IN RE ARBITRATION BETWEEN:

STATE OF MONTANA, MONTANA HIGHWAY PATROL

and

MONTANA FEDERATION OF PUBLIC EMPLOYEES,

DECISION AND AWARD OF ARBITRATOR

JEFFREY W. JACOBS

ARBITRATOR

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APRIL 4, 2025

IN RE ARBITRATION BETWEEN:

State of Montana, Montana Highway Patrol, MHP,

and

DECISION AND AWARD OF ARBITRATOR
Alicia Bragg Grievance

Montana Federation of Public Employees, MFPE,

APPEARANCES:

FOR THE ASSOCIATION:

Nate McConnell, Attorney for the Federation
Alicia Bragg, Grievant
Quint Nyman Deputy exec. Dir, MFPE

FOR THE STATE:

Chad Vanisko, Attorney for the State
Melissa Gardner, Dir. of Human Resources
Major Justin Braun, MHP
Lt. Colonel Kyle Hayter, MHP
Colonel Kirk Sager, MHP

PRELIMINARY STATEMENT

The matter was heard on December 8 and 9, 2024 at the DOJ Central Services Building in Helena, MT. The parties' briefs were served on March 21, 2025 at which point the record closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement, CBA, from July 1, 2023, through June 30, 2025. The grievance procedure is contained at Article 8. The parties agreed that there are no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUE

Did the MHP have just cause to terminate the grievant on these facts and circumstances? If not, what is the remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 8
GRIEVANCE PROCEDURE

8.1 Having a desire to create and maintain labor relations harmony between them, the parties agree that they will promptly attempt to adjust all complaints, disputes, controversies, or other grievances arising between them involving questions of interpretation or applications of terms and provisions of the Agreement.

8.4 Rules of Arbitration

7. The arbitrator's authority shall be limited to the interpretation and application of the express terms and provisions of this Agreement. No arbitrator shall have the power to add to, detract from, or modify the terms of this Agreement.

ARTICLE 3.
MANAGEMENT RIGHTS

3.1 The Employer retains all rights, powers, functions and authority it had prior to the signing of this Agreement except as such rights are specifically relinquished in this Agreement.

3.3 The Employer, in order to maintain efficient government operations, has the sole and exclusive right to set standards of service and to exercise control and discretion over its operations. The Employer also has an exclusive right to:

- direct its Troopers,
- discipline, suspend, discharge for cause.

ARTICLE 17.
COMMITTEE MEMBERSHIP

17.1 The Employer shall grant membership on all committees governing the administration of rules and regulations, accident review board and disciplinary board.

The Employer agrees that said members shall have full voting status on the committees. The Federation agrees to appoint members of the bargaining unit to such committees as required and further agrees that the Employer has the sole right to convene such committees.

POSITIONS OF THE PARTIES

STATE'S POSITION

The State's position is that there was just cause for the grievant's termination. In support of this the State made the following contentions:

1. The State asserted that the grievant was insubordinate when she knowingly and willingly disseminated a confidential internal document in violation of a direct order and later omitted information when asked by a superior officer about her actions. Further, the grievant not only showed no remorse for her actions, but claimed she would do it again.

2. The State noted that the MHP is a paramilitary organization and the grievant is a sworn officer bound by the MHP Code of Conduct, the MHP Core values and the Law Enforcement Code of Ethics. As such she was duty bound to obey a direct order not to disseminate certain information regarding the climate of the MHP yet she disobeyed that order and then was less than truthful about it when she was asked directly about it later.

3. The State asserted that the grievant was selected to serve on a Strategy Improvement Committee ("SIC") (also referenced as "Leadership Committee" or "Steering Committee") within MHP. One of the main purposes of the committee was to use the data and analysis from the climate assessment executive summary to establish and guide improvement priorities and efforts. On March 7, 2024, Major Braun, a ranking officer, emailed the SIC the assessment for review with instructions to not disseminate the document. See (MHP Exhibits 7 and 8).

4. Major Braun gave the committee, including the grievant a direct order not to disseminate the assessment. That order was given both verbally and in writing and there was no dispute that the grievant received that order and that it was clear and that she understood it.

5. Subsequently it was discovered that the document was disseminated to the public through the media. This was patently contrary to the direct order not to disseminate that document. An internal audit of e-mail accounts was conducted and it was discovered that the grievant had in fact e-mailed the document to her personal-mail. It was later discovered that she then sent it to the Union who forwarded it to the press.

6. Major Braun attempted to contact the grievant upon this discovery, but his call to her on her cell phone went unanswered. When he finally did contact the grievant the day after the initial call, the grievant acknowledged that she sent it to her personal e-mail, but failed to disclose that she had in fact sent it to the Union as well. Major Braun asked the grievant if she had sent the SIC document "anywhere," and she simply said that she had sent it to her personal e-mail, but failed to tell him that she had also sent it to the Union. See, State Exhibit 20. The State asserted that this was an intentional effort to mislead a superior officer and hide her actions.

7. The State acknowledged that the grievant was not discharged for missing a phone call nor for her lack of responsiveness, but rather for disobeying a direct order and for not telling Major Braun everything about her actions in disseminating the SIC. The State asserted that her interactions with Major Braun were considered as part of the totality of circumstances that led to her discharge.

8. The State also noted that the grievant was less than truthful about the length of the phone call. She initially claimed it was about 45 seconds long yet the phone record shows that it was far longer than that.

9. The State commenced an investigation of the grievant's conduct and she was placed on administrative leave on April 9, 2024. The due process meeting was held on April 12, 2024 and after the meeting the State determined that the grievant had willingly violated and disobeyed a direct order, omitted vital information upon being question about it by a superior officer and showed no remorse for her actions. The grievant was discharged on April 19, 2024.

10. The Sate countered the claim by the grievant that she was selected for the committee due to her position as the Union president. While the HR Director had e-mailed the field representative for the MFPE, requesting the name of a person to act as the Union representative the Union never responded to the request. Instead the State asserted that the grievant was asked to participate solely because of her role as a Trooper because of her assigned location and assignment to the Strategic Enforcement Traffic Team, SETT.

11. The State asserted that this is a simple case of insubordination and that MHP justifiably made the decision to terminate the Grievant's employment. The grievant's actions were deliberate and intentional and disobeyed a direct order issued by a superior officer in the chain of command. The State asserted that this is a classic case of insubordination that must be treated as a cardinal infraction fully justifying discharge.

12. The State noted that insubordination requires a number of essential elements: a clear direct order issued by a person authorized to issue orders, a refusal to comply with the order and that the employee have clear notice of the consequences of the refusal.

13. All of those were present here. The grievant received explicit notice of the order by a superior officer and she clearly disobeyed it. Major Braun issued the order not to disseminate the SIC report both verbally and in writing. That order clearly fell within his scope of authority.

14. Further, as several of the State's witnesses testified to repeatedly, all orders issued by supervisory personnel are to be followed. Failure to follow that simple yet critical rule can lead to very dire consequences and undermines the authority of the entire chain of command.

15. Officers cannot be allowed to simply ignore orders they disagree with. The State noted that the generally accepted rule in all organizations, both public and private is "obey now, grieve later." Here, the grievant ignored that clear rule and undertook to send the SIC document out without informing her chain of command or seeking their permission to do so. She could easily have done that, but decided to "go rogue" and send the information out on her own.

16. The State countered the claim by the Union that an employee may disregard an order if the employee feels it is immoral or illegal. See, e.g. *Pan American Airways Corp.*, 116 LA 757 (Nolan, 2001), aff'd in *Pan Am v Air Line Pilots Ass'n*, 206 F. Supp. 2d 12, 20 (D.D.C. June 19, 2002), citing *The Common Law of the Workplace: The Views of Arbitrators,* at pages 175-176 (St. Antoine Ed., BNA Books 1998)).

17. The State noted that this is not persuasive law in Montana and cited instead, *Tigert v Higgins*, 290 F. App'x 93, 101 (10th Cir. 2008) and *Crider v Spectrulite Consortium,* 130 F.3d 1238, 1242 (7th Cir. 1997) for the proposition that an employee is not free to disregard an order even if the employee perceives the order to the untenable or unlawful.

18. The State cited several other cases for the proposition that an order must be obeyed even if it is unconstitutional. See, *Watson v Dep't of Transp.*, No. 91-3558, 1992 U.S. App. LEXIS 30953, at *7 (Fed. Cir. Nov. 18, 1992) and *Baron v Meloni*, 556 F. Supp. 796, 800 (W.D.N.Y. 1983) where both courts upheld termination of employees for refusal to obey direct orders even though the orders themselves might well have been unconstitutional.

19. The State also asserted that where a constitutional right may be involved, if the refusal could create a disruptive work environment the termination would still be justified. Here, the dissemination could well create a hostile and even dangerous work environment by eroding the trust that all law enforcement officers need in each other and their command staff. Citing *Curran v Cousins*, 482 F. Supp. 2d 36, 48 (D. Mass. 2007), where the Court upheld the discharge of a corrections officer for "urging correctional officers to decline to follow illegal orders." The Court noted that such a statement was disruptive of department operations. The *Curran* Court also cited *Connick v Myers*, 461 U.S. 138, 152 (1983) where the Court held that an employer need not wait to allow events to unfold before taking action.

20. The State also noted that the no dissemination order was legitimate and had a critical purpose, which was to ensure the orderly and strategic communication of sensitive internal information. The State countered the claim by the Union that the no dissemination order violated State law and the Constitution. Discussed more below.

21. The State asserted that the information contained in the SIC report was sensitive and needed to be disseminated in a strategic and thoughtful way to prevent misinformation or to give the public a wrong idea about the climate within MHP. There was a need for strategic planning and internal communication before sending the entire document out without any explanation. The grievant's actions harmed the MHP as a whole and undermined the confidence the public needs in its law enforcement professionals.

