

LABOR RELATIONS CONNECTION

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In the Matter of the Arbitration Between

MIDDLESEX SHERIFF'S OFFICE

LRC Case No:  
378-20

-and-

NEW ENGLAND POLICE BENEVOLENT ASSOCIATION  
LOCAL 500

Grievant:  
[REDACTED]

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Arbitrator: James M. Litton, Esq.

Appearances:

[REDACTED]	- for the Middlesex Sheriff's Office
Peter J. Perroni, Esq.	- for New England Police Benevolent Association, Local 500

OPINION AND AWARD

Stipulated Issue:

Was the discipline of the grievant, [REDACTED] for just cause? If not, what shall the remedy be?

Relevant Contract Provision:

ARTICLE VI - Discharge and Discipline

Section One. The Sheriff, or his designee, shall have the right to discipline any employee for just cause.

Relevant Provisions of the Middlesex Sheriff's Office's Policy and Procedure 220:

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**Employee Conduct and Discipline**

**220.06.01** An employee shall not foster discontent or otherwise lower the morale of any other employee and shall not make statements to intentionally discredit

another employee, including on any social media technology websites or applications.

**220.14.02** Conduct unbecoming an officer

**220.14.14** Discourteous, abusive, threatening, intimidating or harassing conduct toward any individual or group

Facts Presented:

1. Background

The Middlesex Sheriff's Office (MSO or Employer) and the New England Police Benevolent Association, Local 500 (Union or NEPBA) are parties to a collective bargaining agreement (Agreement). The Agreement sets forth the wages, hours, terms and conditions of employment of certain employees of MSO including certain Corrections Officers and including the grievant in this case, [REDACTED]

[REDACTED] has worked for the MSO for approximately 16 years. He is a Corrections Officer at the Middlesex County Jail and House of Correction (Jail) in Billerica. He has also served as the President of the Union since 2013. He testified that he received no discipline until he became Union President.

[REDACTED]'s work assignment at the time of the incident which led to this case was at the Jail's Visitor Center. The Visitor Center is outside the confines of the jail population. He regularly works the 3:00PM to 11:00PM shift.

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The Agreement contains a provision which details the distribution of overtime. [REDACTED] testified that the membership of the Union is "sensitive" to the manner in which overtime is

distributed among bargaining unit members. He testified that it is common for him as President of the Union to be contacted by members who want to be assured that overtime is fairly distributed in accordance with the Agreement and the parties' practice. In its brief the Union summarized Union concerns surrounding the distribution of overtime during the time leading up to the incident which results in this case:

Management and the Union work together to fill overtime shifts with management deciding how many slots are needed and the Union maintaining the overtime lists. Precipitating the events that led to this grievance, there was a concern within the Union during late January 2020, that the MSO was "pre-booking" overtime shifts too far in advance -- contrary to the parties' accepted practice. Pre-booking overtime shifts too far prior to the date of the overtime shift can be problematic because individuals may work other overtime shifts during the time between the date of scheduling and the shift itself. Overtime work during the interim period would typically push the officer to the bottom of the overtime list, but he or she would still work the previously scheduled shift because it had been "pre-booked." Such an issue leads, understandably, to concerns of unfairness in the assignment of overtime within the membership and undermines the purpose of the overtime eligibility lists. The Union acts quickly to address such potential problems and, consistent with the parties' practice, generally objects to pre-booking more than 24 hours in advance and more than half the anticipated overtime shifts needed.

## 2. The incident

█████ testified that on the night of January 30, 2020 he received a call from Corrections Officer █████. He testified that "█████ asked about the number of people we pre-book" for

overtime. He testified that he replied that "nothing has changed." He testified that "I told [REDACTED] that "absolutely, we don't want to be unfair to anyone" and that "we would pre-book only half of what we need."

[REDACTED] further testified that he spoke with [REDACTED] a second time on the night in question. He testified that "it appeared that [REDACTED] had called the Deputy after [REDACTED] hung up with me." He testified that [REDACTED] told him that "[REDACTED] got a snide remark about me from him." [REDACTED] testified that "I then became concerned that overtime would not be done correctly that night."

