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 In the Matter of the Arbitration between)
)
FRATERNAL ORDER OF POLICE) Disciplinary suspensions
SUNRISE LODGE NO. 80) 40-hour – outside employment
) 160-hour – conduct unbecoming
)
 and) Grievant: Officer John Grievant
) FMCS 12-55840-3
CITY OF SUNRISE, FLORIDA)
)

BEFORE : Mark I. Lurie, Arbitrator

APPEARANCES

FOP Local Lodge 80 : ***** , Esq.

City of Sunrise : ***** , Esq.

This is a grievance arbitration decision issued pursuant to the collective bargaining agreement effective October 1, 2009 through September 30, 2012 (the “CBA”) between the City of Sunrise, Florida (the “City” or the “Department”) and the Florida State Lodge, Fraternal Order of Police (the “Union” or the “FOP”) representing the City’s Police Officers and Sergeants.

Upon due notice, the parties appeared at the prescribed arbitration hearing dates and place: October 17, 2012 and November 1, 2012 at the Public Safety Building, 10440 West Oakland Park Boulevard, Sunrise, Florida, where they presented their respective positions and the evidence in support of those positions. The hearing was transcribed; the transcription is the official record. The advocates timely submitted written closing arguments by email attachment on January 21, 2013, and the City filed a reply brief on February 18, 2013. The Union affirmatively declined to file a reply brief. The Arbitrator exchanged, by email, the briefs and reply brief between the advocates. The hearing thus closed on February 18, 2013.

CBA Article 4.1 states that the City has the sole and exclusive right to suspend or otherwise discipline for just cause.¹ On January 23, 2012, the grievant, Officer John Grievant, was issued a 40-hour disciplinary suspension on charges that he had committed various violations of the City Code of Ethics and of Department Policy and Procedures by reason of his employment, outside the Department, by a private company, Fidelity Information Services (or "FIS").² FIS is engaged in gift card fraud prevention and mitigation.

In an unrelated matter, on January 26, 2012, Officer Grievant was issued a 160-hour disciplinary suspension for engaging in sex while on duty, in violation of various Department Policy and Procedures. The news media took up the story, and it gained notoriety. On May 15, 2012, Officer Grievant filed a grievance asserting that both disciplinary actions lacked just cause. This arbitration decision is the final disposition of both grievances.

The Arbitrator has reviewed, at length, the many contentions of the parties in these cases, the extensive evidence presented in furtherance of those contentions, the 637 page transcript, the 30-page FOP brief, the 109-page City brief, the City's reply brief and the citations proffered with the parties in their briefs. This decision does not contain a reiteration of every assertion, citation and proof advanced by the parties but, rather, is confined to those matters that the Arbitrator deems to have been credible, substantiated, relevant and material to the resolution of the grievances. The omission of any evidence, whether documentary or testimonial, and the omission of any citations or contentions should not be construed as oversight but, rather, as the Arbitrator's conclusion that they are insufficiently relevant, reliable or material to affect the outcome.

BACKGROUND

Officer Grievant joined the Department in 1999. In 2006, his assignment was as one of two community affairs officers, working with community organizations to reduce crime. Officer Grievant was permitted to set his own hours of work, under a very flexible and self-created work schedule, in order to best meet the needs of the Department and the community. He did not punch a time clock but instead made manual entries on a timecard that he submitted to a supervisor each week. His various supervisors signed the timecards, indicating approval for payment. There is no evidence that any supervisor questioned the veracity of the hand-written entries. At the times of the events in these cases, the second community affairs officer was Officer Michelle Eddy. Officers Grievant and Eddy often worked independently of each other and were largely unsupervised in the performance of their work.

¹ ARTICLE 4, Management Rights, Section 1:

The FOP and its members recognize and agree that the City has the sole and exclusive right to manage and direct any and all of its operations. Accordingly, unless otherwise provided herein, the City specifically, but not by way of limitation, reserves the sole and exclusive right to:

...C) Fire, demote, suspend or otherwise discipline for just cause.

² FIS formerly operated under the business name "Wildcard Systems."

THE OUTSIDE EMPLOYMENT CHARGES

Department employees are permitted to engage in outside employment, provided that they meet certain restrictions and requirements. Officer Grievant was charged with having violated the following restrictions and requirements by reason of his FIS employment:

- The employment must be only “incidental or occasional,”³
- It must not exceed 30 hours per week.⁴
- The outside work request will not be approved if the work to be performed is that of a private investigator or is in a capacity “for the purpose of conducting investigations”⁵ or as a bill collector or retail credit investigator.⁶
- Prior to engaging in such employment, the officer must submit an employment application with the Special Details Unit and receive the approval of the City Manager.⁷ Thereafter, the employee must file, annually, a renewal of the request with the Personnel Department.⁸ The form is titled the OUTSIDE EMPLOYMENT REQUEST form (the “REQUEST FORM”). Officer Grievant was charged with having failed to file REQUEST FORMS in 2001 and from 2003 through 2007.

³ City of Sunrise Code, Section 10-24. Conflicting employment, outside employment.

(d) Departmental personnel or employees may accept incidental or occasional outside employment so long as such employment is not contrary, detrimental or adverse to the interest of the city and the approval required in subsection (e) is obtained.

⁴ Sunrise Police Department, Policy and Procedures

36.6.11.1: Members are not permitted to work more than thirty (30) hours in off-duty special details and/or non-police employment in one workweek.

⁵ Sunrise Police Department, Policy and Procedures

36.6.22.5: Approval may not be granted for non-police employment, which might interfere or be in conflict with official duties, may bring discredit upon the employee or the Department or that is in violation of the rules, regulations, policies or procedures of the Department of any City or County Ordinances.

36.6.22.5.1: Examples include, but are not limited to:

36.6.22.5.1.5: Employment as a private investigator or in any capacity for a business for the purpose of conducting investigations.

36.6.22.5.1.6: Employment as a bill collector or retail credit investigator.

⁶ Ibid

⁷ Sunrise Police Department, Policy and Procedures

36.6.22.1: Any member requesting to work non-police employment must fill out and submit to the Special Details Unit a non-police employment application prior to commencing such employment.

City of Sunrise Code, Section 10-24. Conflicting employment, outside employment.

(e) Any outside employment by departmental personnel or employees must first be approved in writing by the city manager who shall maintain a complete record of such employment.

⁸ City of Sunrise Code, Section 10-24. Conflicting employment, outside employment.

(f) Departmental personnel or employees engaged in any outside employment for any person, firm, corporation or business entity shall file an annual renewal request identifying the outside employer and the nature of the work being done pursuant to same. The request shall be filed with the Personnel Department no later than noon on January 31st of each year, including the January following the first year that such person held such employment. The city manager or the city commission may require monthly reports from any departmental personnel or any employee for good cause

Officer Grievant was not charged with having falsified the entries of the REQUEST FORMS that he submitted.

The Department's inquiry into Officer Grievant's FIS employment was prompted by an April 24, 2011 anonymous letter that charged Officer Grievant with being a full-time supervisor for FIS. The content of the letter suggested that its author was a fellow police officer⁹ but the author's identity remains unknown. The letter was referred to Lt. William Glennon, an internal affairs investigator. Lt. Glennon visited the offices of FIS on May 3, 2011, where he happened upon Officer Grievant. Officer Grievant introduced Lt. Glennon to his FIS supervisor, Mr. Ralph Calvano.¹⁰ Officer Grievant then exited, leaving the two men to speak alone. Lt. Glennon took handwritten notes of what Mr. Calvano said. Mr. Calvano is a Senior Vice President of FIS.

Lt. Glennon did not electronically record the conversation and did not take Mr. Calvano's statement under oath.¹¹ Mr. Calvano was not thereafter interviewed; nor did either party call him to

⁹ The letter stated,

"How can John Grievant be a fulltime employee here and a full time supervisor for Wild Card Systems? Does anybody know where the guy is all day? Does anybody care? The guy is committing fraud and theft and slides by because his partner is the Deputy Chief's wife? I get stuck working 11.5 hours a day with no weekends and this guy gets to do whatever he wants. Unbelievable!"

¹⁰ The Union stated, in its brief, Lt. Glennon "chose to craftily arrive without notice and attempt to gain as much information as possible." Presuming, *arguendo*, this to be true, the Arbitrator finds that it was devoid of due process implications.

¹¹ The Union argued that when, on May 3, 2011, Lt. Glennon spoke to Mr. Calvano, he had a duty under FS §112.532(1)(d) to "formally" interview Mr. Calvano, which the Arbitrator takes to mean an interview under oath, and to electronically record his statements. CBA Article 5, Section 1 incorporates the statute by reference:

CBA Article 5, Section 1:

The City agrees to abide by the requirements contained in the Law Enforcement Officers' Bill of Rights [i.e., Section 112.531, et seq., Florida Statutes], including any and all subsequent revisions thereto, and that statute is incorporated herein by reference.

FS 112.532 Law enforcement officers' and correctional officers' rights.--

All law enforcement officers and correctional officers employed by or appointed to a law enforcement agency or a correctional agency shall have the following rights and privileges:

- (1) RIGHTS OF LAW ENFORCEMENT OFFICERS AND CORRECTIONAL OFFICERS WHILE UNDER INVESTIGATION.--Whenever a law enforcement officer or correctional officer is under investigation and subject to interrogation by members of his or her agency for any reason that could lead to disciplinary action, suspension, demotion, or dismissal, the interrogation must be conducted under the following conditions:

...

