#1380

IN THE MATTER OF

ARBITRATION

BETWEEN

THE STATE COUNCIL OF PROFESSIONAL EDUCATORS/OEA

AND

THE STATE OF OHIO/DR&C

PANEL APPOINTMENT: Gr # 27-24-980406-0476-06-10
(Brent Carney, Grievant)

Before: Robert G. Stein

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INTRODUCTION

A hearing held on the above matter spanned several dates. The dates are as follows: October 28, 1998, November 4, 1998, November 6, 1998, December 16, 1998, March 12, 1999, and March 15, 1999. During the hearing the Parties were given full opportunity to present evidence and testimony on behalf of their respective positions. The Parties stipulated that the issue was properly before the Arbitrator. The Parties waived closing arguments in favor of filing briefs. The Arbitrator received the briefs, and the hearing was closed on May 6, 1999. The decision of the Arbitrator is to be post marked by July 7, 1999. The parties agreed to provide the Arbitrator with 60 days to render a decision, following the receipt of briefs.

ISSUE

Was the Grievant, Bret Carney, terminated for just cause? If not, what should the remedy be?

BACKGROUND

This case involves the termination of Bret Carney, who was last employed with the Ohio Department of Rehabilitation and Corrections (hereinafter referred to as "Department") as a special education teacher. At the time of his termination, Mr. Carney had worked for the Department for nine (9) years and held the position of Vice President in the State Council of Professional Educators (hereinafter referred to as the "Union"). In

addition to holding the position of Union Vice President, Mr. Carney served as a Site Representative, Grievance Chairman, and Executive Board Member. Following his termination on March 31, 1998, Mr. Carney was elected President of the Union.

Mr. Carney began working with the Department on September 17, 1990 (J9b) as an Elementary Education Teacher. He taught at the Southeastern Correctional Institution (hereinafter referred to as "SCI") and his supervisor was Ms. Denise Justice. On January 21, 1996, Mr. Carney transferred to the Central Office of the Department and became a multi-institutional teacher. As a Multi-institutional Teacher Mr. Carney was required to travel to two institutions, SCI and Pickaway Correctional Institution (hereinafter referred to as "PCI"). SCI remained Mr. Carney's headquarters and Ms. Justice remained his supervisor. The job of Multi-institutional Teacher involves a significant expansion of duties, increased travel, and a great deal of independence. Ms. Justice was concerned about accountability because of the independence inherent in the job of Multi-institutional Teacher (See Justice testimony) and told her teachers, including the Grievant that they needed to carefully account for their time. Mr. Carney and his colleagues were provided identification badges that could be used to clock in/out of their assigned institutions. Multi-institutional teachers could also sign in and out when they arrived at institutions which is routine procedure.

Multi-institutional teachers were not permitted to claim travel time (being "on the clock" and getting paid) or mileage reimbursement for travel from home to their headquarter institution. In other words, the Grievant could not claim mileage reimbursement for traveling from his home to SCI and would not start getting paid until he started his work at SCI. However, multi-institutional teachers were permitted to claim

pay for travel time and mileage reimbursement if they were traveling from their home to another institution other than their headquarters institution. Mr. Carney was entitled to receive one-hour of travel time and mileage reimbursement for travel to and from PCI. His working hours at SCI were 7:30 a.m. to 4:00 p.m., and his working hours at PCI were 8:30 a.m. to 3:30 p.m.

The evidence and testimony reveal that Mr. Carney and Ms. Justice had a troublesome supervisor-employee relationship that may have been exacerbated by Carney's increasingly active involvement with the Union in 1997 (See Carney and Scott Perry's testimony). It is also clear from the evidence that issues of control, trust, rights, and power were at the center of this difficult relationship. Prior to the instant matter, the Grievant had no discipline on his record.

On November 17, 1997, Mr. Carney attended a Pre-Disciplinary meeting. The meeting was held due to alleged improprieties contained in two travel vouchers he had submitted for mileage reimbursement. On May 16, 1997, Mr. Carney submitted a travel voucher for the dates of April 15, 17, 18, and 25, 1997 (J9j, Item A). On the dates of April 15 and 17 he was to attend the PACE program while on the dates of April 18 and April 25 he reported traveling to OCB. The Department's business office rejected the travel voucher due to the inability to reimburse for mileage to the PACE program or for mileage to OCB for bargaining.

Mr. Carney's supervisor, Ms. Justice, asked him to correct the error and resubmit the voucher. The voucher was resubmitted by the Grievant on June 3, 1997 (J9j, Item B). The second voucher contained the dates of April 15, 17, and 18, 1997. Three of the dates (April 15, 17, and 18) had been changed to show mileage to PCI/CTA (Department's

Corrections Training Academy) instead of PACE (for April 15 and 17) and OCB (for April 18) as originally listed on the May 16th voucher. When the June 3rd resubmitted voucher was compared to the original May 16th voucher, it became apparent that there were inconsistencies. Ms. Justice did not sign the June 3rd voucher and instead put her concerns in a memo to SCI investigator, Tom Ratcliffe (J5b).

On November 17, 1998, a Pre-Disciplinary hearing was held regarding the discrepancy in the two travel vouchers and the exact whereabouts of the Grievant on those dates. Mr. Ratcliffe was the hearing officer. The Union objected to the hearing and argued that the Department did not do an adequate job of investigating this matter. The Department took no action against the Grievant following the November 17th Pre-Disciplinary meeting. Mr. Ratcliffe conducted a subsequent investigation that did not include the dates from the original voucher submitted on May 16, 1997.

Mr. Ratcliffe's investigation focused on several 1997 dates: January 2, 3, 9, 10 and 29 (J9g); February 5, 6, 7, 14, 25 and 27 (J9h); March 11, 14 and 20 (J9i); April 7 and 18 (J9j); May 19, (J9k); September 19 and 26 (J9n); October 16, 23, and 30 (J9o); and November 13 (J9p). The investigation also included the 1998 dates of February 3 and 25 (E3, 4). In addition to the above listed dates, the Employer accused Mr. Carney of inflating the amount of mileage he put on his travel expense reports and misusing his Union position for personal gain.

Following the investigation, Mr. Ratcliffe concluded that all of the above dates and the instances of inflated mileage represented acts of theft. The Employer determined that Mr. Carney had falsified itineraries, travel vouchers, leave forms, and attendance reports in connection with the theft. It was also concluded, by the Employer, that the

Grievant took advantage of his Union officer position to improperly use paid administrative leave to conduct Union and personal business. Mr. Carney was charged with defrauding the Department for $4100. On March 31, 1998, the Grievant was terminated from employment for violating the following Department rules: #16 Theft, #24 Falsification, and # 18 Misuse of position for personal gain (J 3).

Mr. Carney filed a grievance on April 2, 1998 arguing he was terminated without just cause.

RELEVANT CONTRACT LANGUAGE

(listed for reference-see Joint Exhibit 1 for text)

Articles 1, 1.04, 1.05, 1.06, 5, 5.01, 5.07, 13, 14, 14.01, 14.02
23, 23.06, 23.08, 23.11, 26,27,28,30, 40, 40.01, 40.02,40.03

EMPLOYER'S POSITION

The Employer argues that on the following dates Mr. Carney improperly claimed pay for hours not worked and mileage not earned. The dates and the Employer's rationale are as follows:

DATES

On **January 2, 1997**, Mr. Carney's calendar indicated a schedule change to PCI for the day (J-9g). Punch detail reports indicate that Mr. Carney worked at SCI that day from 7:21 a.m. to 8:30 p.m. (J-9ti). Mr. Carney's travel voucher, signed on February 12, requested mileage reimbursement for January 2 for a trip to PCI (J-9g). The voucher indicates that Mr. Carney left home at 6:15 a.m. and arrived at PCI at 7:21 a.m. and left PCI at 8:30 p.m. and arrived home at 9:22 p.m. **According to his travel voucher, he was**

present at PCI at the same time his punch reports placed him at SCI. Mr. Carney was compensated for 70 miles of travel that day which he did not drive. At that time, the reimbursement rate was $0.25 per mile. Mr. Carney received a total of $17.50 to which he was not entitled.

On **January 3, 1997**, Mr. Carney's calendar indicated a schedule change to PCI for the day (J-9g). Punch detail reports indicate Mr. Carney worked at SCI that day from 7:26 a.m. to 3:43 p.m. (J-9ti). Mr. Carney's travel voucher, signed on February 12, requested mileage reimbursement for January 3 for a trip to PCI (J-9g). The voucher indicates Mr. Carney left home at 6:30 a.m. and arrived at PCI at 7:26 a.m. and left PCI at 3:43 p.m. and arrived home at 4:54 p.m. The same times he was at PCI, according to his travel voucher, are the same times he was at SCI according to his punch reports. Mr. Carney was compensated for 70 miles of travel that day which he did not drive. At that time, the reimbursement rate was $0.25 per mile. Mr. Carney received a total of $17.50 to which he was not entitled.

On **January 9, 1997**, Mr. Carney's calendar indicated a scheduled day at SCI (J-9g). Punch detail reports indicate Mr. Carney worked at SCI that day from 6:48 a.m. to 3:29 p.m. (J-9ti). Mr. Carney's travel voucher, signed on February 12, requested mileage reimbursement for January 9 for a trip to PCI (J-9g). The voucher indicates Mr. Carney left home at 5:45 a.m. and arrived at PCI at 6:48 a.m. and left PCI at 3:29 p.m. and arrived home at 4:30 p.m. The same times he was at PCI, according to his travel voucher, are the same times he was at SCI according to his punch reports. Mr. Carney was compensated for 70 miles of travel that day which he did not drive. At that time, the reimbursement rate was $0.25 per mile. Mr. Carney received a total of $17.50 to which

he was not entitled.

In his initial direct testimony, Mr. Carney stated that he "filled out the blocks" and signed the travel vouchers. He stated he had copies of his leave forms and other documents at home. In his second round of testimony, Mr. Carney changed his story. He testified that inmates filled out the forms. He then signed the certification after the inmates filled out the form. Besides the confidentiality issues of inmates filling out travel vouchers, the issue is still the same. Mr. Carney signed the form certifying the accuracy of the mileage and reimbursements sought. Mr. Carney requested mileage for three days he did not travel.

On **January 10, 1997**, Mr. Carney's calendar indicated a scheduled day at PCI (J-9g). Punch detail reports from PCI (J-9tii) and sign-in logs from PCI (J-9uii) do not indicate Mr. Carney arrived at PCI on that date. Punch detail reports from SCI (J-9ti) and sign-in logs from SCI (J-9ui) do not indicate Mr. Carney was at SCI on that date. Mr. Carney did not seek any travel reimbursement for that date. Mr. Carney did not submit any leave forms for that date (J-9g and J-9r). There is no indication from teacher statements or any other evidence produced that Mr. Carney worked that day. There is no indication that Mr. Carney called off for the day. Mr. Carney was not entitled to flex an entire day off. There is no evidence to indicate he requested flextime for any part of that day. Mr. Carney's master time sheet indicates he was compensated for eight hours of work that day (J-9b). On that date, Mr. Carney's hourly rate of pay was $21.29 (J-9b). Mr. Carney received $170.32.

Mr. Carney's testimony is that he accumulated a bank of hours during the audit process. When the audit ended, he took use of the accumulated hours and took a day off.

There is no documentation to verify that this occurred. Mr. Carney testified of his knowledge that prior to flexing, he had to have his supervisor's approval. Ms. Justice testified that having checked her master calendar, she has no indication that Mr. Carney requested the time off. In addition, Ms. Justice testified that Mr. Carney could not flex an entire day off. **Therefore, if Mr. Carney did, indeed take off an entire day, he is not only in violation of various work rules regarding timekeeping, but he is also insubordinate in his actions.** Mr. Carney was not originally charged with these allegations because management was not aware of his location on that day. Until his testimony, management had no knowledge of Mr. Carney's defense.

On **January 29, 1997**, Mr. Carney's calendar indicated a scheduled day at PCI (J-9g). Punch detail reports from PCI (J-9tii) and sign-in logs from PCI (J-9uii) do not indicate Mr. Carney arrived at PCI on that date. Punch detail reports from SCI (J-9ti) and sign-in logs from SCI (J-9ui) do not indicate Mr. Carney was at SCI on that date. Mr. Carney did not seek any travel reimbursement for that date. Mr. Carney did not submit any leave forms for that date (J-9g and J-9r). **There is no indication from teacher statements that Mr. Carney worked that day.** There is a notation on his calendar that Mr. Carney called and stated he would be late. There is no evidence that Mr. Carney subsequently arrived for work. Mr. Carney was not entitled to flex an entire day off. There is no evidence to indicate he requested flextime for any part of that day. Mr. Carney's master time sheet indicates he was compensated for eight hours of work that day (J-9b). On that date, Mr. Carney's hourly rate of pay was $21.29 (J-9b). **Mr. Carney received $170.32.**

Again, Mr. Carney's defense on this date is that he flexed his schedule for an

entire day. The Association even offered an exhibit (U-9) in which Mr. Carney requested the time off. Unfortunately, the request is dated January 30, the day after the day off. As before, Ms. Justice testified that employees could not flex an entire day. In addition, the notation on the calendar for January 29th indicates that Mr. Carney called in and said he would be late. According to his own testimony, Mr. Carney knew he needed approval ahead of time. He clearly did not have it in this case. He called off late to work, decided not to go to work, and then failed to request the proper leave.