22. The State asserted too that the no dissemination order was not "an arbitrary or capricious exercise of managerial authority." The State noted that it contained potentially confidential internal information and that an order allowing such information from being disseminated to the public is manifestly reasonable and necessary to control access to internal assessments of operations and for future planning of the Organization.

23. Further, the Climate Survey contained valuable and highly sensitive information about employees' perceptions, prevailing morale within the ranks, and perspectives that would inform the future strategic direction of MHP. Premature or unauthorized release of such internal assessments carried a significant and foreseeable risk of engendering negative repercussions. The report contained sensitive information about employee morale and perception of their role as MHP officers. Sending this to the public could well have undermined the public's perception of the Highway Patrol and diminished the public's confidence in the effectiveness and professionalism of the agency as a whole.

24. The State noted that the document did not contain any personal information or identifying information regarding any individuals, but it did contain feedback from officers about morale and suggestions for the future of the MHP. Thus, the lack of identifying information did not negate the sensitive nature of the information. As noted, the release of this document could well have fostered unwarranted misinformation, undue speculation about the Agency and undermine internal cohesion and trust within the ranks. In short, the release of the information could well have done damage to the agency as a whole and potentially to individual officers.

25. The State also asserted that the no dissemination order did not impinge or infringe on any Union rights. Nothing about the order interfered with, restrained, or coerced any employee in the exercise of any right of self-organization, collective bargaining, or other mutual aid or protection related thereto, as guaranteed by Montana law. See, MCA § 39-31-201.

26. There was no active bargaining in place at the time of the order and while some of the information was loosely described as "working conditions," that did not contain or pertain to the kind of information guaranteed protection by Montana law afforded to Union communications.

27. The State asserted too that the generally accepted definition of working condition refers to tangible terms and conditions, such as hours of work, fringe benefits such as health insurance, retirement plans, vacation time, safety regulations, and established workplace rules and procedures.

28. Citing *Bonner School Dist. No. 14 v Bonner Educ. Ass'n*, 2008 MT 9, ¶¶ 20-23, 341 Mont. 97, 176 P.3d 262. The general morale and perceptions of the MHP officers who responded to the survey does not fall in that category.

29. The State cited Article 9 of the CBA and asserted that it explicitly states that "the internal business of the Federation shall be conducted by the Troopers during their non-duty hours." Thus, that language clearly delineates the sphere of legitimate Union internal business and suggests that it is to be carried out on Troopers' own time, separate and distinct from their official duties and the internal operational matters of MHP. The State reiterated that the grievant was placed on the committee only in her role as a member of the SETT and not as a Union official and her actions crossed the clear line between work activity and Union activity.

30. The State noted that the grievant was simply wrong in her assertion that she was on the committee as the Union president. She was also only an interim President in any event and that her role in the Union did not grant her unfettered rights to disobey orders when she felt it infringed on a Union right.

31. The State also asserted that the grievant's actions could set a very dangerous precedent. If a document received by a Union member, even in their capacity as an employee participating in an internal management initiative, automatically becomes Union business subject to unfettered dissemination could severely undermine MHP's ability to manage its internal affairs and maintain confidentiality where necessary.

32. The State noted too that one the other main elements of an insubordination case is whether the employee is aware of the consequences of disobeying the order. As an experienced law enforcement officer working in a paramilitary setting the grievant clearly should have known of the dire consequences of disseminating the SIC report and then being less than truthful about it when asked directly by a superior officer a few days later.

33. The State also asserted that progressive discipline would not be appropriate here given the brazen and intentional nature of the conduct. Where the seriousness of the conduct is so extreme, progressive discipline may be bypassed and an employer can go directly to discharge. Serious insubordination such as this falls squarely within that general axiom.

34. The State asserted that not only did the grievant brazenly and rashly disobeyed clear order, but she also gave inconsistent and even contradictory statements in the investigation that raised serious questions about her veracity.

35. She further freely admitted that she would do this very same thing again if given the opportunity and the State asserted that this was shocking and showed an utter disrespect for the chain of command and her duty to obey the legitimate orders of her superior officers.

36. Progressive discipline is designed to correct behavior and given an employee who has violated applicable rules the chance to amend their behavior. However, in light of the candid admission that she would do this again, progressive discipline will clearly not work. This was no lapse in judgment and was intentional and egregious. The State asserted that given her statements she cannot be somehow rehabilitated or trusted.

37. The State repeatedly asserted that the "obey now grieve later" rule is especially important in law enforcement given the very nature of their work. Here the grievant's actions set a very dangerous precedent by refusing to comply with a direct order. Whether the order was about an operational issue or one that touched only on a report compiled by a committee convened to study the internal workings of the department should not matter. An order is an order and that must be obeyed. The very nature of law enforcement work is dangerous, even life threatening, such that the refusal of any order in the field could lead to extraordinary tragedy.

38. Further, the decision about whether a document is public or not is not a decision that rests in the hands of an individual MHP officer. That decision must be left to management in conjunction with consultation with legal counsel.

39. The grievant bypassed this crucial function and acted on her own without consulting anyone. The orderly and controlled dissemination of information is paramount for maintaining public trust and ensuring the effective functioning of MHP. The grievant's unilateral action directly undermined this critical function.

40. As noted, the grievant could simply have asked Major Braun or even HR about disseminating the report. Instead of asking for permission or clarification the grievant acted rashly and without any basis for her decision. This was simply insubordinate behavior on her part.

41. The State also noted that if the grievant had any concerns about possible retaliation against members of her bargaining unit she had a duty to report that and take that up the chain of command as well, yet she failed to do that. Acting unilaterally in this manner can create difficulties on multiple levels.

42. The State also countered the claim that the MFPE is somehow an "in-house" unit of government. It is not. The MFPE is a separate Organization and while it represents some MHP officers it is not an agency of State government. The State characterized the Union's assertion in this regard as specious at best.

43. The State asserted repeatedly that discharge is the only reasonable discipline here and that it is generally recognized that when the conduct is this serious, the arbitrator should defer to the employee's actions . See, in *In re Herrmann*, 192 N.J. 19, 926 F.2d 350 (2007) where the Court stated that the progressive discipline is a recognized and accepted principle, " it is not a principle that must be applied in every disciplinary case." See, also in *In re Jewett*, 2009 VT 67, 186 Vt. 160, 978 A.2d 470 VT/ 2009) and *State v Conn. State Univ. Org. of Admin. Fac.*, 349 Conn. 148, 314 A.3d 971 (2024), where the court discussed the notion of incorrigibility and whether an employee has demonstrated a willingness to change their behavior. Here, the grievant has stated over and over that she has no intention of changing her behavior.

44. The State and its witnesses indicated that they gave considerable thought to the decision to terminate someone with the grievant's long record and noted that while she has made positive contributions to the MHP and is otherwise a good officer, her actions here were simply beyond the pale and cannot be tolerated in this setting. Furthermore, as the Union President she must set an example of behavior for the members of the bargaining unit and her blatant insubordination severely undermined that requirement and sent the wrong message to her fellow officers. Indeed, as a veteran officer she should have known the consequences of her actions and of the dire nature of disobeying a direct order.

45. Overall the State assert that their decision was neither arbitrary nor capricious and was in line with the seriousness of the insubordination and lack of remorse she has exhibited throughout this entire process. The State can no longer trust the grievant to obey orders nor to follow the directives of her superior officers. Her penalty was proportionate to the offense proven especially when considering the nature of the work involved, the need to follow orders and to be able to trust the grievant.

46. The State argued that reinstatement would be contrary to the clear CBA language limiting the arbitrator's power and would contravene the requirement that the arbitrator has no power to add to, detract from, or modify the terms of this Agreement. Here the question of whether the order was lawful or not requires an examination of external law, which the State asserted is not within the jurisdiction of an arbitrator to determine.

47. The State noted that an arbitrator should strive to never render a ruling that is contrary to law and that arbitrator is not a court of law nor does an arbitrator have the power to make rulings on State or federal law. Citing *Alexander v Gardner-Denver*, 415 U.S. 36 (1974), where the Court held that an arbitrator's task is to effectuate the intent of the parties. The State asserted that the interpretation of the Montana constitution is beyond the scope of the arbitrator's power under the CBA.

48. The underlying grievance did not grieve the interpretation of external law. Throughout the grievance procedure the Union claimed that there was not just cause for termination based on the missed phone call from Major Braun -which the State repeatedly indicated was not the basis of the discharge. The State asserted that nowhere in the grievance itself was there an assertion that the "no dissemination" order issued by management was inherently unlawful as a matter of constitutional or statutory law. That appears to be something made up by the Union at the hearing. As such, those arguments should not even be considered since they were made outside the purview of the grievance procedure.

49. Finally, the management rights provisions reserve to management the right to decide which documents are public and which are not. It further reserves the right to direct its Troopers and to require Troopers to respect and obey the rules of the MHP and of the orders given to them by superior officers. An award that dictates how the MHP manages information would in effect be an addition to the labor agreement- strictly prohibited by the terms of Article 8.4.

The State seeks an award denying the grievance and upholding the termination.

UNION'S POSITION:

The Union contended that there was not just cause for the termination of the grievant. In support of this the Union made the following contentions:

1. The Union noted that the grievant is a long term employee of the MHP, having been hired as a dispatcher in 2011 and then as a State Trooper in 2014. She had no discipline in her file as of the date of the discharge in this case and has numerous commendations and awards including one for saving a motorist's life. She has excellent performance reviews.

2. The Union acknowledged that she made an error in 2022 on a search warrant during a traffic stop and was involved in a preventable crash with a State vehicle in 2019. In both of those, she corrected those problems and they have not recurred.

