IN ARBITRATION PROCEEDINGS
PURSUANT TO THE PARTIES'
COLLECTIVE BARGAINING AGREEMENT

In the Matter of a Controversy	
Between	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS, LOCAL 1242, AFL-CIO, **Union,**	**FMCS Case No. 14-52154**
and	
BUREAU OF PRISONS, DEPARTMENT OF JUSTICE, USP ATWATER, **Agency.**	**ARBITRATOR'S DECISION AND AWARD**
Re: Discipline of AMBER ARTIAGA and RAYNISE ROBINSON	

BEFORE: CLAUDE DAWSON AMES, ARBITRATOR

APPEARANCES:

For the Union:

Michael Meserve, Vice President
Sandy Parr, National Vice President,
For Women and Fair Practices
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For the Agency:

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I.

INTRODUCTION

This arbitration proceeding arises pursuant to the Master Agreement between the American Federation of Government Employees, Council of Prison Locals #33, Local 1242 ("Union") and the Bureau of Prisons, Department of Justice ("Employer" or "USP Atwater") under which Claude Dawson Ames, Esq., was selected to serve as Arbitrator and whose Findings, Decision and Award shall be final and binding upon the parties. This arbitration hearing is administered by the Federal Mediation and Conciliation Service and was conducted at Merced, California on June 26, June 27, July 22 and July 23, 2014. The parties stipulated that the grievances of Grievants Amber Artiaga and Raynise Robinson are procedurally consolidated and the Arbitrator shall issue one Finding, Decision and Award in this consolidated matter. Testimony of witnesses was under oath and a stenographic transcript was taken at the hearing. The parties were afforded full opportunity to present documentary and testimonial evidence, to examine and cross-examine witnesses and for rebuttal. The parties stipulated that the matter is properly before the Arbitrator. The Union's closing brief was received on September 22, 2014, and the Agency's closing argument was received on September 8, 2014. The parties' reply briefs were received timely on October 10, 2014 and the hearing was officially closed by the Arbitrator on October 12, 2014.

II.
PROCEDURAL BACKGROUND

Grievant Amber Artiaga was hired at USP Atwater as a Correctional Officer in February 2008 and Grievant Raynise Robinson[1] was similarly hired in April 2008. In September 2008 they began participating in the prison's Rideshare Program ("program").

The USP Atwater Rideshare Program Policy ("policy"), dated June 9, 2008, indicates, in relevant part:

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[1] Grievant Robinson is referred to by her married name, Pavey, in some documents. This Decision will refer to her as Robinson.

ELIGIBILITY:
– To be eligible for a trip reduction incentive award, employees must car pool to work at least 40%, 60% or 80% of the work week. This equates to two, three, or four days out of the five work day week and may be averaged on a monthly basis (i.e., 8, 12 or 16 days of a 20 day work month must have been Car Pool days in matter what the sequence).
TWO DAY A WEEK PROGRAM:
– Incentive awards of $40.00 per person, will be given to those participants who have two riders per vehicle, $60.00 per person, three riders per vehicle and $80.00 per person, four or more riders per vehicle. Each rider must be in the vehicle the same number of days to receive the same incentive award.
THREE DAY A WEEK PROGRAM:
– Incentive awards of $50.00 per person, will be given to those participants who have two riders per vehicle, $70.00 per person, three riders per vehicle and $90.00 per person, four or more riders per vehicle. Each rider must be in the vehicle the same number of days to receive the same incentive award.
FOUR DAY A WEEK PROGRAM:
– Incentive awards of $80.00 per person, will be given to those participants who have two riders per vehicle, $100.00 per person, three riders per vehicle and $120.00 per person, four or more riders per vehicle. Each rider must be in the vehicle the same number of days to receive the same incentive award.
PROCEDURES:
– It is the responsibility of the Car Pool Captain to maintain all documentation, and return it to the Rideshare Program Coordinator (RC) at the appropriate time.
– All employees who participate in the Rideshare Program must complete the monthly rideshare form and submit it to the RC... (EEx. 2, Vol. 1)

The Rideshare form ("form") in use September to November 2008 indicates:

The Car Pool Captain will place his or her initials in the table below for each day that the Car Pool is used... You must Car Pool at least two, three or four days per week. If you were on approved leave or on official travel status, please list the names, type and the dates in the comment section. (EEx. 4, Vol. 1)

On October 14, 2009 Atwater Business Administrator Chuck Gray advised USP Atwater Special Investigator Agent Jesus Estrada that:

I am the Rideshare Program Coordinator for USP Atwater... I noticed that one of the Rideshare forms rider list did not match up with my personal observations of the shifts that those staff were working... There is a pattern of over statement of days carpooled which resulted in over payment of rideshare incentives... It appears that the rideshare forms prepared by the Carpool Captain, Raynise Robinson, have been consistently falsified, both for the number of days the riders rode together and variation in the

signatures of the riders are suspect... (EEx. 1, Vol. 1)

Agent Estrada referred the case to the Office of the Inspector General ("OIG"). This resulted in the opening of an investigation against co-Grievants Artiaga and Robinson as well as Officers Justin Harris, Oscar Melero, Ryan Mitchell, and Jeremiah Wohld, who were all listed as participants in Officer Robinson's car pool.

III.
STATEMENT OF CASE

A. The Investigation Phase

Grievant Artiaga went through employee orientation, or institution familiarization ("IF"), when she was hired. On February 11, 2008 she attended Glynco Preparation and Travel Preparation sessions. Also attending those sessions were newly-hired officers Harris, Wohld, Melero and Omari Pringle. As part of the OIG investigation, in October 2011 Officer Pringle advised OIG Special Agent Michael Hardman that during IF training he received a training block on the rideshare program which covered that each car pool needed to pick a car pool captain, every participant needed to sign the car pool forms and to document every day the officers car pooled together; he did not recall if the block covered how much each officer would be compensated for their actual car pooling. Grievant Robinson went through IF between April 28, 2008 and May 9, 2008. On May 8, 2008 she attended Glynco and Travel Preparation sessions. Newly-hired officers Brian Pena, Joseph Durrant and Jason Ontiveroz, attended the IF training with Robinson and none participated in the rideshare program. These officers advised Agent Hardman that they did not recall receiving training on the program during IF training. On July 31, 2008 newly-hired Officer Mitchell attended the Glynco and Travel Preparation sessions. Co-Grievants Artiaga and Robinson testified that they did not receive any training on the program during their IF training.

Supervisory Contract Specialist, Phillip Espinoza, testified that when he worked in the USP Atwater business office, he provided an overview of the program during IF training. If none of the trainees expressed interest in participating in the program, he would not provide program details or copies of the program policy. If any trainee expressed interest, he discussed the number of days a person needed to car pool and that they were required to initial the rideshare form for the days

they car pooled. The information provided at IF was more recruitment than training. When Espinoza was interviewed by Hardman on January 11, 2012, he stated that he could not recall having any conversations about the program with any of the subjects of the investigation. On January 5, 2012, Hardman interviewed Accounting Tech Shelly Shandor. She alternated with Specialist Espinoza in providing an overview of the program during the IF training. On March 25, 2010 Administrator Gray provided Hardman with a memorandum stating that he sometimes discusses the program during IF training. He discusses the benefits and requirements of the program, including the requirement that the car pool captain document the days they ride together and that the forms must be signed by all participants. He advised the staff that their signature certified that they agree with the days recorded by the captain.

Officer Harris testified that he lived with Officer Artiaga from May or June 2008 until around May 2009. Officer Robinson lived in the same apartment complex, approximately seven miles from the prison. In March or April 2009 Officer Wohld later moved in with her. In October 2008 Artiaga, Harris and Robinson joined the rideshare program. It was not necessary to sign up and the co-Grievants testified they never received any training on the program and did not receive a copy of the program policy before November 2009. On August 4, 2011, Budget Analyst Tami Adam was interviewed by Agent Hardman and indicated in an affidavit that she did not recall if she gave a copy of the policy to the Robinson car pool participants. On January 11, 2012, Agent Hardman interviewed Specialist Espinoza who indicated that he could not recall ever having had any conversations about the program with any of the subjects of the investigation.

Officer Robinson testified that she was the car pool captain and she received permission from the participants to complete and sign the forms. She was never told that each participant must sign the forms. She worked a lot of overtime, perhaps two or three times per pay period. She worked overtime as a Correctional Officer as well as in other departments. Sometimes the lieutenant would call her in for overtime even if she had not signed up. Her overtime was not always reflected on the rosters and the lieutenant did not always know she was working overtime.

Officer Robinson testified that soon after she started car pooling she was told by Analyst Adam to just put her days off by her name. She received no other training on the program. She filed out the forms with what she thought the schedules would be for the month. At that time, the

shifts were changing constantly. Adam told her to put what she thought the schedule would be for the month based on the roster. Robinson assumed she was completing her forms correctly since she was never told she was doing them incorrectly and each month her forms were approved by the business office. Robinson feels that she was consistently filing out the form correctly but was never told that it was incorrect when she was submitting her forms. She feels the delay in the disciplinary process had some effect on her career. She thinks she was passed over for promotion because of the investigation.

Accounting Tech Shandor testified that she spoke to Officer Robinson a couple of times about the program. It was not unusual for people to come to her with questions for clarification. She recalled Robinson coming to her and asking that she look at the form to see if it was correct. She told her it was; she did not recall talking to Robinson about the program requirements.

On July 19, 2011, Grievant Robinson provided an affidavit/statement to agents Hardman and Loftus. (EEx. 41, Vol. 1) Robinson indicates, in pertinent part:

> In October 2008, I started participating in the... program by carpooling with... Officers... Harris and... Artiaga. After the first month of carpooling, I... talked to Adams. I asked Adams if I was filing out the form correctly and she told me that all I had to do was put our days-off next to our names. At different times, I... carpooled with... Mitchell... Wohld... and Melero. I filled out all of the... forms... between October 2008 and October 2009. Sometimes I would sign the officers names to the... forms only after they gave me permission. I completed the... forms based on the officers scheduled work days as told to me verbally, each month, by the officers. I would place the officers initials in the day of the week box on the... forms for the days the officers were scheduled to work. My placing the officer's initials in the box did not indicate if the officers actually carpooled together. I may have made a few clerical errors on the... forms. I do not believe... the daily assignments (work rosters) are always accurate. My understanding... was that we were not required to always carpool together due to shift changes and overtime worked. It was my understanding from Shelly Shandor... that we could come to work in one carpool but go home in another carpool. Shandor told me that employees do this all the time. I did carpool with... Harris... Artiaga... Melero... Mitchell... and Wohld. I can not specifically remember how many times that I actually carpooled with these officers. I can not recall if I ever carpooled with three of these officers in one car. I can not recall specific dates that we carpooled together. I believe that I carpooled at least four times a week as reflected on my... forms. I did not understand the... policy when I participated in the... program. I never received any training on the... program or its requirements... I never received any rideshare training or rideshare policy from the agency. I did not receive any... training during the Institutional Familiarization... course...

In her August 2011 interview by Hardman, Adam stated that it was her responsibility to collect the paperwork, tally the number of days each participant car pooled and forward the forms through her chain of command for approval and payment. (EEx. 4, Vol. 1) Adam stated that she told Robinson at least three times, over three months, that Robinson was filing out the forms incorrectly. Robinson was placing initials in every box on the form regardless if the month had that many days. Adam stated that she asked Robinson to list on the form, the participants' days off, to make it easier for her to tally the number of days each participant car pooled. She never told Robinson to complete the forms with just the officers' work schedules. Adam stated that it would not be a problem if an officer came to work in one car pool and had to go home in another car pool because they worked overtime.