[REDACTED] testified that "at about 10:50PM I decided to contact the Shift Commander who I assumed was [REDACTED] [REDACTED]. He testified that "we had issues in phone conversations in the past, so I went to the Roll Call room." [REDACTED] testified that "I waited outside [the Roll Call room] until he [REDACTED] finished a phone call -- then I entered the room." He testified that "I asked him if he had a current issue or problem with how we do overtime -- had something changed?" He testified that [REDACTED] responded by asking him "if I had a problem." [REDACTED] testified that he replied to [REDACTED] that he "did not have a problem with how we do overtime." He testified that [REDACTED] "then said 'if we're going to discuss overtime we should do it one-to-one'." [REDACTED] testified that he responded that "it was probably a good idea to keep a witness in the room." He testified that "I asked [Officer] [REDACTED] and [Captain] [REDACTED] to stay in the room -- so there were only four of us in the Roll Call room."

The conversation about overtime between [REDACTED] and [REDACTED] continued in the Roll Call room with two witnesses. [REDACTED] testified that he stated that "I don't think overtime is done

fairly." He testified that [REDACTED] then "asked what I meant." He testified that "I didn't like his snide remarks." [REDACTED] also testified that "I asked [REDACTED] if he really wanted to know why I didn't think overtime was being done fairly" and that [REDACTED] responded "yes." [REDACTED] testified that "so I said it was common knowledge that he had a problem with overtime." [REDACTED] also testified that "I said there were rumors -- and he was a liar, a thief, and he took money out of members' pockets." He also testified that "at this point [REDACTED] said it was time for me to leave." He testified that "I said that I had permission to clock off early." [REDACTED] then left the roll call room.

[REDACTED] testified that he returned home after his meeting with [REDACTED]. He also testified that within an hour of returning home he sent an e-mail to [REDACTED] the Superintendent of the Billerica House of Correction. That e-mail reads as follows:

I received a phone call concerning overtime earlier in the night inquiring about pre-booking individuals for overtime. I explained that we did not pre-book individuals more than a day in advance or more than half of what was needed (i.e. on Tuesday if shift commanders know you need 10 overtimes, confirming 5 for the next day is how it has always been done), this is to promote fairness. Subsequently, I was told when this message was relayed to [REDACTED], he scoffed and sarcastically replied, "oh well if this is what [REDACTED] says then I guess I have to do it" (or something very similar). The comment was made in such a fashion that it was apparent he found issue with the process and took pleasure mocking me.

Knowing [REDACTED] may not be the best barometer on how to assign work opportunities fairly I decided to ask him if there was an issue. After receiving permission to leave 7 minutes early I

clocked out, waited for [REDACTED] to finish his phone call and entered the Roll Call room.

I asked if he had a problem with the way we do overtime. He replied, "no, do you?" I asked what that meant and told him of course I do not have an issue with the way we do overtime, but I did have issue with him sarcastically making comments about me and how we conduct business. He asked that we have the conversation one on one and not "in front of everyone" (5 total individuals were in the room at the time), I told him I wasn't comfortable with that. After I asked officer [REDACTED] to leave the room it was only Officer [REDACTED] and Admin. [REDACTED] in the room and told him we were better off with others present to witness the conversation.

With the four of us in the room, I asked that he please bring any overtime issues to me and we should discuss any issue now. He told me he was busy doing paperwork and I told him he didn't look too busy to discuss. I also told him it has taken a long time for us to conduct overtime fairly and would appreciate if he did not make comments/remarks about me to other officers/union representatives. He told me I did not know what I was talking about and asked who told me that. I replied that he absolutely made the comment and unlike him, I do things as fair as possible. He asked what that was supposed to mean so I continued, that he was certainly not the individual that should be overseeing or questioning the OT process as he is a thief and a liar that had already stolen enough money from every detail officer and their families. At this point he told me to go home. I told him I had already received permission and had clocked out in case he was planning on writing me up for leaving early. I then left the roll call room.

I have done nothing but try and avoid any dealings with [REDACTED] I have steered clear and even asked other individuals to address issues with him operationally when necessary. He absolutely lied about a telephone conversation we had in a prior incident and like tonight, continues to make derogatory/sarcastic comments in an effort to discredit and belittle.

[REDACTED], too, wrote a contemporaneous memorandum concerning the incident with [REDACTED] on the night of January 30, 2020. On that same date he wrote the following to Assistant Superintendent [REDACTED]:

On Thursday, January 30, 2020 at approximately 2355 this reporting ADS II had just concluded roll call when Officer [REDACTED] walked into the Roll Call room and approached this reporting ADS II and asked "do you have a problem the way I do overtime?" in which I responded "no, do you have a problem with it?"