On **February 5, 6 and 7, 1997**, the itinerary submitted by Mr. Carney indicates work at SCI on the 5th and PCI on the 6th and 7th (J-9h). Mr. Carney's calendar was changed to reflect that he called off on those three dates. The reason for the call off is not indicated. Punch details from PCI and SCI do not reflect that Mr. Carney punched in or out at either institution (J-9ti and J-9tii). Sign-in logs from both institutions do not reflect that Mr. Carney signed in or out at either institution (J-9ui and J-9uii). Mr. Carney's master time card indicates Mr. Carney received compensation for eight hours of work each day and not charged with use of any leave (J-9b). Statements from teachers indicate Mr. Carney cannot be placed at either institution on those dates (J-9d). Mr. Carney's requests for leave (J-9h and J-9r) do not indicate he requested leave for any of those dates. Mr. Carney did not submit requests for reimbursement on any of those dates. During that time, Mr. Carney's hourly rate of pay was $21.29 (J-9b). **Mr. Carney received $170.32 per day for a total of $510.96.**

Mr. Carney testified he was sick on February 5th, 6th and 7th. His calendar (U-8) shows a notation that he was sick. He offered a copy of a leave slip that he claims is for these dates (U-10). It appears from the form that the request was submitted after the

absence, upon his return to work. The leave form also seems to indicate "not recommended" in the approval box. If this poor copy of a leave form is indeed what Mr. Carney claims, then he is, in fact, AWOL for those three dates as his leave request is not approved. Furthermore, Mr. Carney indicates his reason for absence was due to an illness, yet his request for leave indicates a use of vacation. This is clearly in violation of the standards of employee conduct, especially when coupled with Mr. Carney's testimony that he used vacation instead of sick leave to avoid the Sick Leave Occasion Method. Mr. Carney even testified that such a use of vacation leave was in violation of the sick leave policy and the collective bargaining agreement.

On **February 14, 1997**, Mr. Carney's itinerary reflected the day was to be spent at PCI (J-9h). Punch detail reports from PCI (J-9tii) and sign-in logs from PCI (J-9uii) do not indicate Mr. Carney arrived at PCI on that date. Punch detail reports from SCI (J-9ti) and sign-in logs from SCI (J-9ui) do not indicate Mr. Carney was at SCI on that date. Mr. Carney did not seek any travel reimbursement for that date. Mr. Carney did not submit any leave forms for that date (J-9g and J-9r). There is no indication from teacher statements that Mr. Carney worked that day (J-9d). There is not a notation on his calendar that Mr. Carney called off. Mr. Carney was not entitled to flex an entire day off. There is no evidence to indicate he requested flextime for any part of that day. Mr. Carney's master time sheet indicates he was compensated for eight hours of work that day and not charged any leave (J-9b). On that date, Mr. Carney's hourly rate of pay was $21.29 (J-9b). Mr. Carney received $170.32.

Mr. Carney again testified that on this date, he submitted a request for leave (U-11). Again, the poor quality of the copy provided makes it difficult to read the dates on

the form. It is possible, however, to note where both "vacation" and "other" types of leave are checked. Mr. Carney signed a bi-weekly attendance sheet for that pay period and the following one and did not note any usage of leave.

On **February 25, 1997**, Mr. Carney had 5 hours of approved administrative leave for a seminar at COSERRC (J-9h and J-9b). The seminar was titled "Transition and the IEP Process". Registration began at 8:00 a.m. The seminar ended at 11:30 a.m. Mr. Carney punched in at PCI at 12:45 p.m. He left at 3:21 p.m. (J-9tii). Mr. Carney was at PCI for a total of 2.6 hours. **The remaining 5.4 hours are unaccounted. Mr. Ratcliffe** obtained a statement from Robert Snyder that denotes COSERRC has no records of Mr. **Carney's attendance at a meeting on that date** (E-2). Mr. Carney signed an attendance report certifying absences from work were covered by the appropriate slip (J-9h). Travel expenses submitted March 3, show that on February 25, Mr. Carney left home at 7:00 a.m., drove 42 miles, and arrived at COSERRC at 7:30 a.m. Then Mr. Carney left COSERRC at 1:00 p.m. (when he was already punched in at PCI), and drove 35 miles to PCI, where he arrived at 1:30 p.m. Mr. Carney then left PCI at 3:15 p.m. and drove 35 miles home. Total miles submitted for the day were 112 (J-9h). **According to mileage submitted in April 1996 (J-9s) and the testimony of Mr. Ratcliffe, the** mileage to COSERRC from Mr. Carney's house was 28, not the 42 miles claimed. This is a difference of fourteen miles, or $3.50.

The state's position is that there is no evidence Mr. Carney attended the training session at COSERRC, therefore, the five hours of administrative leave and the whole 42 miles requested are at issue. In addition, the 35-mile trip from COSERRC to PCI is at issue as is eight of the 35-mile trip home. The total mileage submitted for the day is 112.

The reimbursement rate was $0.25 per mile. Less the round trip to PCI at 27 miles each way, the entire mileage in dispute is 58 miles, or $14.50. The compensation at issue is the 5.4 hours of administrative leave unaccounted on that day. At that time, Mr. Carney's rate of compensation was $21.29. Total wages received for unexplained location is $114.97. The total amount at issue for the day is $129.47.

On **February 27th and 28th, 1997**, the itinerary suggested Mr. Carney would spend the days at PCI (J-9h). Punch detail reports from PCI (J-9tii) and sign-in logs from PCI (J-9uii) do not show that Mr. Carney arrived at PCI. Punch detail reports from SCI (J-9ti) and sign-in logs from SCI (J-9ui) do not indicate Mr. Carney was at SCI. Mr. Carney did not seek any travel reimbursement. Mr. Carney did not submit any leave forms (J-9h and J-9r). There is no indication from teacher statements that Mr. Carney worked (J-9d). There is not a notation on his calendar that Mr. Carney called off. Mr. Carney was not entitled to flex an entire day off. There is no evidence to indicate he requested flextime for any part of that time. Mr. Carney's master time sheet indicates he was compensated for eight hours of work that day and no leave deducted from his balances (J-9b). At that time, Mr. Carney's hourly rate of pay was $21.29 (J-9b). Mr. Carney received $340.64.

Mr. Carney testified he submitted a request for leave for those days (U-12). The form does not have any signature from his supervisor indicating approval. There is, in fact, no indication that the form was ever submitted. In addition, Mr. Carney signed the bi-weekly attendance report for that pay period which indicates Mr. Carney's leave usage. When he signed the report, he did not note his vacation use. He also did not indicate any changes the following pay period when he again signed the attendance sheet.

On **March 11, 1997** Mr. Carney requested and received eight hours of administrative leave to attend a "Choicemaker" seminar at COSERRC (J-9I). Mr. Carney submitted a travel expense request indicating mileage to COSERRC was 42 miles one way. Mr. Carney indicated he left home at 6:15 a.m. and arrived at COSERRC at 7:30 a.m. He departed COSERRC at 4:00 p.m. (J-9I). The seminar was scheduled from 9:00 a.m. until 4:00 p.m. **Mr. Carney did not punch in/out or sign in/out at either institution** (J-9ti, J-9tii, J-9ui, and J-9uii). Mr. Carney submitted no other requests for leave (J-9r). According to the letter written by Robert Snyder, Mr. Carney was not registered to attend the class and there is no record of his attendance on that date (E-2). **There is no documentation to verify Mr. Carney performed any state-related business that day.** The mileage reimbursement rate at that time was $0.25/mile. Mr. Carney received $21.00 in mileage reimbursement and $170.32 in compensation for that day, for a total of $191.32.

Mr. Carney's calendar (U-8) and expense reports submitted by the OEA indicate that Mr. Carney was at the Columbus Athletic Club that day (E-13). The event scheduled is indicated as "Lobby Days". Mr. Carney received mileage reimbursement for attending the event. Neither the Association nor Mr. Carney provided a specific denial of attending this event during working hours. Given Mr. Carney's inability to provide documentation or witnesses as evidence of his attendance at the COSERRC seminar, and his SCOPE/OEA reimbursement for attending "Lobby Days", **it is obvious he was conducting Association business while on paid administrative leave for training.** Furthermore, if he did attend the seminar at COSERRC, he charged both DR&C and SCOPE/OEA for the trip to and from Columbus (J-9j and E-13).

The itinerary for **March 14, 1997** shows Mr. Carney at SCI for the day (J-9I).

Punch detail reports from SCI (J-9ti) and sign-in logs from SCI (J-9ui) do not document Mr. Carney arrived at SCI on that date. Punch detail reports from PCI (J-9tii) and sign-in logs from PCI (J-9uii) do not indicate Mr. Carney was at PCI on that date. Mr. Carney did not seek any travel reimbursement for that date. Mr. Carney did not submit any leave forms for that date (J-9h and J-9r). There is no indication from teacher statements that Mr. Carney worked that day (J-9d). There is not a notation on his calendar that Mr. Carney called off. Mr. Carney was not entitled to flex an entire day off. There is no evidence to indicate he requested flextime for any part of that day. Mr. Carney signed the attendance report, indicating proper leave slips were submitted. Mr. Carney's master time sheet indicates he was compensated for eight hours of work that day and his leave balances were not reduced (J-9b). On that date, Mr. Carney's hourly rate of pay was $21.29 (J-9b). Mr. Carney received $170.32.

Mr. Carney now claims that he was on vacation that day. He submitted a leave form requesting vacation (U-13). The leave form was submitted after the fact and not signed by his supervisor. Mr. Carney made no indications on the attendance report sheet of that pay period, or adjustments on the next one, to indicate his absence on March 14th.

On **March 20, 1997** Mr. Carney requested and received eight hours of administrative leave to attend a "Young People with Disabilities" seminar (J-9I). Registration for the seminar began at 8:00 a.m. and the seminar ended at 4:00 p.m. The master time card indicates Mr. Carney received compensation for eight hours of administrative leave that day (J-9b). Mr. Carney submitted a travel expense request indicating mileage to COSERRC was 42 miles one way. Mr. Carney indicated he left home at 6:15 a.m. and arrived at COSERRC at 7:30 a.m. He departed COSERRC at 4:00

p.m. (J-9I). Mr. Carney did not punch in/out or sign in/out at either institution (J-9ti, J-9tii, J-9ui, and J-9uii). Mr. Carney submitted no other requests for leave (J-9r). According to the letter written by Robert Snyder, Mr. Carney was not registered to attend the class and there is no record of his attendance on that date (E-2). There is no documentation to verify Mr. Carney performed any state-related business that day. The mileage reimbursement rate was $0.25/mile. Mr. Carney received $21.00 in mileage reimbursement and $170.32 in compensation for that day, for a total of $191.32.

Mr. Carney alleges he attended the COSERRC seminar. His own document (U-8) reflects his appearance at Belmont Correctional Institution at 3:00 p.m. According to SCOPE/OEA records, Mr. Carney received mileage reimbursement for a trip to Belmont (E-13). The number of miles reimbursed was 180 miles. Had Mr. Carney actually been at COSERRC, he would have had to leave there by 12:00 p.m. in order to make his appointment. Again, Mr. Carney and the Association failed to specifically deny the allegation when provided the opportunity on rebuttal.

On **April 7, 1997**, Mr. Carney's itinerary reflected the day was to be spent at PCI (J-9j). Punch detail reports from PCI (J-9tii) and sign-in logs from PCI (J-9uii) do not indicate Mr. Carney arrived at PCI on that date. Punch detail reports from SCI (J-9ti) and sign-in logs from SCI (J-9ui) do not indicate Mr. Carney was at SCI on that date. Mr. Carney did not seek any travel reimbursement for that date. Mr. Carney did not submit any leave forms for that date (J-9g and J-9r). There is no indication from teacher statements that Mr. Carney worked that day (J-9d). There is not a notation on his calendar that Mr. Carney called off. Mr. Carney was not entitled to flex an entire day off. There is no evidence to indicate he requested flextime for any part of that day. Mr.

Carney signed the attendance report for that pay period indicating appropriate leave forms were submitted. Mr. Carney's master time sheet indicates he was compensated for eight hours of work that day and had no reduction of his leave balances (J-9b). On that date, Mr. Carney's hourly rate of pay was $21.29 (J-9b). Mr. Carney received $170.32.

Mr. Carney would have one believe he flexed that day. There is no evidence that Mr. Carney requested any time off. According to Mr. Carney's original direct testimony (October 16, 1998), he knew he could not flex an entire day. Mr. Carney's bi-weekly attendance report has no indication he took time off on that day.