3. The grievant was also selected for the SET team which is a special enforcement unit that travels to larger Montana cities to enforce seatbelt and DUI laws. That assignment complimented her role as the Union President since she came into contact with Troopers from all around the State of Montana. The Union noted that because of this personal contact, Troopers felt comfortable contacting the grievant by text or phone on a frequent basis.

4. The grievant used her personal e-mail for Union purposes and only rarely ever used her State e-mail. The Union also noted that there was regularly confidential personnel information contained in those e-mails regarding potential contract issues, disciplinary issues and personal issues with regard to Union members.

5. The Union also noted that the climate survey, which was paid for by public money and authorized as part of a publicly funded State agency, deals with a number of issues within the MHP, such as perceptions of MHP leadership, communication, wellness, hiring, retention, job security, and compensation issues including benefits.

6. The Union also noted that as Union President the grievant was uniquely situated to act as their bargaining representative to "manage the [labor] contract, manage the labor issues, manage the personnel issues and discipline." As such, the grievant was invited to the SIC committee as the Union president. The Union noted that the HR Director sent a specific invitation to the Union asking for the name of a person to serve on the committee. The mere fact that the Union did not respond to that does not negate the clear fact that the grievant was on that committee not only because of her role as a SET team officer, but mainly because of her role as the MFPE president representing the MHP Troopers. It would be folly to conclude otherwise.

7. The Union also asserted that the grievant received numerous communications from Troopers from around the State who were concerned about the survey they received and the possibility of reprisal or retaliation if they were honest about their assessments of the MHP.

8. Despite their concerns the grievant encouraged them to be honest and fill the survey out completely and give their honest answers to the questions asked.

9. The summary did contain any personal identifying information in it and was by all accounts anonymous and the grievant assured Troopers that they should not fear reprisals. There was however some trepidation by Troopers and the grievant acknowledged in her testimony that depending on the answers it would be at least theoretically possible to determine what district the responder to the survey was from.

10. The Union asserted that the Executive Summary of the survey, which was a 37 page document that did not contain any identifying information from which the responders could be identified or named and contains no confidential or private data.

11. It covered a variety of subjects, such as employment: health and wellness/wellbeing, personal development, onboarding/orientation; training, advancement, recognition of their work, attrition, hiring, and retention; fulfillment of contracted terms; compensation/wages; employee voices in the workplace and how that was regarded by upper management; physical fitness programs and corrective action in cases where deficiencies were shown. The Union noted that it was a comprehensive summary of how MHP Troopers regarded their jobs, their management team and their work for the MHP. The Union also asserted that it covered the very subject that were within the Union's purview, see those items listed above.

12. The grievant along with the rest of the committee members received the Executive Summary on March 7, 2024 and the Union and the grievant acknowledged that in the e-mail that had the summary attached, Major Braun included a directive as follows: "There is a planned and phased release of this document. Do not disseminate further until it is authorized for further release." The e-mail also advised members to review the document before the next meeting.

13. Even after the release of the Executive Summary, but before the results were made public, the grievant traveled around the State and heard over and over from Troopers who voiced their concerns about the confidentiality of the survey and possible reprisals for what they had put in their answers. There were also concerns raised about the planned release and what that would entail as well as when.

14. As noted, the grievant wanted to review the summary in detail and decided to send it to her personal e-mail from her State e-mail so she could read it in some detail. She indicated that at first she had no intention of sending it to the Union, but after reading the responses in the Executive Summary and seeing the multitude of problems listed in it, she decided she had to send it to the Union and that her role as the President compelled her to do so.

15. The grievant also asserted that she is generally not allowed to send things from her State e-mail to the Union so she used her personal e-mail to do so. This was not the first time she and sent documents and messages to herself from her State e-mail and here supervisors were well aware of this common practice.

16. The Union repeatedly made the point that there were no names in the summary, nothing confidential, no medical data, for example not any information related to any personnel data or current arrests. It was in short information that related to the stress of being an MHP Trooper as well as the perceived climate/morale of the MHP and comments about the compensation package. It was thus the very thing the Union deals with in the administration of the CBA and included information that was subject to bargaining.

17. Since the document contained the very subjects that are in many cases subjects of bargaining and the administration of the contract, the grievant sent the document to the Union without a second thought. The Union then sent the summary to the press which reported on it widely.

18. The Union asserted that the Union sent it to the press, not the grievant, and that she had no knowledge beforehand that it would be sent to the press and there was no evidence that the grievant sent it to anywhere other than the MFPE.

19. The grievant remained steadfast in her position that the document was to be released to the press anyway and she felt it needed to be sent to the Union because of the information in it and how her members felt about their jobs – the very matters that the Union is retained to handle. The Union asserted that the reasons for sending the summary to the Union were based on the clear fact that it related to labor issues and on the feedback the grievant was getting on a continual basis from Troopers in the field.

20. The Union then discussed the phone call to the grievant from Major Braun after the document was released to the press. That call came in on April 5, 2024 while the grievant was engaged in an enhanced DUI enforcement program.

21. The Union asserted that Major Braun is not in the grievant's immediate chain of command and that her direct supervisors typically contact her on her personal cell phone. Major Braun's call came to her duty cell phone and she noticed it when requesting a search warrant. The Union asserted that the grievant did not return the call immediately since the voice mail Major Braun left did not appear urgent.

22. Major Braun called the grievant again the following day. The Union and the grievant suggested that the call was brief and while there was a dispute over the length of the call it was a short conversation during which Major Braun asked if the grievant had sent the Executive Summary "anywhere," or words to that effect. The Union also noted that the call came in an Saturday night at a college town when DUI enforcement was at its height and the grievant was busy doing other things related to that enhanced enforcement as well as training other younger Troopers at the time.

23. The grievant was honest with him and said that she had sent it to her personal e-mail, but that due to the fact that she was training new employee, it "never crossed her mind" to tell Major Braun that she had also sent it to the Union. The Union also asserted that by this time the summary had already been sent to the press and that telling Major Braun that she had sent it to the Union would not have changed anything at that point anyway.

24. The Union asserted that when it became clear the grievant had sent the summary to the Union, the MHP commenced an investigation, but that the investigation was hardly objective or fair. The MHP had already concluded that it was going to discharge the grievant before even hearing her side of the story.

25. The Union noted that there were three reasons for the discharge: knowingly and willingly omitting relevant and vital information when questioned; knowingly and willingly violating a direct order; and inconsistent reasoning and responses for doing so.

26. However the Union asserted that that was not consistent with Ms. Gardner's comment during the subsequent investigation as follows: " … we're not saying that you lied to us about sharing the document. We believe you've been truthful about that. What we're saying is that you shared the document against a direct order to do so."

27. The Union first asserted that the grievant did not omit information during the April 6th phone call. As noted, she was busy assisting a trainee on a Saturday night when the call came in. The call was relatively short and she freely acknowledged sending the summary document to her personal e-mail Major Braun never followed up on that nor did he ask if she had sent it anywhere else.

28. Further, when question in the official interview a few days later, she freely admitted that she had in fact sent it to herself and to the Union. There was no dishonesty or failure to provide information. See above reference to Ms. Gardner's statement during the investigation that there was no allegation of lying about sharing the document. The MHP "believed that [the grievant was] truthful about that." Thus the MHP's own statements belie the allegation that the grievant was untruthful.

29. Further, the order was not to disseminate the document to the media or members of the general public, but the grievant initially sent it only to herself. The Union asserted that it is hardly a violation of that order to send something to yourself.

30. Moreover, the members of the committee were specifically tasked with reviewing the document carefully. Since the grievant knew she might not have a chance to thoroughly review it on her State e-mail – which was how it was initially sent to her, she decided to do what she had done many times before, with the full knowledge of her supervisor with respect to other matters pertaining to her work – to send it her personal email so she could review the documents. Thus, there was no violation in sending the document to herself so she could comply with the directive to read it thoroughly.

31. The Union also asserted that the grievant has been honest and consistent in her responses throughout this entire matter. The Union countered the claim that the logs from April 6th did not support the grievant's statements that she was busy with a trainee. The grievant was not disciplined for failing to maintain proper log books.

32. Further, the grievant explained that she had been at a crash scene and returned to a hotel later. She was called to a potential DUI scene, but that call was later cancelled. Overall it was clear that the grievant was on duty that night, on a Saturday night in a college town during their homecoming celebrations. She was there to assist with the expected DUI issues that frequently arise during such events.

33. The Union's main argument however in all of this is that the order not to disseminate the Executive Summary was not a lawful order, in fact the Union asserted that the order was "patently illegal." As such she had no obligation to follow an order which is illegal under Montana law and was inconsistent with her role as the Union president. The Union also asserted that she had every right to share that document with the Union in her role as President of the MFPE.

34. The Union noted that it is clear that Montana's collective bargaining law, MCA 39-31-101 et seq. is modeled after and in many cases taken directly from the National Labor Relations Act, NLRA, Further, Montana courts for years have held that Montana looks to federal precedent in interpreting the Montana law. See, e.g. *Small v McRae*, 200 Mont. 497, 502, 651 P.2d 982, 985 (1982); *St. Dept. of Highways v Public Employees Craft Council*, 165 Mont. 349, 529 P.2d 785 (1974)); *State ex rel. Board of Personnel Appeals v District Cour*t, 183 Mont. 223, 598 P.2d 1117 (1979); *Local #45 v State ex rel. Board of Personnel Appeals*, 195 Mont. 272, 278, 635 P.2d 1310, 1312 (1981); *City of Great Falls v Young*, 211 Mont. 13, 686 P.2d 185 (1984*); Bonner School District v Bonner Education Association,* 2008 MT 9, ¶18, 341 Mont. 97, 76 P.3d 262. See also, *Ekalaka Unified Board of Trustees v. Ekalaka Teachers' Ass'n*, 2006 MT 337, ¶ P 11-17, 335 Mont. 149, 149 P.3d 902; *Kalispell Education Ass'n, v. Board of Trustees*, 2011 MT 156, ¶¶ 18, 20 & 21, 361 Mont. 115, 255 P.3d 199 (2011). The Union asserted that Montana courts have long held that the NLRA provides guidance under Montana law in labor relations matters.

