STATE OF CONNECTICUT
VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration between

ADMINISTRATIVE AND RESIDUAL EMPLOYEES UNION,
Union,

And

STATE OF CONNECTICUT
(Department of Children and Families),
Employer.

OPINION

AND

AWARD

Grievance: Dale King
OLR File No. 16-4775
Union File No. 14.008

BEFORE: Jeffrey M. Selchick, Esq.
Arbitrator

APPEARANCES:

Administrative and Residual Employee Union
Barry Scheinberg, Esq., General Counsel
Denise Bevza, Esq., of Counsel

State of Connecticut, Department of Children and Families
Diane M. Fitzpatrick, Labor Relations Specialist
OPM-Office of Labor Relations

In accordance with the provisions of the 2007-2016 Agreement (Joint Exhibit 1) of the parties (hereinafter, "Union" and "State"), the undersigned was duly designated Arbitrator by mutual agreement of the Union and the State.

16-09

Hearings were held before this Arbitrator on November 25, 2014, April 23, May 21, June 11, September 10, October 22, and December 10, 2015 in Hartford Connecticut.

The parties were accorded a full and fair hearing including the opportunity to present evidence, examine witnesses, and make arguments in support of their respective positions. The parties filed post-hearing briefs and thereafter reply briefs, and the record was closed upon their receipt on or about March 24, 2016. The parties agreed to extend the due date for this Award to May 31, 2016.

ISSUES

The parties stipulated to the following Issues to be determined by the Arbitrator:

1. Was the Grievant dismissed for just cause as set out in letter dated 1/17/14?

2. If not, what shall the remedy be consistent with the terms of the P-5 contract?

RELEVANT CONTRACT PROVISIONS

Article 3 (Management Rights) of the parties 2007-2016 Agreement reads:

> **Section One.** Except as otherwise limited by an express provision of this Agreement, the State reserves and retains whether exercised or not, all the lawful and customary rights, powers, and prerogatives of public management. Such rights include, but or not limited to, establishing standards of productivity and performance of its employees; determining the mission of an agency and the methods and means necessary to fulfill that mission, including the contracting out of or the discontinuation of services, positions, or programs in whole or in part; the determination of the content of job classification; classification and pay grade for newly created jobs; the appointment, promotion, assignment, direction and transfer of personnel; the suspension, demotion, discharge or any other appropriate action against its employees; the relief from duty of its employees because of lack of work or for other legitimate reasons; the establishment of reasonable work rules; and the taking of all necessary actions to carry out its mission in emergencies.
>
> **Section Two.** Those inherent management rights not restricted by specific provision of this Agreement are not in any way, directly or indirectly, subject to the grievance procedure.
> (Joint Exhibit 1, 3-4).

Article 4 (Employee Bill of Rights) of the parties 2007- 2016 Agreement reads as follows:

> **Section One.** Each employee covered herein shall be expected to render a full and fair days work in an atmosphere of mutual respect and dignity, free from significant abusive or arbitrary conduct.
>
> **Section Two.** An employee's off-duty conduct, speech, beliefs, politics or preferences shall not in and of themselves impact on his/her employment unless clearly job related.
>
> **(a)** In any off-duty conduct involving criminal charges or criminal investigation, which yields no charges, statements made by

the accused shall not be admissible in a later administrative action unless clearly job related.

(b) Any complaints not alleging criminal conduct shall be given to the affected employee within four (4) business days of receipt by the employing agency.

Section Three. An employee shall be entitled to Union representation upon his/her request at each step of the grievance procedure and all predisciplinary hearings.

Section Four. No employee shall be requested to sign a statement of an admission of guilt to be used in a disciplinary proceeding without being advised of his/her right to Union representation. If the employee waives right to representation in this instance, such waiver shall be in writing.

Section Five. No record of complaint against any employee shall be kept in an employee's personnel file unless such record includes identification of the complainant.

Section Six. No employee shall be compelled to offer evidence under oath against himself/herself in any disciplinary action. Testimony by the employee in his/her own behalf shall constitute waiver of this protection. (Id., 4-5).

Article 14 (Dismissal, Suspension, Demotion or Other Discipline) of the parties 2007- 2016 Agreement reads in pertinent part as follows:

Section One. (a) No employee shall be suspended, demoted, or reprimanded except for just cause. (Id., 26).

Article 16 (Hours of Work) of the parties 2007- 2016 Agreement reads in pertinent part as follows:

...

Section Two. For the purpose of determining hours of work, a duty station shall be defined as the State-owned or leased building, or other location at which an employee reports for duty. An

employee's work day shall begin at the duty station except as outlined below.

(a) For designated field employees, the duty station shall be defined as the first business call. However, if the first or last business call is more than thirty (30) minutes from home (if by personal vehicle), pickup point (if by State vehicle) or hotel/motel (if traveling outside of the State on State business), the excess over thirty (30) minutes shall be considered as time worked. Provided, however, if the employee resides outside of the State of Connecticut, the standard work day will be measured from the State line when conducting field assignments in Connecticut or passing through Connecticut on field assignments. Such employee conducting field assignments in his/her State of residence will use his/her personal residence as the point of reference for measuring the thirty (30) minute time period above. Provided, however, designated field employees who conduct field assignments in other States will use the hotel/motel in which they stayed the night prior to the call as the point of reference for measuring the thirty (30) minute time period above. The out of State lunch reimbursement policy shall not apply to designated field employees living out-of-state who perform field assignments in their State of residence and/or in Connecticut. Meal reimbursement shall apply for all field assignments outside of Connecticut and outside the individual's State of residence.

(b) For designated office employees whose duty station is periodically rotated to meet agency operating needs, said provisions (a) shall be equally applicable, except that the facility to which the employee is assigned shall be considered as the first (and last) business call.

Any such employee whose duty station is changed shall be given a minimum of two (2) weeks advance notice of such change except in unusual circumstances. (Id., 35-36).

Article 25 (Travel Expenses and Reimbursements) of the parties 2007-2016 Agreement reads in pertinent part as follows:

...

Section Three. Mileage reimbursement for use of personal vehicle on authorized State business shall be computed as the lesser of the following:

(a) From the duty station to and around the employee's work area and return.

(b) From home to and around the employee's work area and return.

Section Four. Field employees or employees with rotating duty stations whose work day begins at a location not owned, leased or occupied by the State shall be paid mileage portal to portal. Such employees whose work day begins at a location owned, leased or occupied by the State shall be paid mileage in accordance with Section Three above. (Id., 63-64).

BACKGROUND FACTS

The instant proceeding arises from the State's decision to terminate Grievant's employment as a Staff Attorney 3 from the State of Connecticut Department of Children and Families ("DCF" or "Agency") effective January 31, 2014 at the close of business. Grievant was notified of the State's termination decision in a letter of January 17, 2014 authored by Eileen Meehan, DCF Director of Human Resources. In pertinent part the letter stated:

> The findings of two separate investigations have substantiated that you engaged in multiple acts of misconduct; violation of policies and/or neglect of your duties. The findings of each investigation on their own merits would warrant termination of your employment as each separate substantiated offense constitutes just cause for dismissal. Therefore, consideration of the findings of each investigation independently led to the determination that your employment will be terminated for the substantiated findings outlined in the administrative reports dated December 4, 2013, and January 6, 2014.
>
> On November 15, 2013, you and your union representative were advised that the Agency was considering dismissal as a result of the substantiated findings of substandard performance; neglect of duty; and/or violations of policy with regards to your work on a critical incident case involving an infant who had suffered serious injuries due to suspected child abuse. On May 25, 2012 and May 29, 2012 you were present during meetings to discuss the [redacted] case. As an attorney employed by the Department of Children and Families you are required at such meetings to provide legal advice. Your separate and independent responsibility to review the case and provide legal advice is an essential function of your job. You failed at both meetings to provide any advice to your client. A copy of the administrative investigation report, dated December 4, 2013, was subsequently provided to you, and a pre-disciplinary hearing was conducted on December 9, 2013.

On January 6, 2014, you and your union representative were advised that based upon additional substantiated findings of multiple violations of policy, including but not limited to: failure to work your scheduled and required hours; inaccurately reporting payroll and work time; theft of mileage and expenses; submitting fraudulent mileage records; submitting fraudulent payroll records; theft of time and/or funds; neglect of duty and other offenses that are outlined in the findings section of the investigation report, dismissal was warranted. A copy of the administrative investigation report, dated January 6, 2014, was provided to you and a pre-disciplinary hearing was conducted on January 7, 2014. The discovery that you falsified time records and mileage reports resulting in theft of State time and money through underserved reimbursement is especially troubling in light of your responsibilities as an attorney for the Department. Your misappropriation of state time and receipt of mileage reimbursement based upon your falsification of such reports was not just theft against the State, but theft against your client. The Agency cannot have such attorneys working for it.

You had previously been suspended for 29 days for inaccurate recording your time when it was determined that you were conducting non-agency business in court at a time when your pay record indicated you were on duty at DCF. The stipulated agreement that resulted from that investigation was clear that any future inaccuracies or misrepresentations of your time record would result in termination of employment.

The information you presented at the pre-disciplinary hearings of December 9, 2013, and January 7, 2014, has been considered. At both pre-disciplinary hearings, the facts and information you provided did not mitigate the multiple substantiated policy violations and instances of neglect of duty; theft and/or fraudulent and inaccurate submission of mileage reports; theft and/or fraudulent and inaccurate submission of payroll reports; consistent failure to work your required and scheduled hours; misrepresentations of work time; and/or substandard performance on your part.

Based on consideration of all of the above, dismissal is the appropriate level of discipline for each of these offenses individually. Therefore, this action is being taken for just cause and is in compliance with your collective bargaining agreement and State Administrative Regulations, including but not limited to Sections 5-240-5(a), 5-240-1(a) and 5-240-8(a). You are being terminated from

State service effective January 31, 2014, close of business for the following, as more specifically set forth in the investigative reports:

- Neglect of Duty in the Danbury case concerning [redacted]
- Falsification of Mileage Expense Reports
- Falsification of Time sheets

You will remain on administrative leave with pay through that date. (Joint Exhibit 3).

The Grievant entered the State's employ in September, 2001. He was admitted to the Connecticut Bar in 1985. Before beginning his employment with the State, Grievant engaged in the private practice of law with a concentration in family law matters including juvenile court work, neglect petitions, temporary custody issues, and parental rights. The State hired Grievant as an Adjudicator in the DCF Hearings Unit. Though he continued to serve as an Adjudicator or Hearing Officer in the Hearings Unit until 2010, Grievant, as a result of out-of-class grievances and a settlement, became a Staff Attorney 3 in approximately 2004.

As an Adjudicator or Hearing Officer, Grievant conducted hearings in different DCF Area Offices in matters where DCF had substantiated abuse or neglect. He also drafted decisions for his supervisors. Approximately 80 percent of his time was spent presiding over substantiation hearings. In December 2010, Grievant transferred out of the Hearings Unit in his position as Staff Attorney 3 and was assigned as an Area Office Attorney to the Danbury/Torrington Offices and the Special Investigative Unit in Meriden. (Joint Exhibit 10).

As an Area Office Attorney in the Staff Attorney 3 position, Grievant provided support to the Area Offices, which included reviewing petitions and submissions made in court. Actual court appearances were handled by an Assistant Attorney General assigned to such matters. Grievant would, however, present cases for substantiation before DCF Hearing Officers. He also would perform legal consults. According to the record evidence, a "legal consult" occurs when an Area Office in DCF wants to file a neglect petition and/or an order for temporary custody. Grievant would be asked, by way of a legal consult, to determine if there was legal sufficiency for the petitions. Legal consults performed by Grievant were, entered in LINK.

Examples of legal consults Grievant entered in LINK are contained in the record. (State Exhibit 23). Such LINK entries were entitled "Principal Attorney Consultation" and would identify the "Case Participant(s)" and the nature of the legal consult. (Id.). By way of example, the Arbitrator quotes the body of Grievant's LINK entry for a legal consult of May 20, 2013, which immediately preceded the events of the last week or so of May 2013 which gave rise to one of the two grounds for Grievant's discharge. The legal consult of May 20, 2013 reads:

> Legal consult with sw [social worker] and sws [social worker staff]. Torrington High School football players alleged rape 13 year old-perp was 18 and living in victim's family basement. 16 and 13 year old girls living with mom as well as 10 year old twin boys. Dad lives close by with 50/50 custody. 18 year old invited other guys over. Lots of sex happening with the girls. Mom did ICAPs, girls are in therapy. Mom has been going over to the 18 yr old 'new' residence

> (at his parents) - regularly and has stayed with him overnight – No legal sufficiency for OTC [order for temporary custody] – is legal sufficiency for neglect petitions. boys have been arrested, should be protective orders in place. (Id.).

As noted, Grievant, though termed an Area Office Attorney, occupied the Staff Attorney 3 position. The class specification for Staff Attorney 2 and Staff Attorney 3 states that the purpose of the class is to be "accountable for independently performing a full range of tasks in the legal work of the agency." (Joint Exhibit 8). A fair reading of the class specification "Examples of Duties" discloses that a Staff Attorney 3, consistent with the general statement in the "Examples of Duties" that the attorney "[p]erforms advanced and complex legal work of an agency", is charged with a wide range of responsibilities ranging from rendering legal opinions, preparing court documents, appearing in court, and drafting necessary court documents. (Id.). Under the "Minimum Qualifications Required [-] Knowledge, Skill and Ability", the specification contemplates that the occupant of the Staff Attorney 3 position has a comprehensive knowledge of the law, a high level of analytical ability, and "considerable interpersonal skills; considerable oral and written communication skills." (Id.). It is most evident that the Staff Attorney 3 position is occupied by an individual with substantial duties and responsibilities.

As seen in Grievant's termination letter, one claim of misconduct asserted against the Grievant revolves around his involvement with the [redacted] case. The record shows, per an investigation conducted by DCF Principal Human

Resources Specialist, Rose Brown, that [redacted] died at the hands of his father due to child abuse on September 29, 2013. Some 16 months before the child's death, DCF, when the child was four months old, became involved with the child's plight because of a "critical incident report" generated when [redacted] was hospitalized at Yale New Haven Hospital for approximately six days because of injuries.