Grievant Artiaga testified that she worked a lot of overtime, while she was an officer, including time in departments other than correctional services. She was known as the "overtime queen" and worked overtime at least three times per pay period. She testified that she car pooled with Robinson and Harris and sometimes Wohld. She also car pooled with Mitchell and Melero.

On September 22, 2011 Agent Hardman interviewed Officer Artiaga. (EEx. 39, Vol. 1) Her affidavit indicates, in pertinent part:

> ... In October 2008, I started participating in the... program by carpooling with... Officers... Harris and Robinson... At different times, I also carpooled with officers... Mitchell... Wohld and... Melero. I signed the... forms for the months of October 2008, November 2008, February 2009, April 2009, June 2009, and July 2009. Robinson signed my name on the other... forms with my permission. I can not recall if I ever completed any of the... forms. The initials in the boxes on the... forms indicated that the officers normally carpooled to work on that day. My general definition of a "carpool" is two or more people in a car at one time. At different times, I asked Melero, Harris and Mitchell to join our carpool. Robinson asked Wohld to join our carpool. I can not recall why Melero and Harris dropped out of the carpool. I can remember having conversations with Melero and Harris in which they told me that they wanted out of the ... program and I told them to send an e-mail to Robinson letting her know that they no longer wanted to be in the carpool. I did carpool with Harris, Robinson, Melero, Mitchell, and Wohld. I can not specifically remember how many times that I actually carpooled with any of these officers. I can not recall if I ever carpooled together with Robinson and Harris, with Robinson, Harris, and Melero, with Robinson, Harris and Wohld, and with Robinson, Mitchell and Wohld... It is possible for two officers to carpool together if one officer worked a 6:00 a.m. to

> 2 p.m. shift and another officer worked an 8:00 a.m. to 4 p.m. shift. I never received any training on the... program or its requirements. I was told that the... program existed and that I could be compensated for my participation... I did not know that the amount of... compensation was directly based on the number of days that I carpooled or how many members that were in my carpool. I never asked anyone for guidance on the... program. I stopped participating in the... program because of the shift change and the officers in the carpool were assigned to different shifts than I was. I did carpool to work when two officers would work the day shift and two other officers would work the evening shift and we would take two separate cars to work on those days. Due to the passage of time, I do not recall if I ever drove to work by myself during the 13 months that I participated... I do not recall Melero telling me that he wanted out of the carpool because he did not want to get in trouble because they were not carpooling together, that he did not want to lose his job, that he knew what they were doing was wrong, and that they were not working the same shift. I do not recall telling Melero that we did not have to carpool together and that we still could get paid. I do not recall telling Harris, after he told me that he wanted to leave the carpool, that it is not like they (BOP) were checking in people and that nobody was watching them drive-in. I do not believe that the... daily assignments rosters are always accurate...

Between September 2008 and September 2009 USP Atwater used several different rideshare forms. The first form was used from September 2008 and November 2008 and the second from December 2008 and October 2009. Analyst Adam testified that the forms used before December 2008 were confusing to her and the form was changed after she spoke to Administrator Gray. The first form required the car pool captain to place his or her initials in the table for each day the car pool was used and to list how many riders were in the vehicle. This form identified the car pool captain and not who the other car poolers were on a specific day. Specialist Espinoza testified that when the prison changed forms in December 2008, the employees were not brought in for training to explain the new form. If an employee started using the new form, the business office employees assumed the officer knew how to correctly fill the new form out. For the form used between December 2008 and October 2009, the form instructed the employee to place his or her initials in a box for a day they normally car pooled even if, the employee was off that day on approved leave or travel. The employee was then told to add a notation as to the leave or travel. The form did not necessarily represent that the employee was actually car pooling on any particular day. Accounting Tech Richard Ortiz testified as to his concerns regarding the administration of the program. After he was promoted to accounting tech in approximately May 2010, he expressed his

concerns to Administrator Gray about the policy, whereby car pool participants were given credit for employees who were on sick or annual leave or travel days. Both Administrator Gray and Business Administrator Kathy Cole approved of this policy. But it was not until Business Administrator Michael Harbison took over from Ms. Cole, that the rideshare policy was changed so that an employee participating in the car pool, had to physically ride in the vehicle in order to be paid for car pooling. During the time Ortiz worked in the business office, there were four versions of the form and he found it to be confusing, insufficiently detailed and inaccurate. He felt that the employees had problems properly filling out the forms. He was aware of other car pool captains, other than Officer Robinson, signing forms for members of their car pools. To his knowledge no other staff were investigated for having received rideshare overpayments. The Agency's general rideshare policy, if an overpayment was suspected, was to notify the employee of a possible issue. To his knowledge, Adam did not do that in this case. He did not believe that the Grievants intentionally defrauded the Agency, but he felt the program was very ambiguous. It was also his opinion that having an investigation open for five years on an Agency employee would impede that employee's promotional level and affect his or her career.

Business Administrator Michael Harbison testified that he started in the business office at USP Atwater in February 2013. He then reviewed the car pool program and determined that participants were receiving credit for days that they were not physically in the rideshare vehicles, such as when they were on annual leave. He did not agree with this policy and changed it so that the employee had to physically ride in the vehicle in order to receive credit for participation. This was an internal issue of processing the forms and a change to the language of the forms. The policy itself did not dictate this change. (RT 418) He determined that the verbiage of the form left room for error. (RT 423) He changed the form to add language indicating that the employee had to ride in the vehicle in order to receive credit and that credit would not be given for annual or sick leave. It was his understanding, that as far back as 2009 at least, employees were being credited for annual or sick leave and that was an ambiguity in how the policy was perceived. It was his opinion that there was no way the verbiage on the form could have been misinterpreted to allow differences in shifts worked. However, that does not take overtime into account. Administrator Harbison did not conduct any audit of potential overpayments. (RT 417)

Artiaga testified that it is inaccurate that she would tell Officer Harris that it was not like BOP was checking in people and she denied saying, it is not like they can prove who came to work together, or that they only had to drive one way together. Officer Mitchell was not being truthful when he said that he never car pooled and Officer Melero was not being truthful when he said he only car pooled one time. She did give Officer Robinson permission to sign the forms for her.

Robinson testified that she car pooled with Officers Harris and Artiaga, Wohld, Melero, and Mitchell. She signed forms for Harris, Melero and Wohld with their permission. Harris' affidavit stated that she only car pooled with him five or six times, but that is not true. His statements that he never car pooled with Melero, Wohld or Mitchell, and that he stopped car pooling in January 2009, are untrue. Mitchell's statement that he never car pooled is also untrue. Mitchell's statement that Robinson said OIG has nothing on us and they cannot prove anything if they did not talk, is untrue. Melero's statement that he only car pooled once with Artiaga was untrue. Robinson stated the she attempted to make a repayment of any overpayment received, but was only asked to repay the full amount she received of $1480. Her attorney and the Union president, also tried to agree upon a repayment amount with administrator Gray, but Gray refused to speak to them about it.

Special Investigating Agent, Jesus Estrada, testified that he assisted OIG in its investigation of this matter. The investigation compared the forms and the officers' daily assignment rosters to determine whether it was possible for the participants to have actually car pooled together over the relevant time period. The most accurate documents showing all days worked and all overtime would be the daily rosters and the Officer's Time and Attendance files. But he did not provide the Time and Attendance files to OIG, because he was not asked for them and so, he did not volunteer them.

Associate Warden William Lothrop testified that overtime worked in a department outside of the correctional services department would not show on the Correctional Services roster. (RT 389) The Time and Attendance program would be the true and correct place to verify an employee's complete overtime and shifts worked. (RT 390)

The institutional rosters show Morning Watch ("MW") from 00:00 to 8:00; AM Watch ("AM") from either 06:00 to 14:00 or 07:30 to 15:30; Day Watch ("DW") from either 07:00 to 15:00 or 08:00 to 16:00; PM Watch ("PM") from 14:00 to 22:00, and Evening Watch ("EW") from 16:00

to 00:00. (UEx. 7)

On March 9, 2010 Agent Hardman conducted a voluntary interview with Officer Melero. (EEx. 28, Vol. 1) Agent Hardman's interview summary states, in pertinent part:

> Melero stated he could not recall exactly when, but Artiaga asked him to join her carpool, which he agreed to do. Melero stated that Artiaga told him that they (he believed Artiaga and Robinson) would take care of the carpool paperwork... he believes he was paid approximately $100.00 a month while he participated in the carpool, but that during that time he might have actually carpooled on only one occasion, and that was with Artiaga... he could not recall exactly when, but he sent an e-mail to Artiaga telling her that he wanted to get out of the carpool... he subsequently spoke with Artiaga and told her that he wanted to get out because he did not want to get in trouble because they were not carpooling together as required. Melero also told Hardman that he wanted to get out of the carpool because he knew what they were doing was wrong, that they were not working the same shift, and that he wanted to do the right thing... Hardman showed Melero... Rideshare forms for the... months of January 2009 through May 2009... After reviewing the forms, Melero stated he did not sign his name to them and does not know who did. While Hardman was completing Melero's affidavit, union president Donald Martin replaced Marquez as Melero's union representative. Prior to reviewing and signing his affidavit, Melero decided to terminate the voluntary interview and refused to review and sign his affidavit.

On March 23, 2010, Agents Hardman and Estrada re-interviewed Officer Melero. (EEx. 29, Vol. 1) Melero provided a written statement to the agents. The memorandum of investigation indicates:

> Melero wrote in his statement... " I do recall having a brief discussion with Artiaga regarding carpooling in which... I answered yes because I believed I could participate at the time." Melero wrote that he was aware that Artiaga added him to the list but that he assumed that he would only be paid if he actively participated in the carpool. Melero wrote..."I did not know of, nor did I receive any training on, specific details or requirements of the program. I am still not aware of the detailed requirements of the program...
> Melero said that he never knew that he was actively participating in the carpool and that he never carpooled with Artiaga, Robinson, Harris, or any other CO...
> Hardman told Melero that during his first interview he stated Artiaga told him that they... would take care of the... paperwork. Melero stated he could not recall Artiaga making that statement. Hardman told Melero that during his first interview he stated he believed he was paid approximately $100.00 a month while he participated in the carpool. Melero stated he could not recall how much money he was paid, or if he was ever paid any money for carpooling.

> Harman told Melero that during his first interview he stated that he sent an e-mail to Artiaga in which he stated he wanted to get out of the carpool and that he subsequently spoke with Artiaga to tell her that he did not want to get in trouble because thy were not carpooling together as required. Hardman also reminded Melero that he previously stated he wanted to get out of the carpool because he knew what they were doing was wrong, that they were not working the same shift, and that he wanted to do the right thing. During the second interview, Melero stated that he does not recall having that conversation with Artiaga and that he only had one conversation with Artiaga; when she asked him to join the carpool. Melero also stated that he did not recall making the previous statement to Hardman and that he was confused and did not know what was going on during his first interview... Hardman asked why Melero would send an e-mail to Artiaga stating he wanted to get out of the carpool when he did not know he was actively participating in the carpool. Melero did not answer the question but, referred to his prepared statement... Melero said... he was not even aware of the time frame of when he was involved in the carpool. Hardman asked Melero how he could put something in his sworn affidavit that he did not know to be true and Melero, again, said he wanted to only refer to his written statement.