- (d) The law enforcement officer or correctional officer under investigation must be informed of the nature of the investigation before any interrogation begins, and he or she must be informed of the names of all complainants. All identifiable witnesses shall be interviewed, whenever possible, prior to the beginning of the investigative interview of the accused officer. The complaint, all witness statements, including all other existing subject officer statements, and all other existing evidence, including, but not limited to, incident reports, GPS locator information, and audio or video recordings relating to the incident under investigation, must be provided to each officer who is the subject of the complaint before the beginning of any investigative interview of that officer. An officer, after being informed of the right to review witness statements, may voluntarily waive the provisions of this paragraph and provide a voluntary statement at any time.

testify in this arbitration hearing.¹² Lt. Glennon's testimony and notes proffered in this arbitration hearing are hearsay as to the truth of the matters that Mr. Calvano told Lt. Glennon. They are direct evidence that Mr. Calvano made those statements.

Lt. Glennon testified that Mr. Calvano told him the following: that Officer Grievant had worked for FIS since July 31, 2000; that he was a full-time salaried employee with flexible hours; that he worked 40 hours-a-week; that he supervised a staff of 20 people working 7 days-a-week; and that he earned an annual salary of \$94,000. Mr. Calvano said that Officer Grievant's work pertained to preventing gift card fraud, detecting fraud when it happened, identifying the fraudsters, and minimizing the consequences of the fraud. Officer Grievant brought a high degree of computer knowledge to the performance of this work.

Lt. Glennon reported this conversation to Police Chief John Brooks, who directed Lt. Glennon to initiate an Internal Affairs ("IA") investigation. In the course of the IA investigation, Lt. Glennon found that the City's personnel records contained Officer Grievant's approved REQUEST FORMS for 1999, 2000, 2002, and 2008 through 2011, but found no approved REQUEST FORMS for 2001 or for 2003 through 2007.

The Union reasoned that the Department's duty to have "formally" interviewed Mr. Calvano derived from the statutory statement that "All identifiable witnesses shall be interviewed..." and that the requirement that the interview be electronically recorded derived from the statutory statement that "all witness statements..., and audio or video recordings relating to the incident under investigation, must be provided..." to the officer under investigation. The Union stated the following in its brief: "The statute clearly states that there must be audio or video recordings of witnesses." "Florida Chapter 112 is unambiguous; witness interviews must be recorded and provided to the officer prior to his interview."

The Arbitrator finds the Union's contentions to be without merit. The cited statutory provisions do not prescribe the form (e.g., sworn, electronically recorded, etc.) that a witness interview must take, nor is form the subject of the cited statute. The subject of the statutory provisions is procedure, and its applicability is conditional. Here is the relevant text: "whenever possible," witness interviews are to be conducted "...prior to the beginning of the investigative interview of the accused officer." Assuming that Lt. Glennon's talk with Mr. Calvano was an "interview" within the meaning of the statute, it was conducted prior to Officer Grievant's investigative interview. As for the fact that no electronic recording was made, the statute does not require the electronic recording of witnesses' statements. What the statute requires is that *if* such recordings are made, they be furnished to the accused officer prior to the commencement of the accused's investigative interview.

The FOP brief also charged that the Department denied Officer Grievant "the ability to evaluate [Calvano's] statements as they were made." The Union identified no statute or CBA provision requiring an accused officer be accorded "the ability to evaluate [a witness's] statements as they were made."

¹² The Union charged, in its brief, that the Department denied Officer Grievant due process by not calling Mr. Calvano to testify. The Arbitrator disagrees. Had the Union wished to have the benefit of Mr. Calvano's testimony, it could have subpoenaed him to appear as its witness. It did not do so.

WHETHER OFFICER GRIEVANT'S FIS WORK WAS INCIDENTAL OR OCCASIONAL

The following is the evidence that Officer Grievant's FIS employment was not incidental or occasional:

- Officer Grievant stated that FIS considered him to be a full-time employee.¹³
- FIS paid him a \$94,000 annual salary.
- He was not an hourly employee.
- His FIS title was "Senior Manager for Fraud."¹⁴
- For the preceding 5 years,¹⁵ he supervised a staff of 15 to 20 analysts engaged in round-the-clock¹⁶ gift card transaction surveillance.
- He monitored, managed, counseled and prepared performance evaluations of his FIS staff, and had the discretion to and did terminate the employment of a staff member.
- He attended conferences in order to "Improve industry knowledge and expand fraud contacts, establish new law enforcement partnerships, build new relationships across the fraud prevention/detection industry."¹⁷
- Officer Grievant testified that he was instrumental in the development and success of FIS's business.
- Officer Grievant testified that worked for FIS an average of approximately 30 hours a week for many years.

Based upon the foregoing, the Arbitrator finds that Officer Grievant's employment by FIS was, *prima facie*, constant and regular, and was not occasional. And the Arbitrator finds that Officer Grievant's FIS employment was not incidental (meaning negligible, unimportant or insignificant) either intrinsically, or compared to his employment by the Department, whether measured in terms of hours spent or income received.

¹³ Grievant June 13, 2011 investigative interview, pages 4-5.

Q. Okay. Now your job there, is it full time or part time?

A. It's considered full time.

Q. Okay. Now, when you say its "considered full time" what exactly do you mean by that?

A. ... full time is anybody who works 30 hours per week.

¹⁴ Grievant June 13, 2011 investigative interview, page 6.

¹⁵ Transcript, page 598:

Q Did you tell me how long you were a supervisor [at FIS]?...

A I kind of transitioned into the role. I would probably say, to be fair, maybe the last five years.

¹⁶ Officer Grievant testified that it is a 24/7 operation.

¹⁷ Quoting Officer Grievant's FIS performance evaluations for 2009 and 2010.

WHETHER OFFICER GRIEVANT'S FIS WORK EXCEEDED 30 HOURS PER WEEK¹⁸

The evidence that Officer Grievant worked for FIS in excess of 30 hours per week consisted of the following:

- the hearsay statement of FIS Vice President Calvano that he worked 40 hours-a-week;
- the hearsay statement of FIS Vice President Calvano that Officer Grievant was a “full-time” FIS employee and the published FIS policy¹⁹ that defines a full-time employee as one who works more than 30 hours-a-week;
- the circumstantial evidence of the amount of time that would have been required for Officer Grievant to have carried out his FIS responsibilities, as he described those responsibilities;
- the circumstantial evidence of a March 7, 2012 letter to Sunrise Chief Brooks from FIS Vice President Calvano stating that, in the future, Officer Grievant would work “a reduced schedule” that would “average less than 30/week,” from which it may reasonably be deduced that his schedule before the reduction had not averaged fewer than 30 hours a week; and
- Officer Grievant’s statements that, having worked for FIS 30 hours in a week, he nonetheless accepted FIS-related phone calls beyond those 30 hours. Here is an example of such a statement:²⁰

Q. ...[Your] statement is... that you do not exceed... 30 hours at FIS.

A. That’s right.

Q. Nor have you ever?

A. Nor have I ever other than -- yeah, uh, I mean to be honest, I mean could I have gotten a phone call, you know, and if it was - if I was there - I already did 30 hours a week, did I answer the phone call? Maybe, you know. So... 'cause they give me a company cell phone.

- Officer Grievant testified thus as to the number of hours he worked for FIS:²¹

¹⁸ In its post-hearing brief, the Union charged that the Department disciplined Officer Grievant “for working 40 hours a week...” The relevant charge was that his work for FIS exceeded 30 hours a week,

¹⁹ FIS EMPLOYMENT AND COMPENSATION POLICIES, EMPLOYMENT CATEGORIES, Full-Time Employees: “Full-time employees are employees who are regularly scheduled to work more than 30 hours per week.”

²⁰ Grievant June 13, 2011 investigative interview, page 37.

²¹ Transcript page 590-591 [Arbitrator’s emphases]

Q So the definition, according to both of your exhibits, of a full-time employee are employees who are regularly scheduled to work more than thirty hours per week; would you agree with me?

A Thirty or more hours.

Q Work more than thirty hours per week?... the policy is regularly scheduled to work more than thirty hours per week; are we in agreement on that?

A More than thirty, thirty or more hours, yes.

Q More than thirty hours per week. I don't know why we're quibbling. You keep saying something different. I'm reading --

A I'm sorry. That's what it reads, yes.

- He worked an average of 30 hours per week.
- He worked fewer than 30 hours “a lot of days” (by which the Arbitrator takes Officer Grievant to have meant a lot of weeks) and
- Except for the occasional phone call or two, his work did not exceed 30 hours in a week.

The Arbitrator notes the inherent illogic of the three claims.

When asked, during a June 13, 2011 investigative interview, whether, at any point in time, he had been averaging more than 40 hours a week, Officer Grievant answered “I have not been in the building more than 30 hours a week.” He then explained that he could work for FIS from his home.

The Union argues that the Department did not identify a specific week that Officer Grievant’s work for FIS had exceeded 30 hours and that, with this discipline, the Union has been constrained to disprove a negative: that officer Grievant did not work for FIS in excess of 30 hours a week “on a regular basis.”²² (Quoting the Union’s brief.) The Union argues that the Department’s entire case on this point rests on Mr. Calvano’s hearsay statement and that, under Florida statute, hearsay alone cannot support discipline.²³

Assessing the foregoing, the Arbitrator finds that Officer Grievant’s employment by FIS exceeded 30 hours per week.