Useful to an understanding of the [redacted] case is a May 25, 2012 affidavit from John M. Leventhal, MD. (State Exhibit 18). In this affidavit, Dr. Leventhal observed that [redacted] had been admitted to the Children's Hospital on May 23, 2012. He noted in his affidavit that he had "interviewed each parent alone, examined the child, reviewed the medical record, and discussed the case with clinicians caring for [redacted]" as well as reviewing "his head CT scan and MRI with a neuroradiologist." (Id.). Dr. Leventhal further observed that he had discussed the case with DCF. In his affidavit, Dr. Leventhal outlined the child's physical condition, observing that the "subdural hematoma and bleeding in the back of the right eye are consistent with abusive head trauma." (Id.). According to Dr. Leventhal, "other injuries" of [redacted] were "unexplained" and, save for a scratch on the child's nose, were "consistent with child physical abuse in a 4-month-old child." (Id.). Dr. Leventhal opined that "[i]n view of the serious nature of these unexplained injuries in this infant, I believe that he would be at imminent risk of suffering another serious injury or even of dying if he were allowed to

return to his home." (Id.). Thus, Dr. Leventhal "strongly recommended that he be placed outside of the home until its safety can be ensured." (Id.).

After [redacted] died in September, 2013, the Agency charged Rose Brown with the task of conducting an investigation. (See State Exhibit 2). Consistent with other record evidence, her investigation disclosed that a social worker in the Meriden Area Office, Michael Damici, was assigned to the [redacted] case upon the receipt of the "critical incident report". (Id.). Damici then became part of a "critical incident" or "red" team, which also consisted of Area Office Director Bob Allensworth, Program Manager Olga Hehl, Social Work Supervisor Carolyn Meyer, Social Work Supervisor Kate Coffey, ARG Nurse Naveen Hassam, and Grievant. Grievant was thus the only attorney member of the team. The only two members of this team to offer testimony at the hearings before the Arbitrator were Allensworth and Grievant.

The record indicates that Allensworth had created the red team process to review critical incident reports. To that end, there were two red team meetings that occurred on May 25 and May 29. The upshot of these two meetings was that the SW staff reached the decision that, upon [redacted]'s discharge from the hospital on May 29, 2012, he would be released to his mother. Not surprisingly, the SW staff, as Mr. Allensworth put it in his testimony, had no doubt that DCF had "legal sufficiency" to do a 96 hour hold, file a neglect or abuse petition, or to file an order for temporary custody ("OTC"). Mr. Allensworth stated that these "were all viable options". During the investigation conducted by the red team,

according to Mr. Allensworth, he spoke with Dr. Leventhal and, in fact, asked Dr. Leventhal to provide the affidavit referenced above. Mr. Allensworth testified that he asked Dr. Leventhal to provide the "strongest affidavit" the doctor could swear to. Allensworth further testified that when he asked for the affidavit, as Area Director he was considering going to court for an OTC.

Mr. Allensworth testified, after Dr. Leventhal submitted his affidavit, that he discussed with Dr. Leventhal whether releasing the child to his mother would be a safety risk to [redacted]. According to Mr. Allensworth, the investigation disclosed that the child's babysitter or the child's father appeared to be the perpetrator of the abuse. That is, Mr. Allensworth testified, the investigation revealed that, when injured, the child was alone with the babysitter and alone with the father. It was Mr. Allensworth's belief that it was the father who was the perpetrator because, when the child was returned by the babysitter to the father, the father did not raise any claims of injuries. It is noted that the record shows that the father and mother did not live together. Mr. Allensworth stated it was his desire and the desire of the other members of the red team to protect the child from the babysitter and the father and a decision was reached to return the child to the mother under appropriate circumstances. Included in the appropriate circumstances, Mr. Allensworth observed, was the fact that the child was enrolled in community daycare and thus there would be "eyes" on [redacted] on a daily basis because daycare providers in Connecticut are mandatory reporters.

Mr. Allensworth's testimony was consistent with Brown's Investigative Report to the extent that Brown reported that SW Damici informed her that it was the red team's "full recommendation that there should be a 'strong service agreement' in place for [redacted] to be discharged" to the mother. (Id.). The child was thus released to his mother and then died over a year later at the hands of his father. Mr. Allensworth testified that Dr. Leventhal agreed with the decision to return [redacted] to his mother.

Grievant's testified regarding [redacted]. His testimony mirrored Mr. Allensworth's testimony about the red team meetings. According to Grievant, his participation in the red team meetings, which were run by Mr. Allensworth, did not amount to an attorney "legal consult" and his presence at the meetings was to ensure that if any legal questions did arise he could weigh in. It was Grievant's testimony, however, that there were no "legal issues" regarding the [redacted] case. It was clear to all members of the team, according to Grievant's testimony, that there was legal sufficiency to pursue the legal options as identified by Mr. Allensworth in his testimony and the SW staff knew of these options. Instead, according to Grievant, the discussions at the red team meetings boiled down to the choice DCF would make regarding whether to pursue the legal options or to have the child released to his mother.

Grievant also testified that he received emails before the first red team meeting and also later read Dr. Leventhal's affidavit. He also testified he did not go into LINK, given his belief that legal sufficiency existed for DCF to pursue the

options of either going to court or exercising a 96 hour hold. Grievant clarified that the 96 hour hold was a statutory process that allowed DCF to remove a child from its surroundings if there was "imminent harm" that the child faced. Typically, according to Grievant, the 96 hour hold was required if there was a need to remove the child from his home immediately and no time was available to go to court to obtain an order. Finally, Grievant testified that the decision to return [redacted] to his mother was made by Mr. Allensworth and that there were no objections raised by the other members of the red team. Grievant allowed that he was asked if there was a legal issue regarding [redacted] going home to his mother and Grievant replied that there were no legal issue because, as [redacted]s parent, the mother had a legal right to have the child returned to her. Grievant testified that there was no question posed to him at the red team meetings as to whether or not it was a "good idea" to send the child home to his mother.

As noted, in the wake of [redacted]'s death, DCF undertook an investigation that was conducted by Investigator Brown. Her Investigative Report lists the individuals she interviewed and the documents she reviewed. (State Exhibit 2). In her "Findings", she faulted Grievant for not informing the participants at the May 25 and May 29 red team meetings "that legal sufficiency exis[redacted] for a 96 hour hold ... for neglect and/or abuse petitions ... to substantiate neglect" and not providing "proper legal advice, or any legal advice, for the Department to move to protect this child from abuse and neglect". (Id.). Further, she faulted Grievant because "[h]e did not document the Link record to [redacted]w any of his

5/25/12 involvement" in the red team meetings"; "failed to document his legal consults on this case between 5/25/2012 – 5/29/2012"; "did not document the Link record to show his 5/29/12 involvement" in the red team meeting; and "did not log in to read or access the Link record and related cases histories at any time in 2012." (Id.). In addition, Investigator Brown faulted Grievant because "[h]e did not inform his supervisor or alert the chain of command of the high risk decision to allow the baby to be sent home from the hospital on 5/29/12 without the department having taken any legal action"; did not "adequate perform the required duties of his position [which] contributed to the inability to protect this child from subsequent abuse and death"; "was derelict in his duties as a Staff Attorney"; "exercised poor judgment by failing to discuss this case and the known facts with his supervisor or the legal department and/or to alert his supervisor of the stated and known risk to [redacted]'s life"; and "[f]ailed to perform his job duties to the standards, level of responsibility and judgment expected and required of an attorney." (Id.). According to Investigator Brown, Grievant violated DCF policies set forth in Policy 7-4-3.1 (Neglect of Duty), Policy 31-10-2 (Office of Legal Affairs), and Policy 34-2-7, Operational Definitions of Child Abuse and Neglect Policy (Child Protective Investigations). (Id.). These findings and conclusions of violations, as noted, then formed the basis of the State's decision to terminate Grievant based on his involvement in the [redacted] matter.

A second basis of discharge, as seen in the termination letter, is the State's contention that Grievant essentially committed fraud by virtue of his submissions of time sheet records and mileage reimbursement forms. Investigator Brown, in a January 6, 2014, Investigative Report, stated that while investigating Grievant's involvement in the [redacted] matter, she "requested certain electronic and payroll records to ascertain employee Mr. King's whereabouts and work schedule." (State Exhibit 1). According to her Report, a "review of the timesheets/payroll records and mileage reimbursement reports submitted by Mr. King, along with certain computer activity logs and electronic proxy access swipe records revealed significant discrepancies and irregularities when compared to Mr. King's approved work schedule and calendar." (Id.). Ms. Brown reported that she interviewed Assistant Agency Legal Director Thomas DeMatteo and Agency Legal Director Barbara Claire. (Id.). Investigator Brown's Report indicated that the time period under review was between June 1, 2013 and October 31, 2013.

Investigator Brown's Report reported what she learned in her interview of Agency Legal Director, Barbara Claire. Ms. Claire informed her that Grievant knew he had one "duty station", namely, Torrington. Area Office Attorneys, Ms. Claire reported to Investigator Brown, "are eligible for mileage reimbursement on days that they travel between area offices or between other work locations on the same work day and/or if their travel to other area offices exceeds their normal commute from home to their duty station." (Id., p. 7). Thus, Ms. Claire reported

to Ms. Brown, Grievant was "not entitled to mileage reimbursement for his commute" and "on days that he reports to his Torrington DCF office and then drives from Torrington to the Danbury Area Office for work duties he would be eligible for mileage reimbursement for the miles between the two offices that he drove that day." (Id.). Investigator Brown then identified a number of dates in the periods under review that indicated that Grievant's monthly mileage reimbursement requests "included the same pattern of driving from Torrington to Danbury or from Torrington to other locations." (Id., 8). She stated in the Report that if Grievant "actually worked at both office locations on the same day it is okay for him to submit mileage reimbursement for that", but Ms. Claire reported to Investigator Brown that Grievant's mileage reimbursement reports, in fact, should have been for a "couple of miles at best" on those "few times a month when he drives to Danbury from home instead of to Torrington." (Id.). That is, Ms. Claire reported to Investigator Brown that Grievant's reimbursements "should primarily be for the additional mileage it takes him to drive from his home to Danbury instead of his home to Torrington, which is a total of approximately 7 miles that he should report each way on days that he reports to work in the Danbury office." (Id.). Ms. Claire opined to Investigator Brown that the language of the parties' Agreement regarding rotating duty stations or designated field employees did not apply to Grievant basically because Grievant did not have a rotating duty station and did not work in a non-state owned or leased building. (Id., 8-9).

Ms. Brown also identified 28 dates on which Grievant arrived to his work location at times beyond 8:00 a.m., and she concluded that the "computer activity records establish a pattern of computer activity beginning daily within 10-20 minutes of his arrival at the office." (Id., 10). Further, she noted that Grievant's "computer activity records establish a pattern of all computer activity ending most days between 2:00 PM-4:00 PM." (Id.). She also identified 25 dates on which Grievant listed travel from Torrington to Danbury or from Torrington to Hartford and back to Torrington when there was no record on those dates of Grievant having been at Torrington. (Id., 10-12).

During this period, according to Investigator Brown's "Findings", Grievant: "[r]egularly failed to report to work on time; ... failed to work his required scheduled hours; ... submitted inaccurate payroll/timesheet records; ... submitted inaccurate mileage reimbursement forms; .. [a]pplied for and received payroll and mileage monies that he was not entitled to receive; [s]ubmitted fraudulent payroll and mileage records;" and engaged in "[m]isuse and/or abuse of state time and funds." (Id.). The "Violations" she identified were DCF Policy 7-4-3.1 (Employee Conduct/Neglect of Duty); Policy 8-4 (Reporting of Employee Time); State Personnel Regulations Sec. 5-238-2(d) (Work Schedules), and Personnel Regulations Sec. 5-240-1a(c), including but not limited to (7), (8), (11), and (13)." (Id.). Further she found a violation of DAS General Letter No. 115 (Policy for Motor Vehicle Used for State Business) and "related policies" and "[o]ther related and relevant policies in CT. General Statutes to be listed at a later

date including but not limited to those related to reporting work and paid time, payroll, work hours and schedules, mileage and expense reimbursements, misconduct, and theft." (Id.).

The question of whether, in fact, Grievant submitted fraudulent time records and claims for mileage reimbursement relates to a dispute the parties have regarding the language of their Agreement, particularly, Articles 16 and 25. This aspect of the just cause analysis will be set forth in the Arbitrator's Opinion. It is useful, however, to set forth additional details regarding the factual backdrop to this set of allegations.

Grievant, as noted above, was assigned as an Area Office Attorney to the Danbury/Torrington Offices and to the Special Investigative Unit in Meriden. It would appear that Grievant's physical work locations were either in Danbury or Torrington. At his request, Grievant was given an alternate work schedule that required him to work in "week 1" 36 hours consisting of nine hours Friday, Tuesday, Wednesday, and Thursday. (State Exhibit 25). "Week 2" of the schedule required Grievant to work nine hours on Friday, eight hours on Monday, nine hours on Tuesday, Wednesday, and Thursday, for a total of 44 hours. (Id.). His "start time" was set at 8:00 a.m. and his "end time" was listed at 5:30 p.m. except for his eight hour schedule on Monday of "week 2", which had an end time of 4:30 p.m. (Id.).

On a monthly basis, while an Area Office Attorney, Grievant would submit mileage reimbursement requests, and his time sheet records were submitted every two weeks. This documentation was submitted to Thomas DeMatteo, Assistant Agency Legal Director, whose duties including supervising the Area Office Attorneys. There is no question in the record that Grievant's submissions were accepted and approved by Mr. DeMatteo. According to his testimony, he trusted Grievant and had no reason to believe that anything Grievant submitted was not true. Thus, Mr. DeMatteo testified that he was "surprised" and "disappointed" when he reviewed Investigator Brown's Report. Regarding Grievant's mileage submissions, Mr. DeMatteo testified that he assumed that the mileage reimbursement submissions were based on Grievant's travels on "work business" and that he had no reason to believe that Grievant was not at work rather than commuting to and from his residence during the work hours he listed.

