up a story this outrageous - being kicked by a trooper - in order to get out of a ticket, and then call his father and girlfriend in the middle of the night.

While Mr. Taylor also has some criminal history, this is no reason to discredit his statements. He also voluntarily submitted to and passed a polygraph. More importantly, both Sergeant Covey and Investigator Brown found him to be particularly convincing in his demeanor, specifically the way he closed his eyes apparently re-envisioning the incident and the way he acted parts of it out as he did at the hearing.

The clearest evidence in support of the Grievant's innocence would have been recordings of the incidents. Indeed, the Grievant has had an unusually high number of citizen

complaints while at Healy post and was directed by Sgt. DeCoeur to record all contacts with the public. Even troopers who were not directed to do so testified that they would always make a recording when arresting a belligerent individual such as Mr. Eager was claimed to have been. Thus it is particularly troubling that neither incident was recorded.

Even more troubling is evidence that the recording of Mr. Eager's arrest may have been purposefully erased by the Grievant. First, although he has been directed to record contacts with the public, the Grievant has only ever been able to produce one, exonerating recording. Second, Mr. Eager saw the Grievant manipulating the recording device, which he accurately described, and thought he might be deleting the recording. At minimum, this discredits the Grievant's statement that he did not have the recorder at the time. Third, the recordings that were provided included hours of guitar playing and household sounds. Investigator Carson testified that a deleted recording remains in the device until the memory is full. It appears that the Grievant was familiar with this fact and purposefully filled the device's memory with irrelevant noise to ensure there would be no recoverable backup recording of Eager's arrest. Finally, the Grievant testified that he never told Sgt. DeCoeur that he might have accidentally erased the audio and that the Sergeant lied in his testimony and

throughout the investigation. An e-mail from the Grievant to the Sergeant dated September 2, 2009 shows this to be false.

Unlike the complainants', the Grievant's statements have been vague, entirely inconsistent, and at odds with reason. The Grievant obviously has a motive to lie as he has been well aware that he would lose his job if the complaints were found to be truthful.

The Association may argue that he should have been interviewed by the investigators earlier to give a fresh recollection, rather than after the case had been placed in abeyance pending the criminal investigation and then resumed. This argument fails because the Grievant was immediately made aware that his memory of the events was important and he had an immediate opportunity to provide his statement when he was asked about the complaints by Sgt. DeCoeur. He was timely notified when the AI began and when the criminal investigation took place so he had the further opportunity to document his memory of the contacts. In addition, it is part of a trooper's job to testify in court for which purpose they are able to use police reports. The Grievant's claim that he is unable to remember is not credible.

In addition, the Grievant's version of the Taylor traffic stop does not add up. He stated that he placed his foot to keep Mr. Taylor from closing the door of his car because he was

afraid he might be reaching for a weapon or attempting to drive off. On cross, he said his whole body was in the doorway. If this is the case, it makes no sense that the Grievant never searched Mr. Taylor for a weapon or charged him with trying to escape. It makes even less sense that, minutes later, he went back to his patrol car to write tickets leaving the man who allegedly presented a safety concern alone in his vehicle.

Mr. Miller was offered a polygraph and declined, as is his right under the contract. While one decision maker stated that he did consider this fact when arriving at the disciplinary decision, it is clear that the Grievant would have been dismissed even had he not been offered a polygraph based on the sum of the evidence against him. It is simply inconceivable that two witnesses would make up detailed stories describing similar behavior, and both be able to convince trained investigators of their credibility. Whether the Grievant destroyed audio recordings or never made them, the lack of direct evidence does not diminish the weight of the overwhelmingly condemning evidence which is available.

The Employer proceeds to argue that it conducted a fair and thorough investigation prior to arriving at a disciplinary decision. When Captain Barrick received Mr. Eager's complaint, he had Sgt. DeCoeur conduct a supervisory review. Because the Grievant fully denied the allegations, Captain Barrick

determined that further investigation was warranted to establish whose account represented the truth. When Sgt. DeCoeur received Mr. Taylor's complaint, he notified Lieutenant Piscoya who determined that further investigation was warranted, again because the two individuals' accounts were so widely divergent. The incidents were combined under one AI due to the similarity of conduct alleged and the closeness in time. The Association may argue that this was unfair to the Grievant. However, Investigator Brown, Investigator Carson and Captain Barrick all agreed that it did not affect the fairness of the proceedings. There is no evidence that either complaint was investigated unfairly just because they were handled jointly.

The investigation consisted of interviews (by Sgt. Covey) of Mr. Eager, (by Sgt. Covey and Investigator Brown) of Colin Taylor, Sgt. DeCoeur, Trooper Webber, Trooper Salinas, Court Services Officer Jones, Nurse Harrison, Danny Ray Ward of Princess Lodge Security, Richard Taylor, Patty Taylor, Trooper Jones, (by Investigator Brown after the completion of the criminal case) of Mr. Eager, Sgt. DeCoeur, and of Mr. Miller himself. Polygraph examinations of Mr. Eager and Mr. Taylor and an analysis of Mr. Eager's written statement was also conducted by Investigator Dunford. There was nothing more that could've been done to uncover the truth. Investigator Brown's

conclusion, based on a variety of factors mentioned above, was that the Grievant had assaulted the complainants as they allege.