On March 30, 2010 Agents Hardman and Loftus, conducted an voluntary interview with Officer Mitchell. (EEx. 20, Vol. 1) On March 23, 2010 Mitchell had told Agent Estrada that he wanted to do the right thing, tell the truth, and save his job. The interview summary indicates, in pertinent part:

> Mitchell stated that in approximately July 2009... Robinson asked him if he wanted to rideshare with her and Mitchell agreed to do it. Mitchell stated, however, that he never carpooled with Robinson or any other CO... After his first conversation with Robinson... he never spoke to her about the rideshare again until after he was first interviewed by the OIG...Hardman showed Mitchell the Robinson carpool... Forms that show a signature next to his name from June 2009 through September 2009. Mitchell stated he did not sign these documents and does not know who did... he never signed any... Rideshare Forms... Mitchell stated that after his first... interview he had contact with three other subjects in this investigation... Wohld told him that Wohld did rideshare with Robinson because Wohld and Robinson used to live together... Melero told him that Melero never signed any carpool paperwork and that Melero was "caught up" in the same thing that he was. Mitchell stated that Artiaga told him that she did carpool with Harris because Harris and Artiaga used to live together...

On July 8, 2010 Officers Harris, Mitchell, Wohld and Melero were charged with criminal indictments, alleging conversion to their use money of the United States: falsifying rideshare forms related to car pooling and earning money to which they were not entitled.

On October 26, 2010, Melero was interviewed by OIG pursuant to a proffer agreement. (EEx. 30, Vol. 1) The interview summary states, in pertinent part:

> Melero stated that Artiaga asked him if he wanted to join her carpool and he said, "Yes" he would join... Artiaga told him that she would take car (sic) of the... paperwork. Melero said he never signed any... documentation relating to the carpool... a few months later he had a conversation with Artiaga in which she told him that he was on the "carpool list." ...after this conversation... he sent Artiaga an e-mail in which he told Artiaga that he no longer wanted to participate in the carpool... Melero stated he had no understanding about the... program except that he could be paid an extra $80 dollars for participating... he does not recall ever receiving any training on the... program... he was not aware if he was ever paid money for his participation in the... program... during his first conversation with Artiaga... Artiaga told him that they did not have to carpool together and that he would still get paid... he believes this conversation took place in either October or November 2008... he assumed he was getting paid for his participation in the carpool, but... he never looked at his bank statements to see if he actually got paid... he sent Artiaga the e-mail stating he wanted out of the carpool in approximately April 2009... in his follow-up conversation with Artiaga he told Artiaga that he wanted out of the carpool because he did not want to lose his job.

On November 10, 2010, officer Harris was interviewed by OIG pursuant to a proffer agreement. His interview is summarized by Agent Hardman on November 12, 2010. (EEx. 15, Vol. 1) Hardman indicates, in pertinent part:

> Harris stated Artiaga asked him if he wanted to carpool with her and Robinson and told him that Robinson would take care of the... paperwork... he carpooled with Artiaga during one three-month period because they were working the same shift and were living together... he only carpooled with Robinson approximately 5 to 6 times... he never carpooled with Melero, Wohld, or Mitchell... during the three-month period... he carpooled with Artiaga they did carpool together 90% of the time... in approximately January 2009, they started having problems in their relationship and they stopped carpooling together... he told CO... Choudhry that he was being paid approximately $100 dollars a month to carpool with Artiaga... Choudhry told him that he was getting paid too much money.. and he (Harris) should get out of the carpool... it was this conversation that made him realize he was getting paid too much... after this conversation... he told Artiaga that he was not going to carpool with her because they were not living together... Artiaga replied, "Why" that it was not like they (BOP) were checking in people and that nobody was watching them drive in... he was aware that he was getting paid for participating in the carpool...

On December 16, 2010, the criminal charges against Officers Harris, Mitchell, Wohld and

Melero were dismissed. The OIG Investigation Report indicates that all criminal charges were dismissed based upon restitution having been paid and the Officers' cooperation provided during proffer interviews against Robinson and Artiaga. (EEx. A1, Vol. 1)

On May 3, 2011 Agent Hardman re-interviewed Officer Melero. (EEx. 31, Vol. 1) The memorandum of investigation indicates, in pertinent part:

> Prior to this interview Hardman prepared an affidavit containing specific statements... Melero made during his proffer interview... After reviewing the statement, Melero told Hardman that he wanted to remove the admissions he made during his... interview... Specifically, Melero wanted the following admissions removed from his statement:
> * That Artiaga told him that they would not have to actually carpool together but he would still get paid.
> * That he sent Artiaga an e-mail in which he told her he no longer wanted to participate in the carpool.
> * That he assumed he was getting paid for his participation in the carpool.
> ... Melero changed part of another sentence concerning his statement during the proffer interview that he told Artiaga that he wanted out of the carpool because he did not want to lose his job. Melero changed "lose his job" to "get in trouble." ... Hardman... asked Melero to confirm that he actually made the deleted statements during the... interview. Melero stated he does not recall making those statements during the... interview.

On May 11, 2011, Agent Hardman re-interviewed Officer Harris. (EEx. 16, Vol.1)

The memorandum of investigation indicates, in pertinent part:

> Prior to this interview, Hardman prepared an affidavit from the statements Harris made during the proffer interview. Harris subsequently reviewed and signed the affidavit. In addition to the information provided in the affidavit, Harris provided the following:
> ...
> Harris... talked to Robinson about "messing up the paperwork" and... Robinson said she did not receive any training on how to fill-out the paperwork and... Robinson is afraid she is going to lose her job... Artiaga told him that she knew they (Harris, Melero, Mitchell, and Wohld) had paid restitution and that they were fools to pay back the money because it made them look guilty...

In his affidavit, Harris indicates, in part:

> After my first OIG interview, I talked to Artiaga and told her that I was going to lose my job because of Artiaga and the carpool. Artiaga told me that OIG was trying to scare me into giving a statement about her because of her past OIG investigations. Artiaga reminded me that we did carpool together and... Robinson carpooled with

> Wohld. Artiaga... said it was not like they can prove who came to work together and that you only have to drive one way together... After I reviewed the OIG reports... I asked Robinson why she put people down as carpooling when they were on a day off. Robinson told me that they did carpool together and that they did work a lot of overtime that would have put them on the same shifts...

On May 1, 2012, Officer Harris was interviewed again and Agent Hardman summarized his interview. (EEx. 17, Vol. 1) The interview states, in pertinent part:

> Harris reviewed the... forms for the months of September 2008 through April 2009 and stated he did not sign any of the... forms... he does not know who signed his name to the... forms and that he never gave Robinson or Artiaga permission to sign his name on the forms.

Officer Harris testified that he participated in the car pool with Officer Artiaga. He was charged with a misdemeanor for falsifying the car pool documents. The charge was dismissed in exchange for paying full restitution of his car pool payments. He was accused of participating in a fraudulent car pool which was not true because he did car pool. He repaid all the car pool money even though he had car pooled. He signed the proffer statement although he did not agree with the wording of the statement. He complained about the wording, so the U.S. attorney changed the wording, and he still disagreed with the new wording. He signed the statement on the advice of his attorney because he had a child on the way. Harris testified that when he began car pooling with Artiaga, they car pooled together about ninety percent of the time. Between January and April 2009, he was still car pooling a few times. By May or June of 2009 he was car pooling less frequently because his relationship with Artiaga had become rocky. Officer Robinson rode home with him on several occasions when she worked overtime. It was possible that when Artiaga told him that Robinson would take care of the rideshare paperwork, that meant that she would sign for him too.

On May 13, 2011, Officer Mitchell was interviewed further by Agent Hardman. Mitchell indicated that when Robinson asked him to join the car pool, he was expecting to car pool and did not intend to defraud the government. (EEx. 21, Vol. 1)

On May 16, 2012, Officer Mitchell was re-interviewed. (EEx. 22, Vol. 1) The interview summary states that Mitchell reviewed the forms for June 2009 to September 2009 and stated that he did not sign any of the forms. He indicated that the signature on the August form looked similar to his signature but he did not sign that form. He stated that he attended IF in July 2008 and he did

not recall receiving any training on the rideshare program.

On June 25, 2012, Forensic Document Laboratory Director Nancy Cox provided a report to OIG indicating that she performed a hand writing comparison analysis and it was her conclusion that Officer Mitchell had signed the August 2009 rideshare form. (EEx. 23, Vol. 1)

On June 15, 2011, Agents Hardman and Estrada, re-interviewed Officer Melero. (EEx. 32, Vol. 1) Hardman's memorandum of investigation indicates that the purpose of the interview was to ask Melero about the inconsistent statements he made during his four previous interviews. Melero discussed the situation with Union President Martin and thereafter stated to Agent Hardman that he had nothing to change in his previous statements.

On May 22, 2012 Agent Hardman and Assistant Special Agent in Charge Michael Barranti interviewed Officer Melero. Melero provided a sworn affidavit. (EEx. 33, Vol. 1) The affidavit indicates:

> I have reviewed the... forms for the months of January 2009 through May 2009. I did not sign my name to any of these... forms and I do not know who signed my name on these... forms. I do not recall if I ever gave permission to... Artiaga or... Robinson to sign my name on the... forms. Artiaga or Robinson never told me that they were going to sign my name on the... forms. I never talked to Robinson at all about carpooling.

Officer Robinson testified that the investigation came to her attention in October 2009 when Officer Artiaga brought to her attention that the roster had changed. This caused her to think she might have filled out the rideshare form incorrectly so she and Union President Donald Martin went to the business office and asked for the form to make the correction. The business office refused to give her the form.

Artiaga testified that her attorney made multiple attempts to learn what her overpayment was. She was asked to repay $1480, which was the full amount she had received for car pooling. She never refused to repay the correct overpayment amount but has never been told what that amount is. Administrator Gray indicated in the investigation that she should have been paid $300.00, so she feels the Agency knew she participated in the car pool.

On July 14, 2011, Assistant U.S. Attorney Laurel Montoya corresponded with Grievant Robinson's attorney, Ruthanne Edginton, demanding a full repayment of funds the government contended were erroneously paid to Robinson, in order for the Agency to not seek an indictment.

The amount of repayment sought is $1480.00. The offer does not preclude the Agency from taking disciplinary action. (EEx. 17, Vol. 2) On August 12, 2011, attorney Montoya sent the same offer to Grievant Artiaga's attorney Roger Litman. (EEx. 4, Vol. 2)

On November 15, 2011, Roger Ito sent an email to attorney Montoya on behalf of Grievant Artiaga offering to repay the government the sum of $780.00 that Administrator Gray calculated as an overpayment, in exchange for the government's agreement to not indict Artiaga. (UEx. 14)

Scott Keilman testified that he was Captain of Correctional Services at USP Atwater between August 2010 and August 2012. He was not aware during his tenure at Atwater that four of his Correctional Officers were under indictment. Both the Warden and the SIA dealt with those issues. Grievant Artiaga testified that Captain Garcia said that her case sat on Captain Keilman's desk because Keilman did not want to do anything on the case.