Grievant's testimony regarding time sheet records and mileage reimbursements was that he considered himself an employee with a "rotating duty station" as that term is used in Article 25 (Travel Expenses and Reimbursements) in the parties' Agreement. Considering himself to be an employee with a rotating duty station, Grievant, according to his testimony, continued to submit mileage reimbursement claims as he had done when he was a Hearing Officer. Grievant claimed that his mileage reimbursement submissions were consistent with the contractual language regarding rotating duty stations employees and also consistent with what his practice had been when he was a

Hearing Officer. As to his time record submissions, Grievant noted he would leave his home at approximately 6:45 a.m. and arrive at Torrington or Danbury at approximately 8:45 a.m. and would leave work at approximately 4:15 or 4:30 p.m. and arrive at home by 6:30 p.m. As with his mileage reimbursements, Grievant testified that his time records were consistent with his status as a rotating duty station employee, which under Article 16 of the Agreement permitted him to use all but 30 minutes of his commute time as part of his work day. According to Grievant, had he learned that he would not be treated as a rotating duty station employee and not be given the mileage reimbursement and work time benefits under Articles 16 and 25 of the Agreement, he would have filed a grievance challenging the State's denial of these rotating duty station employee rights.

The DCF Legal Director, Barbara Claire, testified that when Grievant transferred from his Hearing Officer position to an Area Office Attorney position to fill a vacancy in the Torrington and Danbury Offices (See State Exhibit 30), she discussed with Grievant the length of the commute he would undergo. She noted that Grievant lived in Stonington and would be faced with a long commute. According to Ms. Claire, she informed Grievant that he would not be paid mileage for traveling to Torrington but could charge the difference from Torrington to Danbury for reimbursement. She expressed her opinion that Grievant's assignment to Torrington and Danbury was not a rotating duty station assignment. As such, Ms. Claire testified, she specifically told Grievant he could

not claim mileage as he had when he was in the Administrative Hearings Unit. Ms. Claire also testified that, in addition to Grievant, there were other Area Office Attorneys assigned to two offices and none of those Area Attorneys sought mileage as did Grievant and none of them adjusted their work hours for commuting as did Grievant. It is noted that Grievant testified that his recall of his conversation with Ms. Claire when he transferred from the Hearings Unit to the position of Area Office Attorney was that he would receive mileage to Danbury but not to Torrington, which Grievant took to mean that he could continue to submit mileage as he had done when he was a Hearing Officer.

Grievant's contentions regarding what he claimed were legitimate time records and mileage reimbursements were addressed by long time Union attorney and chief negotiator Scheinberg. Mr. Scheinberg offered his recounting and analysis of the bargaining history between the parties and, on that basis, his understanding of the language of Articles 16 and 25. Central to his testimony was his claim that, under Article 16, Section Two, Grievant was, in essence, a "designated field employee" who was permitted to be on the clock after the first 30 minutes of his commute. Further, Attorney Scheinberg stated that under Article 25, Grievant had a rotating duty station and was entitled to the mileage reimbursement as set forth in his submissions. Under Article 25, Section Three, Mr. Scheinberg testified, Grievant was entitled to the "lesser" of the two options listed ("from the duty station to and around the employee's work area and return" or "from home to and around the employee's work area and return"). On those

days that Grievant went straight to Danbury and claimed mileage from Torrington to Danbury, according to Attorney Scheinberg, he selected the "lesser of two options because Grievant's home to Danbury was greater mileage" and Grievant's "area was Torrington and Danbury." Although Grievant, as noted in Investigator Brown's Report was not at Torrington on dates he listed travel from Torrington to Danbury, Mr. Scheinberg, as he described in the Union's brief, labeled this reimbursement as a "contractual fiction" required by the language of Article 25, Section Three. Mr. Scheinberg also testified, as did Grievant, that Grievant had been given information and training by the Union regarding the relevant contractual language and that Grievant's time records and mileage reimbursement submissions were appropriate as to how the provision should be applied. Mr. Scheinberg opined that Grievant acted "consistently" with the information and training he received from the Union regarding how Grievant submitted mileage and travel time.

The Union grieved the discharge on January 17, 2014, claiming that Grievant had been dismissed without just cause. (Joint Exhibit 2). Ms. Fitzpatrick, on behalf of the State, denied the grievance in a memorandum of February 11, 2014. Regarding the [redacted] matter, the denial stated that DCF "indicated that it completed a thorough investigation of the incident and substantiated that the Grievant neglected his duty when he failed to provide adequate legal advice to the DCF team charged with evaluating the case." (Id.).

As to the second aspect of termination regarding alleged fraudulent submissions regarding time and mileage, the denial stated that the investigation established that Grievant's "records ... showed that on the majority of days he was not at work before 9:00 when he was scheduled to begin at 8:00", and Grievant "admitted that he left prior to 4:30 on most days." (Id.). According to the denial, Grievant's "explanation" was "that because he considered himself a field employee he was protected by portal to portal coverage" which "was also his excuse for the overcharging of mileage." (Id.). The denial then stated:

> The Grievant is not entitled to portal to portal coverage. He had previously been assigned a position when he was afforded time and mileage considerations due to his rotating work stations. However, he took his new position covering only two offices and was informed by his supervisor that those considerations would no longer be afforded to him. In fact his supervisor indicated during the investigation that she was very specific with him about concerns about commuting from his home on the far south east corner of the State and the new work location on the far north west corner of the State. (Id.).

Finally, Ms. Fitzpatrick in denying the grievance stated that the State would "argue arbitrability on the basis that the Grievant has retired." (Id.). The State in fact challenged the arbitrability of the grievance, which led to a proceeding before Arbitrator Susan E. Halperin. On October 6, 2014, Arbitrator Halperin issued her Opinion and Award that rejected the State's claim that the grievance challenging Grievant's discharge was not arbitrable. (Joint Exhibit 9). In her Opinion and Award, Arbitrator Halperin identified the fact that Grievant, on January 29, 2014, "submitted documents to DCF regarding 'Retirement effective February 1, 2014."

(Id., 3). Arbitrator Halperin quoted from Grievant's January 29, 2014 retirement documents:

> I have been discharged from employment at DCF effective at the close of business on Friday, January 31, 2014. I have filed an expedited step 2 hearing regarding my dismissal. The foregoing submitted on the condition that my subsequent retirement will not have any impact on my ability to challenge the termination of my employment. If there is any difficulty, please advise me immediately at the above e-mail address." (Id.).

Arbitrator Halperin observed that "no response" to Grievant's January 29, 2014 submission was made part of the record before her. (Id.). She also noted that Grievant transmitted a February 25, 2014 email to Nancy Wilson, Retirement & Benefit System Coordinator. Arbitrator Halperin noted that Grievant's email "indicated that he was proceeding with his grievance" and that he sought to clarify:

> ... in writing that the Retirement Commission laws, regulations and policies would not prevent me from being reinstated as a full time permanent state employee. I understand that if I went back to state service, I would not get credit for the time I was receiving retirement benefits (in future retirement calculations) but there is not a penalty associated with reinstatement and I could retire again when I deemed appropriate. I would greatly appreciate if you could address my representations as stated above. The question has been raised and I would like to put it to rest. (Id., 3-4).

Arbitrator Halperin observed that Ms. Wilson responded by sending Grievant the State policy "of the Tier IIA Summary Plan Description that specifically addresses the issue of reemployment after retirement". (Id., 4).

Arbitrator Halperin identified the State Policy that Ms. Wilson forwarded to Grievant, quoting:

> REEMPLOYMENT AFTER RETIREMENT
>
> AFTER YOU RETIRE YOU MAY RETURN TO EITHER FULL-TIME OR PART-TIME STATE SERVICE
>
> ... Reemployment In A Permanent Position.
>
> If you are reemployed by the state in a permanent position after you have retired, your pension payments and benefits must cease. It is your responsibility to notify the Retirement Services Division of your reemployment. You will resume membership in the Tier IIA and receive credit for service during such reemployment. When you next retire, your retirement benefit will not be less than the amount you were receiving prior to reemployment. (Id., emphasis in original).

In her opinion that rejected the State's arguments against arbitrability, Arbitrator Halperin observed that Article 15, Section 9 of the parties' Agreement provides for the appointment of a separate Arbitrator, after a grievance is filed, to determine the issue of arbitrability. According to Arbitrator Halperin, "[t]he question of a remedy should the arbitration proceed to the merits is not within the purview of the instant proceeding. The stipulated issue before me does not include the question of a remedy." (Id., 11).

Arbitrator Halperin found that "[t]he documentary evidence and the Union's preliminary arguments are persuasive." (Id.). She also found that the Union's documentary evidence demonstrated that "Grievant tendered his resignation to DCF 'on the condition that my subsequent retirement will not have any impact on ability to challenge the termination of my employment.'" (Id.). She repeated her

finding that there was no record that Grievant was ever "advised that his application would result in his inability to grieve his termination in accordance with his grievance filed prior to the [retirement] application." (Id.). She also identified a discussion Grievant had with the Retirement Coordinator on January 23, 2014 and his subsequent email to her in February 2014. Arbitrator Halperin also identified "the numerous cases or decisions proffered by the State" and stated she was not persuaded by them. (Id., 12). According to Arbitrator Halperin, of the authorities cited by the State, "only the Duby case offered by the State merits any reference" because "[t]he other cases are distinguishable as each involves an employee who is neither a state employee nor an A&R unit member covered by its collective bargaining agreement or involves a forum for review with different standards and criteria." (Id.).

Further, Arbitrator Halperin found that the grievant in Duby was covered under an Agreement which "differs in terms and conditions" from the A & R Agreement and that, additionally, "the facts of that case indicate that the Grievant's receipt of retirement benefits was not conditional on any fact." (Id.). Arbitrator Halperin then found "that the Grievant's application for retirement was explicitly conditional" and was "processed" by DCF. (Id.). Again, she stated "the hearing record does not include a response as requested in the cover letter to the application as to whether his application would affect his grievance rights." In making her ruling, Arbitrator Halperin stated her disagreement with the Award of Arbitrator Garraty in Duby that, although the grievance was arbitrable, the

grievant in Duby could not seek reinstatement as a remedy. According to Arbitrator Halperin, "the distinction between appeals to the ERB [Employment Retirement Board] and a grievance governed by the A&R contract" is one "that leaves the question of remedy to the arbitrator dealing with the merits of the grievance." (Id., 13). Thus, the instant proceeding ensued.

POSITION OF THE STATE

The State takes note of the fact that Grievant retired from State service prior to the effective date of his termination. The State claims that the remedy of reinstatement sought by the grievance is a "remedy" that is "not within the purview of this Arbitrator due to the fact that Grievant is retired and was retired prior to the State taking the dismissal action." According to the State, the Award of Arbitrator Halperin finding that the grievance is arbitrable and that it could proceed with the merits does not prevent the State from raising the "lack of remedy" argument in this proceeding. Thus, the State claims that Arbitrator Halperin "was not charged with finding if there was a remedy based on the employment status of the Grievant."

The State identifies an Award issued by Arbitrator Garraty holding that the retirement laws of the State do not provide for a "conditional" retirement and a decision by the Connecticut Superior Court upholding a ruling by the State Employee Review Board that a retirement cannot be reversed or nullified. The State identifies Grievant's retirement letter of January 29, 2014 in which he

stated that it was being submitted "on the condition that my subsequent retirement will not have any impact on my ability to challenge the termination of my employment." Nevertheless, the State contends, Grievant makes no mention of his retirement being reversed should he prevail on the grievance nor did he request a "conditional" retirement. The State also identifies a decision of the United States Court of Appeals for the Fourth Circuit in which the Court essentially held that a plaintiff's voluntary resignation amounted to a voluntary relinquishment of his property interest which negated any reliance on the plaintiff's part to challenge termination by way of just cause. According to the State, once Grievant voluntarily retired, "he was no longer covered by the four corners of the collective bargaining agreement", which Agreement "has no reference to retirees."

In setting forth its position that there is no remedy available to Grievant, the State also claims that Grievant must be considered a retiree under Chapter 67 of the State Personnel Act and Chapter 66 of the State Retirement Act. In the State's estimation, Arbitrator Halperin erred in finding that the grievance was arbitrable and that its "argument ... remains the same in this matter concerning remedy and the power of the Arbitrator." The State stresses that retirees are not covered by the parties' Agreement. It identifies judicial decisions and arbitration awards that it contends supports this observation.

Turning to the merits, the State claims that Grievant's termination should be upheld on the ground that it did not act in a manner that was either arbitrary or capricious in terminating Grievant. Setting forth its position that there is a just cause basis for the termination, the State identifies the rules relating to what it labels as Grievant's "mileage and time fraud." Grievant had knowledge of these rules, according to the State, not only by way of "typical notifications" but also because he was "subject to an investigation in 2007 for his misuse of time and was being loudermilled for a dismissal." It also relies on the testimony of the Legal Division Director, Barbara Claire that she would regularly have to remind Grievant of these rules during his tenure with the State.

Moreover, Grievant's knowledge of the rules, the State puts forth, can be derived from his involvement in an institutional grievance filed in 2007 involving travel time compensation under the parties' Agreement. The State notes that in the institutional grievance the claim was made that attorneys assigned to perform field work had rotating duty stations. The grievance itself, the State observes, was settled by a Stipulated Agreement. According to the State, the terms of the Stipulated Agreement provided that attorneys assigned to the Administrative Hearing Unit and a "floater" with Statewide responsibility would be treated as employees with a duty station that was periodically rotated under Article 16, Section 2(b) of the parties' Agreement. The State emphasizes its understanding of the Stipulated Agreement that "no mention" was made of Area Office Attorneys who cover more than one office. Thus, the State claims that Grievant "was well

aware that the practice of claiming reimbursement as described in the Stipulated Agreement only pertained to the Administrative Hearings Unit." The DCF Standards of Conduct, the State points out, state that: employees are to report to work "promptly as scheduled"; report to supervisors "when leaving the work location during working hours"; obtain "express written authorization of their supervisors to work beyond their regular schedules for overtime pay or compensatory time"; and "not knowingly make false entries in or alter any DCF reports or records including ... attendance and pay records and mileage reimbursement requests."