Officer [REDACTED] asked "do I have a problem with it? I asked you" when I elaborated and stated "do you have a problem the way I handle overtime?"

Officer [REDACTED] then stated "yes I do, you're not fair and everybody knows it because you're a thief and you stole money from people's pockets."

Officer [REDACTED] began to loudly state "don't make comments about how I handle overtime" and when asked what comment he was referring to he only repeated this phrase.

I notified Officer [REDACTED] that it wasn't the time or place (in front of other staff to talk about this business) and he stated "[REDACTED] can leave and [REDACTED] can stay and we can talk about this." Officer [REDACTED] is referring to Officer [REDACTED] who was

in the Roll Call room along with Officer [REDACTED] as well as Captain [REDACTED].

This reporting ADS II after listening to Officer [REDACTED] raise his voice louder and louder and watching his face turn red it was decided this wouldn't be a good time to attempt to engage the now enraged officer. Officer [REDACTED] was told that this ADS II was busy in which he replied "yeah you look real busy" and at that point Officer [REDACTED] was given a direct order to punch out and leave the facility in which he replied "I did punch out so you couldn't write me up for leaving my post early or yelling at you on the clock."

Officer [REDACTED] continued to stick out his chest and breathe heavy for a few seconds and then left the facility.

What precipitated this was at approximately 2200 Officer [REDACTED] called this reporting ADS II from Billerica Control and stated Officer [REDACTED] was giving me permission to pre-book overtime 24 hours ahead of time for openings on the 11-7 shift. The response given to Officer [REDACTED] was "Officer [REDACTED] is giving me permission, thank you; I didn't know I needed his permission."

...

[REDACTED] wrote the following:

Right after the 11-7 roll call ended, I (Captain [REDACTED]) witnessed C/O [REDACTED] walked into the Roll Call room and have a verbal argument with [REDACTED]. C/O [REDACTED] said do you have a problem with the way I handle the overtime. [REDACTED] said do you have a problem with the way I do overtime. C.O. [REDACTED] said I asked you that and Deputy [REDACTED] said I know and now I asked you. C/O [REDACTED] said you must have a problem because your making comments to other people. Deputy [REDACTED] asked what comments did I say. Deputy [REDACTED] said this

is not the time for this if you have a problem with me talk to me in private. C/O [REDACTED] said [REDACTED] is here and he is union. Officer [REDACTED] can step out if you want. Deputy [REDACTED] stated we are not having this discussion here. Deputy [REDACTED] said why don't you just punch out and go home. Officer [REDACTED] said I already was approved to leave early so you can't write me up for leaving early. Deputy [REDACTED] said just go home, go home. Officer [REDACTED] said I do the overtime right not like you who steals money you thief. Officer [REDACTED] then left the Roll Call room. End of report.

### 3. The investigation

MSO assigned the investigation of "the 1/30/2020 incident in the Roll Call room involving Officer [REDACTED] and ADS [REDACTED] to [REDACTED], Director, Internal Investigations Unit (IIU). [REDACTED] conducted an extensive investigation in March 2020. He -- or another investigator -- interviewed nine employees of the MSO including the five who were immediately involved in the incident at issue here: [REDACTED]

[REDACTED] Relevant excerpts from "reports of interview" of these five employees follow:

#### a. Report of interview of [REDACTED]

Officer [REDACTED] explained that on January 2020 AD [REDACTED] originally contacted [REDACTED] requesting [REDACTED] overtime lists [REDACTED] ay. Officer [REDACTED] sent these to ADS [REDACTED] v [REDACTED] e-mail. [REDACTED] speaking with [REDACTED], Officer [REDACTED] re-contacted ADS [REDACTED] "to say, yo [REDACTED] ow, the union agree [REDACTED] I started out with I spoke with [REDACTED] and he's going to agree to allow t [REDACTED] i [REDACTED] rupted me with sarcastic comment [REDACTED] ut [REDACTED].

Officer [REDACTED] advise [REDACTED] hat [REDACTED] was promp to call [REDACTED] icer [REDACTED] b [REDACTED] d upon [REDACTED]

discussion with Officer [REDACTED]. In their discussion, Officer [REDACTED] informed Officer [REDACTED] that the shift on January 31, 2020 was going to be down 10 bodies and that it was his understanding that "they" had been pre-booking. ...