Q You were a full-time employee according to FIS standards, correct?

A I was.

Q So you regularly worked more than thirty 5 hours per week?

A My average was thirty hours a week there, with the exception, as I indicated earlier, a phone call or two. The entire two hundred people can attest to that. [Arbitrator’s note: the Union produced no witness who so attested. If Officer Grievant was referring to 200 FIS employees, he did not indicate how they would have known that he worked an average of only 30 hours a week.]

Q Would you agree with me that if you averaged thirty hours per week, there were some that you worked more than thirty hours?

A Maybe a phone call. There was probably a lot of days that I worked there less than thirty hours.

²² The Union stated, in its brief, that “there was an issue regarding the definition of ‘full time employment.’ FIS considered it 30 hours or more. The City precludes over 30 hours of outside employment per week.” The Arbitrator notes that the FIS definition of full-time employment was not “30 hours or more” but rather “more than 30 hours.”

²³ In support of this legal conclusion as to the utility of hearsay evidence, the Union cites Florida statute pertaining to the use of hearsay evidence in administrative proceedings before administrative law judges, FS §120.57(c):

(c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

WHETHER OFFICER GRIEVANT WORKED FOR FIS “IN ANY CAPACITY... FOR THE PURPOSE OF CONDUCTING INVESTIGATIONS” OR AS A “RETAIL CREDIT INVESTIGATOR”

Departmental Policies and Procedures state that outside employment REQUEST FORMS may not be granted if the employment will be engaged in retail credit investigation or will be working “...in any capacity for a business for the purpose of conducting investigations.”

The Union asserts that FIS did not employ Officer Grievant as a fraud investigator but, rather, employed him “to monitor systems that red-flagged transactions that were out-of-the-ordinary, thereby possibly being fraudulent or nothing more than an end-user mistake.”

The evidence that Officer Grievant engaged in investigative activities is (1) Lt. Glennon’s testimony of the hearsay statement given to him by FIS Vice President Calvano, (2) the direct testimony of Officer Grievant and (3) other circumstantial evidence.

Officer Grievant initially testified that he did not engage in investigations of fraudulent uses of gift cards, and explained that his work consisted of computerized card-use trends detection and the reporting of exceptions.²⁴ However, in his subsequent testimony, Officer Grievant described his subordinates’ engagement in work that, the Arbitrator finds, can fairly be considered as investigative. This included his duty to identify whether fraud had occurred, a duty that entailed his pursuing the following inquiries:

“[W]here did you [the vendor] ship the merchandise? Send us the proof.’ Etcetera. ‘How did you get it?’ So forth.”

Officer Grievant’s FIS duties also included the curtailment of fraudulent activities and the remediation of fraudulent card use through charge-backs.²⁵

²⁴ Officer Grievant’s testimony, transcript at 429

“...it’s best summarized as... we work with software and exception reporting at a computer, looking for common trends where we’re going to sustain losses, fraud losses, where someone may have used a stolen credit card to fund the card on a consumer website. For a bank, a negative balance loss because the tolerance, which is the difference of what you pay from like in a restaurant, when you go in a restaurant, every financial device has a term called tolerance that you set up and it says okay, when I go to pay my bill, the bill is going to be \$10, I know that I’m going to tip the waiter at least 20 percent. So we configure the system to say okay, we can accept \$12 from that merchant at that time. So it’s basically a bunch of off-the-shelf software from vendors, or software that we’ve created or built that manages these exception or red flags at the computer.

²⁵ Transcript, 566-567, Officer Grievant:

“There’s charge-backs associated with... card holders just claiming error, ‘I ordered something on-line, I didn’t get it,’ as an example. So you order something through Amazon.com, you say you didn’t get it, right?, and they fill out an affidavit saying ‘Hey, we didn’t get this.’ **We go out to Amazon and say ‘Hey, where did you ship the merchandise? Send us the proof.’ Etcetera. ‘How did you get it?’ So forth. And we can do charge-backs that way... I have to go back... and say ‘Hey, Amazon, you delivered it to the wrong address. You need to give us our money back so we can repay the cardholder if he was disputing.’** [Arbitrator’s emphasis]

Transcript, 568, Officer Grievant:

“[My FIS analysts]... sit there every day looking at the transaction, filling out the form either with VISA or MasterCard on-line, or Discover or American Express, and fighting to recover that money. [Tr 568-569]

footnote continues

During his June 13, 2011 investigative interview, Officer Grievant was asked whether he conducted any type of “investigations” as the term is used from a police officer’s standpoint. Officer Grievant answered that police enforcement officials who were seeking information would contact him or would ask his opinion as to the course of their investigations, and that he would respond to their inquiries, but that he had not done the investigations.²⁶ He was then asked about investigations that he had done for FIS, and specifically “not the police business aspect... but from their business standpoint...,” Officer Grievant answered, in relevant part,

“...I'll analyze the data and then provide [that]... John Doe is, uh, a fraudster and we've confirmed that he's [a] fraud... [and ask] does he have any other accounts on file? And then we have to freeze those accounts.”²⁷

Asked whether this constituted “conducting investigations” Officer Grievant stated “Analysis is what I would call it.”²⁸

Lt. Glennon testified that Mr. Calvano said that Officer Grievant’s FIS duties included setting up card programs and risk monitors pertaining to credit card fraud, ID verification to validate the identity of the fraudster(s), handling credit card disputes and problems with credit card charges, risk management support for the development of fraud prevention, detection and control, and creating fraud chargeback strategies for banks.²⁹

A woman with whom Officer Grievant had an affair wrote a letter to the Department, dated July 11, 2011, on an unrelated matter. In that letter, she stated that Officer Grievant had told her that he “worked for a bank [Fidelity Investment Securities] in fraud investigation full time along with

Transcript, 579, Officer Grievant:

“[My FIS analyst]... who bought this card, are there any other cards that John Smith has bought? Are there any other cards going to that address? ...the funding source he used to buy the prepaid card or to load the prepaid card, what is that linked to and how many times is it being used. Is it in a geographical hotspot that we know that we're getting fraud? ... [The analysts]... evaluate and use that data.” [Arbitrator’s emphasis]

June 13, 2011 investigative interview of Officer Grievant:

A ...[As] an example... an incident where... *credit card* information has been compromised. [We will]... research and then I'll analyze the data and then provide it back like... “John Doe is... a fraudster and we’ve confirmed that he's [a] fraud...” . [June 13, 2011 interview, page 10]

Q You said in this in assisting them in essence if they're doing a... *credit card* investigation... in some capacity.

A I... guess you could label it that way, you know, as far as terminology... We respond to their [the issuing bank’s] request. They're the customer. We have to give them the information. [June 13, 2011 interview, page 12] (Arbitrator’s emphases)

²⁶ Grievant June 13, 2011 investigative interview, pages 9-10.

²⁷ Grievant June 13, 2011 investigative interview, pages 10-11.

²⁸ In its post-hearing brief, the Union charged that IA Lt. Glennon lacked understanding of what Officer Grievant did for FIS. The Arbitrator finds that he did not.

²⁹ If FIS dealt with only gift cards and not credit cards, then Lt. Glennon’s description of the cards as “credit” was erroneous. Whether the error was his or was Mr. Calvano’s mis-speak is unknown. Officer Grievant made the same allusion in his June 13, 2011 interview. (See the immediately preceding footnote.) There is no evidence that FIS employed Officer Grievant as a retail credit investigator.

the police department full time.” There is no evidence that, at the time she wrote the letter, the woman knew that such FIS employment would have violated Departmental policies.

The Arbitrator finds that a preponderance of the evidence establishes that Officer Grievant’s FIS duties included investigating or overseeing the investigation of gift card fraud for the purposes of identifying the method of the fraud, curtailing it and mitigating it.³⁰

Sunrise Policy and Procedures do not prohibit an officer from engaging in investigative activities. Rather, they state that the Department may not approve an employee’s REQUEST FORM to work in a job that entails such activities. Obviously, an employee is obligated to furnish sufficient disclosure on the REQUEST FORM to enable the Department to make an informed decision on the matter. The Arbitrator finds that Officer Grievant did not make such disclosure. For example, his 2011 REQUEST FORM describing his FIS duties did not suggest that he would be investigating or managing the investigation of gift card fraud; only that he would be enhancing *strategies* and improving and implementing *systems*. Here is what he wrote:

“Monitor and lead risk management strategy enhancements for both vendor relationships and internal systems. The development, enhancement, and implementation of risk prevention, detection, recovery-(chargeback) systems to reduce financial loss to clients.”³¹

Since Officer Grievant required Departmental prior approval to engage in such investigative activities, and since he neither requested nor received such approval, he performed his FIS investigative duties in violation of City of Sunrise Code, Section 10-24(d).

³⁰ The Union pointed out that Officer Grievant conducted no criminal investigations. The Department’s Disciplinary Action Report did not charge him with having done so.

³¹ The language obfuscated rather than revealed the investigative element of the work. An analogous description of a police investigator’s work would be that the official implements a law abidance system.