The April itinerary denotes that Mr. Carney would be at the CTA for the Professional Alliance of Correctional Employees (PACE) program from April 15th – 18th (J-9j). The calendar shows a change for **April 18th**, that Mr. Carney was given 8 hours of administrative leave to attend bargaining. The sign in sheet at the Office of Collective Bargaining (OCB) indicates Mr. Carney's presence at that location from 8:45 a.m. until 11:50 a.m. (J-t(v)). Mr. Carney submitted a travel voucher on May 16th indicating a request for mileage for April 18th. The travel expense report requests mileage to OCB and shows he was at OCB from 8:45 a.m. until 1:30 p.m. The grievant was not entitled to mileage to attend bargaining at OCB. On June 3, a second travel expense report was submitted. This time, Mr. Carney indicated he was at PCI/CTA on April 18th. He indicated he was at PCI/CTA from 8:10 a.m. to 3:10 p.m. Mr. Carney signed both vouchers certifying that the expenses were actually incurred on state business. The two reports place him in two different locations on the same date and during the same time period. Mr. Carney signed the attendance report indicating eight hours of administrative leave was appropriate. Mr. Carney was on approved

administrative leave for bargaining purposes that day. **However, Mr. Carney did attempt to steal $17.50 in mileage.**

The Association argued that two of the teachers, Frances Sollie and Todd Dygert, submitted statements that Mr. Carney was at PCI on April 18, 1997. Frances Sollie testified that she particularly remembered that date because the grievant was at PCI in time to escort Dr. Weaver at PCI (J-9d). Records indicate to the contrary. Dr. Weaver signed in as a visitor to PCI on April 17th (E-7). Furthermore, the time he signed in was 9:15 a.m. to 3:00 p.m. The time which Mr. Carney was clearly at OCB if it had been on the 18th of April. Finally, the OEA records indicate Mr. Carney attended lunch with his Association bargaining team. The time on the receipt is 1:10 p.m. (E-13).

Brent Carney was no where near PCI on April 18th. As for Todd Dygert's statements, they are conflicting and vague. His first statement indicates he didn't recall anything. His second statement is adamant that Mr. Carney helped him with a special education placement in the late afternoon of April 18th. **Unfortunately, there is no punch detail or sign in records to reflect Mr. Carney's presence at the institution.** One can only assume much like Ms. Sollie, that Mr. Dygert was confused about the date. Curiously enough, the original voucher including a trip to OCB does not indicate a trip to PCI on the 18th of April.

On **May 19th, 1997**, the calendar of Mr. Carney reveals that he would spend the day at PCI. Denise Justice changed the calendar to indicate a call off (J-9k). Other changes on the calendar indicate "bargaining" when there was a change in schedule due to bargaining. On **June 2, Mr. Carney submitted a couple of requests for leave. One of them requested eight hours of administrative leave for bargaining on May 19th (J-9k).**

There was no bargaining May 19th. There is no indication from punch in or sign in logs that Mr. Carney was at either institution (J-9ti, J-9tii, J-9ui, and J-9uii). There are no additional requests for leave (J-9 k and J-9r). There are no teacher statements proving Mr. Carney to be at either institution on this date (J-9d). There is no travel expense report for this date. Mr. Carney did not sign his attendance report (J-9k). The master time card denotes Mr. Carney's payment for eight hours of administrative leave. At that time, his hourly rate of pay was $21.29. Mr. Carney received $170.32 in compensation for work not performed.

Mr. Carney testified he was in bargaining on May 19th. Records of management representatives indicate there was no meeting on that date. Furthermore, the Grievant's own record (U-8) indicates other bargaining dates with "OCB". This one date is written differently. It gives rise to the question of when the notation was entered and how authentic and accurate is the evidence.

Mr. Carney testified that he filled out this leave form on June 2nd, 1997, after that date and he knew there was bargaining on that date. Three management witnesses, Brad Rahr from the Department of Youth Services and Dennis VanSickle from the state Library Board and Dave Burris from the Department of Rehabilitation and Correction all testified there was no bargaining on that date. All three also testified that not only were they not in bargaining, but their calendars indicate they were somewhere else on that day (E-14 and E-15). This precludes the likelihood of forgetting to note a scheduled date. Furthermore, SCOPE/OEA records indicate Mr. Carney received mileage but no parking reimbursement for that date.

Testimony also showed that if SCOPE/OEA bargaining team was having a

meeting outside of a bargaining date, it would have been at the Westerville OEA office, not at OCB. **The Association did not provide a single member of the bargaining team, including Henry Stevens, to support the contention that bargaining occurred on May 19th.**

On **September 19, 1997** the itinerary shows Mr. Carney at PCI for the day. The schedule changed to accommodate a seminar at COSERRC for IAT. Registration began at 8:00 a.m. and the seminar ended at 3:30 p.m. (J-9n). Mr. Carney requested and received eight hours of administrative leave. His master time card indicates (J-9b), as does a subsequent leave request (J-9r) that Mr. Carney was paid three hours of personal leave and five hours of administrative leave for the day. No attendance reports were signed. No travel expenses were submitted though Mr. Carney was entitled to receive mileage to and from the COSERRC center for this training. There were no punch ins or sign ins at either facility (J-9ti, J-9tii, J-9ui, J-9uii). There **is a statement from Robert Snyder again that indicates Mr. Carney's attendance cannot be verified through the COSERRC** (E-2). Mr. Carney did not register or sign-in. By that time, Mr. Carney's rate of pay increased to $24.88 (J-9b). Mr. Carney was paid five hours of administrative leave for attending a seminar he did not attend. The total compensation is $124.40.

Mr. Carney testified he was at the seminar. His calendar (U-8) indicates he was at Noble Correctional Institution for a labor/management meeting at 2:30 p.m.

The Corrections Education Association had two symposiums on **September** 24th, 25th and **26th**. The first symposium, the 24th and 25th, was in Athens, Ohio. The second symposium, the 25th and 26th, was in Lima, Ohio. Since Mr. Carney's institutions were in the southern half of the state, he was required to go to the symposium in Athens on the 24th and 25th. The symposium in Lima was virtually the same; it was

dedicated to the employees in the northern half of the state. Mr. Carney submitted an administrative leave request for all three September dates of the symposium. Ms. Justice informed Mr. Carney that he could have the afternoon of the 24th and all of the 25th to attend the one in Athens. According to her testimony, Mr. Carney insisted that as SCOPE/OEA Vice-President he should be allowed to go to both events. Ms. Justice told Mr. Carney if he used his own time and paid the registration fee for the northern version; he was welcome to attend. As Ms. Justice was part of the planning committee, she had to attend both sessions. When she arrived in Lima the evening of the 25th, she saw Mr. Carney in the hotel lobby. She thought it odd that Mr. Carney was present because he never submitted a leave form (J-9n and J-9r). The master timecard shows Mr. Carney was paid eight hours of regular pay for the day (J-9b). He did not sign the attendance report. He did not have his leave balance reduced. Mr. Carney's hourly rate was $24.88. He received $199.04 in compensation for the day and is leave balances were not reduced.

The Association submitted two exhibits, U- 3 and U-4. Both exhibits are request for leave forms for the September 26th date. One is a request for vacation leave. The other is a request for personal leave. Neither leave form was processed and properly posted. Mr. Carney should have noticed that by his pay stub. When the Association showed Ms. Justice the leave forms, she identified the form, but could not positively identify her signatures. The copies were so poorly made; it was difficult to determine the dates. If these forms were actually submitted and approved by Ms. Justice, it is difficult to believe that they were not processed like all other leave forms. Furthermore, it is difficult to believe Mr. Carney did not notice his leave balances were not appropriately reduced according to the pay stub.

On **October 23, 1997**, the COSERRC sponsored a seminar on "Evaluate Your IEP. Registration began at 8:00 a.m. The seminar lasted until 3:00 p.m. (J-9o). Mr. Carney requested and received eight hours of administrative leave to attend the training (J-9o). His master time card indicates (J-9b) that he was paid eight hours of administrative leave for the day. **No attendance reports were signed. There were no punch-ins or sign-ins at either facility (J-9ti, J-9tii, J-9ui, and J-9uii). There** is a **statement from Robert Snyder again that indicates Mr. Carney's attendance cannot be verified through the COSERRC** (E-2). Mr. Carney did not register or sign-in. Mr. Carney's rate of pay was to $24.88 (J-9b). Mr. Carney was paid eight hours of administrative leave for attending a seminar he did not attend. Mr. Carney was also reimbursed for seventy-two (72) miles. This time the trip to COSERRC was only thirty-six (36) miles. The mileage reimbursement rate, according to his travel voucher, was $0.26 per mile. The total compensation for mileage not driven and work not performed is $217.76.

Mr. Carney testified he attended the seminar. There is no documentation to support this testimony. Given the nature of the case and the credibility issues, Mr. Carney's self-serving testimony, absent supporting witnesses or documentation, should not be considered.

On **October 30, 1997**, the COSERRC sponsored a seminar on "Identifying Critical Need Skills/Behaviors". Registration began at 8:00 a.m. The seminar lasted until 3:00 p.m. Mr. Carney requested and received eight hours of administrative leave to attend the training (J-9o). His master time card indicates (J-9b) that he was paid eight hours of administrative leave for the day. No attendance reports were signed. There

were no punch-ins or sign-ins at either facility (J9ti, J9tii, J9ui, J9uii). There is a statement from Robert Snyder again that indicates Mr. Carney's attendance cannot be verified through the COSERRC (E-2). Mr. Carney did not register or sign-in. Mr. Carney's rate of pay was $24.88 (J-9b). Mr. Carney was paid eight hours of administrative leave for attending a seminar he did not attend. Mr. Carney was also reimbursed for seventy-two (72) miles. This trip to COSERRC was only thirty-six (36) miles one way. The mileage reimbursement rate, according to his travel voucher, was $0.26 per mile. The total compensation for mileage not driven and work not performed is $217.76.

Mr. Carney testified he was at the training. The Association also provided a witness, Esther Schaeffer, to verify Mr. Carney's attendance. Ms. Schaeffer had documentation to support her attendance at the seminar. She had none to verify Mr. Carney's attendance. Ms. Schaeffer did not come forward at any time during the course of the investigation or grievance procedure to relay such information. Until her testimony at the arbitration, the Employer had no knowledge of her testimony. Reimbursement records received from the OEA indicate Mr. Carney received mileage that day for a trip to OEA offices (E-13).

On **November 13, 1997**, Mr. Carney received eight hours of administrative leave to attend a CIMS meeting at COSERRC (J-9p). Testimony and documentation from Maumee Youth Center's (MMYC) labor relations officer, Jerry Isch indicates that Mr. Carney was at MMYC on November 13th for a labor/management meeting. Maumee Youth Center is a facility of the Department of Youth Services. Mr. Carney signed an attendance sheet at the meeting. Mr. Isch recalls his presence at the meeting. The

meeting began at 2:30 p.m. The facility is located in Liberty Center, Ohio, near Maumee. It is fair to say that it is, according to the testimony of Mr. Carney, approximately a two and a half-hour drive from Columbus to Liberty Center, Ohio. Mr. Carney's hourly rate of pay at the time was $24.88 (J-9b). His compensation for the day was $199.04. In addition, the mileage submitted to COSERRC was for eighty-six (86) miles (J-9n). The mileage reimbursement rate was $0.26 per mile for a total of $18.82. The total amount at issue for the day is $221.40.

The Association again provided two witness, Anna Thompson and Diana Bragg. Both witnesses testified that on the morning of November 13th, Mr. Carney was at the CIMS meeting at COSERRC. Both witnesses also testified that Mr. Carney left the meeting when it broke for lunch, approximately noon. Therefore, from noon until the end of his workday, 4:30 p.m., Mr. Carney was en route to or conducting Association business while he was on approved administrative leave with pay to attend a meeting. This is a clear abuse of Mr. Carney's positions, both as a SCOPE officer and an employee of the Department of Rehabilitation and Correction.

Mr. Carney is currently President of SCOPE/OEA. At the time of his removal, and on November 13th, he was Vice-President and Grievance Chair. Mr. Carney spent a lot of time on administrative leave for association representatives. Section 28.07 specifically provides for a bank of hours for representatives to administer the agreement. Absent an approved leave, charged against that bank of hours, Mr. Carney had no contractual right to take leave to attend a labor/management meeting for another agency. Mr. Carney's attendance at a DYS labor/management meeting, while on approved administrative leave to attend a DR&C education meeting, is theft, falsification and

misuse of his position for personal gain. The theft is not only of time from DR&C, but also a means of avoiding charging of the time against the allotted bank set forth in Section 27.08 of the Agreement between the parties.

Mr. Stephen Gulyassy, Deputy Director of the Office of Collective Bargaining (OCB), testified on rebuttal. He stated that such requests for leave should normally come through the OCB. Absent that, at the minimum, the request should go through the agency labor relations office. Mr. David Burrus, labor relations officer for DR&C, also testified on rebuttal. He stated that he was the agency coordinator for OEA issues. He stated that requests for administrative leave to conduct union business are processed through his office. There were no such requests for the date of November 13, 1997. Furthermore, Mr. Burrus testified, he found out about the incident the day after at an agency labor/management meeting from Henry Stevens.

Mr. Carney was ordered to report to the investigator's office at SCI on February 3, 1998. When he arrived with his representative, Mr. Carney was informed he needed to meet with both the Highway Patrol representative and Mr. Ratcliffe regarding the investigation. Mr. Carney met with the representative from the Highway Patrol and then left the institution. Despite being told to stay and wait for a meeting with Mr. Ratcliffe, Mr. Carney left. He did not return to work that day. He did not request to leave. Mr. Carney was paid for eight hours of work that day. He was at SCI for approximately five and one- half (5.5) hours. The remaining two and half-hours of paid time was work not performed. Based upon the hourly rate of $24.88, Mr. Carney's wages of $62.20 was obtained through theft, falsification and misuse of his position.

Mr. Carney testified he left SCI and went to Mr. Snyder's office, along with Mr.