35. Specifically Section 7 of the NLRA, 29 U.S.C. 157, allows public employees and their Unions to engage in concerted activity for mutual aid and protection. That section appears to be closely tied to MCA 39-31-201, and has very similar language. The information contained in the summary was precisely the sort of information the Union needs in order to engage in "concerted activity for the purpose of collective bargaining or other mutual aid or protection."

36. The Union cited several federal cases that have interpreted the NLRA and asserted that while there is no direct precedent in Montana, the following cases hold that employees and their exclusive representatives have a right to discuss among themselves and their Union and the public information about their terms and conditions of employment for the purpose of mutual aid and protection.

37. See, e.g. *Cintas Corp.*, 344 NLRB 943, 943 (2005), *enf'd,* 482 F.3d 463 (D.C. Cir. 2007); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978); *Albertson's, Inc.*, 351 NLRB 254, 259, 366 (2007); *Battle's Transportation, Inc.*, 362 NLRB 125, 125–126 (2015); *Fresh & Easy Neighborhood Market*, 361 NLRB 72, 73 (2014);. *DirecTV U.S. DirecTV Holdings, LLC,* 359 NLRB 545, 547 (2013), 362 NLRB No. 48 (2015), all of which stand for the general proposition that employees have the right to send information to their Union when it involves concerted activity for collective bargaining and mutual aid or protection.

38. In particular the Union cited *Hyundai America Shipping*, 357 NLRB 860, 872 (2011), enf'd. in part 805 F.3d 309 (D.C. Cir. 2015), where the Court held that a chain-of-command rule directing employees to "[v]oice your complaints directly to your immediate supervisor or to Human Resources" violated the employees' Section 7 rights by "restrict[ing] employees from complaining about any work related matters, including wages, hours, or working conditions, to .... interested third parties, such as Unions." The NLRB further held in *Hyundai* as follows:

> The Board has long held employee communication with third parties to be protected under Section 7. For example, the Board has found employee communications regarding their working conditions to be protected when directed to an employer's customers. 357 NLRB at 873.

39. The Union asserted that this holding is directly on point here and prohibit the employer from restricting the Union from engaging in protected activity for the purpose of collective bargaining or for mutual aid and protection.

40. Further, the Union asserted that "it is well settled that employees have a statutorily protected right to communicate about their wages and terms and conditions of employment with third parties, including Union representatives, government officials, other businesses, and the public." *Motor City Pawn Brokers*, 369 NLRB 132, slip op. at 18 (2020) (citing *Trinity Protection Services*, 357 NLRB 1382 (2011)). Thus, the fact that the grievant acting in her role as the Union President by the summary document to the Union was well within her statutory rights as the President and was clearly based on the feedback she was getting from the Troopers in the field.

41. The Union pointed to MCA 39-31-401 which makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201" and asserted that the no dissemination order fell squarely into that prohibition. The order clearly chilled the exercise of statutorily guaranteed rights to engage in concerted activity and was unlawful.

42. The Union also asserted that those holdings protecting concerted activity do not depend on whether active collective bargaining is going on at the time the information is disseminated. See, *Conley v. Gibson*, 355 U.S. 41, 46 (1957), where the court held that "(c)collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. Thus, the mere fact that the parties were not engaged in bargaining at the time the grievant sent the information to the Union does not negate her right to send the information.

43. The Union asserted that the precedent it cited at some length in its brief at pages 15-20 demonstrates a strong policy in favor of allowing the dissemination of such information and that a rule or order that prohibits it chills the rights guaranteed by Montana law. Such an order is therefore unlawful and is unenforceable. Here the Union asserted that the grievant was engaged in the very activity protected by Section 7 of the NLRA and by Montana law as well.

44. The Union also asserted that the information contained in the summary document was related to wages, hours and other terms and conditions of employment. The Union noted that many of the terms are couched in jargon, but that overall the entire document was related to the climate, the perception of the job by Troopers, stress in the workplace, the need for a leadership steering committee and the need to keep employees informed of the findings contained in the survey itself.

45. The Union also asserted that the discharge was motivated by anti-Union sentiment by the agency The Union asserted that where the employer knows that an employee has engaged in protected activity and takes adverse action against the employee for doing so there is evidence of anti-Union animus that is impermissible. Citing *Wright Line*, 251 NLRB 1083 (1980), enf'd 662 F.2d 899 (1st Cir. 1981). The evidence of a violation of the so-called *Wright Line* test can be inferred from circumstantial evidence. See, *Velox Express*, 368 NLRB 61 (2019).

46. Further, Elkouri notes that arbitrators must make a thorough search and examine the entire record to determine that management has not violated the CBA under *Wright Line*. See, *How Arbitration Works,* 7th Ed at section 15.3.F.xiv. Here the Union noted that it was clear that the grievant was engaged in Union activity and was advocating for her members when the MHP retaliated against her for her Union activity

47. The Union referred to the statement by Lt. Col. Hayter who pointedly asked the grievant in the investigation process, "On a Saturday night, when you're in a dark alley and there's a bad guy that you're foot pursuing is the Union with you or your partners with you." See Union exhibit 8. When asked about this comment at the hearing, Lt. Col. Hayter doubled down and indicated that he felt that the grievant "trusted basically the Union more than the agency and the people that worked for the agency." The Union asserted that these comments demonstrate the state of mind in those who made the decision to terminate her and that it was clearly based on her Union activity and position.

48. The Union also asserted that the no dissemination order was in violation of Montana constitution at Article II, which is commonly referred to as the Public's Right to Know, provides as follows:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

49. The Union asserted that there is a strong policy in favor of disclosure of any document that is paid for by public money to the public. The sole exceptions are where individual privacy outweigh the public's right to know or where there is a legal privilege protected by statute or common law at the time of the disclosure that is necessary for the integrity of government.

50. Here there was no private information in the document at all. It was a summary without any identifying information as to individuals nor any other confidential or private information.

51. Second there was no legal privilege asserted by the State in this case. The sole basis for the discharge was that there was a violation of a direct order. Moreover there was no attorney client privilege asserted nor was there any claim to such a privilege in the document. See, *Nelson v City of Billings*, 2018 MT 36, ¶¶ 15, 20, 390 Mont. 290, 412 P.3d 1058. Neither was there any information that could be construed as "candid advice from those within the executive branch" related to the governor's constitutional responsibilities as required by the Court.

52. Thus, there can be no claim that the dissemination order was consistent with the Montana Constitution either on these facts. The document was paid for by public dollars, clearly related to a matter of public concern, since it related to the perception of MHP Troopers along with Union related matter as discussed above and did not fit into either of the stated exceptions required to prevent public disclosure. The Union asserted that the survey was somewhat negative and the MHP wanted to either sanitize or hide it, perhaps sending out only portions of it at a time in order to prevent public backlash or scrutiny by the media. In either event the grievant was wholly justified in disseminating the document to the Union.

53. The Union noted that there is a three part test to determine if the document in question is public. First, does the right to know law apply to the Agency involved? Second, is the document the document of a public body and last, whether there are any individual privacy interests at stake.

54. The Union noted that the first two are clearly present. The MHP is a body agency. Moreover, as noted, there waw no private information contained in document nor did the State asserted that there was. See, *Bozeman Daily Chronicle v. City of Bozeman Police Dep't.*, 260 Mont. 218, 225, 859 P.2d 435, 439 (1993). Here too the State knew the document was public and acknowledged in the no dissemination order that it would be made public, but apparently the State wanted to sanitize or hide part of it before sending out the entire document. The Union asserted that this is not in keeping with the intent behind the right to know law.

55. See, *Great Falls Tribune v. Day*, 1998 MT 133, ¶28, 289 Mont. 155, 959 P.2d 508 (1998), where the Court was faced with an agency that sought to keep documents confidential while it negotiated to get the "best deal" and stated that while that goal is laudable, the Constitution makes clear that "economic advantage is not a sufficient reason for denying the public the opportunity to observe the deliberations of public bodies and inspect public documents." Montana has a strong and unique constitutional provision providing that documents held or generated by public agencies that "somehow" relate to work of those agencies are open to the public and may not be withheld from the public with only a few narrow exceptions, none of which apply here.

56. The presumption is that all documents paid for by public money are to be made public in their entirety and holding onto them waiting for a better time to release them is inconsistent with the Montana Constitution. The grievant was therefore justified in releasing documents that were to be made public anyway.

57. The Union also asserted that this is not a case where the "obey now, grieve later" maxim applies. The Union cited Professor St. Antoine as follows: "Employees need not immediately obey an order or rule if they reasonably believe it to be illegal, unethical, or immoral." *Common Law of the Workplace*, (BNA, 2005) St. Antoine, Section 6.8 at 188.

58. The Union also acknowledged the famous quote by Arbitrator Harry Shulman that the industrial plant is not a debating society," but noted that shortly after making that statement he also ruled that "in matters that fall "primarily within the Union's domain," the employee is not insubordinate. *Ford Motor Co.*, 10 LA 213, 214 (Shulman, 1948). As noted above, the grievant was acting in her capacity as the Union President and was therefore not subject to the strict dictates to the obey now grieve later rule.

