

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Laurence N. Fisher,	:	
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Petitioner	:	
	:	
v.	:	No. 744 C.D. 2007
	:	
Pennsylvania State Police,	:	Submitted: September 7, 2007
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE COHN JUBELIRER**

**FILED: January 15, 2008**

Laurence N. Fisher petitions, pro se, for review of an Act 111<sup>1</sup> arbitration award that was issued in favor of Appellee, Pennsylvania State Police (PSP). In the award, the grievance arbitrator affirmed the PSP’s termination of Fisher’s employment for deceiving PSP investigators. Fisher argues, in his Petition for Review, that the arbitrator’s decision is based on insufficient evidence and that the arbitrator capriciously disregarded evidence. Additionally, he argues that the

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<sup>1</sup> Act of June 24, 1968, P.L. 237, as amended, 43 P.S. §§ 217.1–10.

discipline was excessive and selective. Given the narrow certiorari standard of review applicable to petitions for review of Act 111 arbitration decisions, we affirm.

PSP employed Fisher as a state trooper since 1990. Fisher was married to a municipal police officer from whom he separated in March 2001 and eventually divorced in May 2004. During the separation, but prior to the divorce, Fisher became involved with another woman, who ended the relationship in February 2003.

In the months that followed the ending of this relationship, the former girlfriend was the subject of various types of harassing conduct. The former girlfriend suspected this conduct originated from Fisher or Fisher's wife, which prompted her to file a Complaint with PSP on December 16, 2003. (Use of Force or Complaint Reception and Processing Worksheet (Complaint), December 16, 2003.) In the Complaint, the former girlfriend averred that, after her break-up with Fisher in February, she had: (1) received numerous harassing telephone calls from whom she thought was a female caller<sup>2</sup>; (2) received several envelopes, through the United States Postal Service, which contained pornographic photographs along with profane messages that had been typed on separate sheets of paper included in the envelopes<sup>3</sup>; and (3) received an intimidating message consisting of the words "F... You," which were written in the recently fallen snow that was on her vehicle and in the snow surrounding the vehicle. (Complaint at 1-2.) This latter incident, which happened

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<sup>2</sup> There had also been some harassing telephone calls to the former girlfriend prior to her terminating the relationship with Fisher, but the former girlfriend suspected that these calls had been made by a woman.

<sup>3</sup> Some of these mailings were also sent to her then current boyfriend.

while her car was parked outside her residence, prompted her to file the Complaint. The former girlfriend noted that there were large sized footprints surrounding her vehicle, which suggested to her that a man had made this writing in the snow. She expressed concern for her safety.

Immediately thereafter, the PSP Bureau of Integrity and Professional Standards (IPS) began an investigation into whether Fisher was involved with any of these incidents. At the conclusion of its investigation, IPS opined that Fisher was responsible for these events.<sup>4</sup>

In its General Investigation Report (Report) chronicling its findings, IPS stated that DNA testing of saliva drawn from the envelopes used to mail the pornographic images showed a positive match with DNA results from a blood sample that had been drawn from Fisher pursuant to a search warrant (Report at 2, June 30, 2006.) The Report indicated that, on April 24, 2003, Fisher accessed the Commonwealth Law Enforcement Assistance Network (CLEAN) computer system to obtain registration information for the vehicle belonging to the man with whom Fisher's former girlfriend was then involved. (Report at 6-7.)<sup>5</sup>

During its investigation, IPS interviewed Fisher in March 2004. In the interview, IPS confronted Fisher with the DNA evidence as well as the evidence of

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<sup>4</sup> A concurrent criminal investigation in the matter led to PSP arresting Fisher and charging him with criminal violations arising from this conduct.

<sup>5</sup> The mailings to the boyfriend began shortly after Fisher accessed the boyfriend's information on the CLEAN system.

his use of the CLEAN system. Fisher stated that, while living with his wife, there were times when he set aside envelopes that he had licked but did not end up using because the adhesive would not adhere. Fisher suggested that perhaps his wife had found these envelopes and had used them for the mailings.