Stevens. Mr. Stevens testified they left SCI and did not meet with Mr. Snyder, but with Mark Foley. Here again, we have a conflict. Records received under subpoena from the OEA indicate the grievant went to the state house that day for a meeting with the Education Committee. This is not approved state work. It is also not a visit to an attorney's office. If, as Mr. Carney testified, the meeting at the state house occurred in the evening, Mr. Carney falsified his expense report to OEA. He charged mileage from SCI to the state house when he was already downtown for a meeting at the offices of Cloppert, Portman, Sauter, Latanick & Foley, coincidentally about two blocks from the state house. Additionally, Mr. Carney charged a one-way trip from the state house to his home of 55 miles that day. On April 18th, 1997, the trip from home to downtown was 56 miles both ways (E-13).

In addition to the above dates, the Employer cites instances that the Grievant inappropriately claimed mileage for travel. The Employer's position specifically accuses the Grievant of inflating the amount of mileage he drove to PCI and COSERRC and getting reimbursed for the extra miles.

MILEAGE

According to the testimony of Tom Ratcliffe, the Grievant's mileage is inflated approximately eight miles one way on his trips to PCI. The employer offered maps as exhibits. Mr. Ratcliffe testified that the most direct route is for Mr. Carney to take Diley Road (south) to Rte. 33 (west) to 1-70 (west) to I-270 (south) to Rte 62/3 to Orient. He testified that the route is approximately twenty-seven (27) miles.

Mr. Carney testified two times that his route to PCI was: Diley Road (north) to Hill Rd.; left (west) on Hill Rd (a.k.a. Rte 256) to Refugee Rd.; right (east) on Refugee

Rd to Harmon Rd.; left on Harmon Rd. to Rte 204; left on Rte 204 to Rte 256; right on Rte 256 to I-70; west on I-70 to I-270; south on I-270 to 71S; south on I-71 to Rte 3/62 Harrisburg. Mr. Carney testified once that he took I-70W to I-71S rather than taking I-270 to I-71S. That would mean Mr. Carney drove all the way downtown before going to PCI.

Only when he was asked, did Mr. Carney falter and admit a detour from this route down two unnamed roads and Twin Creek Drive Northwest. When asked about the address on Twin Creek Dr. NW, Mr. Carney, after having the address repeated three times, acknowledged that he stopped there every morning on his way to work. Mr. Carney, having earlier testified his drive to work at PCI was on state time and with mileage reimbursement, was hesitant to say whether or not this stop was made on state time.

He testified that going north and east was easier and faster than going south and west. He testified that the traffic was better. That there was approximately ten traffic lights. He neglected to mention, until asked, that Hill Rd. was Rte. 256 and he took a circular detour of approximately four miles to avoid about a quarter mile of Rte 256.

In his December 16th testimony, Mr. Carney wrote directions he traveled. **The directions between his house and PCI are different than the directions he testified to in October.** The first set of directions under that heading, does not even include the trip to the babysitter. And Rte 793 is no where near Orient.

The second set of directions, which includes the babysitter trip, is not an accurate set of directions because one can't get from Diley to Greenbower without turning down a whole bunch of other roads. In October, the Grievant could not remember the routes he

drove to COSERRC. In December, having driven several different routes, the grievant arrived at a set of directions that gave him the mileage he needed to fit his story. This is hardly credible testimony.

The Association attempted to argue that if Mr. Carney drove thirty-five miles to and from work, he was entitled to reimbursement and was not in violation of any work rules. The Association urged that no matter what route Mr. Carney drove, as long as he was driving to work, he was entitled to reimbursement. He was never told to take the most direct route, the route with the least miles, or the route that would take the least amount of time.

The Employer does not disagree that Mr. Carney was not told to take the most direct route. However, the Employer also did not tell Mr. Carney that he could not get to PCI via Cleveland and be reimbursed. The issue is whether a reasonable person would find the route driven by Mr. Carney acceptable. The certification on each reimbursement forms states the expenses were incurred on actual state business. It is not reasonable or fiscally responsible to take routes completely opposite of your destination. Taking into consideration Mr. Carney's failure to remember his stop at the babysitter's every morning and evening, as well as his uncertainty as to the names of the streets he drove, it is fair to conclude that the route testified to by Mr. Carney is not a reasonable route. Mr. Carney is not entitled to mileage for driving to the babysitter. Under any definition or explanation, dropping your child off for daycare cannot meet the test of an expense incurred on state business. Due to the potential liability in the event of an accident, the Employer cannot condone such actions.

Looking at E-11 and the routes highlighted by Mr. Carney, it is easy to tell the

routes he drove both to PCI and to COSERRC were out of the way and merely used to fit the mileage he submitted. For a person to spend as much time as he spent driving back and forth to PCI, Mr. Carney did not even know how to draw it on a map, nor did he know how to get to COSERRC.

EMPLOYER'S RESPONSE TO PROCEDURAL ARGUMENTS

The Employer flatly rejects the issues of procedural impropriety raised by the Association. The Employer provides the following rationale for it position:

The Association raised three procedural issues throughout the arbitration. The issues included the use of two pre-disciplinary conferences, a lack of an investigation or an incomplete investigation and the issue of the copies of leave forms. As an aside, the Association also raised issues with the work rules used, disparate treatment and the signature on the removal notice.

Regarding the issue of disparate treatment, the Association entered the disciplinary action of Pat Cavener (U-16). There was no testimony as to the facts leading up to the discipline. The discipline did not include allegations of theft or misuse of position. Cavener's discipline also did not include allegations of a pattern of behavior of deceit. Disparate treatment is an affirmative defense. The burden rests with the union to prove the discrimination exists. In order to prove disparate treatment, it must be shown that all employees who are similar in position and seniority, and engage in same-type conduct, are treated essentially the same

The union failed to establish any similarity of relationship between Mr. Carney's and Ms. Cavener's discipline.

The Association attempted to establish a procedural error based upon the work

rules Mr. Carney was charged with violating. The Association entered into evidence a set of work rules promulgated after the work rules under which the grievant was charged. The only difference is the numbering on the work rules. It is a matter of form over substance. The work rules are not new to the agency. The work rules are not unreasonable. In fact, the Employer would argue that even if there were not a work rule against theft, the grievant could be fired for theft. The action of stealing from a public employer is so egregious that the bond of trust cannot be repaired. Fortunately, there are work rules against theft, falsification and misuse of position for personal gain. There have been work rules on these issues for a number of years. That the employer used a different number, under an older set of work rules does not change the facts. The employee was still placed on notice for his alleged wrongdoing. The association did not show any means of which it was hindered in preparing its case due to the usage of an older set of work rules. The employer showed that the employee signed for and received the rules under which he was charged. It is a matter raised by the association to muddy the waters, stall the process and because there is no defense for the Grievant's actions.

The Association also raised the procedural issue in its opening that the proper individual did not sign the removal notice. The employer merely wants to note that while the objection/issue was raised, the association put forth no evidence on this matter. The employer, therefore, must presume the issue is not relevant.

There were not two pre-disciplinary meetings in this case. There was a pre-disciplinary meeting in November 1997 based upon discrepancies in a travel voucher covering April 16th, 1997. At that pre-disciplinary meeting, Mr. Ratcliffe was the hearing officer. Mr. Stevens represented Mr. Carney on behalf of the Association.

During the course of that meeting, the Association raised the allegation that there was no investigation conducted. Management made the determination that the investigation was not sufficient. Regardless of the phrase used, the date used in that pre-disciplinary meeting is not included in the dates of this removal. According to the hearing officer report and the Step 4 response from the Office of Collective Bargaining, as well as the acknowledgement of the management advocates at the arbitration hearing, that date is not included in the removal. Management excluded the date in order to avoid any procedural issues. No discipline was issued from the first investigation and pre-disciplinary meeting. The discipline at issue is from a separate investigation, excluding the April dates from the November pre-disciplinary meeting.

The Association claims the investigation was faulty for a number of reasons. First, the investigation did not include interviews of the teachers involved with CIMS. Second, they did not interview other teachers about COSERRC dates. Third, the issue of the lack of yellow copies of the leave slips indicates a cover-up. Finally, management raided Mr. Carney's office and surreptitiously removed all pink copies of leave slips that have anything to do with the arbitration.

The Association raised the allegation that the investigation was faulty because other members of the CIMS committee were not interviewed regarding Mr. Carney's whereabouts. As evidence, the Association called two witnesses, Anna Thompson and Diana Bragg. Both witnesses were present at a CIMS meeting on November 13, 1997. Ms. Bragg was also present at a meeting with Mr. Carney on October 16, 1997. Neither teacher was interviewed during the course of the investigation. It is management's position that neither teacher needed to be interviewed during the investigation. On

November 13, 1997, there was clear evidence to indicate Mr. Carney was at Maumee Youth Center. On October 16, 1997, Mr. Carney's administrative leave form places him at the Corrections Training Academy for a PACE meeting. The Association's testimony that he was at COSERRC for a CIMS meeting is clear evidence that Mr. Carney's administrative leave form is inaccurate. Furthermore, if he was at the CIMS meeting, there is no evidence of seeking mileage reimbursement. He is not entitled to reimbursement for PACE, but he is for a CIMS meeting.

The Employer offers the case of Michael Fitch in support of a proper investigation. In that case, the grievant was a custodial worker removed for unauthorized possession of state property. The grievant claimed the investigation was deficient. In support of the Employer's position, Arbitrator Anna Smith wrote, "in as much as the pre-disciplinary report makes no mention of a Grievant defense . . . the Employer would lack any knowledge of any role the supervisor might have played in the incident or even of his presence at the time". Arbitrator Smith went on to state that despite the lack of statements from key witnesses, the investigation was "fundamentally fair" and that there was strong circumstantial evidence, the employer made inquiries and heard from witnesses on both sides. OCSEA Arbitration Decision No. 432, The Ohio Department of Administrative Services and OCSEA, AFSCME, Local 11, Anna Smith arbitrator, April, 1992.

As in the Fitch case, management's investigation was fundamentally fair. **It was due to Mr. Carney's silence during the investigation process and pre-disciplinary hearing that management was not aware of the existence of these witnesses or Mr. Carney's whereabouts on the** days in question.

The Association's next contention is that the COSERRC allegations are faulty. On one date, Mr. Carney claims another teacher was at a seminar with him and she was not interviewed. Management did investigate those dates. The director of the program indicated to management that Mr. Carney had not registered for or signed in at any of the seminars. **What other means existed to investigate the issue? Registration and attendance forms are a logical starting point. None existed for Mr. Carney.**

The last allegation is regarding the issue of leave slips, both pink and yellow and the processing of the form. The Association also opined that management's ability to follow through and process leave forms is at fault. Each employee has an obligation, once leave forms are submitted, to track his/her leave form and ensure that leave is approved. The Association's witnesses, Todd Dygert, Scott Perry and Anna Thompson, as well as management witnesses Mr. Ratcliffe and Ms. Justice testified to that fact. They checked their pay stubs for proper leave balance reductions. Mr. Carney testified that eventually, he always received the pink slip back. He also testified to the numerous problems he considered existed in the process. If that were indeed the case, as both an Association representative and an employee, he had an increased obligation to work with the employer on these issues and improve the system, not misuse it for his personal gain.

The troubles testified to by the Association witnesses are not relevant to Mr. Carney's case. Both Mr. Dygert and Mr. Perry worked in one institution; they were not responsible for multi-institutions. Mr. Perry did not even work at an institution to which the grievant was assigned. Their processing of leave slips did not go through Denise Justice, but through the school administrator to the Deputy Warden. Mr. Carney was on Central Office payroll. His slips went through Denise Justice to central office. None of

the same people were even involved in the processing and returning of leave forms.

The Association made an issue of the location of the yellow copy of the leave forms as well as the pink copies. As was discussed prior to arbitration, the yellow forms do not exist. Furthermore, they are meaningless forms. The top (white) copy is the official form used for payroll purposes. The yellow copy provides no purpose other than as an extra copy.

The pink copy is returned to the employee after dis/approval. Mr. Carney acknowledged he kept his pink copies in his office. He also testified he made copies of his leave forms and took them home to do his expense reports (which, he later testified, were filled out by inmates). Mr. Kajca then testified to the grand conspiracy of management sneaking into the Grievant's office and riffling through the documents to cover its unjust actions. **There is no evidence to support these allegations. There is no purpose for management to engage in such covert activity.** The payroll record (J-9b) is the payroll record. Leave that was processed is already on record and management had no means to change that. If leave requests were not approved or not submitted they are irrelevant in terms of the Grievant's locations on specific dates.

The fact is Mr. Carney had unrestricted access to his office through the day of his removal. He knew of the allegations during his February investigatory interview. He was again informed of them in early March with the pre-disciplinary notice. Even after the pre-disciplinary meeting, Mr. Carney had over two weeks to gather documents from his office. **Mr. Carney knew the dates at issue and chose to not provide any evidence that could exonerate him from the allegations.**

Finally, the Association raised the issue of the Employer's failure to provide

copies of documents requested during the grievance/arbitration process. There was testimony in the record that the Association made a request to view all of the pink, yellow and white leave forms submitted by Mr. Carney. Testimony indicated that the initial request was made in the last half of May 1998. Mr. Burris testified he made all copies in the possession of the Employer available to Mr. Snyder in July, 1998. The issue then did not arise again until October, 1998. For three months, the Association made no issue of the leave forms. In fact, it was not until the day before the arbitration was scheduled to go forward that the Association used the issue as a postponement tactic.

