



her. Brian Donesley represented Goehring. DEQ was represented by Brian B. Benjamin.

## I.

### PROCEDURAL BACKGROUND, ISSUE AND STANDARD OF REVIEW

#### A. Background and Prior Proceedings

Goehring has a Bachelor of Science in Biology with Chemistry minor and was involved with environmental monitoring for close to twenty (20) years. She was employed by the State of Idaho in various assignments for fourteen (14) years. **Tr. Vol. III, p. 125:9-128:7.** Her last position was with DEQ as an Air Monitoring Specialist/Analyst 3 (referred to as a field operator or operator at times). She had numerous responsibilities, most relevant of which was the collection of filters and data from various air quality monitors in the Treasure Valley and inputting of all collected data into the DEQ MI 2.5 database. Goehring was terminated by DEQ on April 9, 2008. The Notice of Contemplated Action letter ("NOCA") dated March 21, 2008 alleged six (6) instances wherein Goehring altered and imported/submitted inaccurate data to DEQ's MI 2.5 database and G: drive (shared drive). In each of the alleged instances, the data collected by Goehring from the St. Luke's FRM monitor was altered and submitted so as to appear as data from the Mountain View FRM monitor ("MTV" monitor). **Respondent's Exhibit 2.** The bases cited for her dismissal are Idaho Code § 67-5309(n) and IDAPA 15.04.01.190.01 (b) and (e) (IPC Rule 190.01 b. and e.) providing as follows:

- (b) Inefficiency, incompetency, or negligence in performing duties or job performance that fails to meet established performance standards.
- (e) Insubordination or conduct unbecoming a state employee or conduct detrimental to good order and discipline in the department.

Goehring appealed her dismissal to the IPC and a four (4) day hearing was held February 10-12, 2009 and February 17 and 20, 2009. As stated above the Hearing Officer found that DEQ did not meet its burden of proving Goehring intentionally altered data obtained from the St. Luke's monitor and submitted it to DEQ as data from the MTV monitor. **Findings of Fact, Conclusions of Law and Preliminary Order, p. 30-31 (June 16, 2009) (hereinafter "Preliminary Order")**. DEQ timely filed its Petition for Review on July 21, 2009.

DEQ's exhibits are referred to as "**Ex. R. \_\_\_**" and Goehring's exhibits are referred to as "**Ex. A. \_\_\_**". References to testimony in the Hearing Transcript are referred to as "**Tr. Vol. \_\_\_, p. \_\_\_:\_\_\_ - \_\_\_:\_\_\_**" to signify: (1) which volume the testimony is found, (2) the page upon which the testimony is found and (3) on that page, which lines the testimony is found.

## **B. ISSUE**

Did DEQ prove by a preponderance of the evidence that Goehring altered data obtained from a monitor located at St. Luke's and submitted/imported it to DEQ so as to appear as data from a monitor located at Mountain View?

## **C. STANDARD OF REVIEW**

The standard of review on disciplinary appeals to the Commission is as follows:

When a matter is appealed to the Idaho Personnel Commission it is initially assigned to a Hearing Officer. I.C. § 67-5316(3). The Hearing Officer conducts a full evidentiary hearing and may allow motion and discovery practice before entering a decision containing findings of fact and conclusions of law. In cases involving Rule 190 discipline, the state must prove its case by a preponderance of the evidence. IDAPA 29.01.01.201.06. That is, the burden of proof is on the state to show that at least one of the proper cause reasons for dismissal, as listed in I.C. §

67-5309(n) and IDAPA 28.01.01.190.01, exist by a preponderance of the evidence.

On a petition for review to the Idaho Personnel Commission, the Commission reviews the record, any transcript submitted, and briefs submitted by the parties. I.C. § 67-5317(1). Findings of fact must be supported by substantial and competent evidence. *Hansen v. Idaho Dep't of Correction*, IPC No. 94-42 (December 15, 1995). We exercise free review over issues of law. The Commission may affirm, reverse or modify the decision of the Hearing Officer, may remand the matter, or may dismiss it for lack of jurisdiction. I.C. § 67-5317(1).

*Soong v. Idaho Department of Welfare*, IPC No. 94-03 (February 21, 1996), *aff'd.*, 132 Idaho 166, 968 P.2d 261 (Ct. App. 1998).

## II.

### FACTUAL FINDINGS AND DISCUSSION

The clear, unequivocal issue presented in this appeal is whether DEQ has proven by a preponderance of the evidence that Goehring altered data obtained from the St. Luke's monitor and imported it to the DEQ MI2.5 database and G drive so as to appear as data from the MTV monitor. If DEQ has shown Goehring did it by a preponderance of the evidence, it certainly constitutes grounds for discipline pursuant to IPC Rule 190.01e, as a matter of law.