59. The Union also countered the claim that the grievant should have simply asked for permission first before sending out the document. Her response was that MFPE is essentially in house and that she has been doing this for several years.

60. The Union cited *Pan American Airways*, 116 LA 757, 761 (Nolan, 2001), and asserted that a crucial and required element of an insubordination case is that the order be lawful In *Pan Am* a pilot was fired for refusing to fly a leg of a flight that he believed would cause him to violate an FAA rule. The arbitrator's ruling was affirmed by the Court in in *Pan Am v Air Line Pilots Ass'n*, 206 F. Supp. 2d 12, 20 (D.D.C. June 19, 2002).

61. Arbitrator Nolan outlined three important elements for the illegality exception to the obey now grieve later rule as follows: first, "no employee should be punished for disobeying an order that is illegal;" next, the employee must have a "good faith belief" that the exception applies to the situation, noting that the employee does not have to be correct; and third, that the "employee's disobedience must be reasonable." Id at 761.

62. Here the grievant met all of those elements. She had a good faith belief that she was entitled to send the document to the Union as it was in furtherance of concerted activity and that she was subject to the exception of the obey now grieve later rule. Finally, even though there is no requirement that the employee actually be correct – in this case she was correct.

63. The Union acknowledge the need for Troopers to obey orders and at no point did the Union assert that a Trooper can simply decide for him or herself which order to follow when it came to operational matters, but there this presented a unique situation that involved Union activity.

64. The Union also noted that the same logic applies in law enforcement cases as well. In *City of Sparta*, 136 LA 1671 (Szuter 2016) an officer was fired after refusing an order to report for duty after he had consumed alcohol after his shift was over. The arbitrator concluded that there was no insubordination because the order was not lawful. The Union cited a plethora of cases of the same proposition – that an employee can refuse an order if the order is unlawful or contrary to public policy or the law. See Union brief at page 32.

65. Finally, the Union asserted that the level of discipline was not progressive and was there far too harsh even if one finds a violation of policy or the Codes involved. The grievant has had a few prior warnings, as noted above, but to jump from those to discharge on these facts would be a miscarriage of justice.

The Union seeks an award upholding the grievance in its entirety and ordering the grievant to be reinstated to her former position, with full back pay and all contractual benefits.

MEMORANDUM AND DISCUSSION

FACTUAL BACKGROUND

The basic facts were both straightforward and for the most part undisputed. The grievant was hired as a dispatcher in 2011 for the MHP. She was hired as a Trooper in 2014. She has two prior disciplinary issues in her career: one stemming from a warrant in 2022 and the other from a motor vehicle accident in 2019. Neither of those were involved in this matter.

At the time of the evidence involved in this case, the grievant was the President of the Montana Troopers Unit of the MFPE and had been for several years prior to these events. As discussed more below, the grievant was selected to serve on the Strategic Improvement Committee, SIC with the MHP.

The evidence shows that the purpose of the committee was to gather data about the "climate" of the MHP by sending out a survey to Troopers and then use that data and analysis to establish and guide improvement priorities and efforts within the MHP. There was some dispute about this, but the overall evidence showed that the data collected reference overall perceptions of MHP leadership, communication, wellness, hiring, retention, job security, and compensation issues including benefits. Some of these were referred in terminology other than that, but the evidence showed that many of the matters dealt directly with matters that would be considered terms and conditions of employment as that term has been used and applied for decades both in Montana as well as at the federal level.

There was also a considerable dispute as to why the grievant was selected to serve on this committee. The State asserted that the sole reason she was selected was due to her participation in the Strategic Enforcement Traffic Team, SET team, also sometimes referred to as the SETT. The evidence showed that the SETT would travel around the State of Montana sometimes providing targeted enforcement of traffic laws and DUI enforcement. It was clear that the grievant was in contact with a great many Troopers in her role as a SET team member and that this was of considerable benefit to her in her role as the Union President as well.

The Union on the other hand asserted that the grievant was selected in large measure due to her role as the Union president. The Union cited the provisions of Article 17 set forth above and noted that when the SIC was formed, the HR director sent a message to the Union asking for names of individuals who would serve on the committee. There was no formal answer from the Union to that request, but it was clear from the overall record that the grievant was placed on the SIC in her role as the Union president, at least in some part. There may well have been a benefit to having the grievant serve on the SIC due to her role as a member of the SET them, but on this record the overall record did not support the state's position in this regard.

It was clear that the management team and the SIC committee knew that the grievant was the Union President and that was in reality the reason she was placed on that committee. To conclude otherwise would be contrary to the clear fact that the Union was asked to have a representative on the committee directly by the HR Department and would also border on the naïve. The evidence showed that the Union rarely submits names of individuals to serve on such committees in the past, and did not here either, but that did not alter the clear fact that the grievant was placed there because of the very nature of the committee's work.

There was clear evidence that there would be a survey of the Troopers and that the questions asked would touch directly on their terms and conditions of employment. As such, the Union's claim that the grievant was there to serve as the Union representative on that committee had merit. It was abundantly clear from the record that the Agency absolutely knew that the grievant was the Union President and as noted above had sent an invitation to the Union requesting a person to serve as the Union representative on the committee. That fact, was significant in the analysis of the case from this point on, as will be discussed more below.

The evidence also showed that there was a survey sent out that asked a number of questions about Tropper's perceptions of their employment, the stress of their jobs, leadership, compensation, manager roles and responsibilities and other matters that touched on their overall work environment.

It was also clear that many Troopers contacted the grievant in her role as Union President to express their concerns about possible reprisals and retaliation based on their answers. It was clear from the overall record that the grievant was concerned about this as well and assured members that they should have confidence in the confidentiality of their responses and that no one would be retaliated against for an honest answer – even if that answer was somewhat negative about the overall climate within the MHP.

The record showed that Troopers sent their responses in and an Executive Summary of the results was compiled into a 37 page document. The Executive Summary was disseminated to the members of the committee, including the grievant, on March 7, 2024 by Major Braun, who was a ranking officer on the committee. There was a directive not to disseminate the document. The committee met again on March 11, 2024 and they were directed verbally not to disseminate the document. The committee was advised to review the document thoroughly.

There was also clear evidence that the intent was to eventually make the document public, but that the Agency wanted to wait to do that. It was not clear when the agency intended to make the document or the results public however - only that it would be made public at some future time. It was also unclear whether the entire document would be made public or just portions of it.

The grievant received the document on her State e-mail, but after looking at it more closely and based on the feedback she had been getting from Union members throughout the process regarding problems with the survey and within the MHP itself, the grievant decided on March 21st to send it to her personal e-mail. The record established that she did this so she could have easier access to the document for her review. She indicated that she did not intend to send the document to the Union or anywhere else initially, but that after she reviewed the document it was clear to her at least that the document touched directly on matters of Troopers wages, hours and other terms and conditions of employment.

She then sent the document to the Union and the evidence was clear that she did so in her capacity as the Union President and in furtherance of her role. As discussed below, this fell within the review of concerted activity within the meaning of both the applicable Montana statutes and federal law, which the Union pointed out generally followed for guidance in interpreting Labor relations issues and concept.

The Union then apparently sent the document to the press. There was no direct evidence as to exactly who sent the document to the media, but it was clear that the grievant did not do that herself. Once the press got it, the details of the contents of it was published in local media sources.

The circumstantial evidence showed that the Agency was not happy about having the documents made public before it was ready to release it and that there were some negative connotations from the release of the document. Without going into excruciating detail of the survey results, it is sufficient to mention that some of the results showed that there were problems with morale and other matters within the MHP.

After it was clear that the document had been made public the Agency commenced an investigation of the committee members' State e-mails to determine who had disseminated it. The record showed that the Agency was able to determine from forensic computer analysis that the grievant had sent the e-mail from her State e-mail address to her personal e-mail address.

Major Braun contacted the grievant by phone on April 5, 2024 to inquire as to her actions. He called her on her State cell phone, but due to the grievant's activities in performing her duties as part of the SET team she was unable to take the call at that time. It was clear that Major Braun was not in the grievant's direct chain of command, although he is a superior officer with the MHP.

The facts were a bit muddy at this point, but it was clear that the SET team was engaged in stepped up DUI and traffic enforcement due to a Major college in the State holding its annual homecoming game. That necessitated increased enforcement and the grievant was part of that effort. The grievant was also engaged in training newer Troopers on DUI enforcement and attendant issues with arrests.

The record showed that Major Braun left a voicemail on the grievant's cell phone, but she testified credibly that the message did not sound urgent and provided few, if any, details as to why he called so she did not return the call immediately. Major Braun called the grievant again the following day on April 6th and reached her by her State cell phone.

As noted, the facts were somewhat disputed about the length of that phone call. The grievant thought it was perhaps less than a minute long, but the phone logs showed that it was approximately 3 minutes long. There was also evidence that the grievant was engaged in other activities at the time of the call, despite some inconsistencies in that based on the log itself. See MHP Exhibit 10. In any event the call was not long and it was clear that the grievant was somewhat distracted by what she was doing in her capacity as a SET team officer that night.

Major Braun testified credibly that he asked the grievant if she had sent the summary document "anywhere." It was not completely clear exactly what he asked her, but the overall record showed that he wanted to know if she had sent the document – although by that time, he would have known that she did due to the forensic review referenced above.

The grievant acknowledged that she had sent the document to herself, but did not disclose to Major Braun that she had also sent it to the Union. It was clear though by then that the document had already been made public – which was the reason for Major Braun's call in the first place. There was also no evidence that Major Braun followed up with any additional questions regarding if the grievant had sent it "anywhere else."