Fisher also stated that he had accessed the CLEAN system after finding a suspicious, unoccupied vehicle near his house, which is located in a secluded area. In explaining why he thought the vehicle was suspicious, Fisher alluded to two potential sources for concern. First, Fisher stated that he had been receiving threats over the telephone from his wife and that he was concerned that his wife might be plotting some wrong-doing involving him or his house. Second, Fisher stated that he knew his former girlfriend was being harassed by someone and that the car may have belonged to the man with whom his former girlfriend was then currently involved. Fisher was thus intimating that this man may have been there to confront him about the harassment that Fisher's former girlfriend was experiencing.

Fisher further stated that he had tried to use the police radio to notify the closest PSP station, but was unable to reach it. He stated that, instead, he wrote the license plate information down and submitted it to the CLEAN system at the police station toward the end of his next shift.

IPS also conducted an Administrative Interview of Fisher in June 2006. In this interview, Fisher reiterated the same statements he made in the March 2004 interview.

On August 10, 2006, PSP issued a Disciplinary Action Report (DAR) charging Fisher with violations of several Field Regulations (FR), in particular: (1) FR 1-1.02 Unbecoming Conduct; (2) FR 1-1.03 Conformance to Laws; (3) FR 1-1.35 Discrimination or Harassment; (4) FR 1.38 Sexual Impropriety; (5) FR 1-2.30 Providing False Information. (Grievance Form, October 19, 2006.)

On October 18, 2006, Fisher was dismissed from employment with PSP based upon all the charges levied in the DAR. Fisher filed a timely Grievance. In his Grievance, Fisher sought to: (1) have the dismissal rescinded; (2) have lost wages restored; (3) obtain reimbursement for legal fees and costs; (4) be reassigned to a PSP station of his choice; and (5) be promoted to the rank of sergeant because he had been prohibited from sitting for the appropriate examination. The Grievance was assigned to an arbitrator, who conducted several hearings on the matter.

Before the arbitrator, Fisher was represented by counsel for the Pennsylvania State Troopers Association (PSTA). The arbitrator addressed two stipulated issues. First, the arbitrator addressed whether Fisher had committed a serious act of deception during the IPS investigation, which would be a violation of Article 26, Section 12 and Appendix A (Appendix A), Section 5 of the 2000-2004 Provisions from Boards of Arbitration Awards and Collective Bargaining Agreements Between Commonwealth of Pennsylvania and PSTA (CBA), added by Pennsylvania State Troopers Association v. Commonwealth, Act 111 Interest Arbitration Proceeding No. 14-L-360-01348-01-ALVA.<sup>6</sup> Second, the arbitrator addressed whether the PSP had just cause to dismiss Fisher.

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<sup>6</sup> This provision reads, in pertinent part, as follows:

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The arbitrator denied the Grievance, concluding that Fisher’s “explanations to the [IPS] investigator claiming use of the system for legitimate law enforcement

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Members of the [PSP] must be morally and ethically above reproach at all times regardless of duty status. All members shall respect the sanctity of the law and shall be committed to holding themselves to the highest standard of accountability. No member shall depart from standards of professional conduct or disobey the law.

Members should be subject to disciplinary action only for “just cause.” The following standards shall govern the elements of “just cause” for the misconduct described below and these standards shall constitute a “clean slate” relating to the twelve terminable offenses described below in that they shall supersede and replace all prior standards, agreements, past practices, and arbitration awards on the same subjects.

Certain conduct immediately and absolutely threatens the integrity of the Department’s public duty and responsibility. In the following circumstances, the proper level of discipline is termination of employment, notwithstanding any mitigating circumstances. Such conduct includes, but is not limited to, the following:

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[5] The commission of a serious act of deception during a criminal, civil or administrative investigation or proceeding, when under a specific, official obligation to be truthful, involving intentional: (1) lying; (2) fabrication; (3) misleading acts or words; (4) civil or criminal fraud; or (5) perjury.

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The above provisions are effective for discipline arising out of any conduct occurring, in full or in part, on or after January 1, 2005. These provisions supersede any prior disciplinary penalties imposed for the twelve (12) offenses specifically set forth herein, by either the Department, Commonwealth, or any arbitrator, and no such prior penalties may be used as precedent in cases involving the above twelve (12) offenses.