The State also claims that Grievant had notice of the "Neglect of Duty" standards. That is, the State claims, in his 12 years with DCF Grievant as a Staff Attorney 3 had ample notice regarding his responsibilities. In setting forth this proposition, the State identifies the job description of Staff Attorney 3. It also identifies the work rules of the Agency that prohibit employees from "knowingly" making "false entries" in records including reimbursement records and to "perform their duties in a diligent, efficient, courteous and respectful manner." Finally, the State identifies Rule 1.1 of the Rules of Professional Conduct for attorneys that require lawyers to offer "competent representation".

The rules it has identified, according to the State, must be considered reasonable in that they are "related to the orderly, efficient and safe operation" of the State. The State also proffers that it had an expectation that Grievant would be honest in claiming reimbursement and reporting his time. In this regard, the

State identifies arbitral authority that provides that certain expectations employers have of employees are so obvious that an employee can be charged with notice thereof.

The Sate claims that the investigation into Grievant's conduct complied with the just cause standard. It anticipates the Union's contention that the Investigator, Rose Brown, was not experienced. Nevertheless, the State claims, Ms. Brown had "over ten years of experience working for one of the largest unions in the State" and, as such, "conducted investigations and was involved with represented employees." Thus, her short period of time at DCF, the State claims, should be considered of no moment. The State also notes, as she testified, Ms. Brown initially investigated a neglect of duty claim against Grievant because of the [redacted] case but, as she began to look at Grievant's time records in an effort to ascertain where he was when meetings about the [redacted] B. matter were taking place, she discovered that Grievant "was signing in and out early and late and while his mileage reports suggested he was in one location he was in fact at the other." These discoveries, according to the State, then prompted her investigation into Grievant's time and mileage claims.

The State puts forth that it has brought forward substantial proof of Grievant's misconduct. Focusing on the mileage and time claims, the State identifies Ms. Brown's testimony regarding the records she reviewed and her interview of Grievant's director supervisor, Tom DeMatteo, and Director of the Legal Division, Ms. Claire. The State maintains that Grievant did not cooperate

with the investigation. The result of the investigation, the State contends, was that Grievant, in fact, falsified his time sheets and mileage. It identifies Grievant's previous disciplinary record in 2007 that produced a 29 day suspension. It also identifies the aforesaid institutional grievance regarding mileage reimbursement.

As to the instant charges, the State claims that the evidence establishes that Grievant "was putting in for mileage reimbursement when he was not actually going between the two offices he was assigned to" and "[o]n at least 20 occasions between July 2, 2013 and October 31, 2013 he reported going between the Torrington and Danbury offices as well on three occasions he reported going back and forth from Torrington to Hartford Central Office." It was also found, according to the State, that Grievant was putting in for time not worked. The State claims that was it substantiated that Grievant, for the period July 2, 2013 to October 31, 2013 "arrived well after his scheduled 8:00 start time on multiple occasions," as discovered by Ms. Brown. Thus, the State concludes that "on a regular basis", Grievant did not report to work when required nor did he stay until the end of his work day.

The State rejects any claim by the Union that Grievant was entitled to "portal to portal coverage." The only time such coverage is mentioned in the parties' Agreement, according to the State, is when an employee's work day commences at a location that is not owned, leased or occupied the State. Because Grievant reported to State offices, the State argues, he was not eligible

for portal to portal coverage. The State identifies arbitration awards that it contends supports its position in this regard on the portal to portal issue.

The State also claims that the Union cannot successfully argue that Grievant had a rotating duty station. It claims that the evidence it produced demonstrated "an established practice that Area Office Attorneys were assigned to two offices", a fact, the State claims, the Union was aware of for a number of years. In fact, the State claims, the record evidence establishes that it was not a practice of the Area Office Attorneys to request mileage reimbursement on a regular basis as seen in a report from CORE looking at an eight year period from 2007 to 2013. The State emphasizes its understanding that when Grievant accepted his position, he knew that it was at the other end of the State and that his commute would be approximately an hour and a half each way as part of a 180 mile round trip. Further, the State contends that Grievant was aware that mileage reimbursement that he had received as an Administrative Hearing Attorney was not utilized for the Area Office Attorneys, as seen by the fact that he was "the driving force behind that grievance ... [that] he presented at all the lower steps and was involved in the stipulated agreement which specifically addressed the mileage for Administrative Hearing Attorneys and specifically did not include the Area Office Attorneys."

The State also relies on the testimony of Ms. Claire that when she commenced her employment with DCF, she was an Area Office Attorney and assigned to cover two offices and would only submit mileage reimbursement

when she went between the two assigned offices. To the same effect, according to the State, was the testimony of Matt LaRock. Mr. DeMatteo also testified to this effect, the State contends.

The record also shows, according to the State, that Grievant never inquired about mileage reimbursement and that Ms. Claire testified, before Grievant transferred from the Administrative Hearing Unit to the Area Attorney Office, she discussed with him about the length of his commute and that he was required to report to work at the established hours. According to the State, Ms. Claire testified that Grievant informed her that it would not be an issue and that Grievant "did not request permission or indicate that he was planning on using his travel time on our clock."

The State claims that Grievant's explanation on this issue was "sketchy at best and at times it was apparent he was trying to avoid answering" questions. It is the State's claim that Grievant ultimately acknowledged he did not actually travel between Torrington and Danbury and that when asked why he would therefore request reimbursement "his answer was vague and confusing in that he claimed it was his right under the collective bargaining agreement and he would not elaborate or explain." The State also contends that Grievant stated that he did it "because it was what he had historically done as an Administrative Hearing Attorney, even though he knew that only Administrative Hearings Attorneys were the only ones that were considered to have a duty station that is periodically rotated." According to the State, Grievant also acknowledged that he "probably

did not travel to Torrington those morning [when staff were allowed to come directly to the Central Office in Hartford] and then to Hartford or Rocky Hill for an early morning meeting nor did he travel back to Torrington."

As the State views the record, Grievant acknowledged that he put in for mileage to travel back and forth to Danbury or Torrington when he did not make such trips and submitted mileage reimbursement requests for travel from Torrington to Hartford to attend 8:00 or 9:00 meeting and then back to Torrington when he never went to Torrington on those days. Further, Grievant acknowledged, the State claims, that he submitted a mileage reimbursement request for travel from Torrington to Rocky Hill to attend a 9:30 meeting and then back to Torrington when he was not in Torrington that day.

The State also claims that it established Grievant's misconduct in connection with the [redacted] matter. It notes the record evidence that, on May 25, 2012, a Staff Pediatrician at Yale New Haven Children's Hospital executed an affidavit that stated that the child was admitted on May 23, 2012 with serious injuries and, within the past 24 hours, had spent time with his mother, father, and a babysitter. Set forth in the affidavit from the Pediatrician, the State observes, were extensive injuries to the child, which the Pediatrician, Dr. Leventhal, stated were consistent with abusive head trauma and that the child would be at imminent risk of suffering another serious injury or even of dying if the child were allowed to return to his home. Dr. Leventhal, the State puts forth, recommended

that the child be placed outside the home until the child's safety could be ensured.

The State identifies emails that were transmitted though the attorney's office regarding the extent of [redacted]'s injuries and the concerns of Dr. Leventhal. An examination of the emails, according to the State, demonstrates that Grievant received them but, the State emphasizes, "there is no evidence that he responded or offered anything except the use of his office for a conference call." According to the State, at the time of this exchange of emails, Grievant was the legal advisor for the Torrington/Danbury office and also was a member of the critical incident team that was notified of the child's admission to the hospital. It is the State's position that the investigation conducted by Ms. Brown "substantiated that he failed to provide adequate legal advice to the staff assigned to this matter", including a failure to review LINK records of the child; attending several meetings of the critical incident team but not providing legal advice or counsel; not ensuring that the social work staff knew that it had legal sufficiency to proceed with either a 96 hour hold or order of temporary custody; did not inform the group that there was legal sufficiency to substantiate neglect; did not engage in communication with the social work staff regarding their legal obligations; did not report to his supervisors the critical incident or the fact that staff was closing the case without any action notwithstanding the aforesaid affidavit of Dr. Leventhal; did not document his involvement in LINK; was

generally derelict in his duties as a Staff Attorney 3; and exercised poor judgment by not discussing the case and its facts.

The State identifies the testimony of its witnesses, LaRock, DeMatteo, and Claire, all of whom testified, the State asserts, "that the affidavit [of Dr. Leventhal] in and of itself was legal sufficiency to begin the process of removing the child via a 96 hour hold or Order of Temporary Custody." The State identifies the statement made to Investigator Brown by Eileen Meehan, Agency Director of Human Resources that all staff involved in the [redacted] matter received discipline although two of the managers retired. The State also relies on Ms. Brown's investigative report, which the State maintains established "that all of the staff that she spoke with indicated that Dale King **DID NOT** offer any advice or counsel on seeking a 96 hour hold; an OTC; substantiation or offer any other information concerning legal sufficiency." (Emphasis in original). In fact, the State contends, all individuals interviewed by Brown with knowledge of the red team meetings agreed that the child be sent home, and that Grievant, was "pushing for returning the child home." Also, the State claims, Ms. B[redacted]wn's investigation plus LINK notes demonstrated that a question existed regard[redacted]g the DCF investigation as opposed to the police investigation. Thus, the State avers that the record establishes that the police told DCF not to interview the babysitter, but, the State puts forth, as set forth in the record testimony, police cannot interfere with a DCF investigation under circumstances that existed in connection with [redacted]. Ms. Brown in her investigative report, the State

asserts, based on her interview with management in the Agency Legal Division, reported that there were standards that should have been followed by an attorney in Grievant's position. These standards, the State observes, included playing an active role in the decision-making process, but Grievant, the State claims, was just a passive participant.

The State identifies Grievant's written statement submitted at his pre-disciplinary hearing, which, the State argues, established that he was not credible. The State makes the same observation about Grievant's hearing testimony, which it submits "contradicts his statements" provided at the pre-disciplinary hearing. Insofar as Grievant testified that there is no legal sufficiency for a 96 hour hold or an order of temporary custody, the State responds that the essence of Grievant's position was "that because the child was in the hospital there was nothing to support either action" and that a 96 hour hold "is taken when there isn't enough time for the filing of an OTC." In the latter case, however, the State claims, it must be noted that the question arises "why wasn't an OTC filed or recommended to the SW staff." Ms. Claire and Mr. LaRock testified, according to the State, that imminent danger is required for either a 96 hour hold or an order of temporary custody and that Dr. Leventhal's affidavit established imminent danger. According to the State, Grievant's contention that it was not his responsibility to confer with the social worker staff about legal sufficiency because "they knew it" and that Grievant "did not say ... you can do an OTC here" must be understood in light of the testimony of Ms. Claire and Mr. LaRock

that Dr. Leventhal's medical affidavit "was perhaps one of the strongest they had ever received in their professional opinion." The State stresses, therefore, that the affidavit itself established legal sufficiency both for a 96 hour hold and an order for temporary custody.

In the State's estimation the record clearly established that Grievant did not discuss legal sufficiency "and that all discussions concerning what would happen when [the child was] discharged involved sending the child home." Several staff indicated, according to the State, that Grievant, was advocating returning the child home. The State claims that Grievant's written statement submitted at the pre-disciplinary hearing and his testimony clearly indicate Grievant cannot be considered credible because, as the State views it, "[i]n his written dissertation he is claiming on every front that he was providing legal advice and counsel on the issue of legal sufficiency with [a] 96 hour hold and OTC, then under oath he testifies that he didn't, wouldn't and no one asked."

The State further stresses that, notwithstanding what the social work staff might decide to do from their perspective, it "is the Area Office Attorneys job to make sure they understood all their legal options", and at the very least, as testified to by Ms. Claire and Mr. LaRock, the process for an order for temporary custody should have started. In the State's estimation, "[t]he bottom line here is that if King did in fact inform and discuss legal sufficiency at these meetings with the SW staff and if he did advise the social worker of DCF's legal right to interview the Dad, it would have been considered a legal consult in the opinion of

the Legal Division management and should have been documented in LINK that those discussions occurred and this legal advice was given." According to the State, Grievant made no documentation on LINK, not because he forgot to, but because he offered no legal opinion.

Any claim by Grievant that legal sufficiency could not be determined until the conclusion of the investigation, the State argues, must be viewed in light of the testimony of Ms. Claire and Mr. LaRock that, "while statutes require investigations to be concluded within 45 days, there is no reason an investigation can't be finished earlier, and when a child is in danger the Agency shouldn't be waiting, the cases and risk are constantly assessed and reassessed throughout the investigation." In fact, the State claims, the whole point of having an Area Office Attorney involved "is to get a legal consult early so that information is available to assist in the decision making." Nevertheless, the State claims, SW staff had no discussions with Grievant about a neglect petition.

The State also maintains that Grievant neglected his legal responsibilities, which included the basic responsibility to provide legal advice to the social work staff. Any contention by Grievant that there was no identified perpetrator, the State contends, must be viewed in light of Mr. LaRock's testimony "that not having an identified perpetrator is not the determining factor on either the 96 HH or the OTC and does not prevent the agency from substantiation." The State also stresses the record evidence that Dr. Leventhal "is one of the nation's experts in child abuse and is used by DCF as well as child welfare agencies

throughout the country." Having an affidavit from Dr. Leventhal stating the child was at risk of death, the State argues, "should have had all these adults at DCF moving to protect [redacted] not worrying about the mother's right to raise her child or that they didn't have a clue who was responsible."