WHETHER OFFICER GRIEVANT FILED REQUEST FORMS IN 2001 AND FROM 2003 THROUGH 2007

Department employees who wish to engage in outside employment are required to file a REQUEST FORM annually, and to have it approved. Officer Grievant testified that he filed a REQUEST FORM every year since 1999, and that each was approved. The Department's Personnel Office has no copies of the FORMS for 2001 or 2003 through 2007.

Officer Grievant's REQUEST FORMS for 1999, 2000 and 2002 did not require the employee to state the maximum number of hours per week to be worked. The FORMS from 2003 on consisted of a 2-page document that elicited, for the first time, the maximum weekly hours to be worked and the duties to be performed. The second page of the REQUEST FORM was for the employee's signature and the signature of the Personnel Director, indicating approval. 2003 was the first the first year for which REQUEST FORMS were not found for Officer Grievant.

In a 2003 REQUEST FORM, Officer Grievant wrote that he would be working his outside job for a maximum of 40 hours per week. The Department's Personnel Director responded to that REQUEST FORM by letter. He informed Officer Grievant that 40 hours a week was "not considered 'incidental or occasional'" and that unless he reduced his hours, the REQUEST would be denied. The letter also advised Officer Grievant that his REQUEST FORM was missing the second page – the signature page.

Officer Grievant did not file the 2003 REQUEST FORM in which he had sought to work 40 hours per week outside employment. In his June 13, 2011 Investigative Interview, Officer Grievant stated that he did not remember having received the Personnel Director's letter described above; that, in 2003, Police Captain Robert Misiti informed him that he could not request to work 40 hours a week in outside employment; and that he – Grievant – had resubmitted the REQUEST FORM to show fewer than 40 hours.

The Department's records contained neither an amended 2003 REQUEST FORM from Officer Grievant, nor the signature page for the original FORM. OFFICER Grievant testified that he could not recall having received approval in 2003.

The Department's records contain no further REQUEST FORMS from Officer Grievant until 2008 (i.e., none for 2004, 2005, 2006 or 2007). Officer Grievant testified that, to the best of his knowledge, he had submitted the required REQUEST FORMS in each of those four years³² and that the FORMS had been approved. He testified that he had not retained copies.

The Personnel Department produced REQUEST FORMS for Officer Grievant for the years 2008 through 2011. Lt. Glennon testified that, in late 2007, the Department acquired a new Chief of Police, Chief John Brooks, who demanded stricter adherence to administrative regulations than had the prior chief, whom Lt. Glennon described as having been "lax." During this arbitration hearing, Lt.

³² Investigative Interview, June 13, 2011:

"[T]o the best of my knowledge, I filled out a form for each of those years." [page 23]

"I completed the form, filled it out, submitted it via chain of command or whoever." [page 29]

Glennon speculated that the arrival of Chief Brooks and the 2008 appearance of REQUEST FORMS for Officer Grievant were correlated: that, prior to 2008, Officer Grievant had not filed the FORMS because he knew that a request for full-time employment by FIS would be denied and had calculated that his non-filing of the REQUEST FORMS would not be detected. Starting in 2008, Officer Grievant resumed filing REQUEST FORMS because he calculated that the new Chief would be attentive to whether the FORMS were being received and approved.

The Department charged Officer Grievant with having intentionally refrained from submitting an amended REQUEST FORM in 2003, and with having intentionally not filed REQUEST FORMS in any of the four subsequent years. Officer Grievant testified that he had filed REQUEST FORMS in those years, and that their absence from Departmental records must be the result of the FORMS having been misplaced or lost.

Gina Pilla is secretary to Richard Fischer, the Director of the City's Personnel Department, a position she has held since January 2006. Ms. Pilla testified that, when an employee submits a REQUEST FORM, it is reviewed and approved (or denied) by Director Fischer. If approved, she – Ms. Pilla – makes three copies of the FORM and gives one to the employee, places one copy in the employee's personnel folder, and places one in a folder for all outside employment. The original is kept by Human Resources.

Ms. Pilla testified that, in her experience, the Personnel Department has never lost any City or employee documents. In particular, she testified that no files were lost during a 2009 relocation of the files to a new location. She testified that, prior to undertaking the 2009 move, she and another secretary had scanned, optically read and stored all personnel files through the letter "N." She testified that, when she received the request for Officer Grievant's REQUEST FORMS, she looked for the FORMS in each of those files and also in the electronically scanned records from 2009, but found no copies of the FORMS for 2003 through 2007. Asked on cross-examination whether, in her experience, papers had ever been misplaced within a file, Ms. Pilla replied "Not that I have come across." She testified that no one had previously asserted that any files were missing. The Union presented no witness, other than Officer Grievant, who made such a claim. Nor did the Union proffer any documents in which such a claim had been made.

The Department asserts that the absence of Officer Grievant's REQUEST FORMS for 2003 through 2007 is *prima facie* proof that he did not file them. The FOP asserts that the evidence is circumstantial, that the FORMS may have been misplaced or lost, and that the Department bears the burden of proving that they were not.

The Arbitrator finds that forms that are filed with the Department in the ordinary course of business will be presumed to be in the Department's possession. This presumption is subject to rebuttal by objective, probative evidence. The Arbitrator finds that the Union has failed to present such evidence. The Arbitrator therefore finds that Officer Grievant failed to file the required REQUEST FORMS for 2003 through 2007.

**WHETHER THE APPROVAL OF OFFICER GRIEVANT'S REQUEST FORM FOR 2012
PROVES THAT THE DEPARTMENT HAD NO BASIS FOR ISSUING DISCIPLINE FOR HIS PRIOR FIS EMPLOYMENT**

Officer Grievant submitted a REQUEST FORM to work at FIS in 2012, for up to 30 hours a week, and the request was approved. The Union contends that the 2012 approval constituted, in substance, the Department's endorsement of the very work that Officer Grievant had performed for FIS over the preceding decade, and that the discipline issued for that past work thus lacked just cause.

The Arbitrator finds that the Union's contention requires an examination of the 2012 FIS employment approval. Officer Grievant initially submitted a request for the renewal of his outside employment at FIS on January 1, 2012. He simultaneously sent a memorandum to Chief John Brooks in which he requested the same. The substance of the requests was that he be allowed to work for FIS for not more than 30 hours a week. He described his FIS job duties as follows. (All of the underlining on this page is by the Arbitrator):

"Risk Management - In 2012 The major role will be to create and launch innovative, market-driven fraud management products and services. Maximize sales, market penetration, build new industry partnerships and profitability of existing Fraud Management products within the company."

In a February 2, 2012 memorandum, Chief Brooks denied the request and instructed Officer Grievant to terminate his FIS employment within two weeks.

In a March 5, 2012 memorandum to Officer Grievant, Chief Brooks noted, *inter alia*, that he – Grievant – had recently stated that he was a "consultant" under contract to one or more companies or individuals. (The quotation was Chief Brooks'.) The memorandum directed Officer Grievant to furnish information about the consulting arrangement and the work to be performed.

On March 7, 2012, FIS Vice President Calvano furnished Chief Brooks with written assurance that Officer Grievant would "work a reduced schedule at FIS"; that his hours "in the office" would "average less than 30/week" and that his "primary job responsibilities" would not include "criminal investigations or the participation in any filing of criminal cases."

On March 19, 2012, Chief Brooks sent Officer Grievant a memorandum, informing him that his – Grievant's – outside employment request would be approved only if it was accompanied by a written document from FIS Vice President Calvano stating that all of his (Grievant's) work-related functions would not exceed 30 hours a week whether or not at the FIS offices, that FIS would furnish written verification of his work schedule and his hours worked, and that FIS would give written assurance that Officer Grievant would not engage or supervise in any type of investigative activities.

On March 30, 2012, FIS Vice President Lisa Tabin sent Chief Brooks a letter of "further clarification." [Ms. Tabin's words]. The letter stated, *inter alia*,

“Due to his obligation at the City of Sunrise Police Department, John’s schedule will not exceed 30 hours per week... Further, John will not engage or supervise investigations or participate in any filing of criminal cases.”

Officer Grievant resubmitted his Outside Employment Request on April 2, 2012, and it was approved on April 5, 2012 by the Department’s Personnel Director.

The Arbitrator finds that the 2012 outside work request, as finally approved by Chief Brooks, precluded the duration and types of work that the Department’s regulations proscribe, and that Officer Grievant had been found to have previously acted in derogation of. The Arbitrator does not find that the approval of the 2012 request constituted the Department’s tacit approval of those prior violations.

CONDUCT UNBECOMING

On January 26, 2012, Officer Grievant was issued a 160-hour disciplinary suspension for engaging in sex with a young woman ("Ms. K") while on duty, in violation of various Department Policy and Procedures. The following are the relevant facts:

Officer Grievant met Ms. K following a community safety watch meeting on April 24, 2009. She asked if he would like to see her socially and he said he would. He gave Ms. K his police business card and wrote his personal cell phone number on the reverse. Their sexual relationship began on or about May 3, 2009. Ms. K and Officer Grievant both testified that Officer Grievant had held out the prospect for a permanent relationship:

Ms. K:

"He had made it very clear that he was in a relationship with me, that he had intentions for -- we wanted to be like a lifelong partnership." (Transcript page 79)

Officer Grievant:

(in response to the question of whether he had led her to believe she would be "the next Mrs. Grievant") "I think I did. I probably, like I said, strung her along. I was trying to manage the chaos, if you will, and trying to separate myself from her and I didn't do a very good job. Bad boyfriend." (Transcript, page 480)

According to Ms. K, on July 3, 2009 she began keeping a log that included, among other things, the dates they were together. (The log contained her personal thoughts as well. It was, in substance, a diary.) According to Ms. K, she and Officer Grievant frequently had sex at her apartment during her lunch break. She referred to these as "nooners." Ms. K's apartment was located a mile from Officer Grievant's assigned Department office, referred to as Station 92.³³

On June 8, 2011, a little more than two years after they started their affair, Officer Grievant ended it by ceasing all communications with Ms. K, changing his telephone number and email address.³⁴ Ms. K testified that she believed herself to have been victimized. On June 21, 2011, she

³³ This is Officer Grievant's estimation of the distance. [Transcript page 474].