It is the Employer's position that the leave forms submitted by the Association should not be admitted into evidence (U- 3, 4, 10, 11, 12, 13, and 14). If admitted, they should be given little weight or relevance. The copies of the forms are difficult to read and thus, may not be accurate reflections. The payroll card (J-9b) indicates that none of these leave forms were processed. **Additionally, the only two forms showed to Denise Justice (U-3 and U-4) are disputed as to the authenticity of her signature.** She was shown the forms for the first time when she testified. Ms. Justice testified the signatures were not hers. Her signature was falsified.

Mr. Carney admitted he had access to his office up until the date of his removal. He testified that is where he kept the pink copies of his leave slips. He knew of the investigation and the dates at issue. He had ample opportunity to return to his office and pull out those slips. **If those slips actually existed, any reasonable person would have done that in order to save his job. The original pink slips would have gone a long way toward boosting Mr. Carney's credibility.**

The Association and Mr. Carney had ample opportunities to rebut, refute or

respond to the allegations of theft, falsification and misuse of position. Mr. Carney and the Association were at the investigatory interview, the pre-disciplinary conference, and the grievance meeting. The Association faults a bad investigation yet there were many issues brought up at arbitration which the Employer had no means of discovering due to Mr. Carney's silence. For instance the October 16th CIMS meeting. Pursuant to Section 13.02 of the agreement, the employee is required to respond to the allegations unless he/she is subject to criminal penalties. Based upon the testimony of the grievant and the witnesses of the Association, they would have one believe there are no criminal penalties. So why did the Employer have to wait almost an entire year and expend thousands of dollars? During the course of all of these events, the Association and Mr. Carney refused to disclose any evidence which would appear to mitigate or clear Mr. Carney of the allegations. Even at the meeting with the Association's advocate before the arbitration, the Association refused to disclose any evidence that the Employer may have used in considering disciplinary action. Yet at the arbitration, the Association had a list of seventeen witnesses and documents to attempt to exculpate Mr. Carney from the charges. **The Grievant and the Association deliberately and intentionally withheld evidence.**

"Sound collective bargaining requires frank and candid disclosure at the earliest opportunity of all the facts known to each party . . . There is not a scintilla of justification for the withholding of information by either party from and after the time it is discovered." Gabriel N. Alexander, General Motors Umpire Decision No. F-97 (1950), Elkouri and Elkouri, How Arbitration Works, 5th edition, p. 417. The evidence presented at arbitration, though known to the Association and the grievant, was not presented to the employer before the determination of discipline was made. The rules of the National

Railroad Adjustment Board require that "all data submitted in support of the party's position must affirmatively show the same to have been presented to the other party and made a part of the particular question in dispute". According to Arbitrator Paul Prasow, "the basic issue to be determined is whether management's action was proper based upon the facts known at the time the action was taken. Normally, the clock stops at that moment." Elkouri and Elkouri, p.417.

In Bethlehem Steel Co. and Industrial Union of Marine & Shipbuilding Workers of America, 18 LA 366 at 367, Arbitrator Feinberg excluded evidence known to the union but was withheld until arbitration. Citing reasons such as preclusion of settlement discussions, the purpose of arbitration, and parties ability to prepare for the case, Arbitrator Feinberg found the withholding of evidence which is "the principal evidence in support of the union's case, or results in expanding the union's claims" precludes its introduction at the arbitration level. In Mr. Carney's case, he had the copies of leave slips put into evidence by the union from the moment they were created. Based upon their failure to submit those at any time prior to the arbitration level, the documents should be excluded. Furthermore, that the documents served not to implicate him in any type of criminal matter, but to, apparently, exonerate him from such allegations, only increased his and the union's obligation to bring the documents forward at any earlier level.

The Agreement is riddled with phrases of mutual communication and exchange of information. Section 1.01 speaks to "promoting cooperation and harmonious labor relations . . . establishing an equitable and peaceful procedure for resolution of differences". Section 5.01 states that the "parties intend that every effort shall be made to

share all relevant and pertinent records, paper, data and names of witnesses to facilitate the resolution of grievances at the lowest level". Section 6.06 requires the parties exchange witness information prior to the arbitration hearing. Section 6.07 requires that the parties meet prior to the start of an arbitration hearing to attempt to come to agreement on an issue. The Agreement calls for several types of labor/management committees to meet and exchange ideas. Health and Safety, QStP, a Pupil Discipline Committee, State-wide, Agency-Wide and facility labor/management committees, the Association is allowed input in setting of school calendars, Joint Health Care Committee representative, transitional work programs, Licensed Professional Development Committee. All of these committees and the spirit of collective bargaining indicate the free exchange of documentation, ideas and theories. The Association, by its actions in this hearing, indicates that the exchange need only be from the Employer. It is the Employer that must give and give and the Association is responsible for nothing. It is time that employees and the Association take some responsibility for their actions.

The Association had ample opportunity to provide evidence and documentation to support its theories. The purpose of investigations and the grievance procedure is to obtain information. **The Association, Mr. Stevens, Mr. Snyder and Mr. Carney deliberately withheld documentation and evidence.** That evidence does not exonerate Mr. Carney from the allegations, but it lessened the number of hours at issue. The Association had an obligation to bring that evidence forward at the earliest possible time.

Arbitrators generally respond to new evidence by not admitting the documents into arbitration. Failure to produce relevant documentation or argument at the earliest level denies the parties "the right to a forthright resolution, together with its potential for

accommodative settlement, deprives the employer of the opportunity to mount a fully investigated/researched case. Fairweather, Practice and Procedure in Labor Arbitration, p.119. "In the grievance procedure, you ought to put all your cards on the table, and both sides should be aware of what the theories of the other are. I object strongly to the ace-in-the-sleeve technique. It inhibits the grievance procedure. If your grievance procedure is going to work, both sides must know in advance what the other is going to say in arbitration. Everybody should know what is going to come forward" Rockford Clutch Division and Automobile Workers, Arbitrator Bert L. Luskin, Fairweather, p. 119.

The Association's failure to disclose subjects of testimony, leave forms, theories and facts prior to the arbitration has inhibited the entire process. Even when the employer subpoenaed documents, the Association refused to turn over Mr. Carney's calendar, claiming it was unaware of the request. The request was directly written into the subpoena. The Association's counsel obstructed the process.

In the words of an esteemed arbitrator, "[I]n as much as the grievance procedure is an extension of the collective bargaining process between the parties, it is important that the process be taken seriously. In a healthy collective bargaining relationship, the parties maximize each step of the grievance process in order to clarify facts and understand each other's point of view"

In this case, the Association refused to participate in the grievance or arbitration procedure in a manner that could be beneficial to both parties. Refusal to disclose facts and evidence during the investigation and grievance process has made a mockery of the collective bargaining process and the purpose and intent of labor relations. For all of these reasons, the employer requests that the Association exhibits be stricken from the

record or given little weight as relevant. The employer did not have these documents in hand when determining the discipline because of the failure to disclose.

ASSOCIATION'S POSITION

PROCEDURAL ARGUMENT

The Association argues that the Employer committed procedural errors in this matter in violation of Article 13.03 of the Collective Bargaining Agreement. A pre-disciplinary hearing was held on November 12, 1997, during which the Grievant was accused of falsifying expense reports in order to obtain compensation for which he was not entitled. This is the same type of conduct, for which the Grievant was ultimately removed, contends the Association. The Association contends that Section 13.03 requires that the Employer must issue a decision in writing within twenty-five (25) days of the pre-disciplinary conference that was held on November 12, 1997. Mr. Ratcliff, the hearing officer, did not issue a decision in the matter. **The Association concludes that the Employer's failure to issue a decision following the pre-disciplinary hearing should have resolved this matter in favor of Mr. Carney.**

The Employer subsequently held another pre-disciplinary hearing several months later (March 12, 1998) and accused the Grievant of the very same allegations of conduct that existed in the November 12, 1997 hearing. **The Association argues that under the Agreement and the principles of due process, Mr. Carney was entitled to have the**

allegations of the conduct contained in the Notice of the November 1997 pre-disciplinary conference. The Association also argues that Section 13.03 also requires that the pre-disciplinary conference be conducted by a person not directly associated with the incidents which led to the contemplated discipline. The Association points out that Mr. Ratcliff was involved in one of the incidents and the investigation that led to the contemplated discipline. Mr. Ratcliff served as a hearing officer for the November 17, 1997 pre-disciplinary conference and following the conference he was assigned to investigate the allegations against Mr. Carney again, argues the Association. This scenario of events is a violation of Article 13.03 and should preclude any need to proceed to the merits of this case, argues the Association.

The Association also contends that Mr. Carney's pre-disciplinary notice and removal order did not provide the Grievant with adequate notice of the charges in question. The Association points out that the charges appear to refer to rules contained in the 1990 Department Standards of Employee Conduct that were not in effect at the time of the activities described in the allegations. The Standards of Employee Conduct were revised in 1996, rules which the Association alleges the Grievant never received.

On March 10, 1998, the Grievant's counsel obtained a 48-hour continuance because of a conflict with his schedule. Less than twenty-four (24) hours before the March 12, 1998 pre-disciplinary conference, the Grievant's counsel learned that there was a pre-disciplinary hearing. Counsel for the Grievant requested a continuance to allow time for counsel to review files. Mr. Chivalas, the March 12, 1998, hearing officer delayed the start of the March 12, 1998 hearing by two (2) hours (JX 8). This was insufficient time to review and respond to the enormous amount of information contained

in the disciplinary packet. The Association contends that the Employer did not treat the Grievant fairly and objectively and is guilty of committing another substantial procedural error that should result in sustaining the grievance on procedural grounds.

MERITS

The Association contends that the Employer did not prove that the Grievant was guilty of the charges that led to his dismissal from employment. The Association makes the following arguments:

The employer in a disciplinary case has the burden to prove by clear and convincing evidence that there has been a violation of the rules of conduct and that the discipline imposed is justified particularly where allegations of dishonesty are involved. See Hy-Vee Food Stores, Inc. and Local 147 International Bld. Of Teamsters, Chauffeurs, Warehousemen an Helpers of America, 102 Lab. Arb. (BNA) 555 (1994), Berquist, Arb. There is even more reason to impose a strict standard of proof where a removal is involved.

The evidence relied upon by the DRC in this case simply does not, by any standard, support the allegation of a violation of the rules of conduct or the imposition of any discipline upon Mr. Carney. In some cases, the evidence is completely contrary to the allegations against Mr. Carney. For example, there are instances where it is alleged that Mr. Carney was not at either SCI or PCI and had not submitted a request for leave for that day. However, the evidence proved that Mr. Carney did submit a proper leave request for the day in question.

There are other cases where the evidence shows, at worst, that the Department

was not sure where Mr. Carney was on the day in question. Yet the employer leaps to the conclusion that he was not at the location where he was supposed to be and that he therefore engaged in theft of compensation for that day. For example, there are several occasions on which Mr. Carney was given permission to go to the COSERRC. The investigators report indicates that Mr. Carney did not sign in at either PCI or SCI and that he did not complete a registration form at COSERRC. The worst that could be inferred from that evidence is that the Department was not sure whether Mr. Carney went to COSERRC. However, the evidence produced by the Union proved that Mr. Carney did attend the sessions in question at COSERRC and that he and other teachers often attended functions at the COSERRC without filling out a registration form or signing in. With regard to those dates on which there were CIMS meetings scheduled at COSERRC, the DRC investigator did not even bother to ask the CIMS members if Mr. Carney was there on that day. See Testimony of Tom Ratcliff, Anna Thompson, Diana Bragg, David Dixon. The Union provided witnesses who verified that Mr. Carney was at the COSERRC sessions on October 16, 1997 October 23, 1997, and November 13, 1997. See testimony of David Dickson, Ester Schaffer, Diana Bragg, Anna Thompson. Despite the fact that DRC did not know if he was at COSERRC and did not interview the other teachers who were there with him, they chose to conclude that he did not attend and that he engaged in theft of the compensation for the day in question. That mentality is typical of that displayed throughout the investigation and disposition of the disciplinary charges in this case.

MILEAGE CHARGES

It is undisputed that the DRC has no rules or policies requiring employees to drive a particular route or the shortest possible route to their destination in order to obtain mileage reimbursement. See for example Testimony of T. Ratcliffe and B. Carney. In fact Mr. McDowell testified that the mileage chart which is published by the DRC for use by employees lists mileage greater than the route that he travels to Columbus from MCI. There are obviously numerous routes that can be taken to arrive at any given destination. Investigator Tom Ratcliff acknowledged that, in measuring the mileage in question, he did not necessarily take the shortest route because that would take longer. Mr. Ratcliffe admitted that he did not know what route Mr. Carney drove from home to PCI or to COSERRC. **He also admitted that the mileage was reported correctly if Mr. Carney actually drove the route Mr. Carney described. Yet he accused Mr. Carney of reporting his mileage incorrectly.**

Despite the fact that it had no evidence of which route Mr. Carney took from his home to COSERRC, the Department determined that he had fraudulently overstated his mileage reimbursement request, based on its assertion that the distance was 28 miles. As to the mileage for travel from Mr. Carney's home to PCI, the employer claims the distance is 27 miles. Despite the fact that he never once followed Mr. Carney, the investigator assumed that Mr. Carney drove that route on every occasion that he went to work at PCI, and charges that Mr. Carney fraudulently claimed mileage reimbursement on 280 separate trips. Testimony of T. Ratcliffe; Joint Exhibit 4.