(Appendix A.)

purposes were deliberately deceptive fabrications.” (Arbitration Award (AA) at 3.)

The arbitrator noted that:

Under the particular circumstances of this case, the Grievant’s personal reasons for his unauthorized use of the CLEAN system without legitimate law enforcement purpose, as well as the use to which he may have put the identity and address information he improperly secured about this former lover’s new boyfriend, are beyond the scope of analysis necessary for determining whether his conduct violated Appendix A[5]. The Commonwealth has produced credible and convincing evidence that the Grievant did provide false information in violation of FR 1-2.30 and did commit “a serious act of deception” in the [IPS] interview in violation of Appendix A [5]. The Agreement provides that the proper level of discipline for this conduct is termination.

(AA at 3.) Fisher, pro se, now petitions for this Court to review the arbitrator’s award.

When reviewing any arbitration award under Act 111, narrow certiorari applies. Pennsylvania State Police v. Pennsylvania State Troopers’ Association (Betancourt), 540 Pa. 66, 78 n.16, 656 A.2d 83, 89 n.16 (1995). Narrow certiorari allows us to review only questions concerning: “(1) the jurisdiction of the arbitrators; (2) the regularity of the proceedings; (3) an excess of the arbitrator's powers; or (4) deprivation of constitutional rights.” Pennsylvania State Police v. Pennsylvania State Troopers Association, 559 Pa. 586, 591, 741 A.2d 1248, 1251 (1999). “For a grievance arbitrator to exceed his or her authority, the arbitrator would have to either mandate an illegal act or grant an award that addresses issues beyond the scope of the collective bargaining agreement or that extends beyond the terms and conditions of the employment.” Township of Ridley v. Fraternal Order of Police Lodge No. 27, 718 A.2d 872, 874 (Pa. Cmwlth. 1998).

In his Petition for Review, Fisher avers the following errors:

In April 2003, my access to the CLEAN . . . System to check a suspicious vehicle was not in violation of authorization to use the system as a Police Officer. Even if it was and did amount to a “serious act of deception”, [sic] the conduct and penalty is governed by the “Old” contract which does not call for a termination of employment, not the “New” contract which mandated dismissal.

(Petition for Review.)

In his brief before this Court, Fisher identifies six arguments. First, Fisher argues that his constitutional rights under the 5<sup>th</sup> Amendment to the United States Constitution were violated because the IPS investigation was biased and limited in scope, with a specific purpose of obtaining Fisher’s termination. Second, and related to the first argument, Fisher identifies each of the areas of deficiency of the IPS’s investigation.<sup>7</sup> Third, Fisher argues that the arbitrator erred in concluding that he had

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<sup>7</sup> Fisher avers the following eight deficiencies in the investigation. First, IPS did not examine the telephone records of his ex-wife, his former girlfriend, and the man with whom his former girlfriend was involved, to determine the person responsible for making harassing phone calls.

Second, IPS should have interviewed more than the three individuals that it interviewed, instead of only interviewing his ex-wife “but when evidence supported that she was the probable responsible party for the letter mailings and harassment, the investigation conveniently shifted to” his former girlfriend and her current boyfriend.

Third, IPS focused on only the obscene letters received, but it did not consider or conduct DNA or other types of tests on the envelopes or personal cards that his former girlfriend and her current boyfriend had received, and no investigation was conducted regarding his ex-wife’s personal typewriter or her employer’s typewriters.

Fourth, the IPS report indicated that a second party was responsible for some of the mailings, but IPS did not pursue who that second party may have been.

Fifth, at an unemployment compensation hearing, the PSP Lieutenant conducting the IPS investigation testified that he had reviewed Fisher’s work schedule to see if he was on duty on the dates that several of the letters were mailed but, on cross-examination, he acknowledged that he

*(Continued...)*



inappropriately accessed the CLEAN system.<sup>8</sup> Fourth, Fisher argues that the PSTA inadequately represented him and, in failing to do so, kept from the arbitrator many facts that were necessary for the arbitrator to resolve the case.<sup>9</sup> Fifth, Fisher argues that the arbitrator erred by utilizing the current CBA provisions, when the arbitrator should have, instead, used the CBA for 2000-2004. Sixth, Fisher contends that PSP failed to present sufficient evidence of his having deceived the IPS investigators.<sup>10</sup>

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had, in fact, not reviewed the schedules. Fisher argues that this is significant because the postmarks from these letters indicate that they were mailed from postal centers located 200 plus miles away from where he was working.