#### A. DEQ Data Monitoring and Collection Procedures.

The Hearing Officer's findings on the general procedure for collecting air quality filters and data from the air quality monitors in the Boise Region are substantially undisputed by the parties and are found in the **Preliminary Order, p. 2- top of p. 4**. As an Air Monitoring Specialist/Analyst 3 working out of the Boise Regional Office ("BRO") Goehring was one of three operators who collected air quality filters and data from various air quality monitors in the Boise Region, following the general procedure for

doing so. Generally stated, Goehring and other operators are charged with downloading the data from the monitors using a Palm Pilot (Palm) or a laptop, noting the time and date of pickup on a Site Filter List and collecting the filters for later delivery to the lab. The downloaded data was then brought back to the BRO and uploaded to Goehring's C drive on her desktop computer. From there, Goehring was charged with creating import files from the data and importing the files to the DEQ MI 2.5 database and shared G drive.

**B. 2007 4<sup>th</sup> Quarter Data and Q/A Process.**

On January 28, 2008, Mary Walsh, Data Analyst at DEQ, sent several emails to all regional operators, including Goehring, advising them they needed to have all their PM2.5 FRM data finalized and imported to the MI2.5 database as soon as possible because DEQ's annual PM2.5 grant application was due early that year. **Ex. R. 9, p.1, 3.**

At all times relevant to this matter, Gary Reinbold ("Reinbold") was the Air Quality Data Analyst tasked with reviewing/auditing monitor data imported to the MI2.5 database and to the DEQ shared drive (G drive). He was responsible for the Q/A process. On February 4, 2008, Reinbold emailed Goehring seeking import files for the 2007 fourth quarter MI2.5 data. Goehring responded February 6, 2008, 9:52 a.m., indicating that "I'll send them to you and I just got everything done except St. lukes. I downloaded the data, but it isn't transferring to RPDATA. I'm headed back out there to try and pry the data out of the sequential." **Ex. R. 9, p. 6.** Thereafter, in reviewing what data Goehring had submitted for 4<sup>th</sup> Quarter 2007, Reinbold had a significant number of questions, particularly with respect to the St. Luke's monitor data and the MTV monitor

data. Over the course of February 8-20, 2009, numerous emails and exchanges between Reinbold and Goehring show the existence of issues concerning MTV data and intertwining with St. Luke's monitor data. **Ex. R. 9. pp. 8-9, 32-37, 42-44, 46, 49-60.**

However, Reinbold testified it was Goehring's February 20, 2008 reply to his questions for St. Luke's data runs (**Ex. R. 9, p. 51; Ex. R. 10, p. 2-3**) that triggered him to suspect data from her import files was being manually altered. Within minutes before her email reply responding to Reinbold questions on St. Luke's import data, Goehring had allegedly saved a St. Luke's 11/21/07 import file, filter 7144395 with a different run date (11/20) than how it had already been imported, on 2/6/08, as an MTV filter (with a run date of 11/17). Further, the environmental data was identical. Reinbold testified he had never seen this before and reported it to Mary Walsh and Chris Ramsdell, and then to Bruce Louks, AG Monitoring Manager for DEQ's Air Quality Division. **Ex. R. 10.**

DEQ Director Toni Hardesty tasked Curt Fransen, Deputy Director of DEQ ("Fransen") with conducting an investigation of the alleged altered data and he testified at the hearing about the investigation. Goehring was placed on administrative leave with pay Friday February 22, 2008 by Pete Wagner, Administrator of the BRO. **Ex. R. 1.** Goehring's office was locked with her desktop computer within, on February 21, 2008 and, after her placement on administrative leave, Pete Wagner secured her PDA ("Palm") and laptop computer and locked them in her office as well. **Ex. R. 5, p. 1.** DEQ IT personnel picked up Goehring's desktop, laptop and Palm in the afternoon on Monday February 25, 2008, leaving the office locked upon leaving. **Ex. R. 5, p. 3-** (**Brian Rayne Email dated February 26, 2008 at 1:16 p.m.**) DEQ personnel backed

up the desktop and the laptop so relevant files could be audited. **Id. – (Brian Rayne Email dated February 26, 2008 at 11:45 a.m.)** After Goehring's placement on administrative leave, Mike Toole, Regional Air Quality Monitoring Coordinator, and supervisor to Goehring, had key access to Goehring's office, and in fact, accessed her office accompanied by Carol Mueller, air monitoring clerical, two times after her placement on leave, according to his testimony. **Tr. Vol I., p. 54:17- 55:1.** He maintained a log of everyone who went in and whether anything was taken from the office. **Id. at p. 55:5-8.** Toole testified he did not recall ever logging onto Goehring's desktop computer in the entire time he worked with her and that no one else got onto a computer or a laptop or a PDA that belonged to Goehring after she had been placed on leave. **Tr. Vol. I, p. 52: 2-8; p. 55: 9-17.**