Officer [REDACTED] recalled that after informing ADS [REDACTED] about [REDACTED] conversation with Officer [REDACTED] regarding the pre-booking of overtime, ADS [REDACTED] responded something to the effect of "oh, [REDACTED] given me the permission to do something? Isn't this great?" At the end of their conversation, Officer [REDACTED] informed ADS [REDACTED] that "I wasn't trying to be smart, I know you two have history, we're trying to figure this out.

Subsequent to [REDACTED] discussion with ADS [REDACTED], Officer [REDACTED] had a second discussion with Officer [REDACTED]. ... Officer [REDACTED] explained to Officer [REDACTED] that [REDACTED] advised ADS [REDACTED] that moving forward, the union agreed to allow pre-booking up to half, 24 hours in advance. Officer [REDACTED] further advised that [REDACTED] informed Officer [REDACTED] "the sarcastic comment [REDACTED] made about him." When asked if it was possible that ADS [REDACTED] may have been joking, Officer [REDACTED] replied "I mean, it was pretty blatant ... Sarcasm, he wasn't joking." Officer [REDACTED] cannot recall what Officer [REDACTED]'s response was but did recall that he was not happy about it.

b. Report of interview of [REDACTED]

ADS [REDACTED] was asked to describe in his own words what transpired between himself and Officer [REDACTED] the evening of January 20, 2020 shortly after roll call. ADS [REDACTED] responded "I was in the Roll Call room and Officer [REDACTED] had come in. I kind of heard some talk behind me, I heard his voice. He came into the Roll Call room and he said to me 'do you have a problem with the way I do overtime?' And I said no do you have a

problem with the way I do overtime? And he said 'yes I do.' And I said okay and he says, he says 'you're a thief and you steal money from people's pockets' and I had said we're not, this is not the time or the place to have a conversation like that. I'd be more than happy to have a conversation with you privately if you want to discuss those type of matters." ...

... [REDACTED] stated that "I could tell how heated he was, he was, he was you know when you get excited you're like almost short of breath. I could tell he was getting really agitated." Based upon how Officer [REDACTED] was reacting, ADS [REDACTED] told him they were not going to discuss it at that time and again offered to discuss this privately with him at another time. ADS [REDACTED] believes that it was then, that Officer [REDACTED] made the comments about him being a thief and stealing people's money from their pockets. ADS [REDACTED] suggested to Officer [REDACTED] rather than have "this escalate why don't you just punch out and go home. Just punch out and go." ...

This investigator asked ADS [REDACTED] if he was threatened in any way by Officer [REDACTED]. ADS [REDACTED] responded that he was "a little intimidated by him the way he came in. It felt like you know, it's, it's just lousy when, yeah, you feel intimidated when you're confronted around your staff in that manner by an officer who's done this before, who's done this to other people, who has a history of not being able to keep his cool. You know? I'm honestly waiting for a physical assault. I honestly feel that that is coming from this officer because of how aggressive he is whenever him and I have to have a conversation. I have never once been aggressive with this officer. I've never raised my voice at him." This investigator reminded ADS [REDACTED] that he characterized their encounter as conversation, but based upon how Deputy [REDACTED] described the exchange it did not seem as though it was.

Deputy [REDACTED] responded by saying "usually, usually if him and I have a conversation it starts off, unless it's a confrontation like this, when we have a conversation it starts off okay, but then just goes off the handle."

This investigator asked ADS [REDACTED] what Officer [REDACTED] 'beef' was with him, if he, ADS [REDACTED] did everything the way he was supposed to do it regarding overtime. ADS [REDACTED] responded "[REDACTED] beef is that it's me. That's what [REDACTED] beef is." ADS [REDACTED] reiterated that he chose individuals for overtime based upon the union's list and was not pre-booking overtime a week out. ADS [REDACTED] believes that "it's most likely that Officer [REDACTED] probably made it sound like I was talking about him, like I was saying something negative about him. I don't talk about Officer [REDACTED]. I don't have anything negative to say about him to other people. You know, I'm sure the conversation [REDACTED] and I had [REDACTED] blew out of proportion, ass Officer [REDACTED] is known to do. [REDACTED] causes a lot of trouble at this institution between people. [REDACTED] talks about everybody. [REDACTED] puts her nose in business that's not hers. [REDACTED] appears to have a vested interest in the 11 to 7 shift. ...