³⁴ This is Ms. K's description of how the relationship ended:

A ...on June 8th, he comes over to talk to me and he, you know, greets me kind of awkward. We got on the couch, he's hugging me, laying on me, kind of like a child to mother, touching my stomach, touching my stomach talking about a baby and that he wants to be with me... I say to him, I really want those same things, Dave, I said, but I need something... And then he says 'I filed for divorce, but we haven't come to terms financially.' I said 'Oh, great.' I go, 'Do you have a copy in your car; something you can bring to me?' He said, 'I have a copy but not in my car.' And I was like 'Okay, great. Listen, you can come back and we can have communication again when you have the divorce paper and you bring a copy.' And we stood up in my foyer and he said to me, 'I know now what I need to do and it's going to take me a little time but we are going to be together and when I come back, we're going to make a baby.' And he like skipped off in a good mood and I felt like I finally achieved what I've been trying to achieve for two years. I was finally going to get him to actually take the next step, free himself as a man from his marriage [from the time they met, Officer Grievant had told Ms. K that he and his wife had separated and were living apart] and be able to just be with me like a normal relationship.

Q And yet you said that's the last time you were with him. What happened then?

A I never spoke to him again or talked to him again via email, like he never conversed with me again after that ever... I sent him an email, it said email closed. (Ms. K, transcript, pages 87-89) *footnote continues*

spoke to a neighborhood courtesy officer who referred her to IA Lt. Glennon. Lt. Glennon asked Ms. K to identify, to the extent she could, the dates and times that she and Officer Grievant had had sex, his reasoning being that if Officer Grievant had not taken himself off the clock for those times, he would have been in violation of the Departmental prohibition against engaging in sex while on duty.³⁵ Sunrise police officers not have a set meal breaks and are considered to be on duty throughout their shift. Ms. K reviewed her log entries, telephone records, text messages and time cards and, using a spreadsheet, listed 92 dates on which, she asserted, she and Officer Grievant had engaged in sex. From the foregoing, Lt. Glennon identified 34 dates on which he deduced that Officer Grievant had been on duty.³⁶

Ms. K noted on her spreadsheet that October 3 and 4, 2009 were a Thursday and Friday. Those were errors; the dates were a Wednesday and Thursday. Also, shortly before the arbitration hearing, Ms. K identified another entry as having been erroneous.³⁷ She removed the erroneous date from the spreadsheet. Ms. K testified, at the arbitration, that, to the best of her knowledge, the spreadsheet, as offered into evidence, was accurate. At the predetermination hearing, Officer Grievant insinuated or told Captain Torres that Ms. K was a scorned woman who had fabricated information with the intention of injuring him.³⁸ The Union argued that the two spreadsheet errors identified above were proof that the entire spreadsheet was unreliable and should be deemed

This is Officer Grievant's description of how the relationship ended:

"I guess I strung her along in the relationship, trying to keep her at bay and hope that eventually, you know, not spending enough time with her that she would realize that hey, I just don't have the time for this." (Officer Grievant, transcript, pages 422-423)

³⁵ The Union charged that the Department thus allowed Ms. K, a civilian, to become part of an internal affairs investigation and that its doing so violated the confidentiality provisions of FS § 112.532(4)(b). The statute states, in relevant part, that

"...whenever a law enforcement... is subject to disciplinary action consisting of suspension with loss of pay... , [t]he contents of the complaint and investigation shall remain confidential until such time as the employing law enforcement agency makes a final determination whether or not to issue a notice of disciplinary action..."

The Arbitrator finds that the Union has not shown that, prior to its final determination on discipline, the Department revealed to Ms. K the contents of the complaint or of its investigation but, rather, that the Department elicited from Ms. K information it required in order to conduct a full investigation of the charges.

³⁶ Throughout its brief, the Union raised arguments as to the reasonable of the factual conclusions reached by Lt. Glennon in the course of his investigations. Since arbitration under a cba is a *de novo* proceeding, in which the arbitrator examines the evidence and tests the validity of the conclusions reached by management, this arbitration is the forum in which the validity of any conclusions drawn by Lt. Glennon is to be judged.

The Union asserted in its brief that because the CBA incorporates FS § 112.532 by reference, the Arbitrator should now address claims of its violation by the Department in its conduct of the investigation. The Department responded that the same statute sets forth its own deadlines and procedures for addressing such claims, that the Union failed to timely invoke such claims or to utilize such procedures, and that the Union should be deemed to be estopped from doing so in this arbitration. As to the specific § 112.532 issues raised by the Union, the Arbitrator agrees with the Department.

³⁷ The entry pertained to April 23, 2010 12:20 – 12:50 p.m., at which time Officer Grievant was conducting a safety meeting for the Sunrise Holiday Inn, as testified to by Ms. Judith Hartstein, who was then Director of Sales for the hotel.

³⁸ Captain Torres in the arbitration hearing transcript at page 266:

"[Officer Grievant]...insinuated or made the assertion that Ms.K[]is a woman scorned and was - intentionally - fabricating information with the intent to injure him."

inadmissible. The Arbitrator deems the spreadsheet admissible, albeit that it is hearsay, and will address credibility at greater length later in this decision.

On October 23, 2009, Officer Grievant attended the first day of a two-day Police training conference in Cocoa Beach. He had driven there in a Department vehicle. According to Ms. K, the two rendezvoused in Vero Beach, and spent the night together. Ms. K produced a receipt for the hotel room. According to Officer Grievant, he drove about half way to Vero Beach but, due to inclement weather and out of concern that he might become too tired for the second day's session, he changed his mind, drove back to the conference and did not meet up with Ms. K. The Union argues that the hotel receipt is "little more than innuendo," and that Officer Grievant had permission to use Department vehicle "for personal errands while on assignment." He was not charged with misuse of the vehicle.

On September 7, 2011, Officer Grievant was interviewed under oath and was furnished with Ms. K's documentation. Asked whether he had engaged in sex with Ms. K during lunchtime, he answered that he had but that, having been "very cognizant of the policy," of not engaging in sex while on duty, he had not done so.³⁹ In this arbitration, Officer Grievant was asked how he could be certain that he had not engaged in sex with Ms. K during any of their noontime meetings. His timecards did not indicate that he had clocked-out for lunch on any date. Here is the question and his answer:

³⁹ September 7, 2011 Grievant Investigative Interview excerpt:

- Q. ...did you ever engage in sexual intercourse with [Ms. K] during her lunch breaks?
- A. Um, specific sexual relations with her during her lunch breaks? I don't know specifically when that was. You know, we had a - I've - I've seen her for lunch, yes.
- Q. Okay. Did you - but you're not answering the question.
- A. I don't - I don't recollect it being always at her lunch break.
- Q. What, the sex being during her lunch break?
- A. Well, meeting her and - and having sex during her lunch break.
- Q. Okay. So you're saying you - you did sometimes but not all the time?
- A. I, you know - well, I - I don't know for sure when -- when it was, the exact time, but, yes, we did - we did meet up - for lunch...
- Q. - sex during her lunch period?
- A. Whether it was her lunch period or it was her day off, I couldn't tell you specifically...
- Q. When you met for lunch at her apartment, you had sex, correct?
- A. Not every time.
- Q. But you did have sex?
- A. We - on -- on occasion, yes.
- Q. Okay. Now, were you ever on duty?
- A. No.
- Q. And how do you know that?
- A. 'Cause I'm very cognizant of the policy...

Q When you met [Ms. K] for any encounter, sexual meetings that you had with her at these lunchtime meetings, how can you say here today whether you were working or not? How are you so certain that you never were working for the police department when you had sex with her?

A Because I knew it was wrong, I knew I couldn't do it. That's why... I knew it was wrong and I wouldn't do it. (Transcript page 485-486)

In this arbitration hearing, Ms. K testified that she had clear recollection of at least three dates on which the two had engaged in noontime sex: July 6, 2009, July 9, 2009, and April 11, 2011. Officer Grievant's timecards showed him to have been on the clock at those dates and times.

THE PARTIES' POSITIONS

The Department's sole direct evidence that Officer Grievant engaged in sex with Ms. K while he was on-duty was Ms. K's testimony and Officer Grievant's timecards. The Union asserts that, because there is no direct evidence, a single mistake in Ms. K's spreadsheet undercuts both the entire spreadsheet and the Department's case. Officer Grievant performed an analysis of Ms. K's data as to the 34 dates at issue. The underlined date and time header that introduces each incident are those identified by Ms. K in her spreadsheet. Ms. K reaffirmed each in her testimony. The Arbitrator has set forth his assessment as to each incident.

May 18, 2009, 12:30 – 1:30 p.m.