Sixth, IPS failed to interview United States Postal Service officials to determine post-marking procedures that would have established where and when these letters had been mailed.

Seventh, IPS should have used an independent laboratory for its tests. A member of the PSP lab had been forced to resign for possibly tainting over 600 lab cases. Additionally, all of the envelopes available that had been used to send correspondence to Fisher's former girlfriend, and the man with whom she was involved, should have been tested instead of testing only four of them at random. Furthermore, much of his clothing and personal items were left at his ex-wife's residence at the time these letters were sent, and his DNA could have been transferred from these items to the envelopes.

Lastly, the IPS investigators failed to have him waive his Miranda warnings during two separate interviews they conducted of him. (Fisher's Br. at 8-15.)

<sup>8</sup> This argument focuses on factual issues in the case and revolves around credibility determinations implicitly made by the arbitrator. For instance, Fisher is contending that the arbitrator erred in not accepting Fisher's statement that he saw his former girlfriend's boyfriend's vehicle parked near Fisher's property. Fisher also notes that someone from his ex-wife's police department had accessed the CLEAN system to obtain the same registration that Fisher had obtained, but that no investigation was made of this inquiry.

<sup>9</sup> As part of this argument, Fisher contends that the PSTA failed to call sufficient witnesses and coerced him into accepting an Accelerated Record Disposition of criminal charges that had been brought against him. Additionally, Fisher argues that the PSTA failed to present his exemplary service record to the arbitrator.

<sup>10</sup> Fisher contends that, "[A]ll actions by [Fisher] relevant to this incident were on the direct advice of his PSTA representative and defense attorneys." (Fisher Br. at 19.)

In response, PSP argues that Fisher has failed to preserve any issue within the Court's narrow certiorari scope of review.

In addressing these arguments, we first note that Fisher raises many issues in his brief that are far outside the scope of the issues that he defined in his Petition for Review. Pennsylvania Rule of Appellate Procedure 1513(d)(5) requires that a petitioner include in an appellate jurisdiction petition for review “a general statement of the objections to the order or other determination” and provides that “[t]he statement of objections will be deemed to include every subsidiary question fairly comprised therein.” Pa. R.A.P. 1513(d)(5). In discussing this rule, we have found that “[a]lthough the petitioner need only make a general statement of the objections to the order sought to be reviewed, which may be refined subsequently in petitioner's brief on the merits, objections which are raised for the first time in petitioner's brief, which are not subsidiary questions fairly comprised in the main issue, will not be considered.” Standard Fire Insurance Co. v. Insurance Department, 611 A.2d 356, 357 (Pa. Cmwlth. 1992). Applying these principles to the present case, we note that many of the arguments raised by Fisher cannot be characterized as “mere refinements” to, or “subsidiary questions” of, the issues raised in his Petition for Review.

The Petition for Review sets forth the following two issues: (1) that the arbitrator erred in concluding Fisher's accessing the CLEAN system was a violation of policy; and (2) that the arbitrator applied the wrong contract provisions. The first issue is briefed on pages 15 through 17 of Fisher's brief in argument heading “3).” The second issue is briefed on pages 18 through 19 of his brief in argument heading “6).” The remaining four issues argued in the brief are not subsidiary to either of

these issues. Accordingly, they are waived. Id. Even if the remaining four issues had not been waived, none of them fall within the confines of our narrow certiorari review and, thus, we are not in a position to overturn the arbitrator as to any of these issues.<sup>11</sup>