The investigation was reviewed by Captain Barrick. Based on similar factors, Captain Barrick agreed with the Investigator's conclusion. His decision was that the Grievant should be dismissed based on the seriousness of the offense and the fact that he could not be trusted to remedy misconduct which he denied took place. The Department is very invested in its officers and the Captain's decision was not made lightly, taking the reputation of the Grievant and the State Troopers into account.

The investigation was also reviewed by Special Assistant to the Commissioner Cadiente, Major Glick and Colonel Holloway. For reasons similar to those cited by the Investigators and Captain Barrick, and based on her observations of the Grievant's behavior during the employee conference, Ms. Cadiente personally believed there was sufficient evidence that the Grievant had committed the assaults. The Major and Colonel agreed and the Grievant terminated based on the egregious nature of the misconduct. All decision-makers initially presumed the Grievant innocent. This was a decision no one in the Department wanted to make.

The contract provides that, in situations where the employee is found guilty of egregious misconduct, progressive

discipline may be bypassed. This is clearly an instance of misconduct which subjects a trooper to discharge, as recognized by the Grievant himself. Specifically, the Grievant is guilty of physical misconduct, criminal misconduct, and abusive behavior as contemplated under Article 7 Section 2.

A number of OPM violations are cited in the Grievant's dismissal letter as follows:

- use of force - in both instances it appeared to have been possible retaliation. There is no evidence force was justified.
- of force must be necessary - Mr. Eager did not represent a threat was he was handcuffed and belted into the back seat of the car. Mr. Taylor was cooperative and informed the Grievant when he was reaching into the car.
- use of force reporting procedures - the Grievant did not report the use of force in either incident
- coarse language - Mr. Miller repeated "fuck me, no fuck you" while assaulting Mr. Eager. He told Mr. Taylor to "get the fuck out of the car".
- truthfulness - the investigation established that the complainants were telling the truth. Thus, the Grievant's denial of any misconduct could not have been truthful.
- failure to perform duties properly - the Grievant's police reports contained inaccurate information. The Grievant apparently destroyed Mr. Eager's cell phone. The Grievant falsely charged Mr. Taylor with driving in his lane and not dimming his lights. Also, because the Grievant did not have probable cause to stop Mr. Taylor, his other citations were not valid and his iPod and headphones were inappropriately seized.
- unbecoming conduct - assault and coarse language clearly reflect poorly on the Department.

- obey all laws - in Alaska, recklessly causing physical injury to another or placing a person in fear of imminent physical injury constitutes Assault in the Fourth Degree. Both complainants reported pain lasting for days and fear of further injury. Although the Grievant was not convicted of assault, neither was there a finding of innocence.

- improper use of department records - the Grievant provided Mr. Sorensen with a print out of Mr. Eager's criminal record which is protected information the release of which to a third party not legally entitled is prohibited.

The Employer concludes (pg. 27 of its brief):

Even though he had a good record, and progressive discipline after a one day suspension would not be discharge, Mr. Miller was dismissed for egregious misconduct. Conduct that even absent prior discipline would have led to discharge... The Department has had only one similar case in which a trooper assaulted a member of the public. He was dismissed. There were no mitigating factors that the Department considered because none were presented. Mr. Miller claims he did not act inappropriately at all. Complete denial does not serve to mitigate the circumstances when the evidence points overwhelmingly the other way. In light of these factors, dismissal was a fair penalty and not in any way arbitrary, capricious, or illegal.

For all of the reasons presented above, the Employer requests that the discharge be sustained.

POSITION OF THE UNION

The Association's position is that termination is not supported by the evidence in this case. The Association further argues that the Employer is unable to meet the just cause standard because it failed to conduct a fair and thorough investigation.

The State relied on insufficient evidence when it terminated the Grievant's employment. The only basis for termination came from the testimonies of two witnesses both of whom had extensive criminal histories and a motive to lie. There was no corroborating evidence and the investigation was incomplete. Thus, the State cannot meet its burden of proof in this classic case of credibility.

Under Article 7 Section 2 of the CBA, an employee is entitled to the presumption of innocence. The absence of any corroborating evidence or documentation renders the State unable to overcome the presumption of innocence. Under Article 7 Section 2, an employee is also entitled to a fair and impartial investigation. This did not take place as exemplified by the fact that the State faults the Grievant and casts doubts on his credibility for failing to make audio and video recordings when it is clear that his vehicle is not equipped with an audio recording device and/or a video camera.

Colonel Holloway authored the Grievant's termination letter. He appears to have relied solely on the statements made by Investigator Brown in one of his first investigations under the Office of Professional Standards. Upon review, these statements constitute mere opinions and suppositions and are not sufficient to meet the standard of proof. The fact that the Colonel did not testify at the arbitration hearing indicates

that his reasoning could not have withstood questioning. In fact, Captain Barrick testified that he questioned the Colonel's termination decision after hearing the evidence.

Investigator Brown, and all those who relied on his report, also placed great emphasis on polygraph results and the Grievant's decision not to submit to a polygraph. Polygraph evidence is not admissible in Alaska court because there is no consensus in the scientific community that it is reliable. For the same reason, most arbitrators have rejected polygraph evidence. The credibility of the complainants and the Grievant is best determined from their own testimony at the hearing. Based on this testimony, it is clear that the complainants are not credible and the Grievant is telling the truth.

Furthermore, the decision makers in this case failed to take into account the circumstances of the Grievant's individual case when arriving at the disciplinary decision. The Grievant had an eight year work history with the State, had received acceptable to high acceptable evaluations, and had no previous discipline related to dishonesty or integrity issues. At minimum, the Grievant was entitled to the application of progressive discipline.