The state attempted to make an issue of the route that Mr. Carney drove from his home to PCI and that he sometimes stopped at his babysitters on the way. However, the undisputed testimony was that this route was quicker, although longer and, it avoided

congested and dangerous traffic on Route 33. The testimony further established that the babysitter's home was less than one half mile off the route that Mr. Carney drove, and did not increase the amount of mileage he reported. Mr. Carney testified that he drove this route even when he did not need to stop at the babysitter's. The state asked Mr. Carney if he stopped at the babysitter's "on state time." Yet the testimony indicated that Mr. Carney was paid for one hour of travel time each way to PCI no matter how long the trip took. The fact that Mr. Carney sometimes stopped at his babysitter's house did not have any impact on his compensation or the amount of time he put in at PCI or SCI. Moreover, Mr. Carney has not been charged with driving too far as he traveled to PCI. He is charged with driving a shorter route and then reporting a longer route.

LEAVE REQUESTS

The absence of a leave slip does not indicate that Mr. Carney did not submit one for approval. Witness after witness testified that the processing of leave slips was a continuous problem at DRC during the years in question. This was a problem throughout the DRC. See testimony of Anna Thompson, Esther Schaffer, David Dixon, Todd Dygart, Scott Perry, Brent Carney. Leave slips were often returned to employees late (days or weeks after submission) or not at all. Employees were told if they did not receive a leave slip with approval or disapproval back by the time the requested date arrived, they could assume it was approved. See testimony of Brent Carney, David Dickson, Mark Dyer, Ester Staffer, Todd Dygart, Scott Perry, Nick Kajca. None of the Union's testimony regarding the problems with leave slip processing was refuted in any way.

Moreover, there was testimony that, after the charges involved in this case were lodged against Mr. Carney, not all of his pink copies of leave slips were returned to him. See testimony of Brent Carney and Nick Kajca. This testimony was also undisputed. **In fact, the evidence demonstrates that it was virtually impossible for Mr. Carney to fully respond to the charges relating to a lack of approved leave, because the documents were not available.** The leave request forms could have been lost or misplaced at any one of several steps or locations. Conceivably a white copy could be misplaced but a yellow or pink copy would still be in existence. Or a yellow copy might contain signatures or information that a pink copy did not. That is why the Union requested to review all copies, white, yellow and pink in the possession of DRC. However, the yellow copies or xerox copies of them were destroyed after the Union requested them. Mr. Snyder requested to review all of these documents by letter of May 21, 1998 (See Union Exhibit 24) and followed up with a phone call in June to schedule a time to review them. But according to Mr. Burrus the yellow copies, or Xerox copies of them, were destroyed by the state on or after July 1, 1998 and were never provided to the grievant or his representatives. See Testimony of David Burrus, Ron Snyder. To destroy those records when on notice that the grievant wanted to review them in connection with this grievance clearly deprived grievant of the opportunity to fully defend him.

There is absolutely no way that the evidence is the record can support the allegation that Mr. Carney was not at work and did not submit a leave slip for any particular day. In fact the Union demonstrated that there were leave slips submitted by Mr. Carney which the DRC no longer had copies of. See Union Exhibits 3,4,10,11,12,13.

Despite the fact that the State does not have all of the leave requests that were

submitted by Mr. Carney and/or approved by his supervisors, they have leaped to the conclusion that if Mr. Ratcliffe did not find a leave slip in the Central Office file, that Mr. Carney did not have approved leave for the day in question and therefore fraudulently obtained compensation.

Perhaps the most inexplicable position taken by the DRC in this entire matter also has to do with the issue of Leave Request submissions. Despite the fact that Mr. Carney called in and reported that he would not be at work on a particular day, the Department claims that he fraudulently obtained compensation because he failed to submit a leave slip upon return to work. The employer knew Mr. Carney did not attend work on the day in question. Instead of requesting that he complete a leave slip or docking his pay, the Department paid him for that day and then alleged that he stole that day's compensation.

Mr. Ratcliffe admitted this not the practice in other sections of DRC. He testified that in some areas of the DRC, if an employee reports off and fails to turn in a leave slip, he/she does not get paid for that time. Kathy Trent testified that the same is true for employees she supervised. She stated that she would not approve pay for an employee who had missed work but not submitted a leave slip. Amazingly, Mr. Ratcliffe testified that the standard he applied was that if the employee reported off and informed his supervisor he would not be at work, but the employer paid him for that day and the employee failed to catch the error on his pay stub, that would constitute fraudulently obtaining pay for time not worked.

Over and over again the evidence proved that Mr. Carney did not knowingly receive pay to which he was not entitled. The following are some examples:

January 10, 1997

Mr. Carney took flextime. His personal calendar reflects that. He worked over 42 hours from Sunday January 5 through Thursday January 9. Investigator Ratcliffe did not even check how many hours Carney had worked that week.

January 29, 1997

Carney took flextime. Denise Justice said he "probably flexed his time". Union Exhibit 9 shows he requested flextime.

February 5, 6, 7, 1997

Carney called off sick, used vacation time. His calendar confirms son was ill. Union Exhibit 10. Shows leave was requested.

February 27, 28, 1997

Carney submitted a leave slip. Union Exhibit 12.

February 14, 1997

Carney took vacation leave. Union Exhibit 11 is leave slip signed by D. Justice.

March 14, 1997

Carney submitted leaves slips for vacation. See Union Exhibit 13 signed by Assistant Principal Paul Denenas.

April 7, 1997

Carney used flextime. Carney's calendar confirms this.

April 16, 1997

DRC dropped this allegation, admitting it was a mistake.

April 18, 1997

Mileage expense for travel to PCI. State alleges he was not at PCI.

Both Fran Sollie and Todd Dygart confirmed Carney was at PCI on this date.

May 19, 1997

Carney was in a bargaining related meeting. Exhibits and testimony of D. Justice indicated she was notified and she approved his leave for the day. Inexplicably, DRC continued to try and prove there was no bargaining that day. **But the most their witnesses could say is they did not have a meeting on their own calendar. State witness Steve Gulassy testified that administrative leave system for bargaining was sloppy.** Itinerary shows he "called off" that day. D. Justice testified "called off" does not mean sick — could be any kind of leave. Ratcliffe assumed he called in sick and should have requested sick leave.

September 26, 1997

Carney had personal leave approved. Denise Justice signed it. Union Exhibits 3 and 4.

October 16, 1997

Carney attended CIMS meeting at COSERRC. Verified by D. Bragg, Anna Thompson.

October 30, 1997

Carney was at COSERRC. Esther Schaffer verified his attendance.

November 13, 1997

Carney was at COSERRC. He was approved for administrative leave for entire day. D. Brag, A. Thompson, and David Dickson confirm Carney was at COSERRC.

FLEX TIME

T would be completely unjust to uphold discipline against Mr. Carney based solely upon the fact that the DRC alleges that it has no record of authorized leave on days when Mr. Carney was not at work. It is undisputed that the "flex time" system permitted by Denise Justice was run "off the books". Denise Justice kept no records of flex time accumulated or used by teachers under her supervision. No Request for Leave forms were required to be submitted to use flexes time. Despite the fact that Ms. Justice admitted that Brent Carney and other teachers used flex time, the state did not produce one written memorandum or note of any employee indicating that flex time was requested or approved in writing. Flextime was not shown on the attendance reports signed by Ms. Justice. Flextime appeared on those reports as regular pay.

The absence of a record of flextime use clearly does not indicate the person did not have approved flextime for that day. Ms. Justice clearly knew that Mr. Carney was going to be absent for at least part of the day on January 29, 1997. In response to Mr. Ratcliff's questionnaire, Ms. Justice indicated that (1) she had a note that he would be late (he had obviously called in) and (2) that he "probably flexed his time" on January 29, 1997. See Joint Exhibit 9C, Question # 18. Yet Mr. Ratcliffe never mentions either of these facts in his report. Instead, he states that Mr. Carney did not call off, did not have approved leave, and "fraudulently obtained compensation for the day". Joint Ex. 4, p.4.

As to January 10, 1997, Mr. Carney testified he believed he used flextime for the day. The evidence supports this conclusion because the records and testimony indicate that Mr. Carney put in extraordinary hours in the days proceeding January 10, 1997,

working to prepare for an audit. See testimony of B. Carney and Joint Ex. T1 and T2. Even though he had the punch sheets in his possession, Mr. Ratcliff did not check to see how many hours Mr. Carney had worked during the week of January 5, 1997 (Sunday) through January 10, 1997 (Friday). Both in her testimony, and in her statement at paragraph 40, Ms. Justice stated that she emphasized that the teachers must put in a 40-hour week. The punch lists show that Mr. Carney spent a total of 42.2 hours at PCI and SCI from Jan. 5 through Jan. 9, not including his travel time from home to PCI and back. Even if he flexed all of Jan. 10, 1997, Mr. Carney worked well over 40 hours prior to January 10 of that week.

While Ms. Justice asserted that she told Brent not to flex an entire day, her statements about flex time procedures were very inconsistent. She responded to question No. 40 that she told Brent not to flex a whole day several times. But if he was never permitted to flex an entire day, why would she have to tell him several times? **When asked if she ever permitted teachers to flex an entire day she did not say no, but rather that she could not recall. She stated that she told teachers they needed to request to use flex time before using it, but she admitted that she sometimes approved use of flextime after the fact.** She stated that her policy was to use the flex hours in the same pay period, but exceptions were made to that practice as well. The administration of the flex time policy was even more informally administered and less well documented than the DRC's regular leave policy.

The testimony of Mr. Ratcliffe and Ms. Justice was inconsistent with regard to the Requests for Leave. Mr. Ratcliffe testified that he got all of the copies of Requests for Leave from Ms. Justice over a period of time as she found them. Yet Ms. Justice

testified that her practice was to send two copies to Dr. McGlone and return the pink one to the teacher — she did not keep any copies for her own records and no copies were retained at PCI or SCI. Of course, this also means that if the form were lost after it left SCI, there would be no record of the request in the possession of the DRC. **Yet the DRC has imposed the most severe discipline possible upon Mr. Carney because it has allegedly been unable to locate documentation for approved leave in a system that is clearly administered in a sloppy, inconsistent, unreliable manner.** It would be one thing if they simply did not want to pay him for the day(s) in question — but the DRC wishes to use this as a basis for ending his career.

DISPARATE TREATMENT

The record indicates that other employees charged with serious offenses have not been terminated. One employee was given a five-day suspension despite being found guilty of several offenses. These offenses included failure to report a criminal conviction and falsification of documents. See Union Exhibits 15 and 16.

The Association concludes by asserting that at most the Grievant is guilty of a couple of book keeping errors and at best, he is guilty of nothing at all. The Employer's entire case is built on inconclusive evidence, faulty assumptions, and premises, argues the Association. The Association concludes that the evidence does not support the Grievant's termination. Therefore, the Association asks that the Grievant be returned to his position and he be made whole for all back pay and benefits.

DISCUSSION

Procedural

The Association raised several procedural issues that it considered to be violations of Article 13 of the Collective Bargaining Agreement. After analyzing all of the arguments I find that the Employer conducted its investigation in a sometime unorthodox and inexplicably clumsy manner. However, the conduct or the method of the investigation did not rise to the level of a violation of Article 13.03 of the Collective Bargaining Agreement. The Employer's conduct did not result in the Grievant being denied a fair opportunity to defend himself prior to his termination and during the grievance process. The Employer should not take comfort in this ruling. The awkwardness of holding an initial hearing, not reaching a conclusion, and launching a new investigation without definitively concluding the first hearing is a sloppy labor relations practice.

It is clear that some arbitrators have viewed procedural errors to be determinative of the outcome of a case. Arbitrator Willard Wirtz argues that procedural rules in contracts are usually enforced "to the letter" no matter the effect upon the arbitrator's own sense of equity (See Wirtz, Due Process of Arbitration, in the Proceedings of the 11th Annual Meeting, National Academy of Arbitrators, ed. Mckelvey (BNA Books, 1958, 1,9)). Arbitrator Daugherty (famous for developing the Seven Test of Just Cause) states the following:

> *"[B]efore the Company can discipline an employee for failure to meet said requirement, the Company must take the pains to establish such failure. Maybe X was guilty; maybe also there are many gangsters who go free because of legal technicalities. And this is doubtless unfortunate. But Company and government prosecutors must understand that the legal technicalities exist also to protect the innocent from unjust, unwarranted punishment. Society is willing to let the*

presumably guilty go free on technical grounds in order that free, innocent men can be secure from arbitrary, capricious action. (Grief Bros. Cooperage Corp., 42 LA 555,557 (Daugherty, 1964).