Regarding the State's position that Grievant did not properly document legal consults in LINK, the State maintains that, had Grievant "documented all the legal advice he claimed to have given in this matter in LINK as he had been directed to do through his career at DCF, but also through his training as an Attorney we would not be here." The State identifies the record evidence set forth in the testimony of Ms. Claire that, after [redacted] died after he was returned home, she went through the entire case history on [redacted] and his family. It was during that investigation, the State notes, that Ms. Claire, according to her testimony, saw the affidavit from Dr. Leventhal and the seriousness of the injuries the child had suffered. When Ms. Claire observed that the child had been returned home without a service plan, the State contends, she sought to determine whether there had been legal opinions and consults and when she found none she discovered that Grievant had not opened the LINK record at that time. In fact, the State puts forth, the record evidence established that the only time Grievant accessed LINK was after the child's death was reported. Further, the State identifies the testimony of Mr. LaRock, the DCF representative on the Child Fatality Review Board, and his testimony that, when he reviewed the case from a legal perspective, he also became concerned that there was no record of

any legal involvement at the time the child had been sent home. According to the State, the records relating to [redacted] "may become part of a legal action and the fact that there was no legal documentation concerning this case was alarming to both Claire and LaRock."

The State contends that Grievant stated that he did not go into LINK because there was nothing there that was not in emails. The State rejects any such contention in view of Mr. LaRock's testimony that, had Grievant gone into LINK, he would have observed that the "mother, grandmother, father, and the father's girlfriend all had previous DCF involvement", which "would have been relevant to the Area Office Attorney and should have been reviewed as part of their responsibilities, so that they could offer informed legal advice." The record establishes that Grievant, as he set forth in his written statement offered at the pre-disciplinary hearing, the State notes, believed that the mother was not the "offending party" and he stated as much during the meetings that accompanied the child's return home. Nevertheless, the State contends, Grievant "made this assumption based on NO information about Mom which he could have acquired if he bothered to look into her past with the Agency." (Emphasis in original). According to the State, though Grievant stated he agreed with LaRock that a staff attorney should read the case information, he stated that all of the information he needed he was obtaining directly from the SW staff but also stated that no one was coming to him with the facts.

As to any claim by the Union that Grievant had no obligation to enter anything into LINK, the State emphasizes its position that there does not have to be "a stated work rule for an Attorney to document legal advice" nor does there "have to be a statute, regulation or policy either." The testimony of Ms. Claire, Mr. LaRock, and Mr. DeMatteo, according to the State, establish that, before LINK, a paper method was used to record information in the case file but with the implementation of LINK anyone in DCF had the full case record available. Moreover, the State contends, Ms. Claire and Mr. LaRock testified that there had been communications both from themselves and the Commissioner "that informed all of the staff at DCF that everything concerning a case has to be entered in LINK."

In addition, the State asserts that, as an attorney, Grievant should have known of the need to document a record when legal advice is given, "especially in critical incidents involving child abuse." Even if the Arbitrator were to believe that Grievant had never been told to make entries into LINK, the State claims that there should have been at the very least "a paper trail that he [Grievant] could have produced for his defense", but there were "[n]o records of his documenting anything" including a "computer entry or paper."

The State also maintains that it established that Grievant "was well versed about LINK", as set forth in State Exhibit 23. The entries made in that exhibit by Grievant into LINK, according to the State, "illustrate that the Grievant was well aware of what needed to be entered into LINK." In fact, the State claims, the

"entries range from something as simple as a MAP team meeting was held to legal consults on various issues and various levels of seriousness", but the State argues, "when it comes to a severely abused baby who a renowned child abuse expert had identified as being at risk for death, he enters nothing, not even that a meeting was held." Grievant simply cannot claim, according to the State, "that he provided legal options, consults and legal sufficiency for neglect petitions and OTC and have nothing documented, when he has made it a habit to enter that information however minor on other cases." In his written statements submitted at the pre-disciplinary hearing, Grievant, the State observes, acknowledged that legal consults are documented in LINK but, the State puts forth, by virtue of that acknowledgement, Grievant further acknowledged that he should have made entries into LINK. It is the State's position that Grievant made no entries into LINK "because he did not provide any legal guidance in this matter."

The State also observes that, in his written statement submitted at the pre-disciplinary hearing, Grievant maintained that there was no policy that required him to contact supervisors to inform them that he had informed SW staff that they had legal sufficiency. Grievant did indicate in this written statement, according to the State, that he had done so in the past because of DCF Policy 31-10-2, which states that, if an attorney is concerned about the legality of a decision, the attorney should consult with a supervisor before giving further advice. The State claims that, "[i]f any time there was a case that had to be brought to management's attention this was the one", especially given Grievant's knowledge

of the affidavit of Dr. Leventhal. The State claims that what the record shows is that Grievant "was too wedded to the fact that the mother had a constitutional right to raise her child and had every legal right to bring him home and as the others on the team indicated he and the Social Worker were the ones driving that discussion." In reaching that conclusion, Grievant, the State contends, neglected to recall that the mission of DCF and his responsibilities were to protect the child. The testimony of its witnesses, according to the State, conclusively establish that the need to protect the child "trumped Mom's rights at that point."

In contending that termination must be considered the only appropriate outcome, the State rejects any claim of disparate treatment that the Union might raise. It notes that the burden is on the Union to establish such a claim. The State identifies nine arbitration awards involving various bargaining units in the State upholding termination for fraud, falsification, and neglect of duty. According to the State, what the record shows is that Grievant "has attempted at various times to take advantage of the State, he has a history of defrauding the State and finally he feels no remorse for neglecting his duties and responsibilities in the [redacted] matter."

The State maintains there is adequate just cause, on either of the two main allegations, to support Grievant's termination of employment and that the instant grievance must be denied in all aspects.

POSITION OF THE UNION

According to the Union, the State did not establish a just cause basis for Grievant's discharge. Regarding the State's contentions that Grievant committed misconduct in connection with the [redacted] matter, the Union asserts that the State did not call any witness who was present at the "red team" meetings of May 2012. The Union observes that the State's failure in this regard included not calling as a witness the Investigative Social Worker (Damici), the Program Manager (Hehl), the Social Worker Supervisor (Meyer), the APRN/ARG Nurse (Hassam), and the Area Office Director, who the Union called as a witness (Allensworth). The combined experiences of this social work staff, according to the Union, exceeded 106 years and, the Union proffers, "[d]espite their wealth of experience, the State avoided seeking their testimony."

The Union maintains that because the State did not call any of these witnesses, it was obliged to call the Office Area Director of the Danbury office, Bob Allensworth. Mr. Allensworth recently retired, the Union notes, and stood to lose nothing by his testimony. His testimony did, however, the Union puts forth, clarify the inaccurate statements that were attributed to him by Investigator Brown.

The State was reduced, because of its failure to call these witnesses, the Union claims, to rely entirely on the hearsay contained in Investigator Brown's Report. Brown's "findings" in her Report, the Union argues, were "totally inaccurate". The Union observes that the findings stated that Grievant said

nothing at the "red team" meetings but Allensworth testified that Grievant participated and answered all legal questions that arose. Thus, the Union maintains that the 12 findings, which began with the contention that Grievant did not inform or ask, "were all in direct conflict with the only witnesses called who were unquestionably present at these 'red team' meetings; Bob Allensworth and Dale King [Grievant]."

Focusing on Mr. Allensworth's testimony, the Union claims that it has conclusively established the inaccuracy of Investigator Brown's Report. Included in Mr. Allensworth's testimony, the Union observes, was the fact that the social work staff did not "formally" open a case on [redacted] and also that Grievant's involvement in the matter was limited to participating at the "red team" meetings. Further, Mr. Allensworth testified, the Union notes, that at the two "red team" meetings in May 2012, no one had any doubt about the legal sufficiency for a 96 hour hold when [redacted] was to be released from the hospital, nor did anyone have any doubt about the legal sufficiency for seeking an OTC, or, for that matter, the legal sufficiency for either a neglect or abuse petition.

The Union claims that "[j]ust because there is legal sufficiency for DCF to take certain action, does not mean that the social work staff must decide to do so" and its "decision to refrain from removing a child from his custodial parent was a valid and/or defensible one." The Union maintains that the record establishes that the social work staff decided that the best interest of [redacted] was to remain with his custodial mother, "particularly when the custodial parent

was not the offending party, had no prior knowledge of the offender's history, and was cooperating with DCF recommendations." The Union stresses Mr. Allensworth's testimony that in his years of experience no attorney had been involved in the "ultimate decision of whether to remove the child from his/her custodial parent(s)." Allensworth also testified, according to the Union, that Grievant participated at the "red team" meetings and did so at a level that Mr. Allensworth would have expected. Further, the Union identifies Mr. Allensworth's testimony that he discussed the [redacted] matter with Regional Administrator, Kenneth Cabral to inform him of the social work staff's decision that the mother would be allowed to retain custody "since the only suspects were the child's father and babysitter, and have [the] mother enter a service plan which prohibited contact with them." Mr. Allensworth also testified, the Union observes, that Mr. Cabral supported this decision. None of these facts, however, the Union argues, were set forth in Investigator Brown's Report. Mr. Cabral was called as a rebuttal witness by the State, the Union acknowledges, but, as the Union views his testimony, he could neither confirm nor deny the testimony of Mr. Allensworth.

The Union also relies on its understanding of Mr. Allensworth's testimony that he spoke at least two times with Dr. Leventhal and informed him about the plan to allow the mother to retain custody with the service plan safeguards and that Dr. Leventhal did not object to the plan. Further, the Union observes the record evidence that the social work staff "secured community daycare, which could monitor the child's behavior, and ensured the child's grandmother was a

back-up for child care." The Union notes that Dr. Leventhal was never called by the State to dispute any portion of Mr. Allensworth's testimony about his communications with Dr. Leventhal.

Mr. Allensworth, the Union claims, also offered "insight" regarding Brown's investigation, seen by the fact that she asked him only two questions: whether there was any policy to prohibit a dissenting opinion and whether Grievant raised any objection to the decision to return the child to the mother. These questions, according to the Union, reflected a misunderstanding of Grievant's role. Moreover, Mr. Allensworth's testimony, the Union maintains, established that parts of Brown's interview of him were "totally inaccurate". According to the Union, the inaccuracies of the Investigation Report established through the testimony of Mr. Allensworth call into question the accuracy of what other social workers might have told her as her portrayed such comments in her Report.

The Union also maintains that the Investigation Report disclosed "a lack of legal understanding and protocols." In the Union's estimation, Investigator Brown ignored the policy that legal staff do not make social work decisions provided that the social work decisions were "legally sound". According to the Union, the decision by the social work staff to allow [redacted]'s mother to retain custody was one that was "legally sound". What Investigator Brown failed to perceive or simply ignored, the Union claims, was that "legal staff shall not make social work decisions including decisions to file petitions or motions", as set forth in DCF Policy Manual (31-10-2); that a "96 hour hold and OTC were options discussed

on or about the May 25, 2012 'red team' meeting"; and that "social work decisions to seek 'substantiation' are made at the conclusion of an investigation, approximately 45 days after the initial hotline call". Further, the Union claims, Investigator Brown misconstrued the red team meetings as legal consults by indicating that they should have been entered into LINK. Instead, the record establishes that the term "red team" meeting was created by Mr. Allensworth in the Danbury Office and was not a term used throughout the State. Additionally, "no protocol existed for these meetings" the Union contends, and the purpose of the meetings, per the testimony of Mr. Allensworth, was "to gather all possible available staff and professionals, to discuss a case in which there was a critical incident report generated."

The Union identifies the DCF Policy Manual's language that "social work staff shall document legal advice provided by DCF legal staff or AAG in the LINK" and asserts that there is "no policy or protocol for the attorney to enter the 'red team' meetings, or even legal consults for that matter, into LINK." It identifies Grievant's testimony that "nearly all legal consults occur when the social work staff is attempting to remove a child from his or her parents and are not certain whether they legally can." All attorneys who testified agreed, the Union contends, that a legal consult should be documented by a staff attorney only if the attorney "is concerned that the social work staff will take action that is contrary to the Attorney's legal advice" such as "filing an OTC even though the attorney has indicated to them that they do not have legal sufficiency." The

record evidence regarding entries made in LINK by Grievant, the Union observes, were made by Grievant if "the social worker was attempting to file a neglect petition or OTC and sought attorney King's advice as to whether they had legal sufficiency to do so."

The Union claims that on the [redacted] matter Grievant was at the red team meetings "solely in case the staff needed legal guidance with regard to legal actions social work staff planned to take." In the first red team meeting on May 25, 2012, the Union asserts, there was no immediate action necessary because the child was in the hospital and at the second red team meeting on May 29, 2012, the social work staff was not attempting to file any court motions and there were no legal issues that arose because "there was no legal question that DCF social workers can allow the child to return home with his custodial parent." The Union stresses that, "with an affidavit as compelling as Dr. Leventhal's, there was no dispute but that there was a legal sufficiency to remove the child, if the social work staff deemed it necessary." It would be "absurd", the Union proffers, to reach the conclusion that Grievant "had a clear obligation to tell the social work team what they already knew and then document it in LINK as a Legal Consult."

The Union also claims that the red team meetings did not rise to the level of a legal consult because the social work staff decided not to take any legal action. Had any social worker involved believed that it was a legal consult, the Union further observes, then the social worker should have entered the legal consult into LINK in accordance with the policy. Also, the Union claims that the

testimony of Mr. Allensworth reflected that there would have been "little if anything" in the LINK record during the time of the May meetings. The Union accuses Investigator Brown of implying that Grievant's failings included not reading LINK but, the Union argues, "when the matter was so new there was not much, if anything, available at the time in LINK." Further, the Union emphasizes that Grievant was at the red team meetings.

The Union also identifies two memoranda that Commissioner Katz transmitted to DCF staff a year after the red team meetings in which she acknowledged, according to the Union, that the DCF's "documentation standards were unclear." It was only 17 months after Grievant's involvement, according to the Union, that DCF elected to offer training regarding its expectations. The Union claims that Grievant "would not have resisted documenting his participation in the 'red team' meeting into LINK if he even had a clue that the Agency wished him to do so." The Union maintains that, but for [redacted]'s death, "there would have been no investigation into Attorney King's very limited role in the 'red team' meetings in May of 2012." The "true culprit", the Union contends, was [redacted] father and, the Union argues, "[a]s it turns out, [redacted] was not in imminent danger returning to his mother." What this case is about, the Union insists, is an effort to deflect attention from any role individuals much higher than Grievant in the chain of command might have played in [redacted]'s death and to lay the blame on Grievant. The Union stresses that, when the social work staff made the decision to return [redacted] to his mother, "they were acting in

conformance with the Commissioner's stated priority that 'it is our obligation to do everything possible to keep children within the family system.'"