The Association cites several cases, including one by this Arbitrator, in support of its position that given the absence of clear and convincing evidence that the Grievant was dishonest,

the Grievant is to be reinstated and made whole. According to the Association, what evidence there is apart from the complainants' testimonies supports the forthright testimony of Mr. Miller. By contrast, "both defendants showed a willingness to lie in order to gain advantages to them, such as a dismissal of the charges by the State" (U brief, pg. 7).

Nor is there evidence that the Grievant mishandled evidence, made a false arrest or showed an inability to follow direct orders, as is proven true in cases where terminations have been sustained. The Association cites a number of cases in which officers were found to have conducted themselves in a "pattern of dishonesty" and to have committed egregious acts in violation of public trust, which did merit termination. The Grievant's conduct does not belong to the same class. Accordingly, the State treated the Grievant too harshly when it decided to terminate his employment based on the statements of two dishonest individuals.

For all of the reasons presented above, the Association requests that the grievance be sustained and the Grievant made whole.

ANALYSIS

The Arbitrator's authority to resolve a grievance is derived from the Parties' Collective Bargaining Agreement (CBA)

and the issue that is presented to him. The issue before the Arbitrator is whether the Grievant was terminated in accordance with the principle of just cause. The pertinent language is found in Article 7 Section 2 of the Parties' Collective Bargaining Agreement and it states:

If it becomes necessary for the Employer to initiate disciplinary actions against any member for just cause, such actions shall be administered in a fair and impartial manner with due regard for the circumstances of the individual case.

The Arbitrator begins his analysis by noting that in a grievance arbitration proceeding, the employer is generally assigned the burden of proof in any matter involving the discipline or discharge of an employee. In all other matters, the union is assigned the burden of proof. The instant grievance does involve a disciplinary issue and the burden of proof, therefore, lies with the Employer.

The grievance is based on the assertion that the Employer lacked just cause to terminate the Grievant and failed to conduct a fair and impartial investigation as required under the just cause standard and explicitly provided for under Article 7 Section 2.

The Arbitrator begins his response to the above assertion by noting that the U.S. Supreme Court has often, in ruling on employment cases, if emphasized the need to find an appropriate balance between the "private interests in retaining employment"

versus "the governmental interest in the expeditious removal of unsatisfactory employees" (470 US 543, 1493). With regard to the private interest in employment, Justice White, writing for the majority in the landmark *Loudermill* decision, penned the following:

First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. (470 US 543, 1494)

The Arbitrator cites the above to emphasize his awareness of the significance of this decision. The Association in its brief emphasizes the fact that if the Arbitrator upholds the termination it is unlikely that the Grievant will ever get a job in law enforcement again. On the other hand, the competing interest for the State of Alaska is its right to remove from employment a trooper that has proven himself to be unfit for service.

The Arbitrator has given full consideration to the above concerns and after a careful review of all the evidence and arguments on the record has concluded that the Employer's decision to terminate the Grievant was in accordance with the just cause standard and does not constitute a violation of the Parties' Collective Bargaining Agreement. The Arbitrator's reasoning is laid out in the following multi-point analysis.

First, arbitrators are frequently called on to set forth the meaning and application of a just cause provision in a collective bargaining agreement. Owen Fairweather in *Practice and Procedure in Labor Arbitration* (2nd ed.) provides the following simplified interpretation:

Arbitrators have noted that the contractual right of the employer to discipline and discharge employees for "just cause" requires the arbitrators to make two determinations in considering cases: (i) whether a cause for discipline exists and (ii) whether the amount of discipline was proper under the circumstances.

The Parties, in the instant case, primarily disagree as to whether there is cause for disciplinary action. The Grievant has been charged with two instances of serious misconduct. The Employer contends that the charges are established by the evidence while the Union strongly disagrees with this assertion. In part the disagreement focuses on the proper standard of proof to be required of the Employer.

The Employer cited the Alaska Supreme Court's ruling in the case of *Manning v. Alaska R.R. Corp.* on just cause for disciplinary action against government employees. According to that decision, just cause exists where the disciplinary action was "not for any arbitrary, capricious, or illegal reason and.. based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true." The Employer also cited the Alaska Supreme Court's ruling in the case of

Romulus v. Anchorage School Dist. According to that decision, "the preponderance of the evidence standard applies to disciplinary proceedings involving a government employee."

The Association bases its argument regarding the appropriate standard of proof on *Fairweather's Practice and Procedure for Labor Arbitration*. The Association's position is that the Arbitrator must require clear and convincing evidence because "the likelihood of Mr. Miller ever working as a law enforcement officer, is remote if State's case is upheld and because Mr. Miller was terminated for allegations of dishonesty."

Ultimately, the Arbitrator has arrived at the conclusion that the evidence on the record is sufficient to meet even the higher standard of *clear and convincing*. Thus, regardless of whether the Arbitrator adopts the standard advanced by the Alaska Supreme Court or the clear and convincing standard advocated by the Association, the outcome of this particular case is unaffected because the Employer has met both.

Second, turning more specifically to the particulars of the just cause standard, the Arbitrator notes that the Association cites Arbitrator Daugherty's Seven Factor Test upon which the Alaska Supreme Court has looked favorably. The Parties arguments, however, focused almost exclusively on two of the seven tests: 1) whether the Employer conducted a fair and

impartial investigation, and 2) whether there is sufficient evidence to establish the truth of the charges. The Arbitrator will provide a detailed analysis of these two points of dispute.