Reinbold was tasked with auditing Goehring's computer files for the 2007 4<sup>th</sup> Quarter data. In so doing, he found and reported six instances in Goehring's 2007 4<sup>th</sup> Quarter data where St. Luke's data was manually altered and imported so as to appear it ran and was collected from the MTV monitor. Except for manually changing the filter number, set/stop run dates, and the date of maximum difference in temperature (which are characteristic of the particular monitor), all six (6) MTV runs had identical data as another one of the St. Luke's data runs. On discovering this, Reinbold felt it was clear that data was being altered to misrepresent the truthfulness of the data; there was no other explanation. It is virtually impossible to have identical environmental data on different dates, both in time and in space. **Tr. Vol I, p. 173:24 – 174:3; p. 176:16-24.** Based upon his findings, Reinbold created spreadsheets to show the alleged manual alteration. **Ex. R. 11-16, spreadsheets.** Further, from review of the spreadsheets he

created at **Ex. R. 11-16**, Reinbold pointed out that in certain of the instances the altered data was not altered correctly- it is apparent that the runs could not have happened like that.<sup>1</sup> On March 21, 2008, Goehring was provided with the NOCA. (**Ex. R. 2**) and evidence supporting the allegations. She was ultimately terminated on April 9, 2009.

**Ex. R. 4.**

**C. Stipulation Between The Parties At Hearing**

On the first day of the hearing, the parties discussed and stipulated to the fact that the data alteration at issue was the result of manual, human alteration and not any technological, equipment or systems failure. **Tr. Vol. I, p. 203:9 – 207:7**. Specifically, counsel for Goehring stated on the record:

We stipulate that there was an alteration of the data . . . and that it wasn't caused by system failure, the system in the sense that the monitors misconveyed information, laptop garbled information, PDA, what have you.

We maintain that, ultimately, the issue . . . has to do with a corruption of the C drive data on Ms. Goehring's database by some person and then entered into the G drive.

**Id. at p. 203:25 – 204:10.**

The stipulation was clarified by Ms. Goehring's counsel and entered a final time in the record as follows:

The parties agree to stipulate that with respect to the allegations in the Notice for Contemplated Action of Termination numbers identified as 1 through 6, the stipulation is that there was human error, whether intentional or not, which resulted in the corruption of the data which constitutes the basis for the allegation against appellant . . .

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<sup>1</sup> For example, **Ex. R. 11** shows the MTV 11/21/07 import file still has the St. Luke's filter number (7144395) from which the data was copied; **Ex. R. 12** shows the set stop date and max. diff. temp. date and time left unchanged from the St. Luke's run from which it was copied (resulting in run dates that don't match a 24-hour run period for the MTV run). **Exs. R. 14 and 15** also show set/actual/stop run dates that cannot occur with normal monitor runs.

**Id. at p. 206: 8-17.**

Finally, the stipulation is reiterated by Ms. Goehring's counsel on the second day of the hearing when Ms. Goehring's counsel objected to DEQ's proffering of evidence related to showing the data alteration as not a result of a technological glitch:

I guess, technically, we stipulated yesterday, and my purpose was to try to avoid this drawing on of this technical truth that there was not some accident technologically rather than these manipulations were done by a person in terms of data entry. . . . I'd like to get down to show what happened and how my client did it. We stipulated that somebody did this thing. . . .

**Tr. Vol. II, p. 157:9-15; p. 158:3-5.**

Notwithstanding the stipulation, in the Preliminary Order the Hearing Officer proceeded to find that DEQ's investigation was inadequate because (1) DEQ allegedly failed to investigate the issue of potential causes other than manual alteration (**Preliminary Order, p. 23**); and (2) DEQ purportedly failed to offer any evidence at the hearing of having ruled out those potential alternate causes. **Preliminary Order, p. 26, 28, 30.** It was error for the Hearing Officer to rule against DEQ, in part, on the basis of lack of evidence presented by DEQ regarding an issue upon which the parties stipulated. "Stipulations are a form of judicial admission that obviates the necessity for proof of facts that are admitted in the stipulation". Reding v. Reding, 141 Idaho 369, 373, 109 P.3d 1111, 1115 (2005); see also McLean v. City of Spirit Lake, 91 Idaho 779, 783, 430 P.2d 670, 674 (1967) ("It is well settled law in this state that a formal admission made by an attorney at trial is binding on his client as a solemn judicial admission. It is well recognized that a judicial admission, applied to the judicial proceedings in which it is made, limits the issues upon which the cause is to be tried

and obviates the necessity for proof of facts within the ambit of a distinct and unequivocal admission or stipulation so made.”)