B. <u>The Adjudication Phase</u>

On September 26, 2012, the Office of Internal Affairs ("OIA") produced a memorandum to Warden Copenhaver, with an attached investigative report. (EEx. A1, Vol. 1) The report indicates:

> Based on the OIG's findings, misconduct was sustained as indicated below.
> <u>Amber Artiaga</u>
> *Theft/Misuse of Government Funds*
> *Lying During an Investigation*
> <u>Oscar Melero</u>
> *Lying During an Investigation*
> <u>Ryan Mitchell</u>
> *Lying During an Investigation*
> <u>Raynise Robinson</u>
> *Falsification of Documents*
> *Theft/Misuse of Government Funds*
> *Lying During an Investigation*
> Please proceed with discipline or adverse action, and notify this office of the action taken.

The OIA report indicates, in its *Synopsis*:

> The OIG investigation determined that Robinson and Artiaga conspired to defraud the... Program by fraudulently claiming on... forms that they were carpooling with other riders, when in most cases, they were not. Robinson and Artiaga were original members of the carpool and the only two members that participated in the program the entire period in question (13 months). Robinson and Artiaga, working together, recruited the other four riders, and when doing so told them that, they would handle

all the paperwork, thereby controlling the process and allowing them to submit false... paperwork to the... Business Office. The OIG found that Robinson falsified the signatures of other riders on the... paperwork.
The OIG determined that Harris, Wohld, Mitchell, and Melero did not carpool as required and knowingly received Rideshare compensation for which they were not entitled... the OIG found that during this investigation, Melero, Mitchell, Robinson, and Artiaga provided information that was either false or not credible...

Under *Details of Investigation*, the investigative report references a memorandum dated October 23, 2009 received from Administrator Gray documenting his opinion as to the amounts the riders in the Robinson car pool should have actually been paid for participating from January 2009 to September 2009. (EEx. 1, Vol. 1) Gray listed the following:

Received Per Form		**Payment Records Indicate**
Robinson	1,080.00	460.00
Artiaga	1,080.00	300.00
Wohld	600.00	280.00
Mitchell	480.00	0.00
Melero	600.00	240.00
Harris	480.00	180.00

The OIA report continues, in relevant part:

The OIG reviewed the "Voucher Validation Reports," for each... participant for the 13-month period they participated... October 2008 through October 2009...The chart below lists the amount each participant earned during the program, based on their participation:

Date	Robinson	Artiaga	Harris	Melero	Wohld	Mitchell
Oct 08	$100.00	$100.00	$100.00	0.0	0.0	0.0
Nov 08	$ 80.00	$ 80.00	$ 80.00	0.0	0.0	0.0
Dec 08	$100.00	$100.00	$100.00	0.0	0.0	0.0
Jan 09	$120.00	$120.00	$120.00	$120.00	0.0	0.0
Feb 09	$120.00	$120.00	$120.00	$120.00	0.0	0.0
Mar 09	$120.00	$120.00	$120.00	$120.00	0.0	0.0
Apr 09	$120.00	$120.00	$120.00	$120.00	0.0	0.0
May 09	$120.00	$120.00	$120.00	$120.00	0.0	0.0
Jun 09	$120.00	$120.00	0	0.0	$120.00	0.0
Jul 09	$120.00	$120.00	0	0.0	$120.00	$120.00
Aug 09	$120.00	$120.00	0	0.0	$120.00	$120.00
Sep 09	$120.00	$120.00	0	0.0	$120.00	$120.00
Oct 09	$120.00	$120.00	0	0.0	$120.00	$120.00
	$1,480.00	$1,480.00	$880.00	$720.00	$600.00	$480.00

Comparison of Rideshare Forms to Daily Assignment Rosters Reveal Discrepancies

The OIG reviewed the... Rideshare forms and compared the days the riders claimed they carpooled to the.. Daily Assignment Rosters for each... participant... The... Rosters show the assignment and shift worked by employees on that particular day, including scheduled days off, and are signed as accurate by... the evening watch Operations Lieutenant and the Captain. The... review revealed no instance where all three, or four, officers... worked the same shift, and numerous instances where riders claimed they car pooled while on a scheduled day off. Below are some examples of the discrepancies between the shifts that the officers worked and days they claimed they carpooled together:

* 9/01/2008 - Harris claimed he carpooled when he was on a scheduled day off.
* 9/05/2008 - Robinson claimed she carpooled when she was on a scheduled day off.
* 12/05/2008 - Artiaga claimed she carpooled when she was on a scheduled day off.
* 1/07/09 - Robinson, Artiaga, Harris and Melero claimed they carpooled when Robinson worked 0730-1600, Artiaga was on a scheduled day off, Harris worked 1600-0000 and Melero worked 0800-1600.
* 6/2/09 - Wohld and Mitchell claimed they carpooled when Wohld worked 1400-2200 and Mitchell worked 0800-1600.
* 7/5/2009 - Robinson, Artiaga, Wohld, and Mitchell claimed they carpooled when Robinson worked 0730-1530, Artiaga and Mitchell worked 1600-0000 and Wohl worked 0800-1600.

USP Atwater Calculations of the Rideshare Forms in Conflict with Written Policy

During this investigation, the OIG learned that the USP Atwater Business Office had been incorrectly calculating how much Rideshare participants should be paid.

... the... Rideshare policy required that for a... participant to earn the maximum Rideshare benefit each month they would need to carpool with four or more riders per vehicle at least 16 days out of a 20 day work month. The... review of the... forms submitted by the Robinson carpool members revealed they were frequently paid for participating in a four-person carpool, but did not actually meet the required criteria of having four people in the vehicle at least 16 days out of the month... Adam... had been delegated the responsibility of collecting the... paperwork, tallying the number of days that each... participant carpooled, and forwarding the... forms through her chain of command...

The OIG asked Adam, using a Robinson carpool... form as an example, why Robinson's carpool was credited for being a four person carpool when they only carpooled (according to the form) with four riders eight days and the rest of the month they had only 2 or 3 riders in their carpool. Adam stated it did not matter if only two or three participants carpooled on a specific day it would still count as a four-person carpool. Adam stated that if a... participant was on a scheduled day-off it would not negatively impact the rest of the participants in the carpool. The OIG told Adam that

this appeared to contradict the Rideshare policy.[2] Adam responded that it would be too time consuming to determine the number of carpool riders on each individual day and that they would need three different Rideshare forms to determine if a person participated in a 2, 3, or 4 person carpool. Adam further stated the purpose of the... program is to remove cars from the road.

The OIG asked Gray if Adam's interpretation of the... policy was correct. Gray stated that according to the... policy, for a carpool to be paid the maximum monthly compensation the carpool would need four carpoolers in one vehicle for a minimum of 16 days a month... If a... rider was on annual leave or sick leave it should be noted on the... form and it would count as a rideshare day because they normally would have carpooled on that day... If one person from a four-person carpool was on annual leave or sick leave then all four carpoolers would be credited with a day of carpooling... he had not been aware that Adam had been using the above-mentioned method for tallying the number of days a person carpooled and that her method of tallying was not approved by the Business Office.[3]

OIG Recalculates Carpool Days Using Adam's Interpretation

The OIG, after learning that Adam had incorrectly tallied carpool... days, reviewed the... forms and corresponding daily assignment rosters of Robinson, Artiaga, Harris and Wohld (using Adam's interpretation of... policy), to determine how many days they could have carpooled with at least one other person, not the four as required by the written policy. The OIG did not include Mitchell and Melero in the analysis because Mitchell admitted he never carpooled and Melero admitted he "may" have carpooled with Artiaga on only one occasion... OIG credited the riders with a valid carpool day if they worked that day (or were on some type of leave other than a scheduled day off), and their shift started within 90 minutes of another rider in the carpool (excluding Mitchell and Melero). The OIG decided to use the 90 minute window because when the riders claimed they were carpooling together they were all residing in one apartment complex that was only 7.7 miles from USP Atwater and it would not be reasonable to expect that they would go to work, or stay after work, for an extra 90 minutes when they lived so close to the facility. The OIG confirmed with Facilities Manager Dale Day and Estrada that 90 minutes was a reasonable grace period as they each said they never saw anyone wait 90 minutes for their carpool to leave... The OIG... excluded from the analysis the months of September 2008 through December 2008 because during that time a different version of the... form was being used that made it impossible to determine who was supposedly in the vehicle on any given day...[4]

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[2] Emphasis added.

[3] Emphasis added.

[4] Emphasis added.

Robinson and Artiaga

The OIG found (using Adam's method of crediting carpool days) that from January 2009 through October 2009 Robinson could have possibly accrued enough carpool days only once (July) and Artiaga twice (March and April) out of the nine months reviewed.

The OIG believes that Robinson and Artiaga conspired to defraud the... Rideshare Program by fraudulently claiming on Rideshare forms that they were carpooling with other riders, when in most cases they were not...

It is clear that Robinson and Artiaga, working together, recruited the other four riders as shown by the riders' comments during the investigation...

The OIG found that Robinson falsified the signatures of the other riders on the... paperwork she submitted to the... Business Office...

It also appears that Robinson and Artiaga attempted to influence the outcome of this investigation...

Melero, Mitchell, Robinson, and Artiaga Display Lack of Candor

...The OIG... does not find Melero credible when he recanted prior admissions during two different interviews...

... The OIG finds that Mitchell provided false information when he denied ever signing a rideshare form.... the OIG also finds that since Mitchell signed a... form he must have been aware he was participating in the program and provided false information when he said he did not know he was going to get paid.

Artiaga displayed a lack of candor when she denied receiving training on the... program. Artiaga attended the same IF training as Officer... Pringle who recalled receiving the training. Gray, Shandor, and Espinoza... confirmed that they provided training on the... program...

Artiaga displayed a lack of candor by claiming she carpooled with Mitchell, Melero, and Wohld. Mitchell admitted he never carpooled with Artiaga. Melero said he doubts he carpooled with Artiaga even once and Wohld could only say that he "may" have carpooled with her.

...the OIG does not find it credible that during her interviews with the OIG, Artiaga was unable to recall many of the details related to her participation in the... program.

The OIG does not find Robinson credible when she said she did not understand the... policy, she had no idea what the maximum monthly payment was, and that she did not know she needed four people in her carpool to be paid the maximum monthly payment.

It is clear that USP Atwater provided training regarding the... program and even if she did not receive formal training, the fact that she felt she had to falsify the signatures of the other riders indicates a knowledge that what she was doing was outside policy.

Robinson displayed a lack of candor by claiming she carpooled with Mitchell and Melero when both admitted they never carpooled with her.

Robinson... displayed a lack of candor when she said she signed the... forms of the other carpoolers with their permission. Harris, Mitchell, Wohld, and Melero all said they did not know who signed their names to the forms and that they did not give permission for Robinson or Artiaga to sign their names (Wohld said he could not recall if he gave them

permission).

Captain Ray Garcia testified that he has been Captain at USP Atwater since December 3, 2012. At that time, he received and reviewed the disciplinary proposal letters for the Grievants, which had been prepared before he came on board. The timeliness delays were caused not by the investigation but the referrals back and forth to Labor Management Relations and through Human Resources' proposal process. It was his opinion that the time length from the end of the investigation in September 2012 and issuance of the proposal letters in February and August 2013 was timely. Prior to his arrival, there had been a proposal for termination of the Grievants. The proposal he received was for suspension. Any delay on his part was due to his need to review the case and his need to attend to his other duties.