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<sup>11</sup> Our narrow certiorari scope of review allows the Court to review issues regarding the deprivation of constitutional rights. Fisher does raise an argument that would, at first review, seem to fall within this aspect of our scope of review. Specifically, he argues that his constitutional rights under the 5<sup>th</sup> Amendment to the United States Constitution were violated because the IPS investigation was biased and limited in scope, with a specific purpose of obtaining Fisher's termination. The focus of this argument is that, prior to its two interviews with Fisher, PSP failed to have Fisher waive his "Miranda" warnings. Fisher argues that this error was particularly glaring because he had been arrested by PSP in March 2006, which he claims was two months before the first interview, and, thus, PSP was in the midst of gathering incriminating evidence against him. In response, PSP argues that Fisher fails to argue any actual infringement and that Fisher is essentially taking factual arguments and mislabeling them as constitutional arguments. (PSP Br. at 7-8.) PSP is correct. These are factual matters that were addressed by the arbitrator.

The arbitrator, in the discussion section of his award, stated that:

On this record, the Grievant plainly exceeded his authority to access the CLEAN system in violation of his authorization. On their face, the Grievant's explanations to the Internal Affairs investigator claiming use of the system for legitimate law enforcement purposes were deliberately deceptive fabrications. At arbitration the Grievant similarly demonstrated the unreliability of his testimony by claiming under oath that he had never had a Miranda interview with the Internal Affairs investigator. He steadfastly maintained this position despite testimony directly to the contrary by the Internal Affairs investigator, despite production of a transcription of the interview, and ultimately, despite hearing a tape recording of the interview, the existence of which he was fully aware at and from the time of the interview. He contended that the transcription and the tape were not accurate and that the tape must have been altered.

(Appendix A at 3.) Review of the record supports the arbitrator's findings in that the first interview appears to have taken place over two years before PSP arrested Fisher, and not, as characterized by Fisher, two months after it. Additionally, the transcript from this June 2004 interview begins with the interviewing officer providing Fisher with Miranda warnings and Fisher acknowledging that he understood them but that he still wished to make a statement. The transcript for the June 2004 interview is not included in the record. Furthermore, the tape recordings referenced by the  
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Turning to the two issues that were raised in the Petition for Review, the first issue we must address is whether the arbitrator erred in concluding that Fisher's accessing of the CLEAN system was a violation of policy. Fisher essentially asks this Court to reevaluate the credibility determinations of the arbitrator. Such a reevaluation falls outside our scope of review. City of Pittsburgh v. Fraternal Order of Police Fort Pitt Lodge No. 1, 764 A.2d 101, 103 (Pa. Cmwlth. 2000). The arbitrator considered the testimony and evidence presented before him and implicitly discounted Fisher's version of events, ultimately concluding that he lacked a legitimate law enforcement purpose for accessing the CLEAN system. In representing otherwise to the investigators, Fisher was being deceptive to them. We may not revisit the arbitrator's findings.

The second issue that was clearly preserved in the Petition for Review was whether the arbitrator applied the appropriate contract language. Fisher argues that the conduct at issue, mailing the pornographic material and accessing the CLEAN system, occurred prior to July 1, 2004 and is, therefore, subject to the prior collective bargaining agreement. Under the prior collective bargaining agreement, the conduct Fisher is charged with would not be punishable by termination. PSP does not address this issue in its brief.

In reviewing the record, we note that the only contract entered into evidence, as a joint exhibit, was the CBA covering the period from July 1, 2000 to June 30, 2004.

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arbitrator are also not included in the record. Nonetheless, it is clear that the arbitrator addressed this issue, and it is also clear that the portions of the record Fisher has provided support the arbitrator's decision. We are without authority to review the arbitrator's findings of fact. Thus, even if the issue was not waived, Fisher would not have prevailed on this issue.

Also entered into evidence was an interest arbitration award that had been initiated by the parties to determine the terms of the successor collective bargaining agreement to the 2000 CBA. One component of this award was a provision referred to as Appendix A.