**D. Did Goehring Alter the Data as Alleged?**

Because of the stipulation the Commission’s focus lies on whether DEQ has proven by a preponderance of the evidence that Goehring imported the St. Luke’s data to the DEQ database so as to make it appear as if it was MTV data.

Goehring appears to have been a good employee with a long history with DEQ, and no blemishes on her employee record. **Preliminary Order, p. 4.** Deputy Director Fransen testified DEQ could not point to any motive on her part. **Tr. Vol. III, p. 108:19 – p. 109:19.** Goehring indicated there was no reason for her to do what is alleged. She points to the criminal nature of the act, how her termination for the alleged act has hurt her career and that she was dedicated to the air quality program. **Tr. Vol. III, p. 130:1-12; p. 129:11-20.** For the sake of argument, she further testified it was sloppily done and she would have done it differently. **Id. at p. 139:24 – p. 140:1-23.** Even then, she credits Reinbold with finding every mistake (**Tr. Vol. IV, p. 14:7-13**) so why would she do it in the first place? All of this is sensible and reasonably considered by the Hearing Officer. **Preliminary Order, p. 29, 30.**

Further, and more importantly, like the Hearing Officer, we find the level of proof is not present to show by a preponderance of the evidence that Goehring is responsible for the alteration of the data. The extent of DEQ’s proof is that (1) St. Luke’s data files were manually altered and imported as MTV data the morning of February 6, 2008; (2) the St. Luke’s data was on Goehring’s C drive on 2/6/08; and (3) Goehring was working

at her computer on 2/6/08 at the time the St. Luke's files were imported and saved as MTV data.

There is no question that human data alteration occurred. This was stipulated to by the parties as described above. However, DEQ did not establish a sufficient trail back to Goehring in order to meet its burden of proving by a preponderance of the evidence that Goehring did it. There is evidence in the record showing the altered data and the time of import to the DEQ database/G drive on 2/6/09 and there is email exhibit evidence and Goehring's own testimony placing Goehring at her desk on the morning of 2/6/09. **Ex. R. 9, p. 6; Tr. Vol. IV., p. 40:21-24, p. 54:11-13; Ex. A 49.**

But no evidence was produced that directly linked the importing of the data in question to Goehring's C drive other than **Ex. A. 50**, which DEQ alleged was a snapshot from her C drive showing importation of the data at issue the morning of 2/6/09. Goehring testified **Ex. A 50** did not represent her C drive. **Tr. Vol. IV, p. 44:16 – p. 50:20.** Reinbold testified that data could be imported to the G drive and MI 2.5 database from any network drive, thumb drive, CD or anywhere someone could connect to from one's computer. **Tr. Vol. III, p. 39: 5-8.** Goehring testified she was instructed to leave her computer on all the time because it's the only one with remote communication so that there could be use of the communication software to communicate with the monitors and meteorological towers. Her computer was the central computer access for the communication software. **Tr. Vol. III, p. 197:23-25; p. 199:7 – p. 200:3.** She further testified there were no access codes required to get into her C drive as long as the computer was on; that it was wide open. **Id. at p. 198:10 -14.**

There was evidence and testimony presented concerning the use of Goehring's CD-ROM on the morning of 2/5/09 when Goehring was out of the office. Goehring proposes that someone used the CD burner on her computer on 2/5/08 at 8:50 a.m., while she was in the field. **Tr. Vol V, p.83:2 Ex. A. 44.** Her theory is that someone cut the St. Luke's data from her C drive and burned it onto a CD and from a different location, imported the St. Luke's data as MTV data. It is evident she points to Toole, although she never explicitly states as much in her testimony. Goehring testified that she was routinely frustrated with Toole because she felt he pawned his duties off on her and didn't effectively address monitor performance issues. **Tr. Vol. IV, p.69-72.** When Bruce Louks found out about the monitor performance issues, he reamed Toole. **Id. at 24.**

Nick Powers, senior network analyst confirmed that **Ex. A. 44 and 45** represent the CD-ROM being used on Goehring's computer for that timeframe. He indicated it shows that the CD drive came alive but it doesn't show file transactions. **Tr. Vol. V., p 129: 7-15.** He further testified that upon full review of **Ex A. 44-45**, he believed that it represented Glenn Huffaker installing software, configuring software and then leaving. **Tr. Vol. V, p. 100:2 – 105:17; p. 128:13 – p. 129:23.** He remembered this because he was watching Huffaker do it at one point; it was taking some time due to configuration problems. **Id. at p. 103:17-18; p. 112:12-16.** He also acknowledged, however that **Ex. A. 44-45** "describe what the computer thinks is going on for events that take place on the computer" (**Tr. Vol. V., p. 99:23- p. 100:1**) and he acquiesced on cross-examination that it wasn't impossible that the event shown signified somebody burning a CD retrieving data from the computer. **Tr. Vol. V., p. 120:18 – p. 121:6.**

