1821

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS
(North Central Correctional Institution)
AND

SCOPE/OEA/NEA

Before: Robert G. Stein

Grievant(s): David Douglas
Discharge Case
Case # 27-30-040930-2311-06-10

Advocate(s) for the UNION:

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Advocate(s) for the EMPLOYER:

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement (herein "Agreement") between the State of Ohio (herein "Employer", "DRC" or "Department") and Scope/OEA/NEA (herein "Union"). The Agreement is effective from 2003 through 2006 and includes the conduct that is the subject of this grievance.

A hearing on this matter was held on February 8, 2004. The parties mutually agreed to the hearing date and location and were given a full opportunity to present both oral testimony and documentation supporting their respective positions. The parties each subsequently submitted post-hearing briefs, postmarked March 8, 2005, in lieu of making closing arguments. The Employer's brief was received March 10, 2005. However, there was a problem with the submission of the Union's brief. It was sent to an incorrect address in Fairlawn Ohio. It was not forwarded to the arbitrator, but was eventually returned to the SCOPE office. After it was returned to the Union, the Union contacted the arbitrator's office to secure the correct address. The Union's brief, which already had been exchanged with the Employer in and about March 10, 2005, was re-sent

to the arbitrator and was received in and about March 25, 2005 and the record was finally closed on March 25, 2005.

The parties have also agreed to the arbitration of this matter pursuant to Article 5 of the Grievance Procedure.

ISSUE

Was the Grievant discharged for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE
(As cited by the parties, listed for reference. See Agreement for actual language)

ARTICLES 5

BACKGROUND

The Grievant is David Douglas, ("Grievant," "Douglas"), a teacher. His employer is the Ohio Department of Corrections/North Central Correctional Institution ("NCCI," "DRC," "Employer" or "Department"). Prior to his discharge, Douglas had been employed with DRC for approximately six (6) years and was terminated on September 13, 2004. He was terminated from his employment for his alleged violation of DRC Rule #14: Theft, and Rule # 24: Interfering with, failing to cooperate in, or lying in an official investigation or inquiry. The Employer's investigation of the Grievant determined that he had made hundreds of unauthorized personal telephone calls, including a lengthy call to Canada. According

to the Employer, when asked about making unauthorized calls, the Grievant was not truthful about making the call.

The Union grieved the Grievant's discharge, and it was eventually appealed to arbitration.

SUMMARY OF EMPLOYER'S POSITION

The Employer asserts the case before the arbitrator is a matter of an employee not being able to correct behavior regarding the continued misuse of the telephone for personal use. The Employer points out that less than 5 months after being in his first assignment with the Department in Chillicothe, Ohio, the Grievant had to be counseled for misuse of the state telephone for personal use. The Employer argues that the Grievant was given a "big break" and was counseled rather than receiving harsher discipline. The Employer contends the Grievant was well aware of his limitations and responsibilities in making long distance telephone calls, but did not learn from his disciplinary experience concerning the same subject early in his career with DRC. The Employer argues that this was not a lapse in judgment or a simple mistake, but was a deliberate violation of departmental rules, which amounts to theft. In its brief (closing statement) the Employer makes the following arguments:

ESTABLISHED FACTS

- The grievant began employment April 13, 1998 as a teacher at the Chillicothe Correctional Institution.
- The grievant was corrective counseled on September 3, 1998 **(Employer 1)** concerning the use of state phones.
- The grievant transferred to the North Central Correctional Institution on March 24, 2002.
- On July 15, 2004, the grievant made a forty-four (44) minute telephone call to Montreal Canada from the phone extension in his office.
- During an investigatory interview **(Joint 2a p 10)** the grievant admitted that it was possible he called the University of Montreal, Canada. The call concerned "classes I am taking" {sic}.
- The grievant admitted in the interview that he thought he had used his calling card and was put on hold during the call.
- During an investigatory interview on 8/9/04 **(Joint 2a p 12)** the grievant stated he did not know of any unauthorized calls he had made from the facility.
- The grievant admitted to making authorized calls from his extension. He identified authorized calls as to Central Office, and some Ohio correctional institutions.
- The grievant stated he had an opportunity to read his interview responses and he signed the Employee Investigation Reports.
- In the grievant's personnel file he had the following telephone numbers listed **(Joint 2a pp 19-20)**: 330-399-2474 listed to Inez Douglas and 330-394-4192 listed to Virgie Douglas.
- The grievant identified these individuals as his mother and brother.
- **(Joint 2b)** is a printout of calls originating from the grievant's extension from 5/28/03 through 8/10/04. The printout contained (272) two hundred and seventy-two calls from the grievant's office extension to the residences of his mother and brother.
- The grievant stated at the hearing that his father lived with his brother and that he called his father there.
- The grievant stated his father died in early March 2004.
- The grievant stated that he continued calling his brother's residence after his father's death because he had family business to attend to.
- At the arbitration the grievant asserted he called a female friend named Alma, on her personal cellular telephone. He asserted that Alma lives in Canada and works for the University of Montreal.
- The grievant stated the call to Canada was about trying to enroll in college classes there.
- The grievant stated he made the telephone calls to his family because his parents were ill.
- The grievant admitted he never logged the telephone calls he made