On February 26, 2013, Captain Garcia issued an unsigned disciplinary proposal letter to Grievant Robinson for a 30-day suspension without pay. (EEx. 16, Vol. 2) The letter indicates that Robinson has ten days to respond. On August 1, 2013 Officer Robinson received a disciplinary proposal letter signed by Unit Manager Donald Tyson. (EEx. 15, Vol. 2) This letter provides Robinson with fifteen days to respond to charges, in pertinent part:

> **CHARGE#1: SUBMITTING INACCURATE DOCUMENTATION FOR PERSONAL GAIN**
>
> ... between... October 2008 and... October 2009, as Captain of your group's... program, you knowingly and willingly submitted inaccurate... program documents to the business office in order to receive maximum compensation from the... Rideshare funds when you were not entitled to... In your affidavit dated July 18, 2011, you admit, "I filled out all of the... forms for my carpool between October 2008 and October 2009. Sometimes I would sign the officers(') names to the.. forms based on the officers(') scheduled work days as told to me verbally, each month, by the officers. I would place the officers(') initials in the day of the week box on the... forms for the days that the officers(') were scheduled to work. My placing the officer's initials in the box did not indicate if the officers actually carpooled together. I have made a few clerical errors on the... forms. A review of the... participants work schedules clearly demonstrated it was not possible to have carpooled on dates claimed as the work schedules of the listed... participants did not coincide to allow for carpooling to occur on the dates claimed... In addition you have as of this date declined to make restitution for overpayments of which you knew or reasonably should have known. Although this charge refers to matters in 2008 and 2009, and the investigation took a significant length of time, the charge is serious and your continued refusal to make restitution constitutes a significant factor in aggravation. Your submission of inaccurate

documents to receive public funds which you knew or reasonably should have known you were not entitled to, forms the basis for this charge.

CHARGE#2: LACK OF CANDOR

While being the subject of an official investigation... you claimed in your affidavit... "I did not understand the... policy when I participated in the... program. I never received any training on the... program or its requirements." Training records reflect your attendance of the Institution Familiarization course on April 28, 2008 to May 9, 2008. The training agenda reflects information presented by the Business Office, specifically information on the... program was covered... Your conduct over a period of many months in consistently submitting inaccurate... documentation to maximize your rideshare reimbursement demonstrate that you knew what to claim to receive such maximum reimbursement... Your failure to honestly answer questions in an official investigation forms the basis for this charge...

On July 1, 2013, Grievant Robinson transferred to a position at USP Atwater as a unit secretary.

On July 18, 2013 Officer Artiaga received a disciplinary proposal letter for a 30-day suspension. (EEx. 3, Vol. 2) The letter indicates, in pertinent part:

CHARGE#1: SIGNING INACCURATE DOCUMENTATION FOR PERSONAL GAIN

... between... October 2008 and... October 2009, as a member of a... program group, you knowingly and willingly signed inaccurate... program documents in order to receive maximum compensation from the... Rideshare funds when you were not entitled to... A review of the carpool participants' work schedules clearly demonstrated it was not possible to have carpooled on dates claimed as the work schedules of the listed... participants did not coincide to allow for carpooling to occur on the dates claimed... Although this charge refers to matters in 2008 and 2009, and the investigation took a significant length of time, the charge is serious and your continued refusal to make repayment constitutes a significant factor in aggravation. Your signing of inaccurate documents to receive public funds which you knew or reasonably should have known you were not entitled to, forms the basis for this charge.

CHARGE#2: LACK OF CANDOR

While being the subject of an official investigation related your involvement in the Rideshare program violations, in your affidavit dated September 22, 2011, you stated "I never received any training on the rideshare program or its requirements..." Your conduct over a period of many months in consistently signing inaccurate rideshare documentation to maximize your rideshare reimbursement demonstrate that you knew what to claim to received such maximum reimbursement...Your failure to honestly answer questions in an official investigation forms the basis for this charge...

On August 5, 2013, Artiaga provided Warden Copenhaver with a written response to her disciplinary proposal letter. (EEx. 2, Vol. 2)

On September 23, 2013, Grievant Artiaga received a decision letter from Warden Copenhaver imposing a 30-day suspension without pay for "Signing Inaccurate Documentation for Personal Gain and Lack of Candor." (EEx. 1, Vol. 2) The letter indicates that "After careful consideration, I find the charge fully supported by the evidence contained in the disciplinary action file." She served her 30-day suspension between October 7, 2013 and November 5, 2013.

On November 25, 2013, Human Resources Manager Rosa Cham-Sanchez advised Grievant Robinson that a debt for the amount of $1,480.00 due to an overpayment is being processed. On April 27, 2014 Grievant Robinson appealed to Warden Copenhaver, requesting that the $1,480.00 sum be waived. On June 17, 2014 Warden Copenhaver denied the request for a waiver. In June 2014 the Agency began deducing $276.51 from Grievant Robinson Pavey's pay. (UEx. 19)

On February 5, 2014, Grievant Robinson received a decision letter imposing a 30-day suspension without pay for "Submitting Inaccurate Documentation for Personal Gain and Lack of Candor." (EEx. 13, Vol. 2) Warden Copenhaver upheld the charges of Submitting Inaccurate Documentation for Personal Gain and Lack of Candor. She served her 30-day suspension between February 10, 2014 and March 11, 2014.

Warden Copenhaver testified that he did not review the investigative report when it was forwarded to him by OIA in September 2012. (RT 244) He indicated that while he did not view the report as being of no use, he chose not to read the report and he would not have looked into the background of the case. He passed the report off to subordinate staff for review.

Atwater Human Resources Manager Rosa Cham-Sanchez testified that she received the investigation report but did not read it in its entirety. She reviewed the report to identify what issues she would need to bring forward to get the proposal letters together. She did not know which official involved in the adjudication phase of the disciplinary action was charged with reading the entire report. (RT 339) It was her interpretation of the report, that any incorrect payments made by the business office under the rideshare program, resulted solely from the documentation that was provided to the office. (RT 341) The business office did nothing wrong, but simply paid, based upon what was presented to them by the Grievants. (RT 343)

On May 18, 2014, Grievant Artiaga resigned from her position with the BOP. (UEx. 15) Her resignation indicates, in pertinent part:

I feel that I am being forced out of the Bureau as a result of an administrative error on the part of management that was turned into a 5 ½ year nightmare, resulting in personal embarrassment, harassment, ridicule, and defamation of character. I believe that I have been subjected to enough abuse and have determined that it is in my best interest to resign.

On May 27, 2014, Officer Mitchell received a disciplinary proposal letter for a 14-day suspension without pay for "Improper Retention of Rideshare Reimbursement Funds and Lack of Candor." On June 23, 2014 he received a 7-day suspension without pay for the same charges. Officer Melero received a 7-day suspension.

On November 22, 2011, Supervisory Paralegal Specialist, Judith Dreher, composed a letter to the Grievants indicating that she was a rideshare captain at USP Atwater from approximately 2000 to May 2011. The letter indicates, "The... program was always confusing to me, despite a detailed Procedural Memorandum that was updated at will and without notice... What was most confusing was the consistency of the paperwork we submitted and the inconsistency in the amount of money we would receive each month. This was a point of constant discussion amongst the... team members, and with Business Office staff... In addition to no training on the Program guidelines, there seemed to be many inconsistencies in the manner it was implemented, particularly in the year or so before my transfer..." (UEx. 18) The Union now appeals the consolidated grievances for arbitral review.

IV.
ISSUES PRESENTED

The parties were unable to agree upon the issues before the Arbitrator and it was agreed that the Arbitrator, after review of the evidence, will frame the issues to be resolved.

The Union frames the issue as follows:

1. Was the investigation and adjudication of these disciplinary actions timely thereby promoting the efficiency of the service? If not, what should be the remedy?

2. Was the adverse action taken by the Agency taken for just and sufficient cause; and, if not, what should be the remedy?

The Agency frames the issue as follows:

Was there fair, just and sufficient cause for the 30-day suspensions imposed upon each of two grievants for their involvement in this matter; and if not, what should be the remedy?

The Arbitrator, after careful review of the record before me, adopts the issues as framed by the Union.

V.
RELEVANT CONTRACT LANGUAGE

ARTICLE 30 DISCIPLINARY AND ADVERSE ACTIONS

Section a. The provisions of this article apply to disciplinary and adverse actions which will be taken only for just and sufficient cause and to promote the efficiency of the service, and nexus will apply.

Section b. Disciplinary actions are defined as written reprimands or suspensions of fourteen (14) days or less. Adverse actions are defined as removals, suspensions of more than fourteen (14) days, reductions in grade or pay, or furloughs of thirty (30) days or less.

Section c. The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except that the parties recognize that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal.

Section d. Recognizing that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions.

1. When an investigation takes place on an employee's alleged misconduct, any disciplinary or adverse action arising from the investigation will not be proposed until the investigation has been completed and reviewed by the Chief Executive Officer or designee...

Section j. When disciplinary action is proposed against an employee, the employee will have ten (10) working days to respond orally or in writing. When adverse action is proposed, he/she will have fifteen (15) working days to respond orally or in writing...

ARTICLE 31 GRIEVANCE PROCEDURE

Section b. The parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level before filing a formal grievance. A reasonable and concerted effort must be made by both parties toward informal resolution.

ARTICLE 32 ARBITRATION

Section h. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the Statute.

The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of:

1. this Agreement; or
2. published Federal Bureau of Prisons policies and regulations. (JEx. 1)

VI.
POSITIONS OF THE PARTIES

A. The Agency's Position:

The Arbitrator should deny the grievance and sustain the 30-day suspensions because the totality of the evidence conclusively proves that the co-Grievants operated a fictitious car pool from September 2008 through October 2009, and improperly took publicly funded rideshare reimbursements. The Grievants also were dishonest about their involvement in this matter.

Pervasive work shift mismatches proves the fictitious nature of the alleged car pool. Comparison of the shifts worked by the co-Grievants, along with those of Officers Harris, Melero, Wohld and Mitchell, categorically establishes the fictitiousness of the alleged car pool. On numerous days, the co-Grievants claimed to car pool when, based upon a comparison of rideshare forms and the individual daily assignment rosters, either no one could have car pooled, or fewer persons could have car pooled than were claimed. Officers Melero and Mitchell's statements against interest prove the alleged car pool to be fictitious. Multiple statements by Artiaga reflect guilty knowledge and Pavey's role as car pool captain proves her involvement. Statements by putative car pool participants as to their limited participation or non-participation corroborate the pervasive shift mismatch to prove the car pool fictitious. As law enforcement officers at the time of the offenses, co-Grievants were held to a higher standard. The thirty-day suspensions are the appropriate penalty for false rideshare claims alone. Removal is the appropriate penalty for exaggerated and/or false commuting cost claims and accordingly the co-Grievants received thirty-day suspensions instead of removal, due to the length of time incurred. Such suspensions are amply warranted by the gravity of their proven misconduct in submitting false reimbursement claims alone. The co-Grievant's conduct and statements prove their lack of candor about their training on the program. A thirty-day suspension is the appropriate penalty for lack of candor alone. Officers Melero, Mitchell, Wohld and Harris are not appropriate cooperators. Warden Copenhaver applied appropriate factors for the adverse action. The co-Grievants' thirty-day suspensions are amply justified by their proven role as the ring leaders of the fictitious car pool and by their refusal to make reimbursement in any amount despite ample opportunity to do so. The admitted delay in the imposition of penalty in this case only worked to the benefit of the co-Grievants because if the action had been timely, they most certainly would have been removed. The Agency's

reply brief argues that, no matter how the policy was interpreted, the pervasive shift disparity among the putative car pool participants proves that the actions of the co-Grievants were deliberate and in gross violation of any interpretation of the program. There is direct evidence of co-Grievants' training. The co-Grievants' highly selective memories prove they knew exactly what they were doing. It is standard practice for a U.S. Attorney's Office to demand complete disgorgement of proceeds in false claims cases. The U.S. Attorney's even handed demand for total reimbursement of all car pool payments, even though the co-Grievants did car pool in some significantly lesser amount than claimed, is not an issue in this case. That the co-Grievants have not yet been indicted is irrelevant. Any agreement to conceal a crime coupled with any action of concealment extends the statute of limitations for criminal prosecution. False testimony to conceal crime by agreement extends the criminal statute of limitations. The co-Grievants' mendacity in their affidavits and at hearing, refusing to own up to the falsity of their car pool claim, simply extends the statute of limitations for prosecution.

