ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 698

OCB GRIEVANCE NUMBER: 34-04-910219-0030-01-09

GRIEVANT NAME: JOHNSON, VIRGIL

UNION: OCSEA/AFSCME

DEPARTMENT: WORKERS' COMPENSATION

ARBITRATOR: DWORKIN, JONATHAN

MANAGEMENT ADVOCATE: DUCO, MICHAEL

2ND CHAIR: THORNTON, ROBERT

UNION ADVOCATE: FISHER, JOHN

ARBITRATION DATE: AUGUST 28 AND SEPTEMBER 18, 1991

DECISION DATE: NOVEMBER 29, 1991

DECISION: DENIED

CONTRACT SECTIONS AND/OR ISSUES: REMOVAL FOR THEFT IN OFFICE AND FALSIFICATION OF EMPLOYMENT APPLICATION

HOLDING: GRIEVANT PARTICIPATED IN A CHECK CASHING SCHEME WITH TWO STATE EMPLOYEES FROM MENTAL HEALTH (SHELLY EVANS AND EMMETT TOLEBERT); GRIEVANT SUPPLYING STOLEN BWC WARRANTS TO THE TWO CO-CONSPITATORS. (ARBITRATOR DISMISSED THE CHAGES OF FALSIFICATION OF EMPLOYMENT APPLICATION AS UNTIMELY.) DESPITE THE "POISED AND ASSURED" TESTIMONY FROM GRIEVANT AS TO HIS INNOCENCE, THE ARBITRATOR CONCLUDED THAT THE ONLY REASONABLE CONCLUSION TO BE DRAWN FROM THE EVIDENCE AND TESTIMONY WAS THAT GRIEVANT WAS GUILTY.

COST: $1,437.30

OCB-OCSEA VOLUNTARY GRIEVANCE PROCEEDING
SUMMARY ARBITRATION OPINION AND AWARD

#698

In The Matter of Arbitration	*	
Between:	*	
	*	
THE STATE OF OHIO	*	
Bureau of Workers Compensation	*	
	*	Case No. 34-04 910219 0030-01-09
-and-	*	
	*	
OHIO CIVIL SERVICE EMPLOYEES	*	Decision Issued:
ASSOCIATION, OSCEA/AFSCME	*	November 29, 1991
Local Union 11, State Unit 3	*	

APPEARANCES

FOR THE STATE

Michael P. Duco	Primary Advocate
Robert Thornton	Second Chair Advocate
Nancy Seman	Agency Representative
Richard R. Bivens	BCI Investigator
Emmett Tolbert	Witness

FOR THE UNION

John Fisher	Primary Advocate
Robert W. Steele, Sr.	OCSEA Staff Representative
Virgil E. Johnson, Sr.	Grievant
Robert Robinson	Witness

ISSUE: Article 24: Discharge for Theft in Office and Falsification of Employment Application.

Jonathan Dworkin, Arbitrator
9461 Vermilion Road
Amherst, Ohio 44001

BACKGROUND OF DISPUTE

Grievant, an eight-year Employee of the Ohio Bureau of Workers Compensation (OBWC), was removed on February 13, 1991. Two charges led to his dismissal. The first was that he falsified his initial employment application in 1983 by responding negatively to the question: "Have you been convicted of any felony?" In truth, he had a long "rap sheet" dating back to 1967, including two felony convictions and arrests for narcotics, weapons violations, larceny and burglary. In 1967, he was convicted of grand larceny and sentenced to three years' probation. In 1974, he was sentenced to twelve years' imprisonment for heroin distribution. He was subsequently paroled, but returned to prison in 1979 as a parole violator (charged with carrying a concealed weapon).

The misstatement on the employment application went undetected for eight years. It did not come to light until Grievant was under investigation for what turned out to be the second charge against him: participating in a scheme to forge and cash OBWC warrants (checks) which had been returned to the Bureau when payees moved or died. The State claims that Grievant, whose job was to record and tally returned checks, appropriated more than $13,000 worth and turned them over to co-conspirators who forged endorsements, deposited them in bogus bank accounts, obtained automatic teller machine

(ATM) access cards, and recovered funds through ATM withdrawals.