ADS [REDACTED] was asked why, if he knew what Officer [REDACTED] personally was like, would he attempt to joke with [REDACTED] especially about a matter involving Officer [REDACTED] with whom he admitted having a contentious relationship with. ADS [REDACTED] responded "yeah an error on my behalf. I admit to that wholeheartedly that, that that you know knowing who [REDACTED], I try to have a good relationship with [REDACTED] because I have to. I communicate with [REDACTED] all the time at Billerica control ... It's my error for even thinking that we could joke ... If [REDACTED] would have said to me, Sergeant [REDACTED] gave permission, I would've said the exact same thing. It had nothing to do with Officer [REDACTED]."

c. Report of interview of [REDACTED]

Officer [REDACTED] believes that when he entered the Roll Call room he asked ADS [REDACTED] "if he had an issue with the way we handle overtime." Deputy [REDACTED] responded "no, do you?" In response, Officer [REDACTED] stated "no, why would I have a problem with the way I do overtime?" Officer [REDACTED], ADS [REDACTED], Captain [REDACTED], Officer [REDACTED] and Officer [REDACTED] were present in the Roll Call room at the time. When ADS [REDACTED] suggested to Officer [REDACTED] that their discussion should be "on on one", Officer [REDACTED] responded "I don't that's a good idea. O don't trust you [REDACTED]. I'd rather we have witnesses. You have Captain [REDACTED] here, I have [REDACTED] who is a Union rep, if you want I will tell Officer [REDACTED] to leave." ADS [REDACTED] did not respond to him. Officer [REDACTED] stated that he then turned quickly and asked Officer [REDACTED] to leave, which he did.

Officer [REDACTED] described his demeanor during the exchange as being "pleasant." Officer [REDACTED] was asked to describe the demeanor of ADS [REDACTED]. Officer [REDACTED] explained that he would not have describe ADS [REDACTED] as being "standoffish ... but he also wasn't being receptive to the conversation." Officer [REDACTED] was asked by this investigator if ADS [REDACTED] was taken aback by Officer [REDACTED] approaching him. Officer [REDACTED] explained "I've done everything in my, I've done everything capable, you know that I am capable of to avoid any discussion with [REDACTED], whether it be email fact-to-face, one-on-one. We've had a previous issue so I don't think that he probably expected me to come in and address the issue. He probably expected someone else to handle it. Which is what I've been doing over the past few years."

During their discussion, neither ADS [REDACTED] nor Officer [REDACTED] used profanity or raised

their voice. Officer [REDACTED] was asked if he called ADS [REDACTED] a thief; stated that Deputy [REDACTED] stole from people's pockets; told Deputy [REDACTED] he was not fair. Officer [REDACTED] responded "I did ... I also called him a liar." ADS [REDACTED] responded by telling Officer [REDACTED] 'it's time for you to go home.'  
...

d. Report of interview of Riley

Officer [REDACTED] recalled hearing Officer [REDACTED] call ADS [REDACTED] "a thief." Officer [REDACTED], however, could not recall hearing Officer [REDACTED] tell ADS [REDACTED] that he "stole money from peoples pockets" and "you're not fair." Officer [REDACTED] recalled hearing Officer [REDACTED] call ADS [REDACTED] "a liar." Based uopon Officer [REDACTED] observation, at no point did he ever feel that the encounter was going to turn physical. Officer [REDACTED] advised that in his best estimation, the encounter between ADS [REDACTED] and Officer [REDACTED] was approximately "45 seconds to a minute." Officer [REDACTED] explained that after the encounter, ADS [REDACTED] did not say anything to him or comment on what had just transpired.

e. Report of interview of [REDACTED]

... Deputy [REDACTED] was in the front of the roll call room. Officer [REDACTED] came in and asked Deputy [REDACTED] if he had a problem with the way he ([REDACTED]) does overtime. Deputy [REDACTED] then asks Officer [REDACTED] if he has a problem with the way he ([REDACTED]) does overtime. Officer [REDACTED] then said, "I just asked you that." Deputy [REDACTED] then said, "I just asked you that." Officer [REDACTED] then said, "Well you must have a problem with the way I do overtime because you're making comments about me." Deputy [REDACTED] then asks Officer [REDACTED], "well, what kind of comments am I making?" Officer [REDACTED] does not answer this question from Deputy [REDACTED]. Then Deputy [REDACTED] said to [REDACTED], "Look this isn't the time or the place to have this