Officer Grievant could not have had sex with Ms. K at her apartment because he had been involved in a minor car accident and, at the time he was purportedly having sex, he was present throughout the ensuing accident investigation. The evidence of Officer Grievant's presence was established by his testimony, the testimony of the officers on the scene – Officers Joslowski, Curran and Hudson – and the Computer-aided dispatch report (or "CAD Report") filed by Officer Joslowski.

The CAD report that Officer Joslowski prepared showed that the scene was cleared at 1:26 p.m. Officer Grievant testified that he remained at the scene, with Officer Joslowki, until that time.⁴⁰ Officer Joslowski testified differently. He testified that the "time cleared" notation on the CAD report had included the interval required for him to have driven to the local Police substation and written up and filed the report. More specifically, Officer Joslowski testified that he arrived at the scene at 12:18, and that Officer Grievant departed

⁴⁰ Officer Grievant, transcript at page 508:

Q. So you stayed with him [Joslowski] in the parking lot there until 1:26, whatever the CAD says?

A. Yes, sir.

Q. You're certain?

A. Yeah...

Officer Grievant testified that, when he left the scene, he drove the vehicle to a Department facility, referred to as Area 3, to assure that it was still operational. There is no corroborating evidence that he did so.

approximately 30 minutes later, or at about 12:48. Captain Torres testified that Ms. K lived about a mile or a mile-and-a-half from the accident site. Sunrise Police Traffic Sergeant Steve Curran⁴¹ and Sunrise Police Sergeant Mark Hudson⁴² testified that they had been at the scene of the accident, but had no independent memory of it, and deferred to the CAD report. The Arbitrator finds that the foregoing evidence does not preclude Officer Grievant having engaged in a rendezvous with Ms. K during the interval cited.

June 4, 2009 1:15 – 1:45 p.m..

Officer Grievant testified that he was at Station 92, preparing the Department's Annual Report on his computer. As proof, he offered the pdf file of the annual report. It showed a "Date modified" timestamp of "6/4/2009 1:19 PM.," the very time he was accused of having been with Ms. K. The Arbitrator takes judicial notice that the "*Date modified*" value of a computer document can be set to any date and time, by changing the system date and time setting of the computer, saving the document, and then changing back the date and time of the computer. The Arbitrator views the *Date modified* value of the Annual Report pdf file to be of no evidentiary value.⁴³

⁴¹ Here is the relevant portion of Sgt, Curran's testimony (Transcript, pages 327-329]

Sgt. Curran testified that he was Officer Grievant's supervisor on this date, that the time of the crash had been 12:05 p.m., that investigation of the crash had taken an hour, and that Officer Grievant did not leave the scene during that hour. He also testified that Officer John Jaslowski completed the crash report, and would have been the last to leave the scene, but that he – Curran – would have left before anyone else.

However, Sgt. Curran also testified that he had no memory of the event:

Q. Sarge, is your testimony today based on your specific recollection of what happened that day or just is it because you've done a million of these and you know that's how long it would take?

A. I can't give you an exact time. I just know how long because -- exactly what you said. I have done a million of them and it takes time, you know, I have to talk to Dave, find out what he's doing, what happened, talk to John, look at the evidence.

Q. John meaning Jaslowski?

A. Right.... "A more accurate number would be [investigating officer] Jaslowski's CAD number, when he 'went 1098' or cleared the scene." "I don't even remember the crash to be honest with you."

⁴² Sergeant Mark Hudson's testimony, transcript page 338:

Q. Do you have any independent memory of the time you got there and the time you left on that day?

A. Not specifically of that specific date what time I arrived. I would go by what was on the CAD report from dispatch.

⁴³ Officer Grievant testified that there was no way for him to have changed the *Date modified* value of his computer files. Here is his testimony; the Arbitrator finds his statement to be untrue:

Q. And you also indicated on Page 65 [a screen capture image of a directory files list], there's something from your computer again?

A. Yes, sir.

Q. Again, this is something that came from your personal computer, not a city record. Correct?

A. Yeah. Again, part of my efforts, if you will, to create my own journal of time.

Q. Okay. And is there any way to make any changes to these dates, John?

A. No.

Q. Not even a computer savvy guy like you? *footnote continues*

March 25, 2010 8:00 – 10:00 p.m.

Again, Officer Grievant submitted a pdf document bearing a file modification timestamp that correlated to the time that he was accused of having been engaging in sex. He testified that he made the modification at Station 92. Again, the Arbitrator views the *Date modified* value of the document to be of no evidentiary value.

June 11, 2009, 6:40 p.m. to 7:40 p.m.

The Union proffered emails sent by Officer Grievant at 6:07 p.m. and 6:23 p.m. from a computer on the Department's server. The Arbitrator finds the emails to have been too removed in time from the interval at issue to be preclusive. The Union also submitted a screen shot of computer files ostensibly modified by Officer Grievant at 7:08 p.m. For the reason previously stated, the Arbitrator views the *Date modified* value of the document to be of no evidentiary value.

June 25, 2009, 5:15 p.m. to 6:00 p.m.

Officer Grievant noted, on his calendar, a meeting at the Water Bridge Condominiums from 6:30 to 9:00 p.m. He received a letter from the association president, thanking him for having attended. The Union described the Condominium as having been "on the other side of town." Given the modest geographic size of Sunrise,⁴⁴ the Arbitrator does not find this evidence to be preclusive. The calendar entry noted that Officers Gerity and Eddy were "Required Attendees." The Union did not call either Officer Gerity or Officer Eddy to corroborate Officer Grievant's contention.

July 9, 2009, 8:30 p.m. to 10:00 p.m.

Officer Grievant submitted entries from his calendar showing that he had reserved that time for work on the annual report. The Arbitrator finds that those prospective calendar entries are not evidence of Officer Grievant's actual whereabouts at the time.

July 16, 2009, 9:30 p.m. to 10:45 p.m.

Officer Grievant submitted entries from his calendar showing his notation of various events and work projects. His notations of those times are not proof that he attended the events calendared or that he engaged in the work projects on the dates and times calendared.

July 17, 2009, 7:45 p.m. to 9:20 p.m.

Ms. K recorded that, during these hours, she dined with Officer Grievant, and that he told her that he was working undercover. Officer Grievant did not deny having made that statement to Ms. K; but testified that he was not, in fact, working undercover at the time. Lt. Glennon

A Well, I'm not saying that I'm a -- software applications and so forth, but I'm not a system administrator. You know, you would have to be a system administrator to ultimately change it.

The Arbitrator: This wasn't part of a system. This was a personal computer?

A Yes, sir, this was this particular computer. But it was my, again, trying to piece back together two years.

⁴⁴ Captain Torres testified that Sunrise is approximately 19 square miles in area.

mistakenly reported that Officer Grievant was on-duty at this time. In fact, he was on comp time.

September 14, 2009, 1:20 p.m. to 1:50 p.m.

(Ms. K alluded to intimacies at her apartment that did not involve sex.) Officer Grievant asserted that, during this half-hour, he was at the firing range. A sign-in sheet dated September 14, 2009 bears his signature, but no time is indicated. Officer Grievant testified that he was able to identify the other officers who were present with him: Officers Michelle Eddy and Amanda Schafer and Lt. Brian Katz. The instructors were Mark Cromonacker and William Velasquez. The Union did not call any of these persons to corroborate Officer Grievant's testimony as to the time he was at the range. The Arbitrator finds that the sign-in sheet alone does not prove Officer Grievant's denial of Ms. K's allegation.

September 14, 2009, 6:30 p.m. to 7:15 p.m.

Ms. K claimed that she and Officer Grievant dined at the Outback restaurant. Officer Grievant proffered a calendar entry noting, prospectively, that he would be attending a community meeting between 6:30 and 9:30. The Union argues that this is evidence that Ms. K's spreadsheet contained errors and misrepresentations. Again, the Arbitrator does not find Officer Grievant's calendar entries to be probative of his whereabouts at the times in question.

January 15, 2010 1:20 p.m. to 1:45 p.m.

Officer Grievant calendared a seniors' event for 1:00 p.m. to 4:00 p.m. at the Striker's Family Sportcenter. He also submitted into evidence a flier that listed the event's activities; they included, in addition to the Department safety presentation, bowling lessons, sugar and blood testing, and fitness training. A subsequent email thanked officers Grievant, Eddy and Sofield for having attended. The email did not state the hours that Officer Grievant was present at the Sportcenter, and the Arbitrator does not find the calendar entry to be proof that Officer Grievant had been there from 1:00 p.m. to 4:00 p.m. The Union did not call Officers Eddy and Sofield to testify.

February 15, 2010 1:20 p.m. to 1:45 p.m.

Officer Grievant prospectively calendared a meeting with Attorney Karyl Ungerer and Ms. Rachel Feuer. The Arbitrator finds there to be no direct evidence that he and Attorney Ungerer actually met with either at that time. The Union did not call Attorney Ungerer or Ms. Feuer to testify.

March 25, 2010, 8:00 p.m. to 10:00 p.m.

The Union again produced Officer Grievant's calendar entries. They showed that a meeting was to take place between 4:00 and 6:00 p.m.. A screen print of the files on Officer Grievant's computer show a "*Date created*" timestamp of 8:25 p.m. and a *Date modified*

timestamp of 8:26 p.m. on that date. For the reasons previously explained, the Arbitrator finds such timestamps to be of no evidentiary value.