Third, the Arbitrator has carefully reviewed the Association's arguments regarding the lack of a fair and impartial investigation. Indeed, failure on the Employer's part to conduct a fair and impartial investigation would constitute a violation of Article 7 Section 2 of the Parties' labor agreement. The Arbitrator's conclusion is that the evidence on the record contains no indication that the Grievant was treated unfairly or that the complaints were not investigated impartially. Thus the Arbitrator finds no violation of the "fair and impartial investigation" language in this case.

The testimonial and documentary evidence clearly establishes that the department undertook an exhaustive investigation into the two allegations of wrongdoing. The report based on the investigation along with supporting documentation is in evidence as Employer exhibit 1 and it is dated June 16, 2010. From the Arbitrator's perspective, all elements of the investigation have been thoroughly documented. The investigation and report were primarily the work of Investigator Jeffrey Brown. The report sustains nine charges of OPM violations against the Grievant:

1. Use of Force and Deadly Force

2. Use Of Force Must be Justified
3. After Force is Used
4. Coarse Language
5. Truthfulness
6. Failure To Perform Duties Properly
7. On Becoming Conduct
8. Conformance to Law
9. Improper Use of Department Records

The Association's main objection to the manner in which the investigation took place is based on the fact that the two complaints were combined into a single Administrative Investigation (AI). Citing Article 7, the Association claims that combining the two complaints into a single investigation violated the CBA.

The Arbitrator notes that Captain Barrick testified that they were combined into a single AI investigation because of the similarity of the complaints and because they were reasonably proximate in time (audio tape). The Arbitrator's reading of Article 7 leads him to conclude that while it might be possible to infer a preferred approach of investigating separately each complaint, there is no specific requirement barring the Employer from combining two complaints into a single investigation.

The Arbitrator recognizes that there is a danger in combining the two investigations. It is possible that the investigation of a second complaint will not be thoroughly conducted if the investigator finds sufficient reason to

establish the fact of the first complaint. Conclusions drawn from the evidence related to the first complaint might be simply applied to the second complaint without thoroughly seeking corroborating evidence for the second complaint. However, there is no indication that such was the situation in the instant case. A review of the file (E 1) and the testimony of Employer witnesses leads the Arbitrator to conclude that both incidents were thoroughly investigated prior to the investigator reaching a conclusion regarding either incident.

In sum, the Arbitrator finds no evidence that the investigation of either incident was in any way prejudiced or shortchanged by the investigation of the other incident.

The Association also makes the allegation that the decision-makers in this case did not comply with the contractual mandate that the employee be presumed innocent. Specifically, the Association cites Special Assistant to the Commissioner Cadiente's testimony to the effect that "DPS presumed Mr. Miller's innocence after receiving the first complaint from Mr. Eager, but they did not presume his innocence after receiving the second complaint from Mr. Taylor" (U brief, pg. 10). After carefully reviewing his audio recording of the hearing, the Arbitrator finds that this is a mischaracterization of Ms. Cadiente's testimony. The Grievant appears to have been presumed innocent by the decision makers up until the time that

the investigation was completed and they were able to review the investigator's report. The report, and the basis for assessing credibility which it provided, was the most heavily weighed factor in the minds of the decision makers. Ms. Cadiente's testimony, as the Arbitrator understood it, is that during the employee meetings which were to allow the Grievant a final opportunity to present information which might contest the conclusions of the AI, she was mindful to look for signs that he was being truthful and was not able to observe them. Ms. Cadiente's statements emphasizes the fact that she was hopeful to find some exculpatory evidence from observing the Grievant's demeanor, but found no indication that the conclusions arrived at by the investigator were inaccurate. It appears to the Arbitrator that the Department wanted to believe the Grievant from the outset and up until the very end of the process when it found that the evidence of his misconduct was simply too persuasive to ignore.

The Arbitrator credits the Employer's claim that this is a decision that nobody in the Department wanted to make. The Department is understandably invested in its troopers and a finding of such serious misconduct as was sustained in this case does not reflect well on the Department as a whole. Ultimately, the Arbitrator finds that both the investigators and the decision makers did what reasonably could have been done to

ensure that the Grievant received a thorough, fair and impartial investigation.

Most importantly, from the Arbitrator's perspective, a presumption of innocence is overcome by the weight of the credible evidence. The Arbitrator's primary job is not to determine the mindset of the Employer when it conducted the investigation but rather to determine whether the quantity and quality of evidence is sufficient to establish the truth of the charges. If so then the presumption is overcome, if not then the presumption stands.

Lastly, the Arbitrator wishes to address the Association's citation of his decision in the case of *the City of Wapato v Teamsters Local 760*. In that case, the Arbitrator found that the employer failed to provide sufficient evidence of just cause in part because it relied solely on complaining witnesses for justification. The Arbitrator would like to point out that there were several other factors supporting his decision in that case which highlight the differences between the conduct of the Wapato investigator and that of the Employer in the instant dispute.