Two employees of other agencies allegedly conducted the scheme with Grievant. They were apprehended by an Agent of the Ohio Bureau of Criminal Identification and Investigation (BCI). Both were convicted and received measures of leniency in return for exposing the person who gave them the checks.

When first interviewed by the BCI Agent, Grievant readily admitted his prior criminal convictions, but denied any intent to mislead or defraud. As he explained in the arbitration hearing, he filled out the application in 1983 at Democratic Party Headquarters, not at a state personnel office. The form contained a second question about felonies which asked: "Have you been convicted of any felony within the last five years?" Grievant was uncertain how to answer either question since his last conviction was more than five years old; so he asked one of the people in charge for help. He was told, according to his testimony, that since he had not been convicted of anything in the previous five years, "Go ahead and check 'No.'" He did as he was advised, fully believing he was responding honestly.

With regard to the second charge, fraudulently misappropriating checks and stealing from the Employer, Grievant steadfastly

insisted he was innocent. He denied the accusation in the investigatory interviews, pre-disciplinary hearing, and arbitration.

The grievance was presented to arbitration in Columbus, Ohio on August 28 and September 18, 1991. At the outset, the Representatives stipulated that procedural requirements had been met or waived and the Arbitrator was authorized to issue a conclusive award on whether or not Grievant's removal was for just cause. The scope of arbitral authority is governed by Article 25, §25.03 of the Collective Bargaining Agreement, which states:

> Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

The Employer's case consisted primarily of the testimony and written reports of the BCI Agent. In addition, one of the conspirators who had named Grievant as a principal in the criminal enterprise appeared on behalf of the State. He proved to be a difficult witness. He refused to answer direct questions and implied that his previous statement was not reliable.

Except for copies of Grievant's employment application and criminal record, the State offered nothing concrete to verify its charge that the application was fraudulent.

The Union's defense consisted mainly of Grievant's testimony.

EVALUATION OF THE ISSUES; SUMMARY FINDINGS ON ADMISSIBILITY OF EVIDENCE AND THE EMPLOYMENT APPLICATION CHARGE

The Agreement between the parties contains powerful language to insulate employees against excessive, carelessly imposed, or contrived discipline. No member of the Bargaining Unit can be disciplined or discharged without just cause, and it is up to the Employer to prove the existence of just cause as well as the facts of its case. Article 24, §24.01 states in pertinent part:

> **ARTICLE 24 - DISCIPLINE**
>
> **§24.01 - Standard**
>
> Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action.

Two other clauses of the Agreement enhance the safeguards of §24.01. Section 24.02 requires that discipline follow a progres-

sive pattern (except in unusual circumstances), and §24.05 guarantees that the State will exercise its disciplinary authority reasonably and correctively rather than punitively. They provide:

> **§24.02 - Progressive Discipline**
>
> The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:
>
> A. One or more verbal reprimand(s) (with appropriate notation in employee's file);
>
> B. One or more written reprimand(s);
>
> C. One or more suspension(s);
>
> D. Termination
>
> . . .
>
> **§24.05 - Imposition of Discipline**
>
> . . .
>
> Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

Not all of these contractual job-security measures are relevant to Grievant's discharge. Just-cause is at issue, as is the burden of proof exacted by §24.01. These are indispensable standards governing every disciplinary controversy between the parties.

The prominent question in this and every other case of its kind is whether or not the aggrieved employee was disciplined for just cause; and the initial evidentiary responsibility is invariably the Employer's. Progressive discipline, on the other hand, is not always a factor. It must be applied when the aggrieved employee's misconduct is "routine," and reasonably correctable. But misconduct which is beyond correction and/or seriously disruptive of the employment relationship may authorize the Employer to skip progressive steps and, sometimes, impose immediate discharge. The phrase: "Disciplinary action shall be commensurate with the offense," set forth in §24.02 and repeated in §24.05 is the source of this finding. It has double meaning. It requires the Employer to avoid unduly harsh penalties: it also allows for bypassing progressive discipline in appropriate situations.

The Arbitrator finds that the sole accusation against Grievant of any significance is that he participated in the plot to steal from OBWC. The employment application charge was neither well taken nor sufficiently proved. It will be dismissed.