On the allegations of misconduct against Grievant based on time and mileage fraud, the Union takes the position that the allegations by necessity are "based upon a distinct belief that there is no contractual language that would permit the Grievant to seek time credit and expense reimbursement as he did." That is, the Union claims that the allegations of misconduct in this category must rest on the State's claim that there was no contractual basis for Grievant's submissions. The Union contends that, on cross-examination, Investigator Brown could not identify any basis for concluding that Grievant engaged in fraud other than her contention that he was not an employee with a rotating duty station. Brown's conclusion that the rotating duty station language was not applicable to Grievant, the Union asserts, was based solely on what Brown learned from Barbara Claire that "language exists for the limited purpose of assuring that an employee receive two (2) weeks notice before one's 'duty station' is changed."

It is the Union's position, however, that the "existence of the Stipulated Agreement (State Exhibit #14) from 2008 and the recitation of benefits therein, demonstrates beyond disputation that this contention is not merely erroneous, but fundamentally absurd and uninformed." The State, simply put, the Union claims, did not consider Grievant to be a "field employee" because, had they concluded that he was a "field employee they would have found him to be

entitled to all of the benefits of Articles 16 and 25, including his travel time and mileage reimbursement."

According to the Union, under Article 16, Section Two(b) Grievant was an office employee with an assignment that required him to serve at more than one home office or duty station and thus he was entitled to receive the benefits of rotating duty station status. The Union claims that the testimony offered by Union counsel regarding the bargaining history and intent of the rotating duty station language was clear and credible and most notably was not refuted by the State. The Union also asserts that "without ever getting to the threshold question of RDS applicability, the Arbitrator can still make a preliminary determination that the facts cited [that the Union claims establish Grievant's status] ... present a logical and legitimate contractually based question upon which a contract interpretation grievance, not discipline ... should be resolved." Under such circumstances, the Union argues, it is simply impossible to conclude that Grievant engaged in fraud.

The State is reduced to taking the position, according to the Union, that Grievant's time and mileage submissions reflect "bad faith" on his part, which the Union labels as "laughable". Grievant, the Union stresses, "'rotates' between primary and secondary responsibilities and different physical locations." The "floater" mentioned in the 2008 Stipulation, according to the Union, serves more than one regular "area office assignment" and, the Union argues, was "precisely like Mr. King ... an Area Office Attorney, not a Hearings Attorney; a detail that

proves that there was never any intent to limit the RDS designation to Hearing Attorneys, as Claire unabashedly claimed." When Grievant transferred from a Hearings Attorney position to an Area Office Attorney position, the Union notes, he filed his submissions "appropriately and unambiguously ... claiming the applicability and benefits of the RDS provisions; exactly as he should have."

At the very least, the Union contends, the Arbitrator is presented with a "bona fide contractual question concerning RDS applicability" which renders any claim of fraud a nullity. The Union emphasizes that DCF did not dispute Grievant's submissions for more than two years, and it would be folly to believe that Grievant, believing he did not have RDS contractual protection, would have not "reassumed his previous assignment rather than travel more than 2 hours each way ...on his own time."

The Union also contends that the evidence that Ms. Claire reminded Grievant that commuter travel would be demanding if he took an Area Office Attorney position is based on the recollection of an alleged conversation occurring over three years ago and was presented into evidence as a hearsay statement by Claire made to Brown set forth in Brown's Investigative Report. Any such discussion, in any event, the Union claims, cannot serve as a foundation for any finding that Grievant waived his right to the benefits of a rotating duty station position. The Union also notes that there is no auditor's findings of overpayment, and the record is barren of any evidence that Grievant acted with fraudulent intent. According to the Union, the proper forum to resolve

the dispute would have arisen if Grievant's submission had been rejected, which would have permitted him to file a grievance challenging the rejection. The Union also emphasizes that Grievant "hid nothing" from the DCF "and his submissions are neither ambiguous nor deceptive."

The Union underscores its position that Investigator Brown could not identify a basis for her conclusion that Grievant engaged in fraud other than it was "obvious" that he was not entitled to the reimbursement he sought. It is clear to the Union that Investigator Brown "did not fully understand the application of the Rotating Duty Station provisions" and, in fact, "had a 'blind spot' and Atty. Claire only reinforced her disinclination to scrutinize the Grievant's justification further." The Union contends that it has not been able to identify any other example of a "benefit–based discipline case." The Union also underscores its understanding of the record that Grievant made no misleading statements in his claims for reimbursement.

In the Union's estimation, the Arbitrator does not need to resolve the rotating duty station dispute but "need merely dismiss the charge that the claims were wrongfully or criminally motivated." The Union, however, invites the Arbitrator to address what it labels "the rotating duty station dispute". According to the Union, the instant proceeding presents "a perfect fact pattern for the application of the [relevant contractual] language."

In setting forth its understanding of Article 25, Section Three, the Union asserts that Grievant's mileage reimbursements were in accord with the language of the Agreement. As the Union views Section Three, it "often embraces a calculation that is often a contractual 'fiction' (the lesser of two different calculations either of which may never have actually occurred)." The Union asserts that it makes no difference to the rotating duty station status calculation which office is considered a "duty station" and which is a "work area". As to Grievant, the Union observes that Grievant's "work area" was the distance between Danbury and Torrington. Multiple duty stations, according to the Union, "do not control the calculation; work area is the operative consideration." Grievant, the Union emphasizes, did not certify that he actually reported to the additional site but certified that his "reimbursement should be calculated as that distance" by virtue of what the Union labels the "demands" of the Agreement.

According to the Union, the State incorrectly has relied upon "the unsubstantiated and rejected belief that the formula found in Article 25, Section (3)(a) means that an office employee in RDS status could receive no mileage reimbursement when reporting to the second (third, etc.) office." The Union asserts that the "only mileage claimed by Attorney King was his mileage from Torrington to the other assigned offices". The Union claims that Grievant was an office employee with Torrington as his duty station and was assigned to rotate to Danbury, Meriden, and Hartford. When Grievant rotated, the Union puts forth, he was entitled to the Article 25, Section Three benefits unless the "trip from home

to the other offices ... is shorter." The Union's interpretation of Article 25, Section Three, it argues, is one that correctly provides Grievant "mileage from Torrington to each of his DCF assignments because ... every one of those calculations is lesser than Grievant's mileage from home."

The Union claims that the State never set forth any meaningful definition of rotating duty station. In setting forth its interpretation of rotating duty station, the Union notes that Grievant's assignment encompassed more than one permanent worksite and that he was assigned to an "'area' that encompassed from Hartford to Danbury, Torrington to Meriden and all of the permutations therein." According to the Union, the locations in Grievant's "area" had to be considered "permanent assignments, and not variable, non-repeating field assignments." The Union also underscores the fact that Grievant's assignment could have been changed on two weeks notice. Further, the Union observes that the description of the Staff Attorney 3 position includes that its occupant "may be required to travel" and that "'may' ripens to 'must' when the agency elects to add additional locations to the 'home' office assignment." Other Staff Attorneys, the Union claims, "assigned to a single office Duty Station do not get this RDS benefit; but those 'assigned to periodic rotation to meet operating needs' are precisely the employees for whom the bargainers created the term ...'Rotating'."

As to the State's contention that other Staff Attorneys 3 did not file grievances seeking RDS benefits, the Union responds that there was no evidence that any of these other Area Attorneys "in point of fact ... meet the

criteria for the RDS benefits, so that a proffered analogy to Dale King can be scrutinized." Such other Attorneys would not be entitled to RDS treatment, according to the Union, unless it could be established that they work at more than one office location; travel more than 30 minutes in each direction (for the travel time calculation); and that they travel to other agency or state offices in order to actually qualify for mileage at the lesser of the two optional formulae. No record evidence exists, the Union contends, that the other employees "are similarly situated."

As to the travel time, the Union identifies Section Two (b) of Article 16, which language establishes, the Union contends, that Grievant was entitled to RDS coverage. The Union emphasizes that, in its estimation, the State did not present any evidence to refute Grievant's claim for travel time. It also emphasizes that Grievant was required to adjust his daily schedule to accommodate the paid travel time. As to Ms. Claire's statement that she told Grievant that he had to report to work at 8:00 a.m.., the Union responds that there was no corroborative evidence to support her assertion and, in any event, Grievant knew that he must start his day at 8:00 a.m. but "specifically denied that he ever received direction to arrive at 8:00 a.m." Further, the Agency, according to the Union, "never sent the Grievant any detailed instructions or summary of time/reimbursement procedures upon his change of assignment (from his prior RDS status) to the Area Office Attorney position." The Union labels the lack of such written documentation "curious because Claire testified that she had

concerns about his time calculations from an earlier dispute." Moreover, the Union stresses that Grievant, when he transferred from Hearings to Area Office Attorney, "was already an RDS employee, and submitted his time and mileage sheets in precisely the same manner as the filing that the State now criticizes."

In contending that Grievant was a RDS employee, the Union observes that Grievant's arrival records indicate that he would arrive between 9:00 a.m. and 9:30 a.m., which meant, factoring in the "travel credit" that he was on time. His departures at 4:00 p.m., the Union claims, also were required given the "travel credit" or otherwise he would have accrued unauthorized overtime in the form of compensatory time for any time after 5:30 p.m. Grievant's adjusted work schedule, which he requested, the Union puts forth, actually reduced the paid travel time from 30 hours per pay period to 27 hours per pay period, which, the Union calculates, saved the State more than $150 per week. According to its calculation, the Union maintains that, had Grievant arrived at the office at 8:00 a.m. and left at 5:30 p.m., he would have accrued 27 hours of compensatory time, per Article 16, every pay period. The Union contends that, in essence, the State's ultimate position regarding the time and mileage claims is based on the unfounded assertion of a past practice because other Area Office Attorneys did not submit such claims. The Union points out that the State never demonstrated the factual details regarding other Area Office Attorneys and, in any event, "past practice" cannot trump explicit contractual language.

According to the Union, neither charge has been established against the Grievant, and in fact neither charge should have been addressed in the disciplinary process. The Union contends that the allegations based on the [redacted] matter, even if established, were only appropriate "for discussion" and "(if determined to be valid) behavior modification by the discussion and/or Service Rating procedure." Regarding the time and mileage accusations, the Union asserts that they "involve managerial incompetence, sloth and at least two separate instances of historical ignorance." That is, the Union claims, the State was ignorant of the rotating duty station language and its intent and history and the State neglected to conduct a "review of the Contract and history ... and afford the Grievant the fullest benefits of the negotiated 'overpayments' provisions." In fact, the Union proffers, the State was looking for a "Judas Goat" and selected Grievant: because of his role as an "Union activist who had already embarrassed the agency in 2008"; because "he was the only attorney in the [redacted] loop, and the Social Workers were expected to close ranks to support each other"; because Grievant "dared to demand the proper application of travel time and reimbursements, when the agency believed that others simply accepted managerial interpretation"; and because the State "believed that cautiousness might encourage him to retire, rather than face the grueling and time-consuming process of arbitral exoneration." [redacted]

The Union maintains that Grievant is therefore entitled an Award of full back pay and benefits as well as reinstatement to his position. The Union rejects any arguments by the State based on the fact that Grievant received retirement benefits, arguing that Grievant had no other choice in the matter. In fact, the Union claims, Grievant did not actually retire but has continued to work. The State's claim that Grievant is not entitled to reinstatement, according to the Union, depends on another case that involved an employee who was not covered by the parties' Agreement. The Agreement before this Arbitrator, the Union puts forth, "contains specific language that permits a return from Retirement, and re-credits employees with their seniority upon return."

Thus, the Union identifies Article 12, Section Four and the language therein that seniority "[c]redit will be granted to any employee with permanent status who is reemployed within one (1) year after termination in good standing, including reemployment from retirement." This language would be "meaningless", the Union argues, if return from retirement is prohibited. According to the Union, the language in Article 12, Section Four reflects the Union's efforts to negotiate "specific language that demonstrates that a return from retirement is not merely possible, not merely a potential remedy ... but is also the appropriate remedy for cases such as this wherein the State sought to force the employee out ... without just cause." In the Union's estimation, an Award sustaining the grievance would find Grievant being "in the same position as any other employee who was speciously terminated or separated 'in good

standing'." The Union stresses its understanding of Article 12 that the parties "anticipated" that an employee might be reemployed after retirement in the circumstances set forth in the record herein. According to the Union, Grievant "would not be receiving retirements benefits now, but for the illegitimate and unsubstantiated allegations ... and the irrevocable action of termination imposed upon him by the real culprits, the face accusers of DCF."

Additionally, the Union claims that Grievant made it clear that he was forced to retire when he did so. It identifies Arbitrator Halperin's Award on arbitrability and claims that "the State already argued unsuccessfully, that Retirement barred reinstatement." Included in Arbitrator Halperin's Award, the Union maintains, is a "discussion of communications between Atty. King and the State that made it absolutely inarguable that his request for benefits was conditioned upon the State's definitive opinion, one way or the other, about his right to appeal." The Union also claims that this Arbitrator has no jurisdiction to interpret the State's pension laws and if any portion of the remedy sought by the Union is unenforceable in the State's belief, the State must apply to Superior Court to set aside that segment of the Award. While the Union acknowledges that the State can offset the amount of a back pay award by deducting Grievant's earnings based on other employment or his retirement benefits, the Union asserts that Grievant is nevertheless "entitled to full credit for his lost accruals and pension participation opportunities." In a wrongful dismissal case, which the

Union identifies as applying to this proceeding, the first step is to reinstate the employee.