However, there are many other arbitrators who emphasize the end result and require that a prejudicial test must be met to determine whether the procedural error prejudiced the Grievant's case in a substantial manner. Arbitrator Marlatt states:

"The essential question for an arbitrator is not whether disciplinary action was totally free from procedural error, ***but rather whether the the process was fundamentally fair.*** *[The arbitrator] must find in order to overturn the employer's action on procedural grounds, that there was at least a possibility, however, remote, that the procedural error may have deprived the grievant of a fair consideration of his case." (See Cameron Iron Works, 73 LA 878 (1979).*

These opinions are useful to demonstrate the range of arbitral thinking over this issue; however, to evaluate the significance of procedural improprieties it is necessary to place them in the proper context. The relevant context in this matter is the purpose of pre-termination conferences. The U.S. Supreme Court in Cleveland Board of Education v. Loudermill provided important guidance in this area. The Court stated that the employer's consideration of the Grievant's response **"need not definitively resolve the propriety of the discharge."** It [pre-termination conference] is **"essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed actions."** (See 470 U.S. 532, 118 LRRM 3041 (1985).

With this purpose in mind, I find that the Employer narrowly avoided a violation of Article 13 in its conduct of this case. Clerical mistakes were made by the Department in listing the wrong Standard's numbers on the charges and in failing to have the Warden sign the termination letter. For a period of time, the Department gave the Grievant the

impression that the November 17th pre-disciplinary hearing was being continued, but then changed its mind and notified the Grievant that a new investigation involving different dates was taking place.

The purpose of the pre-termination conference is for management to receive a check against its desired actions. This is a self-imposed check and is not meant to be a definitive determination of an employee's guilt. Mr. Chuvalas provided that check on March 12th because Mr. Ratcliffe was precluded from doing so, given his role as investigator. The March 12th pre-termination conference dealt with completely different dates than those considered in the November 17, 1997 pre-disciplinary conference, removing any impropriety (contractual or otherwise) from Mr. Ratcliffe's involvement as investigator.

The Association also argued that the Grievant should have been given extra time to review the packet (JX9) of investigative information that was used in the March 12, 1998 hearing. A careful review of the hearing officer's record indicates that the hearing was postponed from March 10th to March 12th at the request of the Association (JX8). Article 13.03 of the Collective Bargaining Agreement contains the pertinent language for requesting a pre-termination hearing continuance. It states in pertinent part:

> *"...The employee, or his/her designee may make a written request to the Employer for continuance of up to forty-eight (48) hours. A continuance beyond forty-eight (48) hours may be arranged by mutual agreement of the parties. Such continuance shall not be unreasonably requested or denied."*

This is permissive language. The Employer is contractually required to consider a request for a forty-eight (48) continuance (or less) of a pre-termination hearing. However, any denial of such a request must meet a reasonableness test. Hearing Officer

Chuvalas granted the Grievant a forty-eight (48) hour continuance from March 10th to March 12th (JX8)

A second continuance was requested by the Grievant's representative, and the Grievant was given two (2) additional hours. It is clear that a second continuance, beyond forty-eight hours, requires mutual agreement of the parties. A continuance beyond forty-eight hours must be mutually agreed upon and must meet the test of reasonableness. The Employer did not violate Article 13.03 when it granted a 2 hour continuance in response to the Association's request to extend beyond forty-eight (48) hours. There was obviously no mutual agreement to delay the pre-termination hearing any longer.

It is also noted for the record that although the pre-termination hearing was held on March 12, 1998, the Grievant was not removed from his position for another nineteen (19) days. Arguably, the Grievant had time to review investigation material and could have provided an additional response to the charges against him.

The Association also contended that the Grievant was the recipient of disparate treatment. It argued that another employee with more serious offenses was not terminated (See UX15). The Association provided no other supporting documentation or testimony regarding UX15 or Ms. Cavener. In addition, the circumstances surrounding Ms. Cavener's suspension appear to be very different than those of the Grievant's. I do not find that Ms. Cavener's treatment can be used as a valid comparison in this matter.

The Association argued that the Employer was "out to terminate Mr. Carney's employment at any cost." The Employer was aggressive in this matter and in its haste it started a second investigation without notifying the Association that it was ending the

first investigation. But for reasons stated above, this error was unrelated to charges and circumstances that led to the Grievant's termination and it was not a violation of Article 13.03.

The Grievant's actions in this case were grounds for possible criminal investigation, which occurred. Article 13.03 contains a waiver of the requirement that the Employer must issue a written decision in 25 workdays under such circumstances. It reads in pertinent part as follows:

> *"The twenty-five (25) work day requirement (to issue a decision following the conclusion of a conference) will not apply in cases* where a criminal investigation may occur..." [emphasis added]

It is unclear from the language when the Employer is required to issue a written decision in the case of possible criminal proceedings or the dismissal of same. I agree with the Association that the Employer should have concluded the November 17th pre-termination conference at some point, but I do not agree the Employer violated Article 13.03 by not issuing a decision in 25 work days. The rights and ability of the Grievant to defend himself under the Collective Bargaining Agreement were not impaired.

Merits

This case is about accountability and honesty. Sufficient evidence and testimony presented by the Employer clearly and convincingly supported the charges of theft, fraud, and misuse of office for personal gain. The Employer cited some twenty-five (25) separate incidents of violation during which the Grievant allegedly falsified his time or his mileage. I found that many of the dates lacked clear and convincing evidence of the Grievant's wrongdoing. However, with acts of theft and or fraud, it is not quantity or

value that count. Employees are responsible for acting in the interest of the employer and not to the employer's detriment. **One convincing incident of theft and or fraud is often sufficient to sustain a discharge** (See Gilbarco, Inc., 93 LA 604 (Flanagan 1989). The following represent incidents cited by the Employer and responded to by the Association. The dates in bold represent clear and convincing evidence supporting the Employer's charges of theft, fraud, and the misuse of one's official position for personal gain:

1. January 2, 3rd and 9, 1997: *If Mr. Carney goes works at PCI, he is eligible to receive mileage reimbursement. He is not eligible to receive mileage for going to work at SCI.*

The punch reports from SCI (J9T1) demonstrate that Mr. Carney worked at SCI: from 7:21 a.m. to 8:30 p.m. on the 2nd of January; from 7:26 a. m. to 3: 43 p.m. on the 3rd of January; and from 6:48 a.m. to 3:29 p.m. on January 9th. Denise Justice, Carney's supervisor, testified under direct examination that she changed the calendar (J9g) for January 2nd and 3rd because she was told by the Grievant that he would be at PCI. On all three of these dates the Grievant filed a travel expense report (J9g) that stated he made round trips from home to PCI. It is noteworthy that the travel expense report accurately identifies the punch in and punch out times for all three dates. **Mr. Carney signed this report and received a total of $52.50 in mileage reimbursement that is not supported by the record. Neither Mr. Carney nor the Association offered any plausible explanation for these discrepancies other than inmates might have erred when they filled out the reports. I find this explanation to be implausible.** An employee would likely remember where he was when he worked over 13 hours on January 2nd. In addition, it is unlikely that inmates would make three consecutive errors of this nature. **The Grievant signed the vouchers**

and he is accountable for their accuracy. I find the Grievant wrongfully received compensation for miles that he did not travel in the amount of **$ 52.50.**

The Employer cites January 10, 1997 as a date on which the Grievant received compensation for not working. The evidence submitted by the Employer and the testimony do not conclusively prove that the Grievant was not on flextime on January 10th. The flextime policy managed by Ms. Justice appeared to be loosely managed. Under direct examination Ms. Justice testified, *"...I told them (traveling teachers) to keep track of their own time and take it off at a later date."*

The testimony of Ms. Justice indicates she had a policy of not flexing the entire workday. It is possible that the Grievant was not authorized to be off the entire day, yet it unclear what Ms. Justice considered to be a maximum amount of flextime one could use in one day and whether such a use would be tolerated. Under cross-examination Ms. Justice said, *"I would try to keep flextime to a maximum of 4 hours."* Also under cross-examination Ms. Justice admitted to approving flextime after the fact even though she said under direct examination, *"...multi-institutional teachers were not to use flextime without prior approval from me.* Ms. Justice was asked under direct examination whether it would have been possible for Mr. Carney to flex the whole day. She answered by saying, *"I would have told him not to do it again."* In addition, it is clear that during the days preceeding January 10th Mr. Carney worked over 40 hours and was eligible for flextime. The evidence regarding January 10th is inconclusive.

For reasons that are described above, I find the Employer was able to provide clear and convincing evidence that the Grievant was not authorized to be on flextime on January 29, 1997. **Ms. Justice stated under direct examination, *"A teacher could leave***

me a note beforehand." Union Exhibit 9 was a note although it was dated, January 30th, one day after the January 29th absence. Although this appears to be against Ms. Justice's unwritten policy, it is not clear from her testimony that she would have simply approved it and told Mr. Carney not to do it again. This is not substantive evidence to substantiate a termination.

2. February 5, 6,and 7, 1997: *Mr. Carney received compensation for three days for which he did not work and were never approved for leave.*

These dates appear in a Request for Leave submitted into evidence by the Association (UX 10). The hard to read copy submitted by the Association was not approved by his supervisor, Denise Justice. The leave request for February 5, 6, and 7th (UX 10) is checked, "not recommended."

Mr. Carney got paid and did not work. It is not clear what Mr. Carney was trying to do. Nevertheless, he was accountable for this paid time and at the very least should have been aware of the fraudulent nature of getting paid without approved leave. Mr. Carney submitted the leave request form on February 11, 1997, some six days after he took the time off. He checked vacation and other (explain) on the form, yet during the hearing there was no substantive explanation for the Grievant's lack of follow-up of this unapproved absence. There was no evidence that Mr. Carney did anything about his receipt of compensation that never resulted in a reduction in any of his vacation leave balance (a balance that most employees carefully track).

In the Grievant's case, the leave request for February 5, 6 and 7th was never approved at the first step of the process. Ms. Justice testified that Mr. Carney called off each of the three days, yet for some inexplicable reason she approved his pay for these

days. Ms. Justice knew of the Grievant's absences and did not approve his request for leave. Under these circumstances it did not appear the Grievant was attempting to fool anyone. The Association's argument that the leave request system was dysfunctional is a persuasive one. Several witnesses (e.g. Thompson, Kajca and Dygert) testified that the leave request/approval system was flawed. However, none of these witnesses testified about leaves that were unapproved for which they still received compensation as if they worked.

Mr. Carney was responsible for making a good faith effort to resolve this matter, yet there was no evidence to suggest he was the least bit concerned about it. This is not a game of "catch me if you can." If Mr. Carney did not agree with Ms. Justice's decision to not recommend his vacation leave, he had the option of filing a grievance. Instead, Mr. Carney did nothing, apparently with the hope of somehow getting away with not working and getting paid. The lack of follow up either verbally or in writing is where Mr. Carney erred. Mr. Carney would have avoided a problem had he notified management of this situation. He needed to alert management that he was wrongfully paid for work he did not perform, and there was no commensurate reduction in his vacation leave balance to account for it. Employees who do not take this self-protective action risk being exposed at a latter date. **The total amount of compensation Mr. Carney received, but did not earn or account for with vacation leave was $510.96.**

The date of February 14th is another matter. Union Exhibit 11 is even harder to read than Union Exhibit 10, yet Ms. Justice checked approved for this leave. It is unclear what happened to this form, but this is not Mr. Carney's fault. Ms. Justice approved the leave and was responsible for following up with Mr. Carney if her superiors overruled

her. I do not find that this date can be used to support the charges against the Grievant.

On February 25th, 1997, Mr. Carney was approved for five (5) hours of administrative leave to attend a seminar at COSERRC (J9h and J9b). The punch reports at PCI indicate Mr. Carney worked there from 12:45 p.m. to 3:21 p.m. In addition, Mr. Carney's COSERRR seminar times ran from registration at 8:00 a.m. to conclusion at 11:30 a.m. Allowing for travel time from home to COSERRC, from COSERRC to PCI, and from PCI to home it is not clear whether the Grievant committed any theft of time. Mr. Carney stated he arrived at COSERRC at 7:30 a.m. If Mr. Carney was on approved leave or working from 7:30 a.m. to 3:21 p.m. he could account for almost eight hours of time. There are some discrepancies in time on Mr. Carney's travel expense report (J9h) regarding times, yet these appear to lack significance from the standpoint of time worked. The Employer also addressed a mileage disparity issue regarding travel distances. This issue will be subsequently addressed in a separate section of this Award.

3. February 27th and 28th, 1997: *The Grievant took off two days and received compensation as if he had worked. No valid requests for leave forms exist.*

The Association submitted Union Exhibit 12 as proof that Mr. Carney submitted a Request for Leave form to cover his absence on February 27th and 28th. The form lacks the signatures of any management officials. Its authenticity is questionable given its incomplete state. Mr. Carney could not prove he ever submitted this form if it did exist at the time. Mr. Carney received compensation for these two days and his leave balances were unaffected. **As with the dates of February 5, 6 and 7, Mr. Carney was accountable for this unearned compensation. The total was $340.64.**

4. March 11, 1997: *The Grievant received eight (8) hours of administrative leave and mileage reimbursement to and from home for attending a seminar at COSERRC from 7:30 a.m. to 4:00 p.m. However, Mr. Carney also attended an Association lobby event in downtown Columbus and claimed mileage. It is unlikely he attended the entire seminar at COSERRC.*

This date involves Mr. Carney's attendance at a COSERRC seminar. He received eight (8) hours of administrative leave for this event. From the testimony of several Association witnesses (Association Witnesses Thompson, Dickson, Perry and Kajca) it appears that the sign-in procedure at COSERRC only involved attendees who are seeking CEU credit. No other attendees were required to sign-in and verify their attendance at COSERRC.