The Arbitrator further finds that there is but one creditable defense to the remaining allegation -- the allegation that the Employee is innocent. The grievance will be sustained only if the Employer's testimony and evidence, evaluated against Grievant's

denials, fails to meet the requisite burden of proof. Otherwise, it will be denied. The assertion that Grievant stole checks for forgers and thieves is too serious for the Arbitrator to even think about reducing the penalty.[1]

The dismissal of the charge that Grievant falsified his employment application stems from two weaknesses in the State's case. First was the eight-year delay in discovering the misstatement; a remarkable failure since Grievant was given a job providing him easy and virtually unsupervised access to returned warrants. It is not as if the State lacked reason to explore the application and other aspects of the Employee's history sooner. Almost from the beginning, Grievant was continually on the disciplinary track. He was discharged in 1984, only to be reinstated. That would have presented an ideal opportunity for the Employer to check his background against the employment application. By the time it moved to

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[1] The Arbitrator has frequently written that automatic discharge is never sanctioned by just cause. What this means is that there is always a possibility that a grievant was induced to commit misconduct by unique forces which robbed him/her of reasonable volition. When such circumstances exist, they may require modifying discipline. But the burden of establishing exculpating factors is the Union's, and no such evidence was presented by Grievant or witnesses on his behalf. The only defense offered was that the accusation was false. This simplified decision-making. If the State proves its case, the discharge will stand. If it does not, the grievance will be sustained and the Employee reinstated with compensation for back wages and other losses.

do so in 1991, he had a substantial investment in his employment -- eight years -- and the potential ground for discipline had become stale. In its opening statement, the Union argued, "Management's accusation regarding the grievant's failure to disclose earlier felony charges on his initial State application is untimely." The Arbitrator agrees.

The second basis for dismissing the charge is that Grievant presented a sound defense which the Employer left unanswered. He said that he secured employment through what appears to have been a political "hiring hall." A person was there to help him fill out the application; he asked her for advice when he came to what (reasonably) seemed to him to be inconsistent questions about felony convictions. He testified that he told her of his criminal record and she advised him he did not have to disclose it.

The word, "falsification" in labor-management context means more than a mistake or innocent inaccuracy. It signifies deliberate misrepresentation, calculated to deceive, usually to achieve illicit advantage. While the omission in Grievant's application may have justified a presumption of wrongdoing, it was a rebuttable presumption; and the Employee's explanation was adequate to rebut it.

* * *

The remaining issue is not complicated. It is free of the confounding definitions of just cause that so often absorb arbitrators. The decisive question is simply whether or not the evidence establishes, with sufficient probability, that Grievant committed the misconduct. It is the evidence which creates the greatest difficulty in this dispute. The State presented a largely circumstantial though credible case tending to establish Grievant's guilt. The Employee testified he was innocent.

* * *

Before examining the merits, a procedural question needs to be addressed. The State's submissions included two investigatory memorandums prepared by the BCI Agent. The Union objected to their admission based on a contractual clause requiring the Employer to provide it with all documents relied upon to support discipline. This sharing of documents is to take place well in advance of arbitration, even before a disciplinary penalty is formally imposed. Article 24, §24.04 of the Agreement establishes an aggrieved employee's right to a pre-disciplinary meeting, and places the following obligations on Management:

> When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee.

The State admits that the Agent's reports were in its possession before the meeting and played significant roles in the disciplinary decision. Nevertheless, they were intentionally withheld because they were critical aspects of an ongoing criminal investigation. In the arbitration hearing, the Employer's advocate argued for admitting the evidence regardless of the apparent contractual departure. He referred to the Ohio Supreme Court decision in *State, ex rel. Dispatch Printing Co. vs Wells*, 18 Ohio St.3d 382; 481 N.E.2d 632 (1985). The case arose when the Civil Service Commission of the City of Columbus denied Relator, a newspaper publisher, personnel files of a city police detective. The newspaper sought a writ of mandamus to compel compliance with an Ohio law guaranteeing access to public records.