For one thing, the Arbitrator found that in the *Wapato* case the employer failed to meet the contractual timeline for conducting investigations and did not attempt to communicate with the union to obtain any type of extension. An

investigation was initiated into an allegation that was extremely stale. Another thing, the Arbitrator found in the *Wapato* case that the investigation was conducted contrary to the employer's normal process of assuring impartiality by calling in an outside investigator (Washington State Police). Even though an outside investigator was specifically requested by the grievant, the Chief chose to conduct the investigation personally. Also significant, the Arbitrator found that the investigator and the grievant's Sergeant both had a strong bias against the grievant based on a number of prior negative interactions. Thus, the Arbitrator felt it was probable that the discipline in that case was retaliatory and that the allegations against the grievant were "clearly tainted by the sequence of events" (pg. 23). And last, the employer in the *Wapato* case made almost no effort to locate and interview the only eyewitness of the event who was not a party at interest indicating a lack of neutrality. In sum, the employer's investigation in the *Wapato* case violated its own rules of conduct leading the Arbitrator to conclude that there was no fair and good faith investigation.

By contrast, in the instant case the Employer has complied with its procedures in terms of how it approached the investigation and disciplinary process. The investigation for both complainants proceeded in a timely fashion. There is no

basis to conclude that the investigators or decision makers were biased against the Grievant or that they ignored or failed to seek out any relevant evidence. On the contrary, the Employer gave the Grievant ample opportunity to review all of the evidence available and to provide his side of the story.

The Arbitrator concludes that while the Association can fault find with certain elements of the investigation, the process as a whole was timely, thorough and completed sufficient to meet the requirements of Article 7 and the just cause standard.

Fourth, this case is all about the credibility of the statements made by the individuals who brought charges against the Grievant and the credibility of the Grievant's denials. Captain Barrick put it very well in his testimony when he characterized the situation as two men all alone on an Alaskan highway. The Arbitrator does not agree with the Association's position that the Employer cannot overcome the presumption of innocence and meet the burden of proof due to the absence of corroborating evidence in this case.

It is true that the instant case rests solely on the issue of credibility. Because there are no audio recordings of either incident and no witnesses apart from the participants themselves, the veracity of the allegations against the Grievant can only be evaluated based on assessments of the Grievant's

credibility as compared to the complainants'. As the Association noted in the course of its discussion on the use of the polygraph, the Arbitrator's task is to arrive at an independent conclusion regarding which version of the events is credible. In the Arbitrator's opinion, the required standard of proof is met when the cumulative weight of the testimonial evidence and the related circumstantial evidence clearly establishes the credibility of the allegations.

As discussed in detail below, the Arbitrator found that a significant majority of the available evidence in this case points to the same conclusion - the version of events recounted by the complainants is the credible version and the Grievant's denials of wrongdoing are not truthful. The sum of such evidence is sufficient to support the finding that the Grievant was guilty of the misconduct for which he was terminated.

Additionally, as previously noted, the investigative report sustained nine charges against the Grievant, the fifth being the charge of untruthfulness. The Arbitrator concludes that it is this charge that the State needs to establish as the other eight charges rise or fall based on the allegation of untruthfulness. In other words, if the Grievant was truthful in his defense of his conduct, then the other eight charges must be dismissed.

Fifth, the Arbitrator's reasoning regarding credibility is set out as follows:

Dewey Eager

Mr. Eager has told his story numerous times in varying degrees of detail to witnesses who were present at the hearing and available to testify regarding the content of what he had said. While most of the individuals who originally heard Mr. Eager's story did not believe him, the Arbitrator, like the investigators, was struck by the consistency of his story across multiple retellings. The fact that Mr. Eager was not immediately believed by other troopers the Arbitrator attributes to the presumption of innocence which exists between colleagues and the fact that none but the investigators were able to observe the consistency of Mr. Eager's statements over time.

In particular, the Arbitrator noted the numerous details recounted by Mr. Eager, most notably that he used the exact same words to quote the Grievant as saying "Fuck me? No, fuck you." and "You must be three quarters pussy". Other aspects of Mr. Eager's account also did not vary including his earlier phone conversations with the Grievant, his provocation of the Grievant and positioning in the car during the assault, his account of his cell phone being broken, his concern over the possible erasing of the audio recording and his request for adjustment of the handcuffs. It appears that over many months of telling the story, the complainant has not wavered in his account in any significant way. In addition, Mr. Eager's account was

internally coherent. The Arbitrator is unable to find gaps or parts that appeared illogical. From beginning to end, Mr. Eager's story appears to have the ring of truth. The Arbitrator considered the internal cohesiveness and the consistency over time of the complainant's story as a factor in his credibility finding.

Apart from the content of Mr. Eager's story, the Arbitrator found that his demeanor at the hearing supported the conclusion that he was being truthful. When questioned in great detail, the complainant readily gave unequivocal answers. While apparently baffled by the redundant nature of some of the questions, he nevertheless answered fully. Furthermore, he fully owned up to provoking the Grievant by cursing at him. Nor did he make an effort to characterize himself in a flattering light in any other respect. On the contrary, Mr. Eager admitted openly that he had gone to jail numerous times on a variety of charges, that he came to the Salmon Bake in violation of his probation, that he was intoxicated and rude to the people there and that he was rude to the Grievant when refusing to take his breathalyzer test. The Arbitrator considered the complainant's open and forthcoming manner as a factor in his credibility finding.