The main evidence DEQ relied upon are the spreadsheets (**Ex. R. 11-16**) created by Reinbold after and as a result of his investigation and emails that show Goehring at her desk the morning of 2/6/09. Review of the record and testimony at the hearing reveal that Reinbold was tasked with conducting the “nuts and bolts” of the investigation and presented his findings and conclusions to DEQ management. At all relevant times, Reinbold was in charge of the air monitoring program Q/A process and had working knowledge of the MI 2.5 database.

In this particular case, solely from a level of proof perspective, it would have been prudent for DEQ to involve a computer professional who may have been able to dig into the history of Goehring’s C drive, something at which Reinbold lacked expertise and which DEQ did not do. Bruce Louks testified they thought about looking at Goehring’s C drive history, but that DEQ’s I.T. personnel indicated log-on records were not kept; that it was not possible. **Tr. Vol. V, p. 246:12 – p. 247:14.**

In any event, while there is evidence showing the clear alteration of data and that Goehring was working at her computer the morning of 2/6/08, we find that this alone, doesn’t rise to the level of proof required to show it was Goehring who altered the data in question in this case. She had an unblemished, distinguished employee record and no motive or anything to gain from altering the data. This is undeniable. Evidence in the record shows that Goehring’s computer was always on and open without access code protection and there was clearly use of her CD drive on the day before the St. Luke’s data at issue was imported to the DEQ database and G drive. It isn’t clear if a CD was burned or whether software was installed at that time, but no CD of any installed software was presented into evidence.

III.

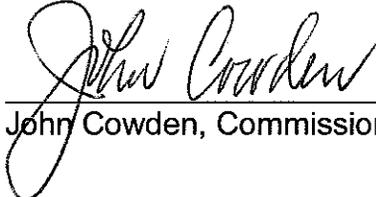
**CONCLUSION**

For the reasons stated herein, we find DEQ has not met its burden of proving by a preponderance of the evidence that Goehring altered data obtained from a monitor located at St. Luke's and submitted/imported it to DEQ so as to appear as data from a monitor located at Mountain View. Therefore, pursuant to Idaho Code §67-5316(4), IT IS HEREBY ORDERED THAT Appellant shall be reinstated in the same position or a position of like status and pay at DEQ. Appellant is also entitled to reimbursement of all pay for the period of discharge and is entitled to all applicable state benefits to which she would otherwise be entitled.

BY ORDER OF THE  
IDAHO PERSONNEL COMMISSION



\_\_\_\_\_  
Pete Black, Commissioner



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John Cowden, Commissioner



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Clarisse Maxwell, Commissioner

#### IV.

#### DISSENT

The Chairman, John Michael Brassey and Commissioner Evan Frasure concurring and dissenting as follows:

We concur in the majority view of the effect of the effect of the stipulation of the parties. Because of the parties' stipulation, the sole dispute between the parties, and hence the sole focus of the appeal, lies on the question of whether DEQ has proven by a preponderance of the evidence that Goehring imported the St. Luke's data to the DEQ database so as to make it appear as if it was MTV data. The majority concludes that DEQ has not met its burden. We dissent.

The Hearing Officer's Preliminary Order and ultimate ruling is premised predominantly on her findings that the investigation in this matter was inadequate, and there is inherent critique of Reinbold throughout. **Preliminary Order pp. 21-26.** As a consequence, she finds DEQ's credibility and, inherently that of Reinbold, to be suspect. **Id. at pp. 22, 26.** The Commission should exercise care in passing judgment on what constitutes an adequate investigation and reaching the conclusion the Commission reached in Idaho Dep't. of Correction v. Weirum, IPC Case No. 97-03 (Decision and Order on Petition for Review, May 13, 1999) ("Weirum"). This is particularly true in cases where, as here, a substantial part of the important factual issues have been the subject of a stipulation and are therefore not in dispute.

Moreover, DEQ's investigation in this case is clearly distinguishable from the Weirum case upon which the Hearing Officer heavily relies. In Weirum, there was an investigative report "adopted by . . . management without any attempt to validate the

investigatory process, and without reviewing the original documents which were used in creating the final report.” Weirum at p. 11. The Commission further pointed out in Weirum that IDOC failed to meet its burden pointing to:

the reliance by management upon the seriously flawed investigation without undertaking even a cursory review of the process and conclusions, its failure to evaluate and seriously consider Weirum’s responses to the investigative report . . .