In setting forth its position on remedy, the Union argues that the Arbitrator's jurisdiction is only to adjudicate issues arising under the parties' Agreement and not to make any determination about whether Grievant's reinstatement is prohibited by either statute or case law. The State's reliance on the *Finder* decision is misplaced, according to the Union, because of the significant differences the Union finds between Grievant's situation and the employee in *Finder*. In this regard, the Union notes that *Finder* was a state manager and was not terminated from service because of any claim by the State he engaged in misconduct. Grievant, on the other hand, the Union observes, was charged with misconduct, and under the parties' Agreement was afforded the right to challenge the State's decision to terminate him based on his misconduct. Further, the Union accuses the State of not apprehending the correct nature of the decision in *Finder*. As the Union reads *Finder*, the employee was given two months notice before layoff and by the time he actually filed a complaint under statutory language he was already a retiree. His claims were ruled untimely, according to the Union, because of this fact. Grievant, the Union notes, filed a grievance and challenged his discharge before "being forced to retire as a method of mitigating his, and the State's losses." Grievant's focus, the Union maintains, "was on protecting his reputation and retraining his job."

The Union also rejects the State's reliance on the *Duby* arbitration decision issued by Arbitrator Garraty in a dispute involving another bargaining unit. The Union stresses that there is no precedential or res judicata value that necessarily can be attached to the *Duby* Award. In setting forth its position, the Union claims that because the Union advocate in *Duby* "did not convince Arbitrator Garraty" has little value because "the Award does not tell us explicitly whether she might have been persuaded differently by our fact pattern, or even a superior presentation."

The Union also notes that, subsequent to *Finder,* SEBAC Pension Arbitrator Golick sustained a grievance filed by the Union that the State violated the SEBAC Agreement when it issued an early retirement incentive plan letter to Grievant Hubbard and denied her re-employment rights. When the *Hubbard* Award was issued, the Union observes, the *Finder* case had already been decided, which meant that the State could have appealed the Award to Superior Court but did not do so. The Grievant in *Hubbard* was reinstated and, the Union concludes, *Finder* hardly stands as setting forth the rule against all re-employment rights.

The Union also identifies grievances brought forth by the NP-5 Unit challenging the State's decision of hiring retirees to fill bargaining unit vacant positions. In those grievances, according to the Union, no argument was made that retirees could not be hired back and, in fact, both parties endorsed the right of the State to rehire its retirees. The Union also maintains that no other

authorities have been presented by the State in support of its argument that Grievant cannot be reinstated to his position. Some of the cases relied upon by the State, according to the Union, involved retirees who were not employees when a grievance was initiated and thus had no rights under the grievance article in the relevant collective bargaining agreement to make any challenge and, in fact, sought to claim benefits to which they were not entitled on the date they retired.

As the Union views the reinstatement issue, "[i]f the State truly believes that, there is a rule against reinstatement following a failed dismissal effort, that rule is not in the Collective Bargaining Agreement." Any such defense raised by the State, the Union thus maintains, is an issue for the judicial forum. The Union also notes that the parties' Agreement bars discrimination based on age and maintains that "the State's ostensible retirement 'loophole' defense offered up as a bar to reinstatement can only be applied to an employees ... 60+ years of age." Thus, the Union contends, had another Area Office Attorney been placed in a similar situation of unfounded accusations but was not eligible for retirement, that employee would properly have been entitled to arbitral reinstatement with full back pay and benefits. Seen in this light, the Union contends, one cannot fathom how it would have been "the intent of the bargainers or the Legislature; that one employee should be reinstated, and one forced to retire."

OPINION

Procedural Components of Just Cause.

The Arbitrator will analyze the State's contentions that Grievant engaged in misconduct relative to the [redacted] matter and his time and mileage submissions separately. At this juncture, however, the Arbitrator can address the procedural requirements of just cause as they apply to both areas of alleged misconduct. These requirements oblige the State to establish that its allegations are predicated on the violation of work rules or policies, which are reasonably related to the State's mission and Grievant's duties, and that Grievant was on notice of the rules or policies, including possible disciplinary consequences for not complying with the rules or policies. *Discipline and Discharge in Arbitration*, 36-64, 85-96 (2nd ed., N. Brand, 2008). Further, the State must show, before discipline was imposed, that it conducted a fair investigation. Id., 42-48.

For both areas of alleged misconduct, the State essentially relies on a claim that Grievant engaged in neglect of duty. Set forth in DCF Policy 7-4-3.1, the Neglect of Duty Policy sets forth a definition of "neglect of duty", which definition includes "being less than alert or inattentive to job functions and responsibilities ... theft, willful neglect or misuse of any state funds, time, property, equipment, materials or supplies." (Joint Exhibit 5). Without doubt, the Neglect of Duty Policy is reasonably related to Grievant's duties as a Staff Attorney 3 and the State's mission through DCF. Moreover, the Policy sets forth expectations that any reasonable employee would know.

Grievant's notice of the Neglect of Duty Policy as it would pertain to the allegations about his time submissions have also been established by the 29 day suspension imposed upon him in 2007 for a failure to comply with the State's expectations in this area. (See State Exhibit 13). As to the allegations of misconduct regarding the [redacted] matter, the Arbitrator would note, as the State has pointed out, that Grievant can also be charged with knowledge of the Attorney Rules of Professional Conduct, which state in Rule 1.1 that an attorney "shall provide competent representation to a client, [which] competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Given the nature of the State's expectations set forth in its Neglect of Duty Policy, Grievant can also be charged with knowledge that his failure to comply with the neglect of duty expectations could lead to the imposition of discipline, to include discharge if the neglect of duty was substantial enough. *Discipline and Discharge in Arbitration*, 93-94 (2nd ed., N. Brand, 2008).

The State, as noted, is also mandated to show that it conducted a fair investigation. (Id.). While the Union vigorously disputes the findings reached by the State at the conclusion of the investigations into the [redacted] matter and the time and mileage submissions, the Arbitrator finds that the Union's position on these points goes to the Union's arguments that misconduct has not been established as to both areas of alleged misconduct. The fair investigation requirement itself, the Arbitrator further finds, was established by the State.

Investigator Brown, as to the [redacted] matter, conducted a full investigation that included her interview of seven individuals and review of a number of documents. (State Exhibit 2). Grievant during the course of this investigation before discipline was imposed was allowed to offer his explanations and was also afforded his right to Union representation. As to the time and mileage allegations, the record shows Investigator Brown also conducted a full investigation, which included interviewing two individuals and examining any number of documents. (State Exhibit 1). As with the [redacted] investigation, Grievant was allowed to offer his explanations before discipline was imposed and was afforded his right to Union representation. Hence the Arbitrator will analyze whether the State has met its burden of establishing that, in fact, Grievant engaged in the alleged misconduct as to the [redacted] matter and the time and mileage reimbursements.

Allegations of Misconduct – [redacted]

Central to an understanding of the question of whether Grievant engaged in Neglect of Duty regarding his participation in the [redacted] matter is the DCF Policy Manual entitled "Administrative Issues Office of Legal Affairs" (31-10-2; State Exhibit 5C). In part, the Policy states:

> Legal staff shall not make social work decisions, including decisions to file petitions or motions. Social work staff, in consultation with the legal staff, shall make these decisions.

> In instances in which a DCF legal division employee does not agree with a decision made by social work staff, he or she shall be ethically obligated to advocate and promote the decision of the social work staff, unless the legal division employee is concerned about the legality of the decision. In that case, the legal division employee shall consult with his or her supervisor before giving any further advice. (Id.).

Consistent with the above Policy statement, Grievant's role at the two red team meetings regarding [redacted] was to provide, to the extent required, legal advice but not to "make social work decisions". It is clear to the Arbitrator that, given the circumstances that were known by the SW staff at the two red team meetings, Grievant was not required to give any legal advice. Mr. Allensworth, who was in charge of the red team or critical incident team, sought out the affidavit from Dr. Leventhal, dated May 25, 2012, for the express purpose of obtaining necessary documentation if DCF elected to go to court. It was abundantly clear to SW staff, as evidenced by Allensworth's obtaining the affidavit from Dr. Leventhal, that the nature of the child's injuries established legal sufficiency in support of any judicial relief sought. As has been said, one does not need a weatherman to know which way the wind blows. Put differently, there is no indication in the record that the SW staff needed legal advice from Grievant and there is no indication that any legal advice was sought.

Under the above cited Policy, Grievant's responsibility was only to consult with his supervisor if he was "concerned about the legality of the decision" eventually made to return [redacted] to his mother. The Arbitrator emphasizes

that, even if Grievant did not agree with the decision of SW staff to return [redacted] to his mother, he was under no duty to notify his supervisor unless he believed the decision to return [redacted] to his mother was without "legality". It is axiomatic that the return of [redacted] to his mother was consistent with her parental rights under the law. While the Arbitrator finds no basis to be critical of the decision to return [redacted] to his mother, given Allensworth's credible testimony that he consulted with Dr. Leventhal before SW staff made its decision, the fact remains that even if Grievant was not in agreement with that decision he had no responsibility under the Policy Manual cited to do anything.

The State's claims that Grievant failed to provide adequate legal advice or counsel, or did not inform SW staff that legal sufficiency existed for a 96 hour hold or a court petition, or failed to notify his supervisor are claims that the State has not established. In arriving at this finding, the Arbitrator is unpersuaded by the State's argument that Mr. Allensworth was somehow not a credible witness. That the rebuttal witness to his testimony, Kenneth Cabral, DCF Regional Administrator, could not recall any conversation with Mr. Allensworth as Mr. Allensworth reported in his testimony does not impeach Mr. Allensworth's credibility, particularly the credibility of his detailed and believable testimony regarding how the decision came to be made to release [redacted] to his mother.

Another part of the State's allegations that Grievant engaged in Neglect of Duty is based on the State's contention that, in connection with the [redacted] matter, Grievant did not document in LINK his involvement in the red team

meetings or any discussion had at those meeting and also did not enter LINK to review what might have been in LINK regarding [redacted] when Grievant attended the meetings of the red team or critical incident team. The only Policy that was in place in May 2012 regarding LINK in DCF was "Policy Manual Administrative Issues Office of Legal Affairs" – "Documentation" (31-10-5.1, Union Exhibit 3). That Policy provided that "Social work staff shall document legal advice provided by DCF legal staff or AAG in the LINK legal narrative only." (Id.). This Policy obviously did not apply to Grievant. Significantly, in keeping with the findings earlier made that Grievant did not provide legal advice at the red team meetings because none was needed, the Arbitrator finds there was no Policy or Rule that required Grievant to put into LINK what was discussed at the red team meetings he attended.

The record shows that when Grievant did give legal advice to SW staff, he would make entries in LINK. (See State Exhibit 23). Also lacking in the record is any kind of Rule or Policy that supports the State's contention that Grievant should have entered LINK in the time period he was attending the red team meetings. In examining the State's position in this regard, the Arbitrator fails to find any information that the State claims Grievant would have possessed, had he entered LINK, which he did not possess by his actual attendance at the meetings, that would have required him to do anything that in fact he did not do.

The Arbitrator would underscore his findings above that the State has not identified any specific work rule, beyond its neglect of duty assertions, that Grievant violated in connection with the [redacted] matter. If the State believed that Grievant needed instruction regarding use of LINK, the State clearly could have provided Grievant with such instruction. There is, however, no basis for a finding of misconduct based on any specific rule violation or the neglect of duty policy itself.

In finding that the State has not established that Grievant engaged in misconduct regarding the [redacted] matter, the Arbitrator is also mindful of Grievant's duty to have acted competently as an attorney. A demonstrated failure to act in that manner would be a basis for a finding of neglect. The Arbitrator, however, finds no evidence in the record to permit the conclusion that Grievant acted other than professionally and in keeping with his duties as a Staff Attorney 3 when he was involved with the red team meetings. The Arbitrator would emphasize that the critical decision made by the SW staff was a "social work" decision. As the Arbitrator has observed, the legal options available to SW staff were known by SW staff, and the record certainly does not permit the conclusion that the SW staff would have not released [redacted] to his mother had they been informed or advised by Grievant that they had other legal options. In fact, they knew their legal options, as seen in the efforts of Mr. Allensworth to obtain an affidavit from Dr. Leventhal. And within their authority, the SW team made the decision to return [redacted] to his mother.

Allegations of Misconduct – Time & Mileage

The State has essentially contended that Grievant fraudulently submitted time records that misstated his hours of work and obtained mileage reimbursement to which he was not entitled. In arguing that the State did not meet its burden of proof as to these allegations, the Union has contended that Grievant was an employee with a rotating duty station and, under Article 16 (Hours of Work) and Article 25 (Travel Expenses and Reimbursements) of the parties' Agreement, Grievant's submissions were appropriate. The Arbitrator, in this disciplinary proceeding, does not need to engage in an analysis of Articles 16 and 25 as he would in a contract interpretation dispute. Thus, the Arbitrator will not address the question of whether Grievant was an employee with a rotating duty station; his focus is on whether the State, in connection with Grievant's time and mileage submissions, has met its burden to establish fraud.

The Arbitrator's observations in the preceding paragraph underscore the fact that this is a disciplinary proceeding and that the time and mileage claims are necessarily predicated on the State's position that the Grievant committed terminable misconduct by his submissions. Additionally, the Arbitrator would note the claim of misconduct is predicated on an assertion of fraud and not on any other type of misconduct. For example, while the State relies on the testimony of Ms. Claire that she informed Grievant that he could no longer charge the mileage he did when he was a Hearing Officer, the State has not charged Grievant with insubordination. In disciplinary proceedings, an employer

is under a just cause duty to proceed with the imposition of discipline by putting the disciplined employee on notice of the misconduct that forms the basis of the discipline. An "employer's failure to provide a precise statement of charges may establish a contractual violation or a due process violation." *Discipline and Discharge in Arbitration*, 48 (2nd ed., N. Brand, 2008). The misconduct based on time and mileage submissions, therefore, cannot be based on any other theory of wrongdoing than the alleged fraud.

Fraud is classically defined as a "false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury." *Black's Law Dictionary* (5th Ed.). Fraud "is always positive, intentional" and requires an intent to deceive. (Id.). The falsity or intent to deceive is seen in the conduct of the wrongdoer who acts with "the design of perpetrating what he knows to be a cheat or deception." (Id.).