The ghost riders' contrite cooperation and restitution were sound bases for leniency. Despite a lengthy opportunity to do the right thing, the co-Grievants failed to tender one red penny in restitution. Accordingly, the fact that they denied themselves clemency that Warden Copenhaver would have provided for making restitution, is on them. The cases cited by the Union are inapposite.

The evidence proves the co-Grievants operated a ghost car pool from start to finish, recruiting ghost riders, exhorting their victims to stay on despite obvious impropriety and the hazard of prosecution and removal, preparing and submitting false documentation, and adamantly refusing to take any responsibility or make any restitution for their outrageous misconduct. That the Agency declined to proffer truck loads of individual time and attendance documentation is immaterial in view of the conclusive evidence proving the co-Grievants' guilt. In the final analysis, the co-Grievants got much less than what they so richly deserved and the Arbitrator should affirm the 30-day suspensions and deny their grievances.

B: <u>The Union's Position</u>:

The investigation and adjudication of the disciplinary action was untimely and therefore failed to promote the efficiency of the service. The record shows that there was a significant, and at times inexplicable, passage of time between the employer becoming aware of the alleged offense and the imposition of disciplinary/adverse action against the Grievants. In this case, the Warden has agreed that the disciplinary cases were not reported, investigated and adjudicated in a timely manner. In other arbitration cases, the Agency's decisions in adverse action cases were overturned by reason of untimeliness.

Applying Daugherty's 7 tests for just cause here, the evidence shows that the Agency does not have a clear, unequivocal or unambiguous policy concerning the operational parameters of the UPS Atwater rideshare program. OIG did not accurately calculate the alleged discrepancies in rideshare reimbursement to the Grievants. The Agency has utterly failed to prove that the Grievants received any training on the car pool or a copy of the rideshare program policy from the business office. There was much evidence that the rideshare forms and program were confusing and difficult to follow. The Agency has failed to prove that the Grievants had been made aware of the specifics of the rideshare program, how the forms were intended to be filled out, or how the calculations were made to credit rideshare participants.

The Agency's investigation was rife with error. The evidence shows that the most accurate means of discovering when the Grievants had been in a position to commute to or from the USP would have been their Time and Attendance file. But OIG never asked for that file and it was not offered to them. There is evidence that by using the complete T&A files to calculate days of rideshare eligibility, OIG would have correctly credited the Grievants with overtime shifts worked outside of Correctional Services which did not appear on the CPD Roster.

In the calculations made by OIG, they solely used 16 days as the number of car pool days required to earn compensation under the program; this is inaccurate. The record clearly shows that rideshare participants could earn incentive award payments by car pooling as few as eight days a month. If OIG Would have used the actual eligibility record for reimbursement under the rideshare policy, the Grievants would have also qualified for reimbursement, more frequently than credited by the investigation.

Taken together with the "scheduled-day off" that OIG did not credit, but Analyst Adam gave to all rideshare participants, OIG did not make a thorough analysis of the days that Grievants could have reasonably car pooled and may have been entitled to greater rideshare reimbursement than OIG recognized.

By requesting that four of the officers under investigation sign "proffered" statements under threat of criminal indictment, OIG coerced the testimony of the officers. In their zeal to secure evidence against the Grievants, OIG seemingly contradicted their own conclusions.

Warden Copenhaver testified that he did not review the report of investigation from the Office of the Inspector General that was forwarded to him by the Office of Internal Affairs, even though he agreed that OIA policy required the report to be sent to him as CEO "for action." While he did not view the report as being of no use, he chose not to read the report and decided not to look into the background of the case. He passed the report off to subordinate staff for review and they testified that they did not read the report in its entirety. The evidence shows that neither the Agency official responsible for formulating the disciplinary proposal letters or the deciding official made a thorough study of the evidence in this case. Nor was there any real effort to certify substantial evidence or proof that the employees were guilty as charged.

One of the most inexplicable aspects of this case, is the fact that out of six correctional officers placed under OIG investigation, Grievants received the harshest discipline despite being the only subjects not placed under criminal indictment. In trying to explain why Harris and Wohld, despite both being subjected to arrest and criminal indictment, were not subjected to Agency administrative discipline, OIA Special Agent Lofstead testified that it was because a conviction is necessary for the Agency to find a violation of the standards of employee conduct. By her logic, Grievants should have been similarly immune to the pursuit of disciplinary action by the Agency, since they were never convicted as a result of the investigation. What the Agency has failed to explain is why Harris and Wohld were not administratively charged with Improper Retention of Rideshare Funds, since the OIG investigation report stated in its findings that: "Harris did knowingly convert to his use money of the United States..." and Wohld "did knowingly convert to his use money of the United States..."

The disparate treatment of Grievants is possibly explained by a statement SIA Estrada is alleged to have made to Officer Brent Pavey, that Grievants should not have fought this and brought in outside lawyers.

The Agency made a valiant effort to convince the Arbitrator that the Grievants refused to pay restitution to the Agency; the evidence supports the Grievants' testimony that they made multiple attempts to learn the actual amounts of their overpayments and to reimburse the Agency for whatever amount they were overpaid as a result of their misunderstanding of the operational parameters of the rideshare program. Substantiation comes from Warden Copenhaver's testimony. A reasonable person would likely reject the Agency's position that by declaring the entire rideshare as "fictitious," the Agency then had the right to demand restitution equaling the entirety of the amount paid to the participants. The Agency's own evidence shows that even when applying the most dis-favorable calculations, the Grievants were entitled to compensation under any interpretation of the policy. At no point in the hearing did the Agency properly explain why it views a total reclamation of monies, even those that the employees were factually entitled to, as "restitution" of what the employees owed the Agency. It seems more likely that the Agency intended to "fine" the six rideshare participants by making them pay the Agency far more than they may have been overpaid. The Grievants and their legal counsel objected to this tactic and requested a fair calculation of overpayment, which they never received.

The other completely inexplicable aspect of this case revolves around the fact that in OIG's investigation, they clearly discovered that the method by which analyst Adam was calculating the credited days of rideshare participants appeared to contradict the Rideshare policy and reached an investigatory conclusion that then necessitated the section titled "UPS Atwater Calculations of the Rideshare Forms in Conflict With Written Policy" in the investigation report.

It is uncontested by the Agency that neither Grievant had been subject to prior disciplinary action and both received performance ratings that were consistently above average. It is difficult to fathom why the Agency believed that depriving the Grievants, both expectant mothers, of 30 days of pay was a reasonable penalty. Added to the fact, that the Agency, at the time of the hearing had already begun garnishment of Ms. Pavey's wages. After already depriving her of a month's wages, to then forcibly relieve the Grievant of an additional, significant portion of her pay on the cusp of her

eminent maternity leave, smacks of double-jeopardy and should be remedied post haste.

There is no compelling evidence that either Grievant went forth with malice, intent or forethought to defraud the government in an elaborate rideshare scheme. What seems more likely is that six correctional officers from the same neighborhood, attempted to rideshare together as often as possible, despite their ever-changing shift assignments, changed schedules and mandatory overtime shifts. Their inadvertently running afoul of one of many varying interpretations of the program is no different than a host of other participants who likely were overpaid as well before corrections to the program and its forms were made in 2013.

The Agency has failed to show that the disciplinary/adverse actions taken against the Grievants was for just and sufficient cause and promoted the efficiency of the service. The Union requests that the Arbitrator uphold the essence of the CBA and the law and sustain the grievance.

The Union's reply brief argues that the Arbitrator should grant the grievance, in the first case, because the unreasonable delays in both the investigation and adjudication of the matter robbed the discipline of its corrective purpose. The Agency utteredly failed to show how the disciplinary actions taken against the Grievants promoted the efficiency of the service. Rather than offering evidence that the discipline was necessary and corrective, the punishment meted out against the Grievants was arbitrary, capricious and unreasonable.

Any inaccurate rideshare payments were, in part, the fault of the employer. It is clear that Ms. Adam was crediting rideshare participants with a greater number of riders than were being reported on the rideshare forms that were being turned in. If she had calculated the credit for rideshare participation based on the institution policy, they would each have received less in reimbursement. Conversely, when assisting OIG in analyzing what rideshare credits the Grievants should have received, Financial Services Administrator Gray did not credit Grievants for scheduled days off as Ms. Adam had done, for all employees participating in rideshare.

The calculations used by the Agency to prove fraudulent reimbursement claims are inherently flawed. The Agency's closing brief went to great lengths to show that Grievants could not possibly have been in a car pool vehicle on numerous occasions. This fails to acknowledge that Ms. Adam gave employees credit for scheduled days off and ignores the fact that Ms. Adam gave greater reimbursement than that which was allowed by policy. It also fails to acknowledge Ms. Adam's

practice of crediting participants who rode to work in one car pool but rode home in a different car pool due to participation in overtime.

The record also reflects that all USP Atwater rideshare participants were credited for annual leave, sick leave, and training days. The brief also failed to follow the shift start time standard used by OIG when calculating potential rideshare participation credit. There are examples in every Agency figure of not crediting rideshare participants for possibly having car pooled together when one officer was scheduled on AM and another on DW or similarly, where one officer is scheduled on PM and another on EW. Also listed as distinct and separate shifts, AM and DW are in close enough temporal proximity that officers could each be assigned to one or the other shifts and still fall within the 90-minute window that OIG defined as reasonable for ridesharing. Both the PM and EW work shifts are similarly related.

The Union responds to the Agency's 72-page analysis of the rideshare documents with a comparison to the Correctional Services Roster, as follows:

OIG stated in its investigation report that it excluded from the analysis the months of September 2008 to December 2008 because it was impossible to determine who was supposedly in the vehicle on a given day. In spite of this, the Agency brief used those three months of rideshare forms to attempt to prove its case. In any event, the Agency's calculations are incorrect. The record shows that when conducting her calculations for rideshare participant credit, Ms. Adam overpaid the Grievants, not based upon the documentation submitted, but due entirely to her arriving at a higher calculation than the document, on its face, would normally produce. This tendency of Ms. Adam to inaccurately tally a rideshare form is documented in the record. Ms. Adam submitted for payment to the Grievants sums greater than they were requesting 10 out of the 13 months in question.