STATE'S POSITION

Paul Thomas, Network Administrator, testified that he routinely checks the institution's telephone call accounting system by identifying the longest toll call for a specified time period and then contacting who made the call to confirm the time etc... On July 19, 2004, a long distance toll call was made from the grievant's classroom extension to number (514) 738-4999. Mr. Thomas contacted the grievant's supervisor and asked him to verify the call with the grievant. Mr. Thomas identified **Joint Exhibit 2b,** as the printout of calls he was directed to pull from the grievant's extension. The time period was from May 28, 2003 through August 10, 2004.

Mark Roberts, the grievant's supervisor testified that he conducted an investigatory interview with the grievant **(Joint 2a p10).** Mr. Roberts stated he was not aware that the grievant was making long distance toll calls and was not aware that his extension had direct outside dialing capability. The witness stated that the grievant told him he was experiencing serious health issues with his family but he never informed him

of the need to make/receive telephone calls. Roberts stated that had such a conversation taken place he would have made it clear the calls needed to be covered properly and paid for.

A second investigatory interview was conducted with the grievant on August 9, 2004 **(Joint 2a p 12).** In this interview the grievant was able to distinctly identify what an authorized call was and he asserted he was not aware of any unauthorized telephone calls he may have placed.

John Coleman, Deputy Warden testified and identified himself as the pre-disciplinary conference **(Joint 2a pp4-5)** hearing officer for the grievant's case. Mr. Coleman testified that during the conference the grievant admitted to making the unauthorized calls to the residences of his mother and brother. He admitted to making the call to Canada, albeit for work purposes. The witness stated that he attempted to call the Canada number to see if it was indeed to the University of Montreal. Coleman stated that a female answered the phone and told him he had not called the University of Montreal.

The union raised two procedural issues during the course of this proceeding, which need to be cleared up. The first has to do with the failure of the supervisor who conducted the grievant's second investigatory interview to sign the document. This is irrelevant to the case at hand. The record establishes that the interview took place and that the grievant had an opportunity to review his responses to the questions and sign an acknowledgment that it took place.

The second issue is the union's assertion that the grievant was not afforded union representation during the disciplinary process. The contention that Lisa Beckley was not an authorized site representative falls flat on its face. **Employer 2,** identified by Lisa Beckley, and former union President Susan May clearly demonstrates that the Association authorized Ms. Beckley to act on behalf of the Association in matters related to the administration of the contract.

ANALYSIS

The evidence against the grievant in this case is clear and convincing and not in dispute. Two hundred and seventy-two long distance toll calls were made from the grievant's office telephone to the residences of his mother and brother. The calls were not logged, reported, or paid for. When you create an expense for an employer for personal benefit and you fail to pay for it that is called theft. The record establishes that the grievant was clearly put on notice **(Employer 1)** about the use and misuse of the state telephone system. There can be no credible argument made by the grievant or the union that he was not aware of the difference between authorized and unauthorized calls.

The grievant's testimony at the hearing did nothing to bolster his credibility. It seemed like each question posed to him on cross-examination elicited a response that had a new twist and nuance to it that was in stark contrast to an earlier response. For example; In the grievant's original investigatory interview **(Joint 2a p 10)** he was asked about the Canada call. His response was "It is possibly a call I make {sic} to the University of Montreal, Canada regarding classes that I am taking. I thought I used my calling card, but I was having trouble with the card and I had to redial it a few times. Also, I was put on hold, but I didn't think it was for 44 minutes". Then, during testimony at the arbitration, the grievant stated the Canada call was to the personal cellular telephone of his friend "Amal" who works for the university and it was about starting to take classes not classes he was currently taking. The grievant was deceptive in answering questions during his investigatory interviews and has continued being deceptive and elusive in responding to questions put to him during this proceeding.