The State's burden, therefore, is to establish that Grievant knew of the alleged falsity of his time and mileage submissions. Put in another way, this burden could be understood as imposing on the State the need to show that Grievant knew that the parties' Agreement, particularly Articles 16 and 25, did not permit him to record his time and submit his mileage reimbursements in the manner he did. The State has argued that Articles 16 and 25 simply did not permit Grievant to make the submissions he did and, in fact, no other Area Office

Attorney sought to utilize Articles 16 and 25 as did Grievant. Further, the State relies on Ms. Claire's statements to Grievant, set forth in her testimony, when Grievant transferred from Hearings to the Area Office Attorney position.

In setting forth its claim that the contractual language establishes Grievant's fraud, the State references a Stipulated Agreement of 2007 entered into by the parties regarding the concept of rotating duty station. (State Exhibit 17D). The Settlement resolved a grievance filed by the Union involving the contention that the State had violated the rights of Union members by not allowing appropriate "travel time" under Article 16 and not appropriately paying "auto usage fees" under Article 25. (State Exhibit 17A). The Stipulated Agreement referred to attorneys in the Administrative Hearings Unit "who have the responsibility of conducting hearings, pre-hearings, and providing training relating to hearing in various DCF area offices and other locations within the State several times per month" and "a floater who was available to provide coverage for all DCF area offices and facilities to perform agency legal duties." (State Exhibit 17D).

Essentially, the State has claimed that the Stipulated Agreement, coupled with the record evidence that Grievant was involved in the processing of this grievance on behalf of the Union, reflected a clear understanding that an Area Office Attorney would not be eligible for the travel time and mileage reimbursement that Grievant claimed as an Area Office Attorney. Hence, the State essentially argues that the terms of the Stipulated Agreement put Grievant

on notice that, under Articles 16 and 25, he was not entitled to the time and mileage reimbursement he sought. The Union, however, argues that the State gives the Stipulated Agreement too broad of a reading and there is essentially no language in the Stipulated Agreement that addresses an Area Office Attorney who, like Grievant, has more than one place of assignment on a regular basis.

The State's reliance on its understanding of Articles 16 and 25, even if the understanding is correct, does not advance its contention that Grievant engaged in fraud. This is not a case where the meaning of the relevant contractual language, on the one hand, is so clear, and Grievant's reliance on his interpretation of the language so obviously erroneous, on the other, that an inference could be drawn that Grievant's claims under the contractual language were simply pretextual and, in fact, Grievant knew he was not entitled to rely on the language in the manner he did. Indeed, while the Arbitrator need not accept the Union's proffered interpretation of the Agreement as it bears on time and mileage under Articles 16 and 25, the Union's interpretation of these Articles is consistent with Grievant's claims that he was an employee with a rotating duty station.

Additionally, the testimony of Attorney and Negotiator Scheinberg on behalf of the Union and Grievant's testimony contain credible assertions that Grievant was advised by the Union as early as 2007 about the Union's understanding of the language in Articles 16 and 25. Again, the Arbitrator has no need to resolve the parties' dispute regarding their different understandings of

Articles 16 and 25, but the language of these two Articles hardly reflects such an obvious meaning that an inference can be drawn against the Grievant, based on the language, to support a conclusion that Grievant knew that his submissions were false.

The State's claim that evidence of fraud can be found in the fact that no other Area Office Attorney submitted time records and mileage reimbursement claims as did Grievant seems more in keeping with a "practice" type of argument asserted in a contract interpretation case. That the other Area Office Attorneys, to the extent they may have been similarly situated to Grievant, adopted a different understanding of Articles 16 and 25, given what the Arbitrator views as the less than obvious meaning emerging from the language of those two Articles, adds no weight to the State's position that Grievant's submissions were fraudulent. Nor, the Arbitrator observes, is there any evidence that Grievant sought to engage in any concealment regarding his submissions, knowing that accurate submissions would disclose their falsity. That Grievant engaged in a practice different from the other Area Office Attorneys is not evidence of fraud.

In keeping with the observation that Grievant did not seek to conceal any part of his time records or mileage reimbursement submissions, the Arbitrator finds it significant that Grievant's time and mileage submissions were regularly approved by his State supervisor from the time he became an Area Office Attorney in 2010 until Investigator Brown and the State adopted a different view of Grievant's submissions in late 2013. The absence of concealment on

Grievant's part and the State's monthly approvals of Grievant's submissions at the very least raise the question of whether the State should be estopped from seeking Grievant's termination based on the submissions. The Arbitrator does not, however, find it necessary to rest his conclusion that fraud has not been established on the doctrine of estoppel. But he does find that the State's failure to disapprove or otherwise object to Grievant's submissions for the period of 2010 to 2013 hardly advances the State's position that Grievant's submissions were fraudulent.

The Arbitrator does take note of Ms. Claire's testimony that, before Grievant transferred to the Area Office Attorney position from the Hearings Unit, she discussed with him the length of the commute that would be required of him based on her concern that he might arrive to work late. Ms. Claire also testified that, at least in her recollection, she made it clear to Grievant that he would not be paid mileage for going to Torrington and could not claim the mileage he did when he was in the Hearings Unit. The Arbitrator understands Grievant's testimony on this point to be that Ms. Claire told him that he would get mileage to Danbury but not Torrington, which Grievant took to mean he could continue submitting the mileage he had when he was a Hearing Officer and traveled to places outside the Central Office. Grievant emphasized he never put in for mileage to Torrington but put in for reimbursement for the 40 miles from Torrington to Danbury and the 40 miles to return based on his understanding of the contractual language. While the Arbitrator has no reason to doubt that Ms.

Claire offered her best recollection of her communications with Grievant that occurred approximately five years before the time she testified, he does not find it possible to conclude that Grievant was given a definitive interpretation of the State's understanding of Articles 16 and 25 *and* instructed to not claim the status, as he did in his submissions, of a employee assigned to a rotating duty station. Putting aside the fact that insubordination has not been charged, Grievant's conduct was consistent with his interpretation of the relevant contractual language and was an interpretation in accord with what he had been told by the Union.

Based on the record evidence, the Arbitrator cannot conclude that the State met its burden of establishing fraudulent conduct on Grievant's part regarding the time and mileage submissions. There is simply an insufficient amount of evidence to allow for the conclusion that Grievant knew he was not entitled to record his time and submit the mileage reimbursement in the manner that he did. In fact, the parties have a genuine dispute regarding the relevant language in Articles 16 and 25, and the record shows that Grievant acted consistent with the Union's understanding. Further, as noted, Grievant made no attempt to conceal his time and mileage submissions, and Grievant's submissions for the period 2010 to 2013 were regularly approved by the State. Hence, the Arbitrator finds that the State did not establish the time and mileage aspect of its termination decision.

Remedy

Because the Arbitrator has found that Grievant was terminated without just cause, he must next address the question of Remedy. This question is a thorny one because of Grievant's retirement. Typically, when no just cause basis exists for discharge, arbitrators reinstate the employee and issue a make whole Award. Grievant's retirement, however, does not permit the Arbitrator automatically to direct the State to reinstate him to the position he occupied when he retired, which retirement occurred before the point in time the State identified as the effective date of termination.

The beginning point of the Arbitrator's analysis is the oft stated maxim that he is a creature of the parties' Agreement. His jurisdiction derives solely from the Agreement and any Remedy the Arbitrator issues must be consistent with the Agreement. Thus, the Arbitrator must confine his analysis to the four corners of the parties' Agreement when answering the question of whether he has the power to direct the State to reinstate Grievant to the position he occupied at the time of his retirement.

The Union raises two arguments based on an interpretation of the parties' Agreement by Arbitrator Halperin and the language of the Agreement to advance its claim that Grievant should be reinstated. According to the Union, Arbitrator Halperin's arbitrability Award can be considered as a basis for reinstatement because, the Union posits, "the State already argued unsuccessfully, that Retirement barred reinstatement." This contention, however, overlooks the

narrow scope of Arbitrator Halperin's Award. In finding that the grievance was arbitrable, Arbitrator Halperin explicitly noted that "[t]he question of a remedy should the arbitration proceed to the merits is not within the purview of the instant proceeding." (Joint Exhibit 9, p. 11). She was careful to note that "[t]he stipulated issue before me does not include the question of a remedy." (Id.). Arbitrator Halperin's Award does not, therefore, stand as the "law of the case" by presenting a definitive ruling on whether Grievant can be reinstated. Instead, she left that question to be decided as a possible issue in the "merits" part of this proceeding.

The Union also claims that support for its position that Grievant should be reinstated can be found in the language of the parties' Agreement itself. Specifically, the Union identifies the language of the seniority provision, Article 12, Section Four, that provides that credit for seniority "will be granted to any employee with permanent status who is reemployed within one (1) year after termination in good standing, including reemployment from retirement." The term "reemployment" or to "employ again" connotes, in the context of an employer-employee relationship, a voluntary relationship between the employer and the employee whereby the employer obtains "the services of (someone) to do a particular job." *Merriam-Webster, Online*. Indeed, the Arbitrator is aware of instances where the State has entered into an employment relationship with retirees to address staffing shortages. Thus, in *Connecticut Police and Fire Union and State of Connecticut (Department of Mental Health*, 2011), this

Arbitrator addressed a dispute triggered by the State's decision to hire back retirees because of a perceived shortage of supervisory staff. [1] The fact pattern before the Arbitrator in that case was markedly different from the circumstances present in the instant proceeding, given the fact that the State has no wish to reemploy the Grievant.

The Arbitrator in fact does not find any precedent cited by the Union to be availing of its position that the Arbitrator, consistent with the parties' Agreement, has the ability to direct the State to reinstate Grievant. One of the Awards relied upon by the Union involved a claim that an employee's contractual rights under the SEBAC agreement were violated by the State. (*State of Connecticut and SEBAC,* Golick, 2006). There, Arbitrator Golick, in finding that the grievant's contractual rights were violated when she was denied reemployment rights, relied specifically on language in the SEBAC Agreement. In contrast to Arbitrator Golick's Award, there is no language in the parties' Agreement to support the Union's claim for reinstatement. Accordingly, the Arbitrator does not find that reinstatement can be provided as a Remedy in this proceeding.

This leaves for consideration the question of a make whole remedy. By placing just cause language in their Agreement, the parties, the Arbitrator finds, conferred upon the Arbitrator the ability to fashion a make whole Award appropriate to the circumstances of the case. As has been noted:

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[1] The same type of fact pattern was present in an Award issued by this Arbitrator in 2010 (*Connecticut Police and Fire Union and State of Connecticut [Department of Environmental Protection*]), where the State hired back retirees.

> Arbitrators have broad authority to fashion remedies for inappropriate discipline. They are constrained only by the contract and the Supreme Court's admonition that the remedy must draw its "essence" from the collective bargaining agreement. ...
>
> ... Arbitrators uniformly hold that an employee who is discharged without just cause is entitled to a "make whole" remedy. The make whole remedy attempts to place the employee in the same position she would have been in if the improper discipline had not occurred. *Discipline and Discharge in Arbitration*, 462-463 (2nd ed., N. Brand, 2008).

The Arbitrator finds, based on findings of fact made by Arbitrator Halperin in her Arbitrability Award, that the Grievant would not have retired but for the State's decision to terminate him – a decision found in this proceeding to be lacking in just cause. That is, Arbitrator Halperin identified Grievant's communication with DCF in which he submitted retirement documentation, stating that they were "submitted on the condition that my subsequent retirement will not have any impact on my ability to challenge the termination of my employment." (Joint Exhibit 9, p. 3). Further, Arbitrator Halperin identified Grievant's communications with the Retirement and Benefits System Coordinator in which he sought clarification, albeit unsuccessfully, on whether his retirement would prevent him from returning to his position. (Id., pp. 3-4).

Implicit in the finding that Grievant would not have retired but for the State's decision to terminate him is the practical motivation Grievant had to retire, faced as he was with the loss of the wages associated with his position for some uncertain period of time. It is reasonable to conclude that, to the extent Grievant

has experienced a financial loss because of the State's decision to terminate him; that the loss is solely due to the termination decision itself. Under these circumstances, the Arbitrator finds that a make whole remedy is consistent with the notion of just cause and, by virtue of the inclusion of just cause language in the parties' Agreement, consistent with the authority of the Arbitrator under all of the provisions of the Agreement.

The make whole remedy's starting date is the date Grievant was taken off the State's payroll. Its ending date will be 90 days after the date of this Award. The 90 day period is in recognition of the need to fashion an Award that is reasonable under the circumstances – it cannot be for an indefinite period – and the 90 day period will give Grievant a reasonable opportunity, if that is his desire, to apply to the State Retirement System or some other forum for reinstatement to his position. The make whole Award is to be based on the difference between the salary Grievant would have received during the period of time encompassed by the make whole Award less the retirement benefits he did receive and less any earnings from other sources. Additionally, Grievant is entitled to be reimbursed, for the same period of time, for the loss of any other benefits, such as health insurance benefits, based upon his submission of proper documentation.

Further, if Grievant does return to his active State employment, it shall be without loss of seniority or any other contractual benefits.

Accordingly, and based on the foregoing, I find and make the following:

AWARD

Grievant was not dismissed for just cause as set out in the letter dated 1/17/14 and is entitled to a make whole Remedy.

The starting date for the make whole Remedy is the date Grievant was taken off the State's payroll. Its ending date will be 90 days after the date of this Award. As Remedy, Grievant shall be paid the difference between the salary Grievant would have received during the period of time encompassed by the make whole Award less the retirement benefits he did receive and any earnings received from other sources. Additionally, Grievant is entitled to be reimbursed, for the same period of time, for the loss of any other benefits, such as health insurance benefits, based upon his submission of proper documentation.

Further, if Grievant does return to his active State employment, it shall be without loss of seniority or any other contractual benefits.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss:

I, Jeffrey M. Selchick, do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this Instrument, which is my Opinion and Award.

Dated: May 18, 2016
Albany, New York

JEFFREY M. SELCHICK, ESQ.
ARBITRATOR