As discussed below, the State alleged that the grievant had falsified her answer by omission and failed to disclose that she had also sent the document to the Union. There was also the comment made by the HR Director during the investigation that the Agency was "not saying that you lied to us about sharing the document. We believe you've been truthful about that. What we're saying is that you shared the document against a direct order not to do so."

The grievant was placed on Administrative leave and brought in for a due process meeting a few days later. The Agency terminated her on April 19, 2024. The Union filed a timely grievance challenging the termination on May 2, 2024 which was processed through the appropriate steps of the grievance procedure to arbitration. It is against that general factual backdrop that the analysis of the matter proceeds.

Initially, before launching into a detailed analysis of the multiple charges and possible defenses raised by both parties it was necessary to determine what the grievant was fired for and what she was not fired for.

The main charge against the grievant was insubordination and disobeying the no dissemination order. That will be discussed in greater detail below. There was also a reference to failing to take Major Braun's initial phone call on April 5th and the for omitting that the great had also sent the summary document to the Union.

As referenced above, there was insufficient evidence to establish any violation of an applicable rule by not taking the April 5th call. Major Braun was not in the grievant's direct chain of command and the voicemail he left did not sound urgent nor did it provide specifics as to why he called.

Second, irrespective of how long the conversation actually was or what the grievant was doing when the call came in, it was clear that she was engaged in other activities on what was shown to be a very busy night. More to the point, the question asked of her was whether she had sent the document anywhere – to which she responded that she had – to herself. There was apparently no follow up to that, but the grievant certainly would have been obliged to inform Major Braun that she had sent it to the Union as well if he had asked that. There was insufficient evidence that any follow up was asked.

Finally, as noted above, the Agency acknowledged that the grievant had been truthful about sharing the document. It was clear then that the main basis of the discharge had little to do with the phone calls or any inconsistencies in her activities as shown in the log book versus her version of events on April 5 or 6, but instead was based on disobeying the no dissemination order. That will entail an analysis of the notion of insubordination and the possible defenses to that charge.

WAS THE GRIEVANT GUILTY OF INSUBORDINATION

Virtually everyone involved in industrial society knows that what Harry Shulman said about the world of labor relations is true: "An industrial plant is not a debating society." *Ford Motor Co. and UAW*, 3 LA 779, 781 (1944).

Indeed, it is not a debating society, at least not generally, and when a supervisor issues an order there is a legitimate expectation that it will be obeyed. That is especially true in law enforcement which are paramilitary organizations by their very nature and where life and death outcomes can depend on whether orders are followed.

Black's Law Dictionary describes insubordination as "a willful disregard of express or implied directions of the employer and refusal to obey reasonable orders." In more common terms, insubordination is the willful disobedience of a legitimate order from a superior. There are elements to an insubordination charge.

First, there must be a direct order from a person authorized to issue orders. There was little question those elements were met here. Major Braun told the committee not to disseminate the summary and he is a superior officer to the grievant.

There must also be a refusal to follow an order. Here, the act of sending the summary document to her personal e-mail would not have been determined to be a violation of the order. The clear import of the order was not to disseminate the summary to anyone else. There was also the directive to review the document and the grievant testified credibly that in order to do that more effectively she wanted to send it to her personal e-mail.

Here, sending it to the Union was the crux of the matter, even though the record showed that the grievant did not send it to the media herself – someone from the Union did - although it was not immediately clear who that was.

Generally too, there should be a clear note to the employee of the consequences of the refusal or the disobedience of the order. While Major Braun did not say in so many words, "or you will be fired" after directing the committee members not to disseminate the summary, in a paramilitary setting that frankly should be implied that the failure to follow an order carries with it some dire disciplinary consequences – perhaps not termination in all cases, but serious in any event.

On this record those elements were met. If the employee's direct supervisor issues an order the employee knows that he/she must obey now and grieve later unless there is a relatively clear exception to that general rule. The question now is whether there was any exception to them that allowed the grievant's action. On this record, as discussed below, there were.

THE CLAIM OF A CONSTITUTIONAL REQUIREMENT THAT THE DOCUMENT BE PUBLIC

The Union cited the Montana constitution at Article II, section 9,[1] and asserted that the document was created using public money and therefore must be made public. Any order contrary to that would therefore be illegal and contrary to the "right to know" law. Citing *Bryan v. Yellowstone County Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶39, 312 Mont. 257, 60 P.3d 381 and *Great Fall Tribune v Day*, supra.

The Union outlined the exceptions to that general rule and asserted that there was no private information contained in the document and thus no "demand of privacy" that outweighed the public's right to know. Nor was there any "candid advice from those within the executive branch" related to the governor's constitutional responsibility to sign or veto bills passed by the legislature. Thus, the argument goes, there was no reason to keep the document from the public and the grievant was within her rights to send it out. The Union is thus not claiming that the order violated the CBA, the Union is claiming that the order was outright illegal and contrary to the Montana Constitution.

The State on the other hand asserted that orders must be obeyed even if they are unconstitutional. Citing, *Watson v. Dep't of Transp.*, No. 91-3558, 1992 U.S. App. LEXIS 30953, (Fed. Cir. Nov. 18, 1992) and *Baron v. Meloni*, 556 F. Supp. 796, 800 (W.D.N.Y. 1983).[2]

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[1] The reads as follows: No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

[2] That may not always be the case especially in law enforcement. Following the dictates of the constitution, state or federal is paramount in ensuring that law enforcement officers follow the law in order to enforce it. See, e.g. *Wright County, MN and LELS*, MN BMS case # 02-PA-58 (Jacobs 2002) where a sergeant who issued an unconstitutional order to a subordinate officer was terminated. In that case a junior officer protested the order at the scene but ultimately did follow the constitutional order and was later disciplined for it until it was revealed that he was following the order of a superior officer who had given the directive.

The State also asserted that the SIC document contains sensitive information that needed to be strategically disseminated in a more thoughtful and appropriate manner and that the grievant's actions in sending the entire document out without any explanation undermines public confidence.

The record showed that the document was paid for using public money and therefore should have been disseminated to the public. There appeared no information in it that warranted keeping all or part of it private or confidential or that fell within one of the exceptions under Montana law.

That however is not for an arbitrator nor a public employee acting on their own to determine. While it may appear to have been a public document to the untrained eye of the grievant – or an arbitrator, the decision as to when something is to be made public may not be as obvious or clear as it might at first appear. For one thing the committee had not yet reviewed the entire document for errors or inconsistencies that might impact the conclusion to be reached.

While it is speculative on this record, perhaps the only thing worse than not sending a public document in a timely fashion may well be sending it out too early, finding that it needs to be amended or supplemented in some fashion and then having to change or retract some of it. There was no evidence of any inaccuracies or inconsistencies in this particular document – at least not on this record, but the grievant sent it out without consulting with the other members of the committee to see if they had found anything wrong with it.

The concern is that employees might well take it upon themselves to send documents to the public without being able to determine if indeed there truly were privacy concerns or whether there was information containing "candid advice from those within the executive branch" related to the governor's constitutional responsibility to sign or veto bills passed by the legislature, or perhaps even worse, attorney client privileged information in a particular document.

On this record, the Union's constitutionally based argument alone was not the only basis to overturn the discharge. This decision was also based on the conclusion that the grievant was entitled to engage in concerted activity. The NLRB's general counsel had problems an employer policy that required employees to check with management before sending out any information and which cautioned employees that "when in doubt about whether the information you are considering sharing falls into one of the [prohibited] categories, DO NOT POST. Check with [Employer] Communications or [Employer] Legal to see if it's a good idea." The Board has long held that any rule that requires employees to secure permission from an employer as a precondition to engaging in Section 7 activities violates the Act. See, *Brunswick Corp.*, 282 NLRB 794, 794-795 (1987).

In this regard Ms. Gardner's testimony as follows:

Q. Ms. Gardner, whose determination is it to determine if a document is public?

A. That's a -- that's a decision that's made more on the legal side of DOJ and so it's something -- again, depending on the nature of the document, if it has to do with personnel I would weigh in on something like that and also go through the steps of talking -- if it has to do with an employee and personnel issues then I would be the one to go through the steps with that employee to ask them if they were going to assert any right to privacy over this document and weigh that versus the public's right to know. So if it has to do with personnel, but I wouldn't say that across DOJ, I would be the person that would determine for all documents.

Q. Understood. But for any document it would not be for an individual Trooper to make that decision; is that correct?

A. No, it would not be for any DOJ employee. It would be an upper-level management decision.

Thus, the document probably was public – a matter that the record showed clearly.[3] The no dissemination order even referenced that the document be made public at some point. Ultimately though, it was not necessary to dive into a complex analysis of what is private or public and how the Montana "right to know" law impacted this case. The Union's other theory was found to be sufficient to justify the grievant's action on this very unique record.

[3] In this regard, even though the decision is based on other grounds, the Union's actions may well have been in furtherance of public policy by releasing a document that appeared to be a public document to the public.

WAS THE ORDER NOT TO DISSEMINATE THE SIC DOCUMENT LAWFUL OR VIOLATE THE GRIEVANT'S ROLE AS THE UNION PRESIDENT?

One of the other longstanding exceptions to the obey now grieve later rule is where the employee is acting in their capacity as a Union representative. Where the employee is a Union official exercising rights on behalf of the bargaining unit and in pursuit of collective bargaining, conduct that otherwise may be the subject of discipline, remains protected activity, and can only be removed from that protection, by "egregious" misconduct.

Thus, in *Labor-Management Contracts at Work* (Harper 7 Bros., 1961) Morris Stone, editorial director of the American Arbitration Association stated:

> "When a steward or Union officer is disciplined for violating some rule of conduct, there may be a dispute as to whether there was just cause for the penalty. To that extent a steward's case may be no different from that of any other employee. However, when the Union asserts that the disciplinary action was motivated by an attempt to frustrate collective bargaining, or that the steward's violation occurred during the course of negotiations and was, therefore, beyond the reach of the employer's power to discipline, a different sort of problem is presented."