April 23, 2010, 12:20 p.m. to 12:50 p.m.

Ms. K. included this entry in an earlier spreadsheet but, finding it to have been in error, redacted it.⁴⁵ The Union asserts that the Department nonetheless included the date as a basis for the discipline, and that it did so out of malice. The Arbitrator notes that the Department issued the discipline before it learned of the mistake.

April 26, 2010, 1:15 p.m. to 1:45 p.m.

The Union asserts that, during this 30-minute interval, Officer Grievant was at Station 92, being disciplined for having failed to submit his timecard. The documentary evidence offered to corroborate the claim are emails that Officer Grievant sent at 10:47 a.m. and 2:00 p.m. (Again, Station 92 was located a mile from Ms. K's apartment.) The Arbitrator finds that the email time stamps are not preclusive as to the interval cited.

May 19, 2010, 7:30 p.m. to 8:30 p.m.

The Union asserts that, during this interval, Officer Grievant was at Station 92. It presented an email from Officer Grievant bearing a time-sent stamp of 8:04 p.m. The Arbitrator finds that, in the absence of evidence that Officer Grievant could not remotely access his email account from any location other than Station 92, the email is not probative of his location at the time.

August 16, 2010, 6:00 a.m. to 7:30 a.m.

Officer Grievant submitted an email notification from his daughter's school (in Boynton Beach, Florida), to his wife. The email scheduled a parent-teacher meeting for 9:00 a.m. to 10:00 a.m. Officer Grievant testified that he and his wife "did a lot of different things that morning in order to get prepared" for the meeting. The Union did not call Mrs. Grievant to testify in this proceeding. Officer Grievant testified that the teacher would attest to their having met. The Union did not call the teacher to testify. Officer Grievant's timecard showed him to be on-the-clock from 7:00 a.m. to 3:00 p.m. (i.e., while meeting with his daughter's teacher). Officer Grievant testified that

"...again, I asked if I could go to this event because it wouldn't be long and because again, I work from home on many occasions. Again, not taking advantage of the position but communicating to my supervisors as I have provided..."

⁴⁵ Transcript, page 395, Officer Grievant: "I believe [Ms. K] came back before the arbitration and redacted this one, if that's the correct word, and said that she was mistaken."

Transcript, page 299, Attorney Ryder: "...That's the date she took off the list."

“I worked on some stuff and then when it came time to go to that event to *Meet The Teacher*, which I cleared through my supervisor that I could go, I went and dropped off the school supplies, met the teacher, and then came back to work. Actually I came in to The City at that time. But it was not unlike any of my supervisors to grant me this flexibility for a few minutes, because they knew obviously I did plenty of work on my own time.”

The Union did not call any supervisor to testify that he had given Officer Grievant time on-the-clock to meet with the teacher, or that he had given Officer Grievant non-comp time on-the-clock for any other non-Departmental purpose.

December 15, 2010, 1:15 p.m. to 1:45 p.m.

Officer Grievant offered a calendar showing that had planned a luncheon meeting from 11:30 a.m. to 12:30 p.m. He submitted emails bearing “sent” timestamps of 1:37 p.m. and 1:38 p.m. The subject matters of each was identified as “test email.” In the absence of evidence that Officer Grievant could not access his email account from any location other than Station 92, the email is not probative of his location at the time. The calendar entries are not evidence of Officer Grievant’s actual whereabouts during the date and time in question.

December 23, 2010, 12:30 p.m. to 2:30 p.m.

For the purpose of impeaching Ms. K’s account of his activities on this date, Officer Grievant proffered an email chain, bearing the Department’s server signature, that showed him having sent an email at 12:28 p.m. The Arbitrator does not find that submission dispositive of his whereabouts between 12:30 and 2:30 p.m. (Officer Grievant was not on-the-clock at the time.)

January 28, 2011, 1:45 p.m. to 1:59 p.m.

Officer Grievant furnished a calendar entry showing that, between 1:00 p.m. and 1:30 p.m., he would be transporting an electronic message board. At 2:15 p.m., he sent an email message reporting that he had done so. The Arbitrator finds that this evidence did not preclude his being with Ms. K during the interval cited.

January 31, 2011, 1:15 p.m. to 1:45 p.m.

Officer Grievant submitted an email that he had sent at 2:15 p.m. The email said that he had moved the message board. The Arbitrator finds that the email does not prove that he had moved it during the interval at issue.

March 9, 2011, 1:20 p.m. to 1:50 p.m.

Officer Grievant submitted emails he sent at 8:43, 10:51, 11:13 and 11:57 a.m., and at noon; and an invoice from a printer in Pompano Beach, showing that printed materials were picked up on that date, but not showing the time. The Arbitrator finds that this evidence did not preclude his being with Ms. K during the interval cited.

April 18, 2011, 12:00 p.m. to 1:00 p.m.

Officer Grievant submitted an email he sent at 11:27 a.m. and a screen capture showing that he modified a file at 12:48 p.m. For the reason previously stated, the Arbitrator does not find this to be reliable evidence.

Decision

Officer Grievant asserts that Ms. K is not to be believed; that she is a scorned woman, out for revenge. The Union described Ms. K's spreadsheet as a piece of "conjured" evidence. The Department asserts that it is Officer Grievant who has been untruthful about having engaged in sex while on duty. The testimonies of Officer Grievant and Ms. K are often contradictory and cannot both be true. The Arbitrator must determine whether he can attribute credence to the testimony of either.

As to Ms. K, the Arbitrator deems it axiomatic that a witness who is telling the truth will make numerous and specific factual claims, being confident that those claims will, in the main, prove out, while a person who is lying will be unspecific, knowing that his/her allegations may be contradicted by substantive alibi evidence. The number and specificity of Ms. K's factual claims make her a credible witness.

Officer Grievant's evidentiary response to the dates and times cited by Ms. K ultimately devolved to his word as to where he was and what he was doing; that, and the enunciation of his moral certitude: "I knew it was wrong, I knew I couldn't do it."

The Arbitrator does not find Officer Grievant's defense persuasive because the Arbitrator does not find him to have been a credible witness. Foremost, there is Officer Grievant's admittedly deceptive treatment of Ms. K – he led her to believe that he might be her life-mate but then discarded her, leaving her to deduce the repudiation of his devotion through her observation of his strategy of neglect. But there are additional reasons for concluding that Officer Grievant was not credible:

Officer Grievant's defense was hermetic.⁴⁶ The Union did not call witnesses who, Officer Grievant testified, could have furnished relevant and material corroboration of his claims.

His wife:

- "... you know, my wife has been pretty supportive in this whole effort. She knows who I am."⁴⁷ (Officer Grievant testimony at Transcript page 424)
- In his September 7, 2011 investigative interview, given under oath, Officer Grievant stated that Ms. K had sent him an email in which she had threatened to kill his wife. As of the arbitration hearing, he had not produced a copy of that email. Here is the relevant portion of the investigative interview:

"In -- in my opinion, it shows the possessiveness of -- and -- and maybe some insecurities. It shows that I basically ceased all communication with her, which set her, I think -- you know, call me a coward, you know, as far, you know, I tried to be a

⁴⁶ Union called only three corroborating witnesses, none of whose testimony was material.

⁴⁷ This is Officer Grievant's second wife, with whom he has two children. He also has a child by his first wife.

nice guy and break it off so many times and then I felt that I had to keep her at bay to keep myself somewhat secure. Um, but, um, I mean, you're welcome to have 'em. They're just -- they're e-mails that you don't have. Um. You know, specifically, there's two e-mails I've been trying to recover where she said she would ruin me and that she wanted to kill my wife. So I don't have those. I've been trying to get them. Um -- um, so I don't have those today, but if I can get them, I will, uh, forward them on to you guys."

Officer Grievant did not explain why he did not preserve and produce these emails. He testified in his September 7, 2011 interview that, in response to the threats, he had moved to a new address, had installed closed circuit television cameras, had placed the community security company on alert, and had alerted his childrens' school security and police.

The Union did not call Officer Grievant's wife, the security service personnel, or the school security personnel to corroborate these claims. Nor did the Union proffer documentary evidence to corroborate that Officer Grievant had taken the precautions to ward off the threat that Ms. K had sent him by email, which email he did not produce and regarding which no other witness testified.

FIS employees:

- His FIS supervisor, Mr. Calvano, told Lt. Glennon that he – Grievant – had been working for FIS 40 hours per week. Mr. Calvano's statement was hearsay as to the truth of whether Officer Grievant was doing so, but was direct evidence of Mr. Calvano having made that statement – a statement that Officer Grievant denies having been true.
- Officer Grievant testified that he had worked an average of 30 hours a week at FIS, except for a phone call or two, and that "The entire two hundred people can attest to that." The Union called none of those 200 persons and furnished the written affidavit of none.