While in both the OIG investigation report and the record of the hearing, the Agency implied that the Grievants purposefully submitted fraudulent rideshare claims with the intent of gaining the "maximum amount allowable" from the program, the evidence shows that the vast majority of the time the participants received the maximum reimbursement of $120, it was solely due to the miscalculations of Ms. Adam, not the paperwork submitted by the Grievants. It would not be an unreasonable leap of logic to deduce that if the Grievants truly intended to defraud the government for their maximum gain, they would have consistently submitted rideshare forms that would tally to the greatest amount

available in the program. They consistently submitted paperwork that would only entitle them to lesser amounts than the maximum, and were only paid the maximum because of miscalculations on the part of the Agency.

Where Management is also at fault in connection with the employee's wrongful conduct, the Arbitrator may reduce the penalty assessed by Management. Here, much of the testimony relied upon by the Agency is unreliable. According to the investigatory findings of OIG, neither Melero or Mitchell are credible witnesses. They both were charged with lying during the course of the investigation. To then rely heavily upon incriminating statements they made to prove the Agency's case against the Grievants is a fairly desperate measure. While the Agency believes it has proven the Grievants had "guilty knowledge," it offered no substantial proof that any of the alleged incriminating statements were even uttered by either Grievant.

The record reflects that no two financial Management employees could give an identical and precise description of the dynamics of the Atwater rideshare program, what kind of training was given, to whom the training was given, or which employees received copies of the program policy. The Agency has failed to show a full consideration of the Douglas factors. The Warden did not address a single Douglas factor in Ms. Artiaga's 30-day suspension decision letter.

The Union asks that the Arbitrator view Ms. Artiaga's regretful severance from the Bureau of Prisons as a form of constructive discharge. An appropriate remedy may include an order that the BOP return her to her previous position, after expunging the disciplinary action from her records.

The Union is requesting that both Grievants be made completely whole, which should include revocation of the 30-day suspensions. In additional the Agency has further punished Ms. Pavey by garnishing her wages and the Union asks that the Arbitrator order the Agency to cease and desist this action and repay the additional wages taken from her.

The Agency should also provide back pay consistent with law and regulation. The Arbitrator should exercise his broad authority granted him under the law to address the harm suffered by the Grievants due to these unjust personnel actions, and take any remedial action he deems appropriate. The Arbitrator should retain jurisdiction to ensure compliance with the award for the amount of time necessary to effectuate it.

VII.
DECISION

The issues in these two consolidated cases are, 1.) whether the investigation and adjudication of the disciplinary actions were timely and thereby promoted the efficiency of the service, 2.) whether the adverse actions were for just and sufficient cause, and 3.) what remedies are appropriate if it is found, that the actions were not timely and/or were not for just and sufficient cause.

A. **Timeliness of the investigation and adjudication such that the efficiency of the service is promoted**:

> On the issue of timeliness, 5 USC 7513 provides in pertinent part:
> (a) ... an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service...
> (b) an employee against whom an action is proposed is entitled to - -
> (4) a written decision and the specific reasons therefor at the earliest practicable date.

In his testimony at the hearing in this matter, Warden Copenhaver agreed that the investigation and adjudication of these disciplinary cases were not timely. In fact, the delay was noted by the Agency in its proposal letters issued to Grievants. The Agency argues that if the adjudication process had been more timely, this delay would have inured to the benefit of the Grievants since they would have been terminated rather than suspended.

The evidence record contains no explanation as to why the investigative phase of this matter extended between October 2009, when Business Administrator Gray reported his concerns to OIG, and September 2012, when OIA issued its investigative report to Warden Copenhaver. It is noted that Grievant Artiaga testified that Captain Garcia told her that the case sat on Captain Keilman's desk but this Arbitrator does not rely upon that testimony in making his decision. Captain Keilman was Captain of Correctional Services between August 2010 and August 2012. But there is no evidence in the record to support a finding that Captain Keilman was involved in the investigation of this matter. The investigation was conducted by OIG, and OIG, in the course of its investigation, discovered sufficient evidence against Officers Harris, Wohld, Melero and Mitchell to refer the case to the United States Attorney's office for potential criminal action, such that criminal charges were filed by May 2010. There is no evidence explaining why further interviews were not completed until May 2012. The close-to-34 month investigative process cannot be found to be timely in these matters.

Similarly, the adjudicative phase of this case extended from September 2012 until Officer Robinson completed her suspension in March 2014. Captain Garcia testified that he became captain of Correctional Service December 3, 2012 and received suspension proposals at that time. His issuance of a formal proposal letter to Grievant Robinson on February 26, 2013 might be seen as timely, if it had not been subject to procedural deficiencies. The record is completely silent as to why a corrected proposal letter was not issued until August 1, 2013; some six months later. The record is also silent as to why a proposal letter was not issued to Grievant Artiaga until July 18, 2013. Additionally, the evidence record does not explain why a decision letter was not issued to Robinson until February 5, 2014. The passage of time between September 2012 and March 2014 is found by the Arbitrator to be an untimely period of eighteen months.

Under 5 USC 7513, it is found that the disciplinary actions taken against the Grievants are not for such cause as will promote the efficiency of the service. The written decisions have not been shown to have been issued at the earliest practicable dates. The Grievants and technician Ortiz testified that the delay in the disciplinary process caused harm to the Grievants' careers and their chances for promotion. A delay between the report of potential misconduct until the imposition of discipline, or even until the issuance of a decision letter, of the magnitude seen in this case is found to be inherently prejudicial to the Grievants. In addition, issuance of suspensions are part of progressive discipline and are imposed as corrective actions. It cannot be found to promote the efficiency of the service for such unjustified delay to occur, since such delay robs the discipline of any corrective purpose. The employees who are subject to the discipline, and any other employees who may know of the disciplinary action, cannot be expected to see the effectiveness of delayed discipline. Further, it then becomes most difficult for the employer to argue that an employee's conduct was objectionable, where corrective action is unreasonably delayed.

In this case, the Agency argues that Grievants benefitted from any delay in issuance of the decision letters, since if the decisions had been issued earlier, they would have been terminations. This argument lacks persuasiveness, since it may also be argued in any suspension case, that the employee is lucky to not have been terminated. The appropriate remedy for the Agency's untimeliness will be discussed below in the Remedy.

B. **Just and sufficient cause for suspensions:**

The Grievants are each charged with lack of candor while being the subjects of an official investigation. In addition, Grievant Artiaga is charged with signing inaccurate documentation for personal gain and Grievant Robinson is also charged with submitting inaccurate documentation for personal gain.

1. **Lack of Candor**

The Agency's August 1, 2013 proposal letter to Grievant Robinson charges that, "While being the subject of an investigation... you claimed in your affidavit... 'I did not understand the... policy when I participated in the... program. I never received any training on the... program or its requirements.' Training records reflect your attendance of the Institution Familiarization course from April 28, 2008 to May 9, 2008. The training agenda reflects information presented by the Business Office, specifically information on the... Rideshare program was covered."

But the evidence record before me fails to support a finding that Grievant Robinson lacked candor when she indicated she never received training on the program or its requirements. Officer Robinson attended a training session on May 8, 2008, but it was on Travel Preparation. Robinson has maintained consistently throughout this case that she was not trained on the rideshare program during IF. Other officers who also attended that session were interviewed by OIG and corroborated the fact that no details about the program or its requirements were taught at the session. The evidence supports the conclusion that no training on the rideshare program was provided at that session and it follows that Officer Robinson cannot be found to have lacked candor when stating she was not trained during IF.

Nor can it be found that Grievant Robinson lacked candor when she stated in her affidavit that she did not understand the program when she participated in it. Statements made during the OIG interviews and testimony at the hearing established that there was a fairly universal lack of understanding of the program and its forms and how to complete them, not only among the car poolers, but also among the members of the business office staff in 2008 and 2009. The language on the form underwent several changes because the guidelines were both ambiguous and confusing. Staff members even interpreted and applied the policy differently, resulting in differing payments. In a letter addressed to the Grievants, Specialist Dreher commented upon the confusing nature of the program

and while her letter is hearsay, her conclusions are corroborated by the testimony of Technician Ortiz, who worked in the business office, and who described the program and its forms as "ambiguous, confusing, insufficiently detailed and inaccurate".

Grievant Artiaga also was charged with lack of candor by the Agency for stating in her September 22, 2011 affidavit, "I never received any training on the... program or its requirements." The Agency's proposal indicates that, "Training records reflect your attendance of the Institution Familiarization course on February 4, 2008 to February 15, 2008. The training agenda reflects information presented by the Business office, specifically information on the... Rideshare program was covered." But again, it is found that the Agency has failed to prove that Grievant Artiaga lacked candor when she said she never received training. The IF course class sign in sheet indicates that officers Pringle and Artiaga attended the course between February 4 and February 15, 2008, and the course outline indicates that Travel Preparation was covered by Financial Management on February 11, 2008. However, the course documentation is silent as to which member of the business office staff conducted any particular session and contains no record or confirmation signed by Officer Artiaga confirming that she was trained on the rideshare program requirements during her IF course. The program might have been covered in February 2008 by Specialist Espinoza, Technician Shandor or Administrator Gray, depending upon who was available. However, none of these staff members ever advised Agent Hardman that he or she recalled training Artiaga. Specialist Espinoza testified that his IF sessions on the rideshare program focused more on recruitment than training.

Standing alone, however, the fact that Officer Pringle recalls receiving a training block on the rideshare program during IF training is not persuasive evidence sufficient for a finding that Officer Artiaga also was trained during the session, to find that she lacks candor on the issue. Officer Pringle advised agent Hardman that he was interested in carpooling when he attended the IF course and the evidence record does not reflect when Officer Artiaga decided to car pool. Certainly, she and Robinson did not form their car pool until September of 2008. Grievant Artiaga may simply not have recalled at the time of her OIG interview that the program was discussed at IF, if at the time she was not planning to participate. Her simple presence during an IF session is not sufficient evidence to conclude she lacked candor as to her receipt of training.

As to both Grievants, the memoranda of investigation does not document specific questions, if any, asked of the Grievants to which they replied that they never received training. It has not been shown that Grievants were specifically questioned about training during the IF course by OIG agents when interviewed. The Grievant's simple, subjective statements regarding training, are insufficient to support a charge of lack of candor.

As to both Grievants, the Agency's proposal letters go on to charge them with lack of candor for conduct over a period of months, by inconsistently signing or submitting inaccurate documents. This portion of the "lack of candor" charges is appropriately discussed below in conjunction with the second charges of "Signing inaccurate documentation for personal gain" and "Submitting inaccurate documentation for personal gain."

2. **Signing or Submitting Inaccurate Documentation for Personal Gain**

The evidence record does not support a finding that Grievant Robinson submitted or Grievant Artiaga signed inaccurate documentation for personal gain. The Grievants have been charged with providing inaccurate documents in order to receive the maximum compensation from the rideshare program to which they were not entitled. Both proposal letters charge, "A review of the carpool participants' work schedules clearly demonstrated it was not possible to have carpooled on dates claimed as the work schedules of the listed... participants did not coincide to allow for carpooling to occur on the dates claimed."

A. **Inaccuracy of the documentation**

There is no substantial dispute in this matter that the car pool documentation submitted by the Grievants contained inaccuracies. Grievant Robinson indicated in her affidavit that her paperwork may have contained clerical errors and she testified that the forms had inaccurate information but that she was not advised of the inaccuracies when she was participating in the program. Further, she approached the business office in October 2009 to retrieve her paperwork, after realizing that it might have contained errors relating to a shift change.