conversation [REDACTED]. Why don't you go punch out?" Officer [REDACTED] replies, "Well, I've already punched out because I had permission to leave early so you don't have to write me up for that one." Captain [REDACTED] took a moment to recollect and then said Deputy [REDACTED] just kept saying this isn't the time or place for this conversation. Deputy [REDACTED] then said, well if you can do the overtime better. Officer [REDACTED] then said "I know I can do the overtime better because you are a thief." This investigator verified that Captain [REDACTED] had heard Officer [REDACTED] call Deputy [REDACTED] a thief which [REDACTED] said he did. Captain [REDACTED] belief is that Officer [REDACTED] must have realized what he had just said because at that point, Officer [REDACTED] just walked out. Until that point there was not swearing or name calling. According to [REDACTED], Shea was referring to when Deputy [REDACTED] was doing the details. Officer [REDACTED] left without an apology. Then Deputy [REDACTED] looked at those in the room and stated that he was sorry they had to see that exchange.  
...

The "Executive Summary" of the investigative report sustained "the allegation that Officer [REDACTED] called ADS [REDACTED] "a thief," told him "you steal money from people's pockets," was "not fair," and further called him "a liar." It did not sustain "ADS [REDACTED] characterization of Officer [REDACTED] verbal and physical demeanor." The Executive Summary states that "the interview results further confirm that neither party used profanity, was yelling or that the exchange appeared as though it may have turned physical."

#### 4. The discipline

[REDACTED] testified that "all discipline goes out over my name" after investigation. He testified that he received the investigatory report in this case, read it, and determined that

it was "clear." He testified that "I came to the conclusion that [REDACTED] should get a written warning."

On June 22, 2020 [REDACTED] issued to [REDACTED] a written warning which included the following:

... During this exchange, you called ADS [REDACTED] a "thief" and that he "stole from people's pockets." You also told ADS [REDACTED] that he was "not fair" and a "liar." You made the statements noted above in front of other people.

...

As a Corrections Officer it is important that you respect your supervisors and not foster discontent among your fellow colleagues. Every employee should be spoken to with respect even if you disagree with an action taken by that employee. Your discourteous behavior fostered discontent and lowered the morale of another employee. The manner in which you communicated your disagreement with an employment decision and the fact that it was done in front of other employees is not acceptable. You could have aired our grievances in a more professional and respectful way.

That written warning results in this arbitration.

#### Opinion:

The position of MSO is that its discipline of [REDACTED] was for just cause. MSO argues that after two conversations about pre-booking overtime with [REDACTED] on the night of January 30, 2020, [REDACTED] "decided he needed to address [REDACTED] on this subject immediately." It argues that [REDACTED] "went to the Roll Call room where [REDACTED] was located." It argues that "there, in front of at least two other employees (a senior staff member and a

correction officer) [REDACTED] questioned [REDACTED] as to whether he had an issue as to the facility's practice regarding pre-booking of overtime." MSO argues that "during the course of this discussion, [REDACTED] referred to [REDACTED] as a 'thief' and a 'liar' and stated that he had stolen money from detail officers and their families."

MSO argues that [REDACTED] "does not dispute the above." Specifically, it argues that [REDACTED] "in an e-mail he sent at 12:37 the next morning to [REDACTED], [REDACTED] admitted making the comments to and about [REDACTED]." It argues that [REDACTED] "re-affirmed his admission in an interview that occurred as part of the IIU investigation of the incident."

MSO argues that [REDACTED] "clearly violated" the MSO rules which [REDACTED] cited in the written warning which he issued after receiving the IIU report. Specifically, it argues that [REDACTED] misconduct in this case

- Fostered discontent or otherwise lowered the morale of other employees
- Intentionally discredited another employee
- Was discourteous, abusive, threatening, intimidating, or harassing conduct toward any individual

MSO also argues that "it should be noted that, under MSO's discipline and progressive discipline policies, a written warning is among the milder forms of discipline that the MSO may impose."

MSO rejects any argument of the Union that "discipline is inappropriate since, in engaging [REDACTED], [REDACTED] was acting in his role as President of the Union." Specifically, MSO

argues that [REDACTED] "role as Union President does not insulate him from discipline for inappropriate conduct such as this." It cites Plymouth Police Brotherhood v. Labor Relations Commission, 417 Mass. 436 (1994) in which the Massachusetts Supreme Judicial Court upheld a five-day suspension issued to an employee/union president who had sent an e-mail to other employees stating that town officials had lied and cheated in the course of contract negotiations." It argues that "the fact that the employee's status as union president did not make him immune from discipline for such conduct."