The collective bargaining agreement governing the detective's employment required the City to "take all reasonable precautions to ensure the confidentiality of the personnel records of police offi-

cers. The City argued that it could not comply with both the agreement and the law. It directed the Court's attention to a provision in the Ohio Public Employee Bargaining Law stating that public-sector labor agreements take precedence over conflicting laws, ordinances, and governmental resolutions [Ohio Rev. Code §4117.10(A)]. The Court turned down the City's argument, holding:

> . . . respondents' contention requires an unreasonable construction of R.C. Chapter 4117. The wording in the cited portion of R.C. 4117.10(A) was designed to free public employees from conflicting laws which may act to interfere with the newly established right to collectively bargain. If respondents' construction of this provision were accepted, private citizens would be empowered to alter legal relationships between a government and the public at large via collective bargaining agreements. It is an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences.

The Court ordered disclosure and, from that perspective, its decision provided no support for the Employer's argument that it had a right to suppress the Agent's reports. In another part of the opinion, however, the Court added *obiter dictum* markedly limiting the scope of the ruling. It held that records could be kept confidential if disclosure was not required by Revised Code §140.43. That statute specifically authorizes keeping law enforcement investigatory information private in certain situations. It places such

documents outside the definition of "public records," and states in part:

> (2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature but only to the extent that the release of the record would create a high probability of disclosure of any of the following:
>
> (a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;
>
> (b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose his identity;
>
> (c) specific confidential investigatory techniques or procedures or specific investigatory work product;
>
> (d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

The Employer made the following argument based on the statute and *Dispatch Printing Co.*:

1. The BCI memorandums were confidential law enforcement investigatory records as defined by *Revised Code* §149.43. They pertained to an ongoing criminal investigation in which Grievant was a suspect who had not yet been charged.

2. The Supreme Court ruling in *Dispatch Printing Co.*, which is now the law of Ohio, is reasonably interpreted as stating that collective bargaining agreements do not take precedence over conflicting statutes where they impair the rights of citizens under public law.

3. The privacy of confidential law enforcement investigatory records is obviously a public right and in the interests of the citizens of Ohio. Therefore, although §24.04 of the Agreement may have required disclosure to the Union, it was superseded by Revised Code §149.43

One cannot help but respect the creativity of the arguments. Nevertheless, the Arbitrator finds he is without power to approve or adopt them. He is prevented from doing so by the very Agreement which vests him with authority over this dispute. It states unambiguously in Article 25, §25.03 that he lacks authority to subtract from or modify the Agreement. Assuming the Section means what it says, the Arbitrator's duty is to interpret and apply contractual language. He may look to law or other external sources for help in discovering meaning for obscure clauses, but he may not substitute a statute or even a Supreme Court Decision for what the negotiators plainly intended. Section 24.04 states that the Employer **must** provide the Union with **all** documents used to support discipline. It

must do so before the pre-disciplinary meeting and continue to do so as new information develops during grievance processing.

The provision makes no sense if the Employer is permitted to withhold evidence until arbitration and then introduce it to support its case. In the Arbitrator's judgment, it would be an unqualified violation of his responsibility and office to accept such a proffer. Accordingly, the Union's objection to the investigatory memorandums is granted; the documents will not be reviewed or considered in the decision.

It is to be observed that, as applies to this dispute, sustaining the Union's objection constitutes a somewhat unproductive victory. The BCI Agent, whose identity **was** disclosed with requisite timeliness, appeared in the arbitration as a witness for the State. He exhaustively recounted his investigation procedures, findings, and conclusions. All, or practically all the contents of the excluded reports was properly placed in evidence by his testimony.

THE STATE'S FACTS, EVIDENCE, AND ARGUMENTS

The first suggestion of irregularities involving OBWC warrants was obtained in April, 1989 when a Workers Compensation claimant

filed an affidavit stating he had not received his February check for $3,131.64. A search of Bureau records disclosed that the check had been cashed in March. It bore two endorsements -- the claimant's and "MH"[2] -- and had been deposited in the name of MH in the Navarre Deposit Bank, Navarre, Ohio. Further investigation revealed that seven compensation checks, totaling nearly $9,500, had been placed in the account. Each bore what turned out to be forged endorsements of the payee and MH. Subsequently, a similar account was uncovered at Bank One in Akron; it showed deposits of eight OBWC warrants for approximately $6,000. Both accounts were opened under MH's social security number.