However, collaborative evidence regarding Mr. Carney's attendance at an Association Lobby Days function (at the Athletic Club, 136 East Broad St.) creates substantive doubt that Carney attended the entire seminar, which ran from 9:00 a.m. to 4:00 p.m. (J9I). On Mr. Carney's calendar (UX 8) it also states that Mr. Carney had a "Grievant C 6:30" appointment on the 11th of March. During the hearing Mr. Carney never admitted or denied attending the Lobby Days event during working hours. The Grievant Travel Voucher (J9I, dated 3/28/97) clearly indicates he left home at 6:30 a.m. and arrived at COSERRC at 7:30 a.m., one and one-half (1 ½) hours before the start of the seminar. It also states he left the seminar at 4:00 p.m. and arrived home at 4:45 p.m. He claimed mileage of 42 miles each way.

It is not clear what hours the Lobby Days were conducted. However, from Employer Exhibit 13 it is clear that the Grievant submitted a travel expense voucher to

the Association for 56 miles. This distance would indicate a round trip to and from home to attend this event (See Employer Exhibit 13 for comparable miles submitted by the Grievant for a round trip to and from OCB). **It is implausible that Mr. Carney arrived home at 4:45 p.m. and then returned to downtown Columbus in sufficient time to** participate in the Lobby Day event. This is admittedly circumstantial evidence, yet it creates substantial doubt regarding Mr. Carney's credibility. I am not convinced he faithfully completed the seminar at COSERRC, went home, drove back to downtown Columbus, attended a lobbying event and then went to a grievance committee meeting at 6:30 p.m. (as indicated on his calendar). Mr. Carney received eight hours of administrative leave, and it is reasonable to conclude he inappropriately used a substantial part (if not all) of this time to attend an Association event.

The amount of time that the Grievant spent lobbying rather than in the seminar cannot be determined from the evidence. Under direct examination, on the last day of the hearing, Mr. Carney stated the Lobby Day session ran from 9: 30 a.m. to 5:30 p.m. **If Mr. Carney went home after the COSERRC seminar (as he stated in J9I) and then drove to the Columbus Athletic Club he would not have arrived until well after 5:00 p.m.** It is illogical that the Grievant attended Lobby day at this hour. It is far more likely that he was there early in the day. Claiming mileage reimbursement to and from home from the Department and from the Association appears to be a case of "double dipping." The amount of money that the Grievant improperly received charged against administrative leave and improperly received in mileage cannot be readily determined from the facts.

The evidence submitted by the Employer regarding the date of March 14th, 1997 is inconclusive. Mr. Carney submitted into evidence Union Exhibit 13, which is a

request for leave that was approved by supervisor Paul Denenas. Mr. Denenas is deceased.

5. March 20, 1997: *Mr. Carney claimed to have attended a seminar at COSERRC from 7:30 a.m. to 4:00 p.m., for which he received eight (8) hours of administrative leave (J9I). The same day he appeared at Belmont Correctional Institution at 3:00 p.m. The travel time between COSERRC and Belmont is over two (2) hours. Mr. Carney claimed round trip mileage from home to COSERRC of 84 miles. He also submitted a mileage claim to the Association for 180 miles on the same day (EX 13).*

It is reasonable to conclude that the Grievant spent at a minimum three to four hours of administrative time on Association business. This is time that should have been charged against Association leave. The Grievant's claim of mileage from the Department and the Association must be viewed as the Employer has characterized it. This is fraudulent conduct. The Grievant was again seeking to be reimbursed twice for a portion of the same miles driven. At a minimum the Grievant should not have been reimbursed from COSERRC to home; he inappropriately received **$10.50 in reimbursement for mileage and three to four hours of paid compensation that was inappropriately charged against administrative leave.**

The evidence proffered by the Employer for April 7th, 1997 is inconclusive. Mr. Carney claims to have used flextime in taking the day off. As stated above, Ms. Justice so loosely administered her unwritten flextime policy that it is impossible to determine what the Grievant did wrong with regard to the policy.

6. April 18th, 1997: *Mr. Carney claimed to have been at OCB from 8:45 a.m. to 1:30 p.m. and at PCI from 8:10 a.m. to 3:10 p.m. He claimed mileage for the trip to OCB, which he is not eligible to receive. Mr. Carney submitted two (2) travel vouchers (one on May 16th, indicating he was at OCB and one submitted on June 3rd, claiming to be at PCI). Mr. Carney never punched in or signed in at PCI.*

The Association had two witnesses testify they saw the Grievant at PCI on April 18, 1997 (See testimony of Sollie and Dygert). I did not find these witnesses to be credible. For example, Ms. Sollie testified she saw the Grievant escorting a Dr. Weaver on that day. The sign-in records indicate Dr. Weaver was at PCI on April 17th, not on April 18th (EX 7). In Employer Exhibit 13, there exists a lunch receipt that was submitted to the Association for reimbursement. The receipt indicates that it was created at 1:10 p.m. on the 18th of April. I do not believe Mr. Carney was at PCI, on the 18th of April. He did not punch in or out and he was having lunch at another location. The amount of inappropriate reimbursement for mileage is **$17.50 and the amount of time paid and not worked is eight hours ($170.32).** More importantly, this represents another example of the Grievant's pattern of deceptive behavior.

7. May 19th, 1997: *Mr. Carney received eight hours of administrative leave to attend a bargaining session at OCB. There was no bargaining scheduled at OCB on that day (See testimony of Rahr and VanSickle)*

Mr. Carney testified he was meeting with his bargaining team on May 19th. However, Mr. Carney and the Association did not provide any collaborative evidence or testimony to validate the existence of this session. This appears odd in as much as there were several people who would have attended such a meeting. It must be concluded that

the Grievant was not where he said he was on May 19th. It is also noted on Employer Exhibit 13, that the Grievant submitted an expense voucher for a round trip from home to OCB for a total of 56 miles. **The amount of money apparently inappropriately received by the Grievant was $170.32.**

I find that evidence submitted by the Employer regarding the date of September 19th, 1997 to be inconclusive. Mr. Carney testified he attended the IAT meeting on this date. Although this calendar (UX 8) indicates he was at Noble Correctional Institution on that date, Mr. Carney did not submitted travel reimbursement from the Association, as he did for a previous trip to Belmont. The Employer failed to prove that the Grievant did not attend the IAT meeting as he stated.

The confusion surrounding the symposiums held on September 24th, 25th and 26th do not conclusively prove that the Grievant violated any rules when he attended seminars in Athens, Ohio and Lima, Ohio. It is very odd he would attend both of these seminars, yet, Ms. Justice, the Grievant's supervisor, signed and approved two leave request forms for September 26th (UX 3, 4). The Employer did not provide conclusive proof that on this date the Grievant violated Departmental rules.

On the date of October 16, 1997, Mr. Carney attended a CIMS meeting (See testimony of Association witnesses Thompson and Bragg). Mr. Carney received eight hours of administrative leave to attend a PACE meeting. The Employer admitted that Mr. Carney would have been approved to attend the CIMS meeting if he had requested to attend it. The Grievant's actions on this date do not rise to the level of theft or fraud, yet they do demonstrate, as the Employer points out, the Grievant's cavalier and unaccountable behavior.

The Employer failed to provide substantial evidence that the Grievant did not attend seminars at COSERRC on October 23, 1997 and October 30, 1997. As previously stated, COSERRC did not have a sign-in policy, unless CEU's were involved. Mr. Carney testified he attended these seminars, and no evidence exists to prove he did not attend. Association witness, Anna Schaffer testified that Mr. Carney attended the October 30, 1997 seminar. The records of the Association contained in Employer Exhibit 13, p. 11, demonstrate that the Grievant received mileage for a grievance meeting held at the OEA offices on October 30, 1997. However, it is not clear that this meeting ever took place or whether it was held at the same time as the COSERRC conference.

8. November 13, 1997: *Mr. Carney received eight hours of administrative leave to attend a CIMS seminar at COSERRC. On the same day he attended a labor/management meeting at the Maumee Youth Center at 2:30 p.m. Maumee Youth Center is over a two-hour drive from COSERRC (See Carney testimony).*

The Employer provided clear evidence that Mr. Carney used several hours of paid administrative time to conduct Association business with another Department of the State of Ohio. Mr. Carney submitted a Travel Expense Report and claimed to have attended the seminar at COSERRC from 9:00 a.m. to 3:30 p.m. (J9p). He got reimbursed for 86 miles for the round trip. Clearly Mr. Carney was on Association business from approximately 12:00 p.m. on November 13, 1997, yet he did not charge this against the bank of hours set aside in Section 28.7 of the Agreement. Mr. Carney wrongfully used paid administrative time from the Department of Corrections to conduct Association business with DYS. The Employer demonstrated that Mr. Carney misused his position and lied on his expense report.

I do not agree with the Employer that Mr. Carney wrongfully left SCI on February 3, 1998. The facts regarding this day are far from clear and the communications among Mr. Ratcliffe, Mr. Stevens, and Mr. Carney were confusing at best.

Mileage

Throughout this case the Employer has insisted that the Grievant inflated his mileage on numerous occasions. For example, Investigator Ratcliffe measured the distance between the Grievant's home and PCI on three separate trips. It ranged between 25 and 27.1 miles. Mr. Carney constantly submitted mileage of 35 miles for this trip. Another prominent example was the often-made trip from home to COSERRC. The Grievant frequently listed this trip at 42 miles (although he also listed it at 43 miles and 36 miles on different dates). Investigator Ratcliffe measured the mileage from Mr. Carney's home to COSERRC going three ways. It ranged between 22 and 28 miles.

Under cross-examination Investigator Ratcliffe admitted he never followed Mr. Carney on any trips to PCI or COSERRC. Mr. Carney testified he would take different routes depending on the Columbus traffic. In addition, the Department does not have a policy on taking the most direct route. The testimony of Mr. McDowell demonstrated how variant the policy on mileage is in the Department. This is not surprising given the relative independent nature of correctional institutions.

A mileage policy is a difficult policy to manage given all the road construction and delays that are inherent in driving in Ohio and particularly in a rapidly growing city such as Columbus. It is difficult to say that an employee should drive a certain way to a

meeting given the many variables involved. For example, recently this Arbitrator was within 500 yards of a hearing and was forced to drive an additional 16-mile detour because of road repair. For the most part, employees tend to drive the shortest distance to meetings because the reimbursement rate of twenty-six cents per mile covers only a portion of the cost of driving according to the American Automobile Club.

An employer has the right to expect that employees will act in the employer's best interest. If an employee has to travel farther to arrive at a work site there should be a logical reason for the extra distance (such as a traffic accident, road work, or traffic congestion that would delay the employee's arrival). In the absence of these occurrences, an employee is expected to minimize travel and costs to the employer. Mr. Ratcliffe verified that this trip should be no more than 28 miles. The Grievant charged the Employer with 42 miles for each trip. He added an additional 14 miles (a 50% increase) to most of his trips to COSERRC. There was no reasonable justification for the Grievant to continually drive an extra 14 miles on every trip to COSERRC. If he liked the longer route, he needed to absorb the cost of driving the extra miles and should not have charged the Department, unless there was a plausible need to drive a longer distance on a particular day. Therefore, I must conclude that the Grievant acted to the detriment of the Employer by submitting an inflated number that was greater than the actual mileage driven in order to receive extra compensation. On the trips from home to PCI the Grievant charged the Employer with 35 miles per trip. Mr. Ratcliffe estimated the longest distance to be 27 miles. These charges are almost 30% more than the longest estimated distance. Again, an actual distance of 35 miles or even more maybe justified at times, but not on every trip. The mileage to PCI appears to be unnecessarily inflated.

Conclusion

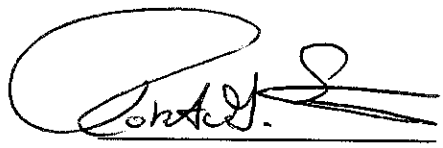
This case was a marathon and not a sprint. It was an acrimonious process that at times brought out the worst in both parties. However, having been an advocate for both sides of the bargaining table, I understand how frustration can get the best of people; it is simply part of the business. In spite of these distractions, the evidence skillfully presented by the Employer's representatives, Ms. Ryan and Mr. Rahr, pointed to one inescapable conclusion: **Mr. Carney committed fraud, theft, and misused his position for personal gain on several occasions.** The Employer submitted an arbitration case that deserves to be cited. In the articulate words of one well-respected arbitrator, Jonathon Dworkin, "the central obligation of every employee, endorsed by management and union alike, is to put in a full day's work for a full day's pay." I would add that unions and employers have a reasonable expectation that their employees will act in their best interests when performing work. The Employer convincingly demonstrated that Mr. Carney violated both of these tenets.

The Association, through the accomplished efforts of Mr. Snyder, Ms. Redman and Mr. Stevens, provided a valiant defense of the Grievant. Several of the Employer's accusations were unsubstantiated because of their efforts. However, in the end it was the Grievant who lost his own case. He was put on notice by his supervisor to be accountable for his time (EX1) and instead he wove a tangled web of deception and got caught. The Employer had just cause to terminate the Grievant's employment, and I find no mitigating circumstances that would justify another outcome.

AWARD

Grievance Denied

Respectfully submitted this 7th day of July, 1999 in Summit County, Ohio.



Robert G. Stein, Arbitrator