MSO also argues that "it seems clear that what motivated [REDACTED] to seek out [REDACTED] on January 30, 2020 was not concern about the practice of pre-booking overtime, but rather [REDACTED] alleged sarcastic comment about [REDACTED] himself." It argues that "in this regard, it is important to note that there are no allegations that [REDACTED] had, either prior to the January 30 incident or otherwise, failed to follow the pre-booking practices." It also argues that "a reading of [REDACTED] early morning e-mail to [REDACTED] seems to focus on [REDACTED] alleged sarcastic remark, and not on the underlying issue of pre-booking overtime." It argues that "while [REDACTED] testified that he sent the early-morning missive to [REDACTED] because he wanted to assure that overtime pre-booking practices were followed, that issue is addressed only indirectly in the e-mail." It argues that "it appears that the e-mail was more of an attempt by [REDACTED] to get ahead of what he recognized might be a problem resulting from his statements to [REDACTED]."

MSO argues that "it is not unreasonable for the MSO to require that employees refrain from conduct such as that

engaged in by [REDACTED] on January 30, 2020." It argues that "this is true in any event, but is especially true since, as all parties acknowledged, there had been prior incidents between [REDACTED]

Finally, the MSO argues that "despite the Union's insistence, the fact that [REDACTED] may have believed that [REDACTED] had previously engaged in conduct deserving of [REDACTED] comments does not excuse [REDACTED] behavior." It argues that "the comments were still inappropriate, particularly at that time and place, and in front of other employees." It argues that "as [REDACTED] concluded the June 23, 2020 warning letter, if [REDACTED] had issues with [REDACTED] conduct he could and should have aired his concerns 'in a more professional and respectful way'."

#### Position of the Union

The position of the Union is that the discipline of [REDACTED] was not for just cause. The Union argues that "arbitrators are reluctant to find just cause for discipline against union officers engaged in grievance representation especially where it interferes with the union's grievance handling responsibilities or threatens to disrupt labor-management relationships." The Union cites Tennsco Corp., 107 LA 689, 693) (Nicholas, Jr. 1996) as follows:

Decisions of arbitrators recognize that union stewards, representing fellow employees in grievance meetings, are entitled to equal stature with management and may not be subjected to disciplinary action when using "ungentlemanly" language in the course of their representation. The very nature of the collective bargaining

process is that an employee who is designated as a union representative must be free to discuss union matters as though he were not a company employee. Otherwise, an employee would be inhibited in the performance of his duties as a union representative, by fear of discipline for the use of strong language ... . Undeniably, the use of "liar" was a bad choice of words. However, I do not find that such choice of words was either egregious or malicious.

The Union argues that in this case, "there can be no dispute that [REDACTED] was acting in a representational capacity." Specifically, it argues that [REDACTED] "had clocked out of work and was on his own time." It argues that "prior to any exchange, the Roll Call room was cleared except for another Union steward and another manager both of whom were kept in the room to witness the conversation." The Union further argues that "[REDACTED] answered [REDACTED] honestly when [REDACTED] asked him about his reservations about having [REDACTED] control the overtime list." It argues that "[REDACTED] was understandably concerned that [REDACTED], newly demoted to shift-commander, [REDACTED] [REDACTED] [REDACTED] would not adhere to established overtime practices and was instead sarcastically undermining Union attempts to assure the practice was followed."

The Union also argues that "the MSO introduced no evidence to undermine [REDACTED] testimony and, indeed, fought hard to prevent production of [REDACTED] [REDACTED] -- evidence that could ultimately corroborate the truth of [REDACTED] statements." The Union also argues that "perhaps most tellingly, [REDACTED] did not testify." It further argues that "moreover, the extensive investigation into this matter made two important findings:

1) [REDACTED] and another officer (not [REDACTED]) were equally complicit in instigating the confrontation and 2) [REDACTED] allegations that he was intimidated and that [REDACTED] was physically aggressive were not true.

The Union argues that "given that [REDACTED] was acting in a representative capacity to protect the rights of other officers, his conduct was protected and his discipline for '[fostering] discontent,' 'conduct unbecoming,' and/or 'discourteous' behavior cannot properly stand."