The payees on the fifteen checks were interviewed and gave affidavits that they did not receive or endorse the instruments. At that point, the matter was turned over to the Massillon, Ohio Police Department. City detectives made a critical find. They discovered that MH, or a person of the same name, was a patient at Massillon State Hospital, and they focused their search on hospital employees. The search was not a blind one. ATM withdrawals had been recorded by bank cameras. Photographs were shown to hospital

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[2] The initials "MH" designated a real person who is (or was) a patient in a state mental hospital. Using the individual's full name would unduly invade his/her privacy, as s/he was not a party to the check-cashing scheme.

security officers who identified SE, a current employee, and ET, an employee of Western Reserve State Hospital and President of the Union Assembly.

When confronted by investigators, SE gave a written statement, confessing her guilt and implementing ET. While ET admitted that he was the man in the ATM photo, he denied guilt. However, the BCI Agent had strong refuting evidence; ET's palm print had been lifted from one of the deposited checks. Since he had no legitimate access to OBWC warrants, his denial was not credible. Nevertheless, it was not until after he was convicted and sentenced that ET confessed.

Part of the conspiracy remained unsolved for months. It had been ascertained that ET obtained the warrants and SE opened the accounts and deposited them. But there had to be another operative who supplied checks to ET. Neither SE nor ET had identified Grievant. A number of OBWC employees could have taken the warrants; he was only one of several in the pool of possible suspects. BCI looked into his background and interviewed him twice -- on October 16, 1989 and January 8, 1991. He denied involvement on each occasion. Meanwhile, SE had identified Grievant as the source on August 27, 1990, the day she was sentenced to five years' probation

for theft in office. But her identification was not strong enough to charge him.[3]

The breakthrough came on October 16, 1990 when ET, in the presence of police, state investigators and his attorney, inculpated Grievant. According to testimony presented by the State, ET was facing a long prison sentence on convictions for grand theft and forgery, and was extremely anxious about the welfare of his son. While not in prison, he had custody of the child, but his former wife had taken him. He desperately needed to get out of jail. He had a chance for shock probation and was willing to do almost anything to get it approved. He contacted the State from his prison cell, offering to cooperate if no protest was lodged against his probation application. When the State accepted the deal, he named Grievant not only as a participant, but as the originator of the conspiracy. According to his statement, SE took forty percent of the proceeds while he and Grievant split sixty percent. On January 8, 1991, after his release from the Lorain Correctional Facility,

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[3] It is doubtful that SE had direct knowledge of who was the supplier. The only meaningful testimony on SE's accusation was the BCI Agent's. He said that SE told him that ET told her that Grievant was the third person. That testimony was dismissed on the Union's objection. While arbitrators do not automatically exclude hearsay, there are limits. This was third-hand, and accepting it would have been grossly unfair to Grievant and the Union. The identification through SE was worthless and prejudicial.

ET gave investigators a sworn statement, in writing, confirming what he told them earlier.

Armed with the affidavit, the BCI Agent tried to interviewed Grievant again on January 22, 1991. The Employee declined to discuss the matter, and referred the Agent to his attorney.

All these facts were presented through testimony of the BCI Agent. He was not the Employer's only witness. ET was subpoenaed to verify statements and keep his side of the bargain. It is an understatement to characterize him as an uncooperative witness. He ignored the first subpoena, causing the hearing to take two days. To induce him to testify, the State had to issue a second subpoena, pay for the appearance, and enlist the assistance of his probation officer. When the Employer finally got him to Columbus (several hours later than the time set by the subpoena) he was forced to confront the accused face-to-face. He struggled not to commit himself. He admitted his own involvement in the scheme and conceded making the statement implicating Grievant. But he adamantly refused to directly answer the question of whether or not he received checks from Grievant.

The question was asked several times, and ET persisted in his refusal to answer it. All he would say was, "You have my statement." The direct questions and circuitous responses continued for

awhile, then the State's Advocate was granted a recess to obtain a court reporter. The witness was advised that he would be ordered to answer the question and, if he refused, the matter would be certified to the Franklin County Court of Common Pleas for a contempt citation. Finally, after the reporter arrived and the hearing reconvened, he affirmed the statement that Grievant gave him OBWC checks. But he said that investigators coerced him into making the statement, and implied that the Arbitrator also coerced him by the threat of contempt. He concluded by saying that he would have lied to investigators to get out of prison and would lie to the Arbitrator to stay out.