His Department Supervisors

Officer Grievant had the authority to both set his schedule for any given day and to fill out his own time card at the end of each work week. During the arbitration hearing, he revealed two instances in which he took personal time while reporting that he was on-the-clock:

- On May 19, 2010, Officer Grievant returned from a trip to Milwaukee, retrieved his car from the Ft. Lauderdale parking lot, and drove to Station 92. The drive from the parking lot to the Station would have taken at least 25 minutes. Officer Grievant's parking lot receipt recorded a departure time of 5:07 p.m. Adding the 25 minutes enroute, he would have been at the Station and on duty no earlier than 5:30 p.m. Yet he wrote on his timecard that he had started worked at 5:00 p.m.⁴⁸

⁴⁸ Officer Grievant's testimony that he had his supervisor's authorization:

A ...I told my supervisor, like again, I have flexible time, so I said "Hey, I'm running late" and never, he didn't say I have to put anything otherwise. Otherwise, I would have taken comp time. But I probably have fifty examples

- He recorded on his August 16, 2011 timecard that he arrived at the City Police Department at 7:00 a.m. and worked until 3:00 p.m. He also offered into evidence an email from his daughter's school teacher, indicating that that same day he attended a parent-teacher meeting at his daughter's school in Boynton Beach from 9:00 a.m to 10:00 a.m., and testified that he had, in fact, attended that meeting.⁴⁹

As to each instance, Officer Grievant testified that a supervisor had explicitly acknowledged that he – Grievant – could take personal time while on-the-clock under “a mutual understanding.” The Union did not elicit the testimony of any supervisor to corroborate this claim.

In his September 7, 2011 initial investigative interview, under oath, Officer Grievant was asked whether he had engaged in sexual intercourse with Ms. K at lunchtime. He at first answered that he could not recall, then that they had not had sex, and then that they had not had sex “every time” they had met for lunch.⁵⁰ He produced no timecard on which he had signed out for any lunch period.

where I've worked off-duty, so it was kind of a give and take and a mutual understanding between me and my supervisor. So yes, I put that time...

Q And would you agree that that seems to show you took a little advantage in this one instance of the flexibility that you had?

A No, because I told my supervisor, right, I told him I was going to be late.

Q Did you tell him you were going to put in the time card that I'm here at the airport but I'm going to start counting it as time at work; did you tell him that?

A I probably didn't. I don't know that I actually told him that...

Q Then that's a decision you made on your own to fill it out as 5:00 o'clock as the time you were on?

A Same decision I make when I don't put in for the time.

Q Okay.

A I mean, I have flexibility... [Tr 537-538]

⁴⁹ Officer Grievant's testimony that he had his supervisor's authorization:

“I worked on some stuff and then when it came time to go to that event to *Meet The Teacher*, which I cleared through my supervisor that I could go, I went and dropped off the school supplies, met the teacher, and then came back to work... But it was not unlike any of my supervisors to grant me this flexibility for a few minutes, because they knew obviously I did plenty of work on my own time.” [Tr 544, Arbitrator's emphasis]

⁵⁰ The following is an excerpt from that interview:

Q. What kind was [the relationship]?

A. I mean, just a relationship, you know. As far as we had, you know -- we had lunch. We had dinner. You know, we had some physical contact so --

Q. Okay. What do you mean by physical contact?

A. Well, that's embarrassing to say but, um --

Q. Of a sexual nature?

A. And - I guess if you wanna - classify it or --

Q. Now, again, this is according her that - that, uh, numerous times she would have -- you would engage in sexual intercourse with her. Is that correct or not?

A. Um, you know, I don't -- I would define sexual, I mean, as a, you know -- just kissing and, you know, there was sexual activity, yes...

Q. When you say sexual activity, I mean, you talking about sexual intercourse or not?

A. Um, we had body contact.

Q. Did you have sexual intercourse or not?

-
- A. Well, I don't - you know, we had contact, like, kissing and -- and stuff like that, yes. I mean, sex - MR. BUSCHEL: Answer it plainly.
- A. I mean, I don't -- I guess you'd -- sexual contact, yes.
- Q. Okay. According to her, that you -- you had sexual intercourse, which she, you know -- which is penetration and she says also that, uh, she would provide you with, uh, numerous, uh, blow jobs.
- A. Um, no.
- Q. No? Did she ever?
- A. Not that I can recall...
- Q. Okay. Now, when you met her for lunch at her apartment, did you ever engage in any sexual type of activity?
- A. Maybe some kissing and stuff like that.
- Q. What about sexual intercourse?
- A. Not that I can recall specifically at lunch, uh, no.
- Q. How about any - any course of the day, work day?
- A. Well, um, as far as the work day, I never engaged in any, if you will, sexual activity, you know, during work, during, you know, city time, specifically. You know, I'm very cognizant of that, you know, as far as, you know - you know, that that - you can't be doing that. You know, it's a strict violation, you know, policy violation so...
- Q. Okay.
- A. -- I'm aware of that, yes.
- Q. But did you ever engage in sexual intercourse with Melissa Kingfield during her lunch breaks?
- A. Um, specific sexual relations with her during her lunch breaks? I don't know specifically when that was. You know, we had a - I've - I've seen her for lunch, yes.
- Q. Okay. Did you - but you're not answering the question.
- A. I don't - I don't recollect it being always at her lunch break.
- Q. What, the sex being during her lunch break?
- A. Well, meeting her and - and having sex during her lunch break.
- Q. Okay. So you're saying you - you did sometimes but not all the time?
- A. I, you know - well, I - I don't know for sure when -- when it was, the exact time, but, yes, we did - we did meet up --
- Q. And you did have --
- A. - for lunch.
- Q. - sex during her lunch period?
- A. Whether it was her lunch period or it was her day off, I couldn't tell you specifically.
- Q. What about when she came home during her break?
- A. Um, again, it may have happened, but, you know, I don't know exact, you know -- you know, which days or -- or when it was, but we had -- we -- we have met for lunch before.
- Q. When you met for lunch at her apartment, you had sex, correct?
- A. Not every time.
- Q. But you did have sex?
- A. We - on -- on occasion, yes.
- Q. Okay. Now, were you ever on duty?
- A. No.
- Q. And how do you know that?
- A. 'Cause I'm very cognizant of the policy...
- Q. Now, according -- again, getting back to the spreadsheet here, according to [Ms. K]... there [are]... 24 times approximately that you met her at her apartment for sexual intercourse during her lunch break... Now, would you say that's a fair amount of times that you had sexual intercourse with her over a period of time?
- A. Well, I mean, I - are you asking did I recall it being 24 times? I'm -
- Q. I'm not... so much concerned about the number.

There are other indicia of the unreliability of Officer Grievant's testimony including those pertaining to his outside employment (discussed earlier) and the contradicting testimony of Officer John Jaslowski as to when he – Officer Grievant – had left the scene of the May 18, 2009 accident.

THE SEVERITY OF THE DISCIPLINES

The Arbitrator finds that with respect to his outside work and his sexual conduct while on duty, Officer Grievant breached the Department Policies noted in the related footnote.⁵¹

-
- A. Right.
- Q. But I'm just saying obviously my point being is that there was numerous times that you met her over the time period of April 2009 through June 2011 -
- A. Right.
- Q. - that you met during her lunch break and engaged in sexual intercourse.
- A. Well, I don't know that it was -- that it was necessarily 24 times that she's indicating, but I've met - I had met her, yes - for lunch and things of that nature.
- Q. ...and what was the purpose of meeting her for lunch?
- A. Just, you know, we had a relationship. You know, we were, you know, friendly, friends.

⁵¹ Policies and Procedures Relevant to Officer Grievant's outside employment

- 36.6.11.1: Members are not permitted to work more than thirty (30) hours in off-duty special details and/or non-police employment in one workweek.
- 36.6.22.1: Any member requesting to work non-police employment must fill out and submit to the Special Details Unit a non-police employment application prior to commencing such employment.
- 36.6.22.5: Approval may not be granted for non-police employment, which might interfere or be in conflict with official duties, may bring discredit upon the employee or the Department or that is in violation of the rules, regulations, policies or procedures of the Department of any City or County Ordinances.
- 36.6.22.5.1: Examples include, but are not limited to:
- 36.6.22.5.1.5: Employment as a private investigator or in any capacity for a business for the purpose of conducting investigations.
- 36.6.22.5.1.6: Employment as a bill collector or retail credit investigator.

Policies and Procedures Relevant to Officer Grievant's conduct unbecoming

- 19.6.1.1: Members will comply with all Federal, State, County, and local laws and ordinances, including those that are punishable by no other penalty than a fine, forfeiture or other civil penalty. Members shall comply with the official policies and directives of the Sunrise Police Department.
- 19.6.3.6: Members shall not commit any act, which brings discredit upon the Department or otherwise impairs the ability of personal concerned to perform assigned duties.
- 19.6.3.10: Members will not engage in activities or personal business, which would cause them to neglect or be inattentive while on-duty.
- 19.6.3.23: Conduct unbecoming an officer will include:
- 19.6.3.23.1: Officers who engage in activities, which may bring the Department into disrepute, which discredits the member, or impairs the operation efficiency or effectiveness of the Department or member.
- 19.6.4.1: Members will not use their official positions for personal or financial gain.
- 19.6.6.5: Members are prohibited from using their official position, Department identification badge, or business card for personal or monetary gain, obtaining privileges not usually available to the public, or avoiding the consequences of illegal action.

The durations of the suspensions that were imposed – 40 hours and 160 hours – for the two different genera of recurring misconduct – were unusually long. But the Arbitrator does not find them to have been disproportionate to the severity and repetition of the infractions committed. These were infractions that entailed aggravating elements inimical to one’s qualification to serve as a police officer.

AWARD

The grievances are denied.



Mark I. Lurie, Arbitrator

February 24, 2013