### Discussion

I conclude that the discipline of [REDACTED] was not for just cause. It is clear that [REDACTED] told [REDACTED] to his face that he was a "thief" and a "liar" and someone who "stole out of people's pockets." Indeed, [REDACTED] acknowledges that he uttered those words to [REDACTED] in the Roll Call room on the evening of January 30, 2020. [REDACTED] use of such language to a supervisory co-worker may have been rude and unprofessional, but it did not cross the line into prohibited language within the context of [REDACTED] confrontation with [REDACTED] on January 30, 2020

The most significant aspect of the context of the meeting between [REDACTED] in the Roll Call room is the fact that [REDACTED] was acting in his role as President of the Union. But for [REDACTED] concerns regarding the procedures for the assignment of overtime which [REDACTED] had communicated to him, [REDACTED] would not have confronted [REDACTED] on the evening of January 30, 2020. The assignment of overtime was an issue of great importance to members of the bargaining unit, [REDACTED] had what at least to him were reasonable suspicions concerning [REDACTED] ability and/or willingness to assign overtime to his membership in accordance with the Agreement and the parties' practice.

Arbitrators are traditionally loath to sustain discipline of union officers whose discipline is based on language they have directed toward supervisory or managerial employees while acting in their roles as union representatives. That is not to say that union representatives are universally inoculated against discipline for any language which they may direct toward supervisors or managers. Rather, it is only to stress that union representatives have great leeway in such circumstances and that the context in which the language was used is of great significance in any just cause analysis of the resulting discipline.

In this case, not only was [REDACTED] acting in his capacity as a representative of the Union in a discussion with [REDACTED] which was motivated by his concerns about [REDACTED] assignment of overtime to bargaining unit members, but the audience of the conversation was extremely limited. In addition to the two participants in the conversation there were only two people in the Roll Call room: Officer [REDACTED] and Captain [REDACTED] -- each of whom was personally selected by [REDACTED] and [REDACTED] to serve as witnesses to their conversation. Thus, to the extent to which [REDACTED] words could have any negative impact at all on other people -- such as bargaining unit members, members of supervision or management, or prisoners at the jail or their visitors -- it could be minimal at most. As officers in a correctional facility it is highly unlikely that [REDACTED] and [REDACTED] were strangers to rude, strong, or discourteous language. Contrary to the concerns of MOS, [REDACTED] language was highly unlikely to undermine the morale of the two witnesses or to render them less content in their work.

The MOS argues that [REDACTED] was not, in fact, dealing with [REDACTED] in his role as a Union official during the confrontation at issue. It argues that [REDACTED] was not focused on [REDACTED] alleged improper pre-booking of overtime. Rather, it argues that [REDACTED] was focused on the sarcastic comment which [REDACTED] had allegedly made about him to [REDACTED] earlier during the evening in question. I disagree. Although it is clear that the e-mail which [REDACTED] sent to [REDACTED] in the early morning hours after his confrontation with [REDACTED] twice mentions [REDACTED] alleged sarcastic comment, it is also clear that the e-mail focuses on pre-booking of overtime as well. Pre-booking of overtime is the topic with which the conversation between [REDACTED] and [REDACTED] opened. It figures prominently in the statements of virtually all of those interviewed in the course of the investigation of this case.

It must also be stressed that [REDACTED] initial claims that [REDACTED] was enraged, threatening, loud, red-in-the-face, chest pumping during their confrontation were not corroborated by others questioned during the investigation of this matter. In addition, it must be noted that [REDACTED] descriptions of [REDACTED] alleged outraged demeanor became less extreme as this case advanced. Specifically, [REDACTED] description of [REDACTED] alleged behavior was significantly muted in his responses to questions posed to him during the subsequent investigation. At hearing [REDACTED] did not even testify. Ultimately, the investigation concluded -- and [REDACTED] concluded -- that [REDACTED] used no profanity, threatened no one, and intimidated no one. The record evidence suggests that [REDACTED] may not even have raised his voice.

Award:

The discipline of the grievant, [REDACTED] was not for just

cause.

The Middlesex Sheriff's Office shall expunge all evidence of the written warning which it issued to [REDACTED] on June 22, 2020 from his employment records.

/S/ James M. Litton

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James M. Litton  
Arbitrator

Dated: January 28, 2021