ET was the last person called by the State. He was not a good witness, but he was the only one with direct knowledge of whether or not Grievant was a player in the conspiracy. The State argued that his statement was true and should be believed. It placed Grievant at the center of the theft ring and, according to the Employer, proved him guilty of gross misconduct fully justifying his removal.

THE UNION'S FACTS, EVIDENCE, AND ARGUMENTS

The Union's first witness was Robert Robinson, a Staff Representative. He testified that he knew ET well and was acquainted

with SE. Both were active in Bargaining Unit activities, as was Grievant. He attended ET's trial and noted that Grievant's name was not even mentioned in court. According to Robinson, ET was coerced and his motive for saying whatever State investigators told him to say was plain; "he did what he had to do to get out [of prison] after his ex-wife took the child." The witness also believed that SE was coerced to implicate ET. She had to make certain of not going to jail because she was the sole support of her mother and children.

The Union called Grievant as its final witness. His demeanor was exemplary. He spoke articulately, answering all questions on direct and cross-examination responsively. He told of shockingly deficient procedures which corrupted the security of returned OBWC warrants. He said that checks were delivered to an unlocked mail room where they lay in open bins. They were not recorded until his office tallied and processed them. Anyone could have taken and negotiated the warrants.

Grievant testified that he did not know SE; he never met or spoke with her. He knew ET, but only from Union meetings. He did not understand why they singled him out for the accusation, and insisted that ET's statement did not contain a grain of truth. He said he was innocent.

In closing, the Union argued that the Employer did not meet its contractual burden of proof. Its entire case against Grievant was assemble from coerced testimony which was less than credible. The Union urged that the grievance be sustained.

OPINION

The resolution of this controversy turns on the testimony of two witnesses, Grievant and his accuser. The Employee testified forcefully that he was innocent; ET reluctantly maintained that Grievant was guilty. It is an arbitrator's nightmare. When a case depends on two witnesses, one of whom is lying, the search for truth often is hopeless. The parties to this dispute will only be frustrated if they suppose that the Arbitrator, by some divine insight or brilliance, can sort out the truth. Arbitrators are not omniscient. The best they can do is apply their intelligence and experience to discover probabilities. This case will be decided by the evidence which is most convincing and most probable.

Burden of proof is a concept upon which parties frequently rely. They call forth obscure legal concepts -- preponderance of evidence, clear and convincing evidence, proof beyond a reasonable doubt. A review of past decisions in which these formulas are

discussed reveals that they are seldom applied. An arbitrator may state that proof beyond a reasonable doubt is required, but more often than not the decision turns out to be premised on a finding of probabilities regardless of reasonable doubts.

The Arbitrator has attempted to place the highest degree of proof on the Employer in this case. He finds that all of the probabilities support the conclusion that Grievant committed the misconduct -- that he provided the returned OBWC warrants for his coconspirators to forge and negotiate. His protestations of innocence, weighed against ET's testimony, are simply not credible. They could be true, but the possibility is improbable. In other words, while there remain lingering doubts as to his guilt, in the Arbitrator's judgment they are not reasonable doubts. These findings prevail even though ET was an appalling witness. Short of stating outright that he was lying, he did everything he could to render his testimony suspect. Grievant's testimony, on the other hand, was poised and assured.

Strangely, it was ET's unwillingness to testify against Grievant that added believability to his accusatory statement. He admitted that before all this occurred, he had developed a kind of friendship for the Employee. While his primary aim was to stay out

of jail, it was obvious that he had a second objective -- to protect Grievant if he could.

Despite testimony and contentions to the contrary, it is clear that ET was not coerced to identify Grievant. He was the one who offered to deal with the State. It was apparent to the Employer that there was a missing link in the scheme -- someone inside the Bureau who stole the checks; and ET was the only one who knew who it was. So the State agreed to negotiate. It refrained from protesting ET's probation, and ET informed on Grievant as the third conspirator. Either he spoke truthfully or he made a false accusation to protect someone else. The latter is a remote possibility; the former is the only reasonable probability to be drawn from the evidence. Accordingly, the grievance will be denied.

AWARD

The grievance is denied.

Decision Issued at Lorain County, Ohio, November 29, 1991.

Jonathan Dworkin, Arbitrator