A more current textbook on labor-management relations, *Discipline and Discharge in Arbitration,* (Brand, Norman, ABA, BNA, 1998), makes the same point as follows:

> A Union steward or official serves in two capacities: first, as a bargaining-unit employee receiving pay or wages: and second, as a designated representative for the Union in what are commonly referred to as Union activities. When the Union representative is acting in an official capacity, negotiating grievances or engaging in collective negotiations, the Union representative and the company have been described as "equals." Thus, arbitrators have recognized, that while acting on behalf of the Union, "[a] Union representative must be able to do his job properly, without fear of retaliation of any kind for the performance of his proper role" and that "[m]ere zealousness can never justify punishment and a steward is certainly entitled to be wrong in issues that he presses on behalf of his constituents." Id at 326.

As determined above, the grievant was in the committee because of her role as the Union president, which was a fact that came through frequently and clearly throughout the process.

The Union's argument on this point based on the notion of concerted activity for mutual aid and protection had considerable merit on this record. As the Union noted "Employees need not immediately obey an order or rule if they reasonably believe it to be illegal, unethical, or immoral." *Common Law of the Workplace*, (BNA, 2005) St. Antoine, Section 6.8 at 188.

Only a few years after Arbitrator Shulman's "obey now grieve later" rule, in *Ford Motor Co.*, 3 LA 779, 781 (Shulman, 1944), he held that where the "duty of obedience falling generally within supervision's domain" occurs, the employee must follow the directive. However, in matters that fall "primarily within the Union's domain," the employee is not insubordinate. *Ford Motor Co.*, 10 LA 213, 214 (Shulman, 1948).

Here that pronouncement had particular significance. The grievant was at all points relevant to this inquiry, acting at least in large measure in her capacity as the Union president. Also as determined above both the survey data as well as the feedback she was getting from members was clearly within her purview as the President of the MFPE. As such, the order had less impact on her in that capacity than it otherwise would have.

It should be stated clearly though that generally, any order from a superior officer must be obeyed absent a clear exception, such as a health or safety concern, and that is especially true in a law enforcement setting. Here through the order did not impact her role as much as a Trooper as it did on her role as the Union president. The no dissemination directive did not impact her role as a Trooper per se, but was shown to be designed to allow time for the committee to digest the full import of the survey results and to perhaps arrive at a strategic way to make it public. That however was subject to the grievant's clear right to send the document to the Union in furtherance of her right to engage in concerted activity.

The Union made the point that there is no direct caselaw in Montana that clearly states that the federal law precedent has a similar impact on employee and Union rights in the State. However the language of the two relevant states are nearly identical and there is authority for the proposition that employees and their Union have the same or similar rights under Montana law as they would under federal law. Here the inescapable conclusion is that the grievant was acting in her capacity as the Union President when she sent the document to the Union.

It was also clear that she did not send the document to the press nor did she direct anyone at the Union to do so. While the survey may have been somewhat embarrassing to the MHP, that alone did not render her actions terminable.

The State asserted that nothing about the orders limiting dissemination of the document or the actions complained of interfered with, restrained, or coerced any employee in the exercise of any right of self-organization, collective bargaining, or other mutual aid or protection related thereto. Citing MCA 39-31-201. The State further asserted that the information in the SIC report that was disseminated did not constitute the type of information typically afforded heightened protection under labor law for Union-related communications.

The record established the contrary – this was exactly the kind of information used for mutual aid and protection within the meaning of the law and as the record showed, was the subject of considerable concern by MHP officers who expressed their concerns to the grievant in her role as the Union president.[4]

Further, the notion of working conditions is not limited merely to what the State called tangible items such as hours of work, fringe benefit, such as health insurance, retirement plans, PTO or vacation time, safety regulations, and established workplace rules and procedures. It can certainly encompass morale of the workforce, perceptions of management and suggestions and perception of the future of the organization by employees. The evidence showed clearly that the grievant was getting multiple communications from MHP officers about the survey, its security and anonymity as well as possible retaliation. This is precisely the sort of communications that falls squarely within the Union's purview whether there are active negotiations ongoing or not.

[4] Also, as noted, rules that require that employees check in with management before discussing their terms and condition of employment are suspect and could chill concerted activity. In this sense the Union's claims had merit here as well.

Moreover, while the information was certainly sensitive to the management of the MHP it was also the very sort of information contemplated by Article 2 of the Montana Constitution that must be made public and not be hidden or disseminated in an antiseptic fashion.

The Union's point was well take that this was a document created using public money and therefore the clear pronouncement of the law is that the public had the right to see it. There was also evidence to establish that the information went directly to working conditions – and not "loosely" as the State asserted. This of course is a matter that directly relates to the Union's right to know this information and to guide their actions as the exclusive bargaining representative for the MHP officers within the bargaining unit.

The State cited *Tigert v Higgins*, 290 F. App'x 93, 101 (10th Cir. 2008) and *Crider v Spectrulite Consortium,* 130 F.3d 1238, 1242 (7th Cir. 1997) and asserted that an employee is not free to disregard an order even if they perceive it to be unlawful. Those cases are inapposite to the instant matter.

The *Tigert* case invoked an inmate at a correctional facility who was assigned to a work crew and refused the order to work. He was placed in handcuffs and charged with disobedience. The Court rejected the inmate's claim of a denial of a constitutional right. Needless to say, there is a significant difference between an inmate's claim of a constitutional violation while incarcerated and ordered to comply with a correctional officer's orders and a Union official who disseminates a public document to the public who was operating in her official capacity of a Union official.

Likewise, the *Crider* case involved a very different fact scenario. The plaintiff was ordered to submit to a drug test by his employer after an absence from work. He refused citing a CBA provision that allowed a drug test for "just cause." He claimed the test was essentially random and did not comply with the just cause language in the CBA.

The Court upheld the discharge for insubordination and cited that he was given a reasonable instruction and refused to follow it. There was also CBA language discussing the drug test that did not rise to the level of a constitutional issue as is present here.

In that regard, the case is somewhat analogous to an officer being told to violated the constitutional rights of a member of the public, refusing that odder and getting fired for insubordination. Each case must be assessed on its own facts. Here, though there was merit bot the Union's claims that the grievant was on the committee as a Union President and that the order to not disseminate the SIC report, however sensitive the material within it might be, was contrary to law.

Under those circumstances the *Pan Am* case and the author's notes in Professor St. Antoine's work, *Common Law of the Workplace* cited above were more applicable and more persuasive on this unique record.[5]

In *Pan Am*, a pilot was fired for refusing to fly because he believed it would force him to violate a FAA regulation. The employer argued that it had a management right to order pilots to fly and that the refusal was outright insubordination warranting termination. The employer countered that a pilot is only justified in refusing an order from a superior "when the pilot believes a flight would be unsafe," and that in this instance there was no claim that flying would be unsafe or hazardous. An arbitration board reinstated the pilot who was fired for insubordination and cited the "illegality" exception to the "obey now grieve later " rule. The court upheld that determination noting that the [U.S.] Supreme Court has repeatedly made clear that arbitrators are not bound strictly by the specific terms of a collective bargaining agreement.

The *Pan Am* Court cited the U.S. Supreme Court as follows:

> "A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. [I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. The collective bargaining agreement covers the whole employment relationship. It calls into being a new common law-the common law of a particular industry or of a particular plant."
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> Citing *Consol. Rail Corp. v Ry. Labor Executives' Assoc.*, 491 U.S. 299, 311-312 (1989) (quoting *Transp. Communication Employees Union v Union Pacific R. R. Co.*, 385 U.S. 157, 160-161 (1966)).

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[5] Professor St. Antoine notes that "an employee need not obey an order or rule if he or she … reasonably believes it to be illegal, unethical, or immoral." Here, the facts and evidence showed that there was a good faith belief that the no dissemination order was in violation of the Montana Constitution, which requires that public documents be made public. There was also no dissemination of personal or confidential data on individuals

Thus, there is clear precedent for an exception to the "obey now, grieve later" rule where there is a showing that the order is unlawful or contrary to law, whether it involves a safety issue or not.

Here the Union's arguments had merit in that regard.

The cases cited by the parties were reviewed in some detail. The Union cited numerous decisions from Montana courts, the NLRB and the federal courts that supported its position that the grievant in this unique setting had the right to send the information to the Union as concerted activity.

The decision in the *Hyundai America Shipping* was significant as well. The employer's rule prohibited communications that could be construed as portraying a "negative attitude." Employees who exhibited a negative attitude were fired. The Board upheld an administrative law judge's ruling reinstating them. The Judge had stated as follows:

> the [company] has failed to define what constitutes a "negative attitude," and in failing to do so, the rule would reasonably be construed to prohibit employees from discussing the terms and conditions of their employment, particularly if they had any complaints about those terms and conditions of employment. Employees should not have to guess as to whether something they wish to discuss regarding their employment may be construed by the Respondent to constitute a "negative attitude." When employees are forced to act at their peril in making such a determination, they likely will be reluctant to engage in otherwise lawful concerted activity. Therefore, the language in question is likely to chill employee Section 7 activity.

Here, there was some sense that sending the information out sent a negative message to the public. That may well have been the case, but there was no direct evidence of how the publication of the summary was perceived by the public. The point is that simply sending something out that may be perceived as negative by the press does not override the Union's right to engage in concerted activity.