The Arbitrator was also struck by the complainant's repeated requests that the audio tape of his arrest be

confiscated from the Grievant and produced in support of his complaint. Mr. Eager seems to be equally outraged by the belief that the Grievant erased the recording as by the assault itself - he insists adamantly on this point. It appears highly unlikely to the Arbitrator that his persistent requests would have been made had the complainant's allegation against the Grievant been false. The Arbitrator considered the complainant's concern with the audio recording as a factor in his credibility finding.

In addition, Mr. Eager has had numerous contacts with the police. While the Association argues that his extensive criminal history renders him less credible, the Arbitrator sees the matter differently. The fact that Mr. Eager has never, in all his numerous contacts with the police, made a complaint is itself an indication of veracity and was considered by the Arbitrator as a factor in his credibility finding. The questions asked by the Arbitrator is, "why this time, why not the other times?"

Lastly, The Arbitrator rejects the Association's claim that Mr. Eager fabricated the entire story in order to have his charges dismissed. Whether he was believed or not, Mr. Eager was clearly violating parole and knew that he would be sent to jail for doing so. There is no evidence that he sought to avoid

the consequences of his behavior. Mr. Eager did, in fact, serve time because of his parole violation.

Based on all the factors cited above, the Arbitrator found Mr. Eager's claim that he was assaulted by the Grievant credible.

Colin Taylor

The account given by Mr. Taylor is consistent in its details, coherent in itself and presents a logical version of events which has a ring of truth. While Mr. Eager admittedly provoked the Grievant by cursing at him, it appears that the Grievant was angered by Mr. Taylor's flashing his high-beams. Mr. Taylor's actions on encountering the Grievant all appear to be consistent with those of a person in fear of his safety, careful not to do anything that may constitute provocation. His actions after the encounter, such as calling his family in the middle of the night, are not the actions of someone who is used to getting tickets (which Mr. Taylor was). These are the actions of someone who is genuinely disturbed by what has happened to him.

The Arbitrator was not able to find anything in the content of Mr. Taylor's account which cast doubt on its veracity. His story is plausible from beginning to end. Nor does the Association point to any specific aspect of the story as being fabricated. Rather, it urges the Arbitrator to discount it in its entirety based on an alleged motive to lie in order to avoid

the tickets. The Arbitrator considered the internal coherence of plausible details in the complainant's account as a factor in his credibility finding.

Mr. Taylor, understandably, continues to be very upset by his encounter with the Grievant. The investigators who interviewed Mr. Taylor noted that he was particularly convincing in his demeanor, becoming emotional at the recollection and physically reenacting some parts of the story. The Arbitrator agrees with the investigators that Mr. Taylor's demeanor is indicative of truthfulness. That he continues to be affected by the incident was observable in his facial expressions, his body language and the tone of his voice. The Arbitrator was particularly struck by the fact that Mr. Taylor was visibly angry at the close of his testimony at what he considered the injustice in the Grievant's behavior during the night in question. The Arbitrator considered the complainant's involved and emotional manner as a factor in his credibility finding.

The Arbitrator rejects the Association's claim that Mr. Taylor fabricated the entire story in order to have his tickets dismissed. There is no evidence that Mr. Taylor himself sought to have his tickets dismissed. He did not petition the State or take any action to clear them from his driving record. Rather, the evidence indicates that it was the Department that took action to clear the tickets from Mr. Taylor's driving record.

As in the case of Mr. Eager, Mr. Taylor has had previous contacts with the police. Again, the fact that Mr. Taylor has never previously complained about mistreatment by an officer is itself an indication of veracity and was considered by the Arbitrator as a factor in his credibility finding.

Based on all the factors cited above, the Arbitrator found Mr. Taylor's claim that he was assaulted by the Grievant credible.

Circumstantial Evidence

The credibility of the testimonies of Dewey Eager and Colin Taylor are further reinforced by each other's statements and by the results of polygraph examinations.

Like the investigators and the decision makers in this case, the Arbitrator was struck by the similarities in the two complainant's descriptions of the Grievant's behavior. Mr. Eager and Mr. Taylor both describe an individual who lost his temper, who cursed and acted out violently and then was able to quickly regain his composure and assume a semblance of professional demeanor. Using different but comparable metaphors, both complainants describe the change in the Grievant as nearly instantaneous and very strongly pronounced. Both said he was like a completely different person after the assault. The Arbitrator attached quite a bit of significance to the fact

that both complainants described very unusual behavior in essentially similar terms.

The Association insinuates that the complainants may have jointly fabricated their stories because both are engaged in a civil suit against the Grievant. The evidence on the record indicates, however, that the complainants did not know each other at the time they filed their complaints and that they do not come from the same area of the state. The evidence further indicates that they are joined together in legal action more by the action of their attorney than by their joint efforts. Thus the Arbitrator concludes that the filing of civil action by the two at a time distant from the filing of the complaints has no relevant bearing on this arbitration decision.

Lastly, the Arbitrator took into account the fact that both complainants willingly submitted to a polygraph examination. In both cases, the examiner, Ramin Dunford, concluded that the responses recorded "contained no significant physiological reactions and [were] consistent with those of a person not attempting deception" (Ex. E-1). The Arbitrator defers to the examiner's professional opinion that Mr. Eager's first polygraph examination does not constitute evidence of deception. Furthermore, Investigator Dunford also performed a statement analysis of Mr. Eager's letter to Captain Barrick. Again, he

concluded that "the letter is not problematic and is predictive of a truthful statement" (Ex. E-1).