Id. at p. 17.

The Hearing Officer in this matter cites to Weirum and then makes a number of conclusory findings, not verified in the record and testimony, to suggest DEQ’s investigation was just like the faulty Weirum investigation. **Preliminary Order, p. 22-23, 25-26.** However, the evidence in the record and the testimony at the hearing shows that DEQ undertook a serious, detailed investigation lasting nearly a month, including management review and discussion, and detailed attention to Goehring’s explanations. **Tr. Vol. V, pp. 49-123.** Unlike in Weirum, DEQ’s decision was not founded upon a single, unsubstantiated report. Here, there was review, examination and discussion of the underlying data and information at issue by multiple individuals including the ultimate decision-maker Deputy Director Fransen. **Id.** We don’t believe the investigation was inadequate in this case.

The ultimate question is whether DEQ proved its case by a preponderance of the evidence. We believe the evidence in the record shows that it is more probable than not that Goehring altered the data as DEQ alleged. In summary, we believe the evidence in the record shows that (1) St. Luke’s data files were manually altered and imported as MTV data the morning of February 6, 2008 (2/6/08); (2) the St. Luke’s data was on Goehring’s C drive on 2/6/08; and (3) Goehring was working at her computer on

2/6/08 at the time the St. Luke's files were imported and saved as MTV data. No direct evidence was produced that anybody else was using her computer at the relevant time and there is no credible evidence that anyone else took any action to alter the data on her computer. The record supports a finding that DEQ has proven by a preponderance of the evidence that Goehring altered the St. Luke's data at issue so as to make it appear to be MTV data. The evidence shows Goehring probably altered the data and that is the essence of the burden of proof placed upon DEQ<sup>2</sup>.

Goehring asserted she did not have the St. Luke's data files on 2/6/08 when the altered MTV import files were last saved and imported to the DEQ database. She bases this assertion on her 2/6/08 email at 9:52 a.m. to Reinbold wherein she stated: "I'll send them to you and I just got everything done except St. Luke's. I downloaded the data, but it isn't transferring to RPDATA. I'm headed back out there to try and pry the data out of the sequential." **Ex. R. 9, p. 6.**

First, her email states only that she does not have St. Luke's "done", it does not say that she had not created any import files or had not collected any St. Luke's data for the quarter. Second, the evidence in the record shows Goehring did have the St. Luke's data that was used in importing the MTV files so as to appear as MTV data.

The uncontested data collection procedures as set forth by the Hearing Officer described how and when data is collected from the monitors. The PDAs used to download data from the monitor did not hold/store many files at one time. Collecting the

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<sup>2</sup> "Preponderance of the evidence" is defined as [t]he greater weight of the evidence, . . . superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other". Black's Law Dictionary (8<sup>th</sup> ed. 2004), p. 1220. It is often characterized as "more probable than not". This is a lesser standard than "clear and convincing evidence" (defined as "highly probable or reasonably certain") and certainly lesser than the criminal standard of "beyond a reasonable doubt". *Id.* at p. 596.

filters that had run and the data from the monitor site was a **continuous process throughout the quarter**. Once collected, Goehring testified she brought it back to the DEQ office and uploaded it onto her desktop computer into certain files. **Tr. Vol IV, p. 42:2-10**. This was corroborated by Reinbold's testimony and **Ex. R. 17**. Once uploaded it was a matter of "cutting and pasting" the data into import files, labeled by the date the filters/data were retrieved from the monitor. **Tr. Vol. V, p. 5:19-25**. From there, the import files were then ready for importing to the DEQ database and G drive. **Preliminary Order, p. 3**.

Consistent with this practice, the record shows that the St. Luke's import files from which the data was used in the six altered MTV files at issue are as follows: **SL 11/21/07** import file (Allegation 1); **SL 12/17/07** import file (Allegation 2); **SL 12/21/07** import file (Allegation 3); **SL 11/28/07** import file (Allegation 4); **SL 12/04/07** import file (Allegation 5); and **SL 12/10/07** import file (Allegation 6). **Ex R. 11-16, Spreadsheets**. Further, Site Filter Lists in the record also document the dates the St. Luke's data was retrieved from the monitor. **Ex. R. 20** (Tare Date 11/09/07- data collected from St. Luke's on 11/21, 11/28, 12/4, 12/10; Tare Date 11/26/07- data collected at St. Luke's 12/17, 12/21). When shown the Site Filter Lists, Goehring acknowledged she had been to the St. Luke's monitor multiple times throughout the quarter and collected data as shown. **Tr. Vol. V., p. 28:7-30:14**. This is substantial and competent evidence that Goehring did have the St. Luke's data in her C drive well before 2/6/08 and it directly refutes her assertion and testimony on the subject.