The grievant testified that he had to make the **(272)** calls in question because of serious family illnesses, especially because of his gravely ill father who was residing with his brother. When asked on cross-examination when his father had died he was unable to testify with specificity when that occurred. His response to the query about why telephone calls continued to his brother's residence after his father's death probably revealed the only truthful answer offered by the grievant, that being, **he had to take care of family business.** That response only serves to beg the question, who was taking care of the State's business while the grievant was engaged in these voluminous and lengthy conversations with his family?

Management's decision to remove the grievant for theft was supported by the clear and convincing evidence in the record and consistent with the Standards of Employee Conduct, the collective bargaining agreement as well as other arbitral decisions. As I wrote this closing I found myself drawn to a decision rendered by yourself, in THE STATE COUNCIL OF PROFESSIONAL EDUCATORS/OEA AND THE STATE OF OHIO DR&C, GR # 27-24-980406-0476-06-10, Brent Carney, Grievant. In that decision you affirmed the opinion of arbitrator Jonathon Dworkin that "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." You went on to opine that "unions and employers have a reasonable expectation that their employees will act in their best interests when performing work."

These findings are in stark contrast to this grievant's behavior. Rather than performing the work he was paid for Mr. Douglas engaged in a continuous pattern of taking care of his personal business at the State's expense both in time and toll telephone expenses. If one were to total up the amount of time that the grievant spent on the phone and away from his responsibilities of teaching and supervising inmates you would find that Mr. Douglas was paid for spending approximately **(26)** hours talking to his family.

On the basis of the evidence and testimony management asks that you uphold the finding of just cause and deny the grievance in its entirety.

SUMMARY OF UNION'S POSITION

The Union asserts the Employer is obligated to apply progressive discipline and in given the circumstances in this matter the penalty of discharge is excessive. The Union points out that even the Department's disciplinary grid calls for a suspension on the first and second offenses (Joint Exh. 4). The Union also asserts that the Grievant's past corrective counseling, that also involved the misuse of the state telephone system for personal use, was in 1998 and should be considered "stale" in the parlance of labor relations and human resource management. According to the Collective Bargaining Agreement a corrective counseling is to be removed from an employee's personnel file after one (1) year.

The Union also argues that the Employer failed to take into consideration the Grievant's family illness issues and the obligations

placed upon the Grievant to provide assistance to his family by making telephone calls and being absent from the NCCI. In its brief, the Union makes the following arguments:

ARGUMENT

The Contract between the State Council of Professional Educators (SCOPE) and the Department of Rehabilitation and Corrections (DRC) contains strong policy of progressive discipline. Section 13.04 of the Contract provides in part "The employer shall follow the principles of progressive discipline. Disciplinary action shall include:

1. Oral reprimand (with appropriate notation in the employees personnel file);

2. Written reprimand;

3. Working suspension (employee is required to report to work for hours designated as working suspension hours, is paid regular rate of pay for hours worked, but a working suspension has the same effect as a suspension without pay for purposes of disciplinary action);

4. One of more fines in an amount of one (1) to five (5) days pay, the first fine for an employee shall not exceed three (3) days pay; to be implemented only after approval from OCB;

5. One or more days of suspension(s) without pay;

6. Demotion or discharge.

Disciplinary action shall be commensurate with the offense."

Even the Department's own disciplinary grid provides for a short suspension on the first and second offenses. (See Joint Exhibit 4). The disciplinary grid does provide a reference for removal as an option; however, the circumstances of this case do not warrant removal in this case. The evidence regarding the matters in question is largely uncontested.

Mr. Douglas was forthright in regards to the question of the long distance phone call to Canada. Mr. Douglas was confused and felt under attack when asked additional questions regarding his family phone calls. The initial investigation report submitted by Mark Roberts states that Mr. Douglas may have called the number in question. The number in question is the Canada number (514) 738-4999. This is the telephone number in question that had brought forth the investigation. It was only after the initial investigation was the attempt made to bring additional charges against Mr. Douglas.