The Association objects to reliance on the results of the polygraph examination on the basis that such evidence is not admissible in court because there is no consensus in the scientific community that it is reliable. The Arbitrator is in agreement with the Association that it would not be appropriate to rely exclusively on polygraph evidence in making a disciplinary determination, particularly when the charges involve misconduct of an egregious nature. However, the Arbitrator does not agree that the results of the polygraph are to be dismissed in their entirety. In the Arbitrator's opinion, it is appropriate to weigh such results as one more factor in the assessment of credibility, alongside all other such factors as have been presented in the above discussion. The Arbitrator himself considered the polygraph, not as the deciding factor, but as an additional piece of evidence which served to confirm his independent judgment regarding the credibility of Mr. Eager and Mr. Taylor.

Moreover, while arbitrators do it times disagree about the appropriate use of the polygraph, Elkouri and Elkouri indicate an acceptable use in corroborating what would appear to be truthful statements. They write (6th Edition, at Page 421):

Arbitrators have declined to give any weight to lie detector test results when the Employer has relied solely on such tests in discharging an employee. However, one Arbitrator noted that "[a]rbitrators are not totally inhospitable to the receipt, consideration and evaluation of evidence obtained by the use of the polygraph."

Arbitrators accept lie detector results only for limited purposes, noting that "such evidence has not attained scientific acceptance as a reliable and accurate means of ascertaining truth or deception." Test results were accepted as corroborative of the truthful demeanor of an already credible undercover agent testifying to firsthand observation where the agent had filed daily reports with the investigative agency.

The evidence on the record indicates that the investigators in this case did the same - they listened carefully to the complainants and the grievant, citing various factors that are generally indicative of credibility or lack thereof. They also cited the results of the polygraph as an additional piece of evidence which confirms the conclusion that the complaints had merit. The decision makers in turn relied on the results of the investigation, citing those factors uncovered by the investigators which they found persuasive. They also cited the results of the polygraph as an additional piece of confirming circumstantial evidence.

In sum, the Arbitrator found that all relevant factors indicate that both complainants were truthful in their allegations of assault.

The Grievant

The Grievant denies any wrongdoing towards Mr. Eager or Mr. Taylor. The Arbitrator found the Grievant's denials unpersuasive for a number of reasons.

The Grievant gave vague answers and claimed to be unable to recollect some of the pertinent details with respect to both incidents. According to the testimony of Sergeant DeCoeur, the Grievant has not been consistent in his account of the Taylor traffic stop. While the Arbitrator recognizes that a lengthy period of time has elapsed between the incidents and the hearing, the Grievant was timely notified that the incidents would be investigated and he had numerous opportunities to give a more complete account.

The Grievant's stories are not convincing largely because they lack substance. Rather than giving his own version of events, the Grievant's testimony consisted mainly of denials of the complainant's versions, with no supporting details or explanations. He appeared to be relying heavily on a lack of memory as evidence that he did not commit the assaults as alleged. The Arbitrator finds it implausible that the Grievant remembers as little as he claims considering that, in both incidents, the sum of exonerating evidence consists of his side of the story.

The Arbitrator also considered the Grievant's demeanor as he gave his testimony. The Grievant appeared very cautious, unresponsive and emotionally flat. The Arbitrator found that the Grievant's demeanor was not consistent with that of a person who is facing losing his career based on false charges.

Perhaps most significantly, the Grievant's testimony conflicted with statements made by his Sergeant, who clearly had no motivation to lie. Sergeant DeCoeur testified that he had previously instructed the Grievant to record all contacts with the public. He also testified that the Grievant had told him that he may have accidentally erased the recording of the arrest of Mr. Eager. Finally, he testified that the Grievant initially denied touching Mr. Taylor at all, but then stated that he may have brushed his leg, which the Sergeant found suspicious. The Grievant denies all of these points.

The Sergeant's testimony was consistent with statements made by him in the course of the investigation and was delivered with certainty. Sergeant DeCoeur has nothing to gain from the outcome of this arbitration. Accordingly, the Arbitrator has no reason to discredit his statements. On the other hand, the Grievant has been aware from the start of the impact it would have on his career should the complaints be sustained. It appears from Sergeant DeCoeur's testimony that the Grievant was evasive from the start, and immediately attempted to find an

excuse for the absence of the audio recording and a plausible explanation of his contact with Mr. Taylor. Finding himself unsuccessful, the Grievant ended up simply denying the statements made by his Sergeant, denials that the Arbitrator found wholly implausible. The Grievant's lack of truthfulness with regard to the Sergeant's statements serve to significantly diminish his overall credibility.

Lastly, the Arbitrator finds that the absence of the audio recording of Mr. Eager's arrest serves to diminish the Grievant's credibility with regard to that incident. There are a number of suspicious circumstances related to the absence of an audio recording, none of which are dispositive on their own, but the sum total of which cast doubt on the Grievant's credibility. For example, the Arbitrator believes that the Grievant did receive a verbal directive from his Sergeant to record all of his interactions with the public so that complaints could be investigated based on physical evidence. Other officers questioned at the hearing testified that, although not required to do so by Department policy, they would always record an arrest, especially of someone like Mr. Eager. The Grievant had a recording device and there is reason to believe that he would have complied with his Sergeant's directive and made a recording. If so, it would give

credibility to Eager's statement that he saw the Grievant do something that he believed was erasing his recorder.

As to the significance of the fact that the Grievant chose not to take a polygraph, the Arbitrator has several observations. One observation is that the Grievant cannot be required to take a polygraph and his choice not to do so cannot be used directly as evidence of his guilt.