Goehring claims she did not provide the altered data. Necessarily, based upon the stipulation between the parties that **someone** did, she alleges someone

altered the data and made it appear that she had performed the alteration. However there is no direct evidence in the record to support this assertion. Goehring proposes that someone used the CD burner on her computer on 2/5/08 at 8:50 a.m., while she was in the field. **Tr. Vol V, p.83:2 Ex. A. 44.** Her theory is that someone cut the St. Luke's data from her C drive and burned it onto a CD and from a different location, imported the St. Luke's data as MTV data.

There is substantial and competent evidence explaining a legitimate, credible reason why her CD burner was used on 2/5/08 from 8:50 a.m. until 10:25 a.m. Nick Powers, senior network analyst explained that **Ex. A. 44 and 45** simply represent the CD-ROM being used on Goehring's computer for that timeframe, but not for burning data onto a CD. He further testified that upon full review of **Ex A. 44-45**, he is confident that it represented Glenn Huffaker installing software, configuring software and then leaving. **Tr. Vol. V, p. 100:2 – 105:17.** He explained how **Ex. A. 44** shows that the computer recognized the new software. **Id. at 129:16-23.** He remembers watching Huffaker at work on the installation and configuration; it was taking some time due to configuration problems. **Id. at p. 103:17-18; p. 112:12-16.** The greater weight of the evidence (particularly Nick Powers' testimony) shows there was no CD burned from Goehring's computer.

Through testimony Goehring asserted other reasons she couldn't have done it. Goehring doesn't deny, but, rather, admits that she was working at her computer on the morning of 2/6/08 when the alleged alteration of data occurred. Instead, she asserts that 5 of 6 of the altered MTV files were imported within 5 minutes (based on the last saved dates) and that she couldn't do it that fast. She also asserts that, on the morning

on 2/6/08, during the timeframe in which the St. Luke's data was imported and saved as MTV data, she was working on importing and saving data collected from a different monitor site, Northwest Nazarene University (referred to as NNC1" and/or "NNC2" data and collectively as "NNU" data).

The Hearing Officer made findings consistent with her assertions. **Preliminary Order, pp. 13, 28.** However, Goehring's assertions and the Hearing Officer's findings do not appear to be supported by substantial and competent evidence in the record. Substantial and competent evidence in the record actually refutes Goehring's assertions and the Hearing Officer's findings.

Goehring testified she never had occasion, at any time, to enter six (6) files within 5-6 minutes in her 14-15 years of doing this. **Tr. Vol. V, p. 68:1-7.** However, evidence in the record shows numerous examples of other import files created by Goehring (not alleged to have been altered) with last save dates very close in time indicating she could do so and it wasn't unusual:

- **Ex R. 11, p. "1A MTV G 1121 Import File"**: This shows a screen shot of the 4<sup>th</sup> quarter MTV import files with the last save date under Date Modified column at the end. There are also two files saved on 2/11 at 2:37, and **four** files saved on 11/20 between 1:28 and 1:31 (within 3 minutes).
- **Ex R. 11, p. "1B StLukes G 1121 Import File"**: This shows a screenshot of the St. Luke's 4<sup>th</sup> quarter import files with the last save date under the Date Modified column at the end. There are three files saved on 11/20 between 1:15 and 1:21, and **seven** files saved on 2/8 between 9:51 and 9:56 (within 5 minutes).
- **Ex. A. 52:** This is a screenshot of 4<sup>th</sup> quarter MTV files on Goehring's C drive. This same screenshot can be seen in **Exs. R. 11-16.** In **Ex. R. 11** it is page "1E MTV C 1121 Import file." Both of these exhibits show that there are **six** filters saved on 11/20 for MTV from 1:25 through 1:31. The last five files are saved in one-minute intervals. Goehring testified she created the 11/20 files for MTV. **Tr. Vol. IV, p. 56:12- 57:18; 59:21-23.**

To the contrary, it appears more normal than not for Goehring to import files in such a time period.

Goehring was working at her computer the morning of 2/6/08 when the data was altered. The Hearing Officer made this finding and Goehring testified as much. Goehring asserts she was saving and importing NNU data the time the St. Luke's data was imported so as to appear to be MTV data that morning between 7:31 and 7:36 a.m. She did work on NNU data that morning, but there is no evidence in the record that she saved and imported NNU data at those specific times that the St. Luke's data at issue was saved and imported so as to appear to be MTV data (the allegations).