There are numerous investigatory interviews throughout this investigation that were conducted with no signature or reference as to who conducted these interviews with Mr. Douglas. The Joint Exhibit 2B (telephone log) including 51 pages of logged telephone calls. Some are toll calls and quite a few are not, a total of 2,376 calls. This presentation of supposed evidence actually resulted in 49 calls not completed, 32 calls not connected, and a total of 191 calls supposedly made to his family. There is no supporting documentation in 2B that a telephone call was ever made to Canada. If all the telephone calls made by Mr. Douglas are charged at a personal telephone price of $.06 cents per minute. The total charge would be $95.82, which Mr. Douglas stated he would pay at the Pre-Disciplinary hearing.

The employer's opening statement refers to the employee's previous corrective counseling in 1998 for use of telephones within a state facility. There is no mention of any further action until the recent

incident. Corrective Counseling is not part of the discipline process for DRC (Joint exhibit 4). How then is it that Mr. Douglas received the proper discipline for the incident? The employer's opening remarks also state that Mr. Douglas did admit that he may have made the telephone call in question. That, being the telephone call to Montréal Canada in regards to his required teaching certification by his employer. The opening statement goes on to state that there were hundreds of telephone calls made to the identified telephone numbers and to Canada. But, when the facts are placed before us we see : 1) There is no telephone call to Canada, 2) There were not hundreds of telephone calls, and 3) He did admit to making the calls and offered to pay restitution.

The issue is whether the employer violated, misinterpreted, or misconstrued the contract when it terminated Mr. Douglas without just case, and, if so, what shall the remedy be?

My determination is that the previous Corrective Counseling in 1998 is part of a ***stale past's record.***

> ***Arbitrator Ipavec*** *states: There is further consideration that the foregoing progression of discipline be within certain reasonable time limitations in that it has also been widely accepted that a rehabilitated employee...may have any prior discipline for poor performance, ignored; and the employee's slate to be, so to speak, clean. (Belmont Hotel, 74-1 ARB ¶8316, 4189 (1974) (incompetence, inefficiency)*

The question is whether the previous action is stale. The practice in progressive discipline for the State of Ohio has been 2 years. By the state's own opening statement, the corrective counseling was in 1998. Technically, the corrective counseling is not part of the disciplinary process (Joint Exhibit 4) and should have been removed from his file after 1 year.

In 1949, Arbitrator McCoy defined progressive discipline as follows:

> *The Company imposes a mild penalty for a first offense, a somewhat more severe penalty for a second, etc., before abandoning efforts at correction and resorting to discharge...The theory is that this is in the interest of both management and employees...I might hold a discharge without any prior discipline whatever proper in the case of some offenses; in the case of other offenses it might be held that discharge did not become reasonable necessary for a long time and after many fruitless efforts at correction. (International Harvester Co., 12 LA 1190, 1193 (1949)*

Was the discipline given to Mr. Douglas worthy of termination? There are several facts that are brought to light by his immediate supervisor. His supervisor, Mark Roberts made reference to severe family illness that Mr. Douglas shared with him, forewarning him of the possible need to make telephone calls and to be away from the institution. Mark Roberts made several references to the conversation during testimony. Mr. Douglas's father did pass away in this time frame. Mr. Douglas was needed to assist the family in their time of need.

Has the punishment fit the crime? No.

> ***Arbitrator Alexander*** *points out that to draw an analogy from the criminal law; corrective discipline is somewhat like a habitual offender statuette. It presupposes that the primary purpose of punishment is to correct wrong-doing rather that to wreak vengeance or deter others. Corrective discipline assumes that the employer as well as the employee gains more by continuing to retain the offender in employment, at least for a period of future testing, that to cut him form the rolls at the earliest possible moment...If a continuing level of employment is assumed, the discharged employee must be replaced by another. Normal hiring procedures provide little guarantee that the new hire will be a perfect citizen...(Concepts of Industrial Discipline, MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS 79-81 (Proceedings of the 9th Annual Meeting, National Academy of Arbitrations 1956.)*

The other principal to underlying discipline is that the "punishment should fit the crime". (R.E. Phelon Co., 75 LA 1051, 1053 (Irvings, 1980) (unauthorized absence)("disciplinary penalty imposed must fit the seriousness of the offense")

"Once the misconduct has been proved, the penalty imposed must be fairly warranted and reasonable calculated to eliminate or correct the offensive conduct. (5). Punishment should be passed on the employees actions, not on the consequences of those actions. (Capital Airlines, Inc., 25 LA 13, 16 (Stowe, 1955) (misuse of sick-leave privilege.)