In the present case, the arbitrator clearly relied on Appendix A. In this appeal, Fisher, in arguing that the wrong collective bargaining agreement is being applied is, in fact, arguing that Appendix A does not apply. The problem with this argument is that a review of the record shows that Fisher stipulated to the applicability of Appendix A. We note that the arbitrator, in his discussion, indicated that the issues before him were stipulated and that the first of these issues was whether Fisher had committed a serious act of deception during the IPS investigation, which would be a violation of Section 5 of Appendix A.<sup>12</sup> Thus, it seems that Fisher is raising an

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<sup>12</sup> On the record, the arbitrator, after discussing the issues with counsel, specifically stated the two issues before him, as identified in the arbitration award, and Fisher's counsel explicitly agreed to that statement:

ARBITRATOR: All right. Then let's leave it that the parties agree that the issue is whether the Commonwealth had just cause to dismiss Corporal Fisher and that the parties agree that my jurisdiction of remedy extends to any issues other than the issue of false information to Internal Affairs.

[FISHER'S COUNSEL]: Yes.

(Arbitration Tr. at 13, December 14, 2006.) Fisher's counsel later clarified this point, this time explicitly indicating that Appendix A would be applicable:

[FISHER'S COUNSEL]: If, Mr. Arbitrator, you find that there is just cause to conclude that Corporal Fisher violated one of the sections of Appendix A then clearly our position is that mitigating circumstances are not allowed because that's exactly what it says. Other than that, your ability, your jurisdiction to decide the remedy, I think is anything.

*(Continued...)*

argument that he failed to preserve before the arbitrator and that, in fact, is contrary to the position he took before the arbitrator. To preserve this issue for review by this Court, Fisher needed to have raised it before the arbitrator. City of Philadelphia v. Fraternal Order of Police Lodge No. 5, 677 A.2d 1319, 1323 (Pa. Cmwlth. 1996). However, he did not. Accordingly, although this issue was raised in the Petition for Review, it was not raised before the arbitrator and was, thus, waived.<sup>13</sup>

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[PSP COUNSEL]: Well, I disagree with that. The 12 deadly sins [the enumerated offenses in Appendix A] are automatically dismissible offenses. If we can establish that any of the enumerated 12 conducts occur in Appendix A then your're limited to the remedy of dismissal.

[FISHER'S COUNSEL]: That's what I'm saying.

ARBITRATOR: That's what I'm...

[PSP COUNSEL]: I thought you said that the remedy could be anything. Okay.

[FISHER'S COUNSEL]: The remedy can be – my position is that the remedy can be anything as long as there's not a finding that something under Appendix A was violated.

(Arbitration Tr. at 24-25, December 14, 2006.)

<sup>13</sup> Fisher focuses on the contract date, and that his purported violations occurred prior to July 1, 2004, to argue that his conduct should be subject only to the prior contract; however, Fisher does not discuss at all, in any manner, a provision of Appendix A which reads:

The above provisions are effective for discipline arising out of any conduct occurring, in full or in part, on or after January 1, 2005. These provisions supersede any prior disciplinary penalties imposed for the twelve (12) offenses specifically set forth herein, by either the Department, Commonwealth, or any arbitrator, and no such prior penalties may be used as precedent in cases involving the above (12) offenses.

(Appendix A.) This language could arguably be used to indicate that his misrepresentations in the interview from June 2004 could not be used as a foundation for an Appendix A offense because it occurred before January 1, 2005; however, as the argument is not specifically raised, we do not address it.

To the extent we could read Fisher's argument as somehow including this language from Appendix A, we note that this language discusses conduct occurring in full, *or in part*, after January 1, 2005. Fisher's conduct in continuing to stand by his prior statements during the  
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For these reasons, we affirm the arbitrator's award.

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**RENÉE COHN JUBELIRER, Judge**

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remainder of the investigation could also be seen as a part of the offense, since at least part of this investigation occurred after January 1, 2005. In particular, the IPS conducted an Administrative Interview in June 2006, at which Fisher maintained the positions he originally gave in the March 2004 interview. The statements in this June 2006 interview clearly occurred after the January 1, 2005 date established in Appendix A and thus would bring his conduct in this hearing within the provisions of Appendix A.

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Laurence N. Fisher,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 744 C.D. 2007
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Pennsylvania State Police,	:	
	:	
Respondent	:	

**ORDER**

**NOW**, January 15, 2008, the award of the arbitrator in the above-captioned matter is hereby **AFFIRMED**.

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**RENÉE COHN JUBELIRER, Judge**