Beginning on **Tr. Vol. IV, p. 39**, Goehring acknowledges that **Ex. A. 49** is a screenshot of her RPdata **file folder**, which contains additional **file folders** of the various monitors from which she collected data. Goehring testified that since the "date modified" for her **file folders** for NNC1 and NNC2 are 2/6/08 at 7:11 a.m. and 7:43 a.m., respectively, that this means she was working on NNU files from 7:11 until 7:43 a.m. on 2/6/08. Therefore, she claims she didn't save and import the MTV import files at issue that morning between 7:31 and 7:36 on the G drive and her C drive.

However, substantial and competent evidence in the record, plus explanatory testimony from Nick Powers, Sr. Network Analyst refute her explanation regarding the meaning of "date modified" on the **file folders**. It is crucial to understand that the **file folders** and their "date modified" in Microsoft Windows operate differently than the "date modified" or last saved date of the actual import files saved in subfolders within the file folders. Goehring testified she created her folders and files by quarter. **Tr. Vol. V, pp. 4:13- p. 7:4**. As an example, see the screenshot of her C drive MTV import files at **Ex.**

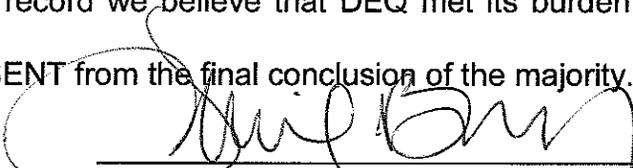
**R. 11- “1E MTV C 1121 Import File”**. The path to those files is C:\RPData\MTV\MTV 4<sup>th</sup> Quarter 2007. The bolded part “**MTV 4<sup>th</sup> Quarter 2007**” is the **subfolder** within another **subfolder** that are both within the parent (actually “grandparent”) file folder “C:\RPData”, a screenshot of which is at **Ex. A. 49**.

Nick Powers testified to the meaning of “date modified” on **Ex. A. 49** for “parent folders” when a **subfolder or file within a subfolder** is updated or saved. Powers testified that newly updated or saved **files** would only update the folder they were directly located in, and would do nothing to the “parent folders” or “grandparent folders” above it. **Tr. Vol. V, pp. 107:12 – 110:15**. You have to look to the actual import files within the subfolder to see actual last saved dates for import files. **Ex. A. 34** shows a screenshot of all of Goehring’s NNC1 import files on the G drive (imported from her C drive). It shows the “date modified” (last saved date) of 6 NNC1 files on 2/6/08 between 7:02 and 7:12 a.m. and another NNC1 file saved at 9:34 a.m. None match or overlap the 5 minutes when the altered MTV import files at issue were last saved. **Ex. R. 11-16; Ex. A. 50**.

DEQ represents **Ex. A. 50** shows a screenshot of Goehring’s **subfolder containing MTV import files** and shows the last saved date times between 7:31 and 7:36 on 2/6/08. Goehring denies it is her subfolder. However, she presents nothing credible to show why it isn’t her subfolder. First she asserts the last saved date for the **MTV subfolder on Ex. A. 50** does not match the last saved date for the **MTV parent folder on Ex. A. 49**. Nick Powers’ testimony (see above) refutes this assertion. The parent folder date modified (last saved date) is not affected by modification and saving of files within a subfolder below it. Goehring also testified **Ex. A. 50** wasn’t her

subfolder because it contains an Excel worksheet file at the very top and she doesn't use that. **Tr. Vol. IV, p. 47:1:12.** However, on cross-examination, she recanted on this point recalling that Reinbold had sent her an Excel Q/A worksheet and she had made changes and saved it under a different name to send back to him because he had originally sent it to her in "read only". **Tr. Vol. IV, p. 112:1 – 115:10.** This explains the existence of the Excel worksheet on **Ex. A. 50** and refutes her claim that it isn't her subfolder of MTV data.

Based upon the evidence in the record we believe that DEQ met its burden of proof and we therefore respectfully DISSENT from the final conclusion of the majority.



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Mike Brassey, Chairman



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Evan Frasure, Commissioner

V.

### **STATEMENT OF APPEAL RIGHTS**

Either party may appeal this decision to the District Court. A notice of appeal must be filed in the District Court within forty-two (42) days of the filing of this decision. Idaho Code § 67-5317(3). The District Court has the power to affirm, or set aside and remand the matter to the Commission upon the following grounds, and shall not set the same aside on any other grounds:

- (1) That the findings of fact are not based on any substantial, competent evidence;
- (2) That the commission has acted without jurisdiction or in excess of its powers;
- (3) That the findings of fact by the commission do not as a matter of law support the decision. Idaho Code § 67-5318.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to the following parties by the method stated below on this 22<sup>nd</sup> day of February 2010.

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Secretary, Idaho Personnel Commission