A second observation is made from the testimony of Captain Barrick. He acknowledged under heavy cross examination that this choice of the Grievant was bothersome to him. Captain Barrick believes that if he were falsely accused that he would pursue all reasonable means at his disposal to disprove the allegations; he would be aggressive in trying to clear his name. This would include a demand to have a polygraph test. The fact that the Grievant did not act aggressively in defense of himself simply added to the overall picture of the Grievant's denials as being weak and unpersuasive.

The critical point, the point that the Arbitrator finds significant, is that in the overall picture the majority of the pertinent facts bring into question the credibility of the Grievant: his personal demeanor, variations in his account of the events and the absence of an audio recording. The absence of a polygraph is not a negative but had he passed a polygraph

that fact might very well have helped offset the factors that are undermining his credibility. He needs some pluses on his side of the ledger and they are simply not there.

Apart from the obvious reasoning that, if the complainants are telling the truth, the Grievant must be offering a false denial of wrongdoing, the Arbitrator finds that the unpersuasive nature of the Grievant's own statements, his demeanor and the credibility issues around the absence of an audio recording are all indicative of dishonesty.

The Arbitrator has found that the complainants gave credible accounts of their encounters with the Grievant and that the Grievant's denial of misconduct is not credible. Accordingly, the Arbitrator's conclusion is that the decision by the Employer to sustain the allegations against the Grievant did not violate Article 7 of the CBA. The evidence on the record establishes that the Grievant was guilty of misconduct and cause for discipline does exist in this case.

Sixth, the last issue before the Arbitrator is whether the amount of discipline (discharge) was proper under the circumstances. The Arbitrator notes that without a clear basis for doing so, arbitrators are generally reluctant to alter the level of discipline in cases where the evidence supports the conclusion that the alleged misconduct did occur. This Arbitrator is likewise mindful of not simply substituting his

judgment for that of management absent a showing that the disciplinary decision was made without due regard for the individual circumstances or was somehow in bad faith. Even if giving consideration to the concept of progressive discipline, as suggested by the Union in its concluding remarks (U Br 17), discharge is permitted for offences of a highly serious nature.

In the instant case, the evidence clearly indicates that the Employer put a great deal of thought and effort into investigating the complaints and was likewise careful in arriving at the disciplinary decision. The final decision was arrived at based on the consensus of Special Assistant to the Commissioner Cadiante, Major Glick and Colonel Holloway. Testimonies of the available decision makers convincingly demonstrate that they entered into the matter in depth. This decision was not impulsively made. The Arbitrator has no reason to question the decision makers' professional judgment regarding the appropriate level of discipline in this case.

Furthermore, the proven charges are of a nature that strike at the core of the relationship between the Department and the public. The egregious nature of the Grievant's misconduct undermines the public's ability to place trust in the Department and impedes the Department's ability to conduct its operations. The Arbitrator again references the analysis of the Alaska Supreme Court in *Manning v. Alaska R.R. Corp.* related to just

cause for disciplinary action against government employees. According to that decision, just cause exists where the disciplinary action was "not for any arbitrary, capricious, or illegal reason..." Given all of the facts of this case, the Arbitrator finds nothing to suggest that the Employer's decision of immediate dismissal was contrary to the just cause standard; it was not arbitrary, capricious or illegal.

The Arbitrator concludes that the Employer has met its burden of proof. The evidence on the record indicates that the Department did not violate the Parties' Collective Bargaining Agreement when it decided to terminate the Grievant's employment. The grievance is denied.

Conclusion

The issue before the Arbitrator is whether the Grievant was terminated for just cause per Article 7 Section 2 of the Parties' Collective Bargaining Agreement.

The Arbitrator has reviewed the documentary and testimonial evidence on the record and arrived at the conclusion that the Grievant was guilty of assaulting Mr. Eager and Mr. Taylor as alleged in their complaints. The Arbitrator has also arrived at the conclusions that the Employer conducted a fair, impartial and thorough investigation into the incidents which correctly established the truth of the charges against the Grievant and

that the decision of the Employer to terminate the grievance employment was not improper under the just cause standard. Accordingly, the Arbitrator finds that the Employer has met the burden of proof in this case.

An award is entered consistent with these findings and conclusions.

IN THE MATTER OF THE ARBITRATION)	ARBITRATOR'S
)	
BETWEEN)	AWARD
)	
PUBLIC SAFETY EMPLOYEES)	
ASSOCIATION, PUBLIC SAFETY)	
OFFICERS UNIT)	
)	
"THE ASSOCIATION" OR "THE UNION")	
)	
AND)	
)	
STATE OF ALASKA)	
)	HAROLD (SHAW) MILLER
"THE STATE" OR "THE EMPLOYER")	GRIEVANCE

After careful consideration of all arguments and evidence, and for the reasons set forth in the Opinion that accompanies this Award, it is awarded that:

1. The Employer did terminate the grievant for just cause and in accordance with Article 7, Section 2 of the Collective Bargaining Agreement.
2. The grievance is denied.
3. Article 10 Section 5 of the CBA provides that "Expenses incident to his/her services shall be assigned by the arbitrator to the losing party". Thus, the Arbitrator assigns his fees to the Public Safety Employees Association.

Respectfully submitted on this, the 31st day of August, 2011 by

Timothy D.W. Williams
Arbitrator