Both parties cited numerous cases in support of their relative positions. In the interest of brevity, not all of those will be analyzed in detail here, but a few cases merited some discussion. In *Connick v Myers*, 461 U.S. 138, 152 (1983) the court held that that if the refusal of an order is reasonably believed to cause dissension among the workforce an employer is allowed to take actions before a problem arises. In that case however the essential question was whether the employee was speaking out as a private citizen on matters of public concern, pursuant to the holding in *Pickering v Board of Education,* 391 U. S. 563, (1968).

In *Connick* the employee, who was dissatisfied with a decision to transfer her, disseminated a questionnaire soliciting the views of her co-workers on such matters as the transfer policy, office morale and the level of confidence in supervisors. There was evidence that the questionnaire was creating a "mini-insurrection" in the office.

The employee was fired ostensibly for refusing the transfer, but sued the employer claiming that her 1st amendment rights had been violated and that she was acting as a private citizen on a matter of public concern.

The essential difference between *Connick* and the instant case is that for one thing there was insufficient evidence of anything like a mini-insurrection within the MHP caused by the grievant's dissemination of the report. Further, the evidence showed that the State sent the survey out, not the grievant, and the results were somewhat negative on several issues, including the morale of some MHP officers. Thus, the "disruption," if any, existed before the grievant sent the report to the public.

Second, the grievant was acting in her role as the Union President and in reaction to the many contacts she was getting from members of the bargaining unit. These facts are thus distinguishable from those presented in *Connick*.

THE USE OF EXTERNAL LAW TO DETERMINE JUST CAUSE

The State argued that questions of whether the order issued by MHP management not to disseminate the climate survey was "lawful" is a matter that necessitates an examination of external law, specifically the Montana Constitution and relevant statutes governing the authority of public employers to issue such directives. Likewise the question of whether the document was a public document or not also involves the interpretation of Montana law. As such, these questions are outside of the jurisdiction of an arbitrator acting pursuant to a Labor agreement.

The State further asserted that the CBA has no provision in it allowing an arbitrator in interpret the law or the Montana constitution and to allow that would be to exceed the powers granted to an arbitrator under section 8 of the labor agreement.

That argument was not persuasive.

Elkouri discusses the notion of how external law may impact the outcome of the contractual dispute at some length as follows:

> "[p]rivate sector parties are free to control the degree to which the arbitrator is to consider external, including statute and regulations, in deciding the case. To be sure, the field of labor relations as it has developed through collective bargaining and arbitration, has never been purely private. Various state and federal legislation has always existed, providing various degrees of detailed regulations of working conditions in various industries. …
>
> Long ago, the US Supreme Court emphasized that arbitration awards are generally not subject to being set aside for errors of law. See, *San Francisco Unified School District*, 114 LA 140 (Riker 2000). See *How Arbitration Works*, 8th Ed. footnote 1 on page 10-2 for other citations). … The continued vitality of the general rule that awards are not impeachable for errors of law has been recognized by federal and state courts in both statutory and common law arbitration. (Some citations omitted. But see *Postal Workers v U.S. Postal Service* 789 F.2d 1 (DC Circuit 1986) where the Court held that awards may not generally be overturned for a mistake or an error of law).
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> "An interpretation giving a contractual term a law lawful is preferable to one that makes an agreement unlawful. In the absence of clear direction from the contract or the parties, arbitrators are otherwise divided on whether they should consider external law in applying a collective bargaining agreement. Citing *The Common Law of the Workplace*, Snow, *Contract Interpretation,* St. Antoine Ed. BNA books 2005, section 2:15.
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> In accord with that statement, arbitrators generally accept the following three propositions. First, an arbitrator may consider all relevant factors including relevant law, where the contractual provision at issue has been formulated loosely. Second, where a contractual provision is susceptible of two interpretations, the one compatible with, and the other repugnant to, an applicable statute, the statute is a relevant consideration in interpreting the language, and arbitrators should seek to avoid an interpretation that would make the agreement invalid. Finally, where the submission makes it clear that the parties want an advisory opinion as to the law, such an opinion would be within the arbitrator's role. Elkouri 8th Ed. at page 10-13. Citing Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, 20th Annual Proceedings of the NAA 1967.
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> "One commentator urged that where there is clear conflict between the agreement and law, the arbitrators should 'respect the agreement and ignore the law.' [P]arties call on an arbitrator to interpret their agreement, rather than to destroy it, and there is no reason to credit arbitrators with special expertise to discern the law, as distinguished from the meaning of an agreement. Thus, arbitrators should 'respect the agreement that is the source of their authority and should leave to the courts or other official tribunals the determination of whether the agreement contravene a higher law.'" Elkouri 8th Ed at page 10-14. Citing *Meltzer*, supra at 16-17. See also, *Hunter Engineering*, 82 LA 482 (Alleyne 1984) and *Olin Corp.* 103 LA 481 (Helburn 1994) where the arbitrator ruled that a company was not required to accommodate a disabled employee in a way that violated contractual seniority rights. Id. At page 10-14.

> "In sharp contrast to this position, one arbitrator insisted that 'arbitrators, as well as judges, are subject to and are bound by law, whether it is the Fourteenth Amendment to the Constitution of the United States or a city ordinance. All contracts are subject to statute and common law; and each contract includes all applicable law. ... There is a responsibility of arbitrators, corollary to that of the General Counsel and the NLRB to decide, where relevant, a statutory issue. That the NLRB, consistent with its announced policy, may avoid a decision on the merits, and the statutory policy of determining issue through arbitration may be fulfilled." Elkouri 8th Ed. at pages 10-16 and 10-17, citing Howlett, NAA 20th Annual proceedings (1967).

After a review of the lengthy discussing of the divergent views of arbitrators on the question of whether external law can be used it appears that the best and most reasonable approach allows external law to be used as an aid in the determination of the appropriate result under the labor agreement. The arbitrator is there not to interpret the law necessarily, but rather to use the law as appropriate to interpret the labor agreement.

Here the statutory citations, Court and Board decision as well as the provision of the Montana constitution were reviewed as an aid to determining whether just cause existed to discharge the grievant for her actions.[6] As noted several times, she acted in her role as the Union President and was engaged in concerted activity.

Here there is no limitation on the use of external law to aid in the interpretation of the CBA or in the determination of just cause. As the commentators such as Elkouri, Professor St. Antoine and many others have long noted, arbitrators can and sometimes must resort to a review of external law to determine the contractual question before them. It is abundantly clear that arbitrators can and do use external law to aid in the interpretation of a CBA, including whether just cause has been shown.

It is correct that an arbitrator should strive to never render an award that is contrary to state or federal law. That is certainly true, but there was no evidence that the grievant acted illegally or that the agency did anything illegal either.

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[6] It should be noted too that the NLRB frequently defers to arbitrators in cases where there is both a charge of an unfair labor practice as well as a claimed CBA violation in the so-called Collyer doctrine, which allows arbitrators to weigh in on both issues. See, *Collyer Wire* 192 NLRB 837 (1971). While there was no claim of unfair labor practice here that precedent clearly allows the use of external law, i.e. The NLRA and appropriate Board precedent to aid in the interpretation of the labor agreement, including where there exists just cause for discipline.

Neither does this award compel the State to perform an illegal act. Nor did this case require a definitive ruling on Montana law or its constitution. The question was and remains whether there was just cause for the termination. As noted herein, there was not based on the clear fact that the grievant acted in her role as the Union President and sent what the State acknowledged was a public document to the Union.

However, in this case and any case involving the notion of just cause, the arbitrator is called upon to render an award based on the CBA. External law can be used to determine if just cause exists and that may well entail a determination of whether an order was lawful or constitutional or not. That does not exceed an arbitrator's power to determine whether just cause exists. The use of or interpretation of external law is used to determine if there is just cause for discipline.

In short, this case did not transform the proceeding into a court of law nor did it render the arbitrator a District Court judge. The issue is and remained whether there was just cause for the grievant's discharge as the term just case has been applied by arbitrators for many decades.

The grievant acted in her role as the Union President and engaged in protected concerted activity. There was some sense too that the document she sent to the Union was a public document – since the State acknowledged it was and indicated in March 2024 that it would eventually be made public. Finally, there was nothing in this award that should be construed as amending or modifying the labor agreement.[7]

The remaining question is whether there should be any penalty imposed for the grievant's; actions. As noted, she acted somewhat prematurely in sending the document out, but there was nothing that showed that doing that compromised any individual's privacy nor was there evidence that it compromised the "candid advice from those within the executive branch."

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[7] The Union presented evidence and argument over whether the termination was motivated by anti-Union animus. That question need not be addressed on this record given the findings and determinations here. The "back alley" comment made during the investigation was a bit troubling, but did not rise to the level of a showing of anti-Union animus. This, no determination is made on that.

The State made much of the grievant's comments that she would do this again and claimed that she showed no remorse. Remorse is not the issue here. She acted within her scope as the Union president. It was clear though from her record that this directive was very different from one that she might receive in her role as a Trooper. There was no evidence that the grievant would disobey an order regarding her operational functions in the field.

Since there was clear evidence of an exception to the obey now grieve later rule for the reasons set forth above, there was no basis to impose any discipline at all. Accordingly the grievant is to be reinstated to her former position as a MHP Trooper within 10 business days of this award with full back pay and accrued contractual benefits. Back pay is to be reduced by any wages, salaries or governmental wage replacement benefits received in the interim. The Union and grievant are directed to provide any documentation necessary to calculate the back pay.

AWARD

The grievance is SUSTAINED. The grievant is to be reinstated to her former position with back pay and contractual benefits. Back pay is to be reduced by any wages, salaries or governmental wage replacement benefits received in the interim. The Union and grievant are directed to provide any documentation necessary to calculate the back pay. The arbitrator will retain jurisdiction to resolve any matters pertaining to this award.

Dated: April 4, 2025

Jeffrey W. Jacobs, arbitrator