B. **Signing or Submitting for Personal Gain**

The central issue in this charge is whether there is just and sufficient cause to determine that the Grievants' actions constitute misconduct because they "knowingly and willingly" signed or submitted documents "in order to receive maximum compensation" to which they were not entitled.

The evidence record does not support a finding that the Grievants committed misconduct when they participated in the rideshare program.

In this case, the inaccuracies in the rideshare paperwork has multiple causes, all of which mitigate against a finding that there was knowing and willing intent by Grievants to receive reimbursements which were not due to them. Given the different interpretations applied by staff as to who qualified for the program and how payment was determined, Grievants cannot be held to have committed misconduct, with "knowing and willing intent."

The OIG investigation report points out that Analyst Adam inaccurately tallied car pool rider participation and overpaid participants during the time period the Grievants car pooled. Adam did advise Agent Hardman and so testified, that it had been her understanding that all members of a car pool were credited with participation in the car pool, even on days when a member of the car pool was on a regular day off. Adam indicated that it would be too time consuming to actually determine the number of riders on each individual day. The purpose of the rideshare program was to "take cars off the road" so presumably an employee on a day off is "off the road." Administrator Gray, in his testimony, defined this as an inaccurate application of the policy. Human Resources Manager Cham-Sanchez, testified that it was her responsibility to extract information from the OIG report to support charges of misconduct. She testified that the report did not indicate that Adam or the business office was misapplying the program policy and she asserted that any incorrect calculation of payments was due solely to inaccurate documents furnished to the business office by the Grievants. But this conclusion by Ms. Cham-Sanchez, is a fatal misreading of the import of the investigative report because she attributes blame, or misconduct to the Grievants' actions that more properly lies with the incorrect tallying by Adam, of the information provided by the Grievants. Neither the proposal letters that were signed by Captain Garcia and Unit Manager Tyson or the decision letters from Warden Copenhaver, acknowledge this significant fact that Adam was inaccurately paying the car pool participants. This failure is not only relevant, but calls into question the basis for the Agency's discipline imposed in these consolidated cases.

Further, during the time frame when the Grievants participated in car pooling, the policy at Atwater assigned participation credit and payment, for days on which a member was on sick or annual leave or on a travel day. It was not until Administrator Harbison assumed responsibility for the

program in February 2013, that the policy was changed to require that a member actually be present in the vehicle in order to receive credit and pay for participation.

Grievant Robinson indicated in her affidavit and testimony that she understood that the car pool members were not required to always car pool together due to shift changes and overtime. She understood from Technician Shandor, that she could come to work in one vehicle and return home in another when mandatory overtime was required, and that employees did this all the time. Shandor denied saying or implying this, but Analyst Adam testified and indicated in her affidavit, that she would give credit to an employee who rode back and forth in this manner, lending support to the conclusion that Officer Robinson was advised that it was permissible to be paid for days when the members did not all ride together in one vehicle.

Further, the language on the forms and policy for completing those forms changed in December 2008 and Specialist Espinoza testified that there was no formal training done by the business office at that time to inform employees already participating in the program. The OIG specifically disregarded any misconduct by the Grievants in submitting rideshare forms prior to January 2009. Thus any forms submitted prior to that time cannot reasonably form the basis for a finding that the Grievants committed misconduct.

The evidence record establishes that the information provided by Administrator Gray and by Specialist Estrada to OIG regarding the work schedules of the six involved officers was incomplete such that, it cannot be found that the investigation was fair and relied upon complete information. Grievant Artiaga pointed out in her affidavit that the daily rosters are not always accurate. Agent Estrada and Associate Warden Lothrop corroborated this in their testimony to the extent that the Time and Attendance Files would most accurately reflect the work and overtime shifts of the officers. Agent Estrada confirmed that OIG did not request the Time and Attendance files and he did not offer them up so they were not reviewed by OIG as part of their analysis of the case. The comparison by Administrator Gray and OIG of only the daily rosters and the rideshare forms cannot be relied upon to determine when the six officers could have car pooled together.

The Grievants testified without rebuttal that they worked overtime both within and outside the Correctional Services Department. Although OIG took into account the miscalculations made by Adam in its analysis, its failure to include the Time and Attendance files, renders the OIG conclusions

as to whether the officers could have car pooled together, unreliable. Further, OIG set what it considered a reasonable limit of ninety minutes between shifts as a measure of whether officers could have car pooled and Grievant Artiaga indicated in her affidavit that it was possible for officers to ride together, when working shifts that were two hours apart. Review of the OIG memoranda of investigation do not reveal any specific questioning of the Grievants, or of the four other officers, as to the particulars of the assignment rosters or the rideshare forms. The memoranda does not state when the officers car pooled together or whether overtime or other factors could explain any apparent discrepancies between the rosters and the forms.

The OIG report concludes that Officer Harris only car pooled with Officer Artiaga for three months. The OIG found that Officer Harris stopped car pooling in January 2009 and that most, if not all, of the car pool days credited to officer Harris after December 2008 were falsely credited. Officer Harris testified that he continued to car pool after January 2009, but at a lesser frequency than before that time. The conclusion that he ceased riding in January 2009 is not supported by either Officer Harris or the Grievants' testimony and cannot support a finding that the Grievants submitted or signed inaccurate documents.

It is found that the statements of Officers Melero and Mitchell cannot be relied upon to determine whether the Grievants committed the charged misconduct. Those officers were both found to lack credibility, in that the OIG report found that they both lied during the investigation. In the context of the totality of the circumstances of this case, the proffered statements of all four male officers are found to be suspect, in that the OIG report indicates that "the officers cooperation provided during the proffer interviews against Robinson and Artiaga" resulted in dismissal of the criminal charges against the men.

Officer Harris testified that he signed the proffer statement even though he did not agree with its wording, even after the wording was revised. He signed the statement on the advice of his counsel and because he had a baby on the way. This calls into question the statements by Mitchell and Melero as to the extent, if any, of their participation in the car pool. Mitchell and Melero both recanted statements made during the investigation. Melero indicated at one point in the investigation that he might have actually car pooled, once with Artiaga and at another point, that he never car pooled at all with her. Mitchell denied ever car pooling but was found not to be truthful when he denied that the

signature on a car pool form was his. The conflicting stories of these two officers call into question their veracity to the extent that their statements cannot form a basis for any findings by the Arbitrator or Agency of misconduct by the Grievants.

The evidence record does not support a finding that the Grievants conspired to receive compensation to which they were not entitled by signing for the other car pool members. Officer Artiaga gave officer Robinson permission to sign for her. The male officers denied that the Grievants had permission to sign for them. However, the evidence does not prove that there was not a misunderstanding as to the extent of the authority given to Robinson as car pool captain. She reasonably could have understood that when the men agreed that she and Artiaga could take care of the paperwork, that included all of the tasks involved. Technician Ortiz testified that Officer Robinson was not the only car pool captain who signed for other participants. There is no reliable evidence that the Grievants obtained a copy of the rideshare program policy before November 2009 or that they were on notice that each participant had to sign the monthly forms. In any event, the policy is both vague and ambiguous in that it states, "It is the responsibility of the Car Pool Captain to maintain all documentation..." The program expressly empowers the Car Pool Captain with broad responsibility in maintaining the documentation.

As such, the evidence does not support a finding that Artiaga or Robinson lacked candor by consistently signing or submitting inaccurate documentation to maximize their reimbursements. Given the lack of effective training on the program and the confusing forms, as well as the inconsistent interpretations of the policy, such that not all the inconsistencies can be attributed to the Grievants' actions; the evidence fails to prove that there was intentional misconduct, as opposed to misunderstandings based on poorly drafted policy guidelines. It cannot be found that there was an intent to deceive if the Grievants understood that they were to add scheduled days off to the rideshare forms, that they could complete the forms with the officers' regular shifts, given the changeable nature of their schedules, or that they could ride to work in one vehicle and home in another.

The OIA referred the OIG investigative report to Warden Copenhaver, as CEO of the prison, with the instruction to "proceed with disciplinary action or adverse action." The facts of this case cannot support a finding that the decision-making process by the warden, or those to whom he delegated responsibility, was thoughtful or thorough. It appears that neither a careful or fair

consideration was given to the complex content of the OIG's report. The information contained within the interviews do not reasonably support OIG's findings of misconduct by the Grievants and it was incumbent upon the warden to either reject those findings, in whole or in part, or to refer the matter back to OIG to obtain additional clarifying information.

The proposal letters issued to Grievants indicate, "... your continued refusal to make repayment constitutes a significant factor in aggravation." Every demand for restitution directed to either the Grievants or the other four subjects of the investigation contemplated full repayment of all monies received from the rideshare program. It is found that the decision to consider whether the Grievants made restitution in the full amount of payments received was arbitrary. The evidence record is not a reliable basis for this Arbitrator to reach accurate conclusions as to when each officer participated in the car pool or to determine to what amount of compensation each participant was rightfully entitled. It can, however, be concluded that the Grievants did car pool to work. The record indicates that the Grievants and their attorneys offered to sit down with the Agency to sort out what, if any, overpayment had been made. The Agency did not rebut Grievants' claims that they were willing to repay any properly-assessed overpayment and it has not been shown why a full repayment of all monies received was properly considered as being due.

Finally, the evidence does not support any arguments that the Grievants were treated more harshly because they hired outside lawyers or involved the Union and are unsustainable.

3. **Remedy:**

After a careful review and analysis of the evidence presented, the voluminous transcripts of record and the parties' post-hearing arguments and replies, the Arbitrator finds that the Agency has not provided sufficient facts to allow the Arbitrator to find either that the disciplinary process was timely or that there is just and sufficient cause for the discipline imposed upon Grievants. The remedy for both the unreasonable delay found here and the lack of sufficient evidence to support any finding of wrongdoing on the part of the Grievants, is for the Arbitrator to sustain the two grievances. While there may have been overpayments made to the Grievants to which they were not entitled, the evidence record does not 1.) support a finding that the overpayments were due to misconduct on their part, or 2.) support a finding as to what the amount of overpayment might be. There is not just and sufficient cause to support imposition of any discipline against the Grievants, in the amount of a thirty-day

suspension or otherwise. Accordingly, for the reasons set forth above, the consolidated grievance are hereby sustained.

VIII.
AWARD

1. The consolidated grievances of Officers Amber Artiaga and Raynise Robinson are sustained.

2. The evidence fails to prove that the investigation and adjudication of the disciplinary actions against Officers Artiaga and Robinson were timely and promoted the efficiency of the service.

3. The evidence fails to prove that the adverse actions taken against Officers Artiaga and Robinson by the Agency were for just and sufficient cause.

4. The Agency's disciplinary actions of thirty (30) days unpaid suspensions of the Grievants are hereby ordered rescinded and the Agency is ordered to expunge the actions from their personnel records.

5. The Agency is hereby ordered to cease and desist from its garnishment of Grievant Robinson/Pavey's wages.

6. The Grievants shall be made whole for all lost wages and related benefits, consistent with law and regulation. This applies to the wages relating to their suspensions and the garnishment action.

7. The evidence fails to prove that the resignation of Grievant Artiaga was a constructive discharge by the Agency and the Arbitrator shall not order that she be return to her previous position of employment with the BOP.

Respectfully submitted,

Dated: November 23, 2014

Claude Dawson Ames

Claude Dawson Ames, Arbitrator