When the Department of Rehabilitation and Corrections terminated Mr. Douglas they went beyond the bounds of progressive discipline. As matter of fact, progressive discipline was not even used in his case. There were mitigating circumstances in this case. Mr. Douglas had aggravating circumstances with a family illness and then the death of his father. This can also be construed as acute personal problems. Was Mr. Douglas's behavior a threat to the security of the intuition? Was his behavior a continual problem? Was Mr. Douglas malicious in his intent with making the telephone calls to his family?

The answer to all of these questions is **NO**.

I ask the question, "Has the Seven Test of Just Cause" been met?

1. Was notice given to the employee of possible or probable consequences of his behavior? YES
2. Was the rule or rules reasonable applied to the work environment? YES
3. Was the investigation performed in means to gather all of the facts? NO
4. Was the investigation fair? NO
5. Was the discipline handled fairly and even-handily? NO
6. Was their proof of the charges? NO
7. Did the penalty fit the crime? NO

When all of the facts are gathered and the progressive discipline is applied correctly, Mr. Douglas should be working as we speak. He should have received a lesser penalty for his actions.

III CONCLUSION

Based upon the evidence presented in this case it is respectfully submitted that terminating of David Douglas from his position with the Department of Rehabilitation and Corrections is not warranted by the evidence submitted in this case. Mr. Douglas acknowledges that, although he did use poor judgment at the time of the crisis in his life it was not done with malicious intent. He has expressed remorse and regret and has offered to pay restitution for the telephone calls. There is nothing in the record to indicate that Mr. Douglas would not be responsive to corrective action short of removal. It is respectfully submitted that the State has failed to meet its burden to establish just cause for the termination of Mr. Douglas under the circumstances of this case.

It is therefore respectfully requested that the grievance be sustained and that discipline be reduced to an appropriate level, and further that Mr. Douglas be reinstated to his position with back pay and benefits and otherwise be made whole.

DISCUSSION

The U.S. Supreme Court has cautioned that an arbitrator is confined to an interpretation and application of a collective bargaining agreement, and he does not sit to dispense his own brand of industrial

justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from a collective bargaining agreement. *Ohio Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass'n, Local 11, AFSCME, AFL-CIO*, 59 Ohio St. 3d 177, 180, 572 N.E.2d 71 (1991), citing *United Steelworkers of America v. Enterprise Wheel & Car. Corp.*, 363 U.S. 593 (1960).

The Arbitrator supports the school of arbitral thought that the prime purpose of workplace discipline is not to inflict punishment for wrongdoing, but to correct individual faults and behavior and to prevent further infractions. *Keystone Steel & Wire Co. and Indep. Steel Workers Alliance*, 114 Lab. Arb. 1466 (2000); *Ashland Petroleum Co.*, (90 Lab. Arb. 681 (1988). Arbitrators generally believe that the degree of discipline should be proportionate to the seriousness of the offense (*Columbia Aluminum Co.*, 102 LA 274 (Henner, 1993). However, it is also recognized by experienced arbitrators that there are certain offenses committed by employees for whom progressive discipline may not be an appropriate response. *Flintkote Co., 49 LA 810 (1967); Cadillac Products, Inc.,76-2 ARB ¶ 8541(1976).*

I find that the instant offense, unauthorized telephone calls, falls into the category of a "theft-related" offense. It clearly involves spending the employer's resources in an unauthorized manner, yet its execution does not contain the traditional elements of physically removing something of

value from the workplace that either belongs to the Employer or to other employees. Theft-related offenses are often addressed with suspensions and not discharges for first offenses. *AlfredM. Lewis, Inc., 85-2 ARB ¶ 8594 (1985); Gear Research, Inc., 12 LA(S 1020 (1984); Columbia Gas of Pennsylvannia, 83-1 ¶ 8242 (1983).* In theft-related offenses it is often necessary for an Employer to make clear to an employee that what he/she is engaging in is "theft", and should be understood as such.

However, in the instant matter the facts demonstrate that the Grievant has had two theft-related offenses for the exact same conduct. In the first incident the Grievant had only been on the job for approximately five (5) months when he was discovered to have made several personal, unauthorized calls at the Employer's expense. The calls amounted to hundreds of dollars in cost to the Employer (See Davey testimony under direct). It is reasonable to assume that for most employees, this event would have an impact on their future conduct. It would represent a "clearing of the air" regarding any confusion about the propriety of using the Employer's telephone to make unauthorized long distance personal telephone calls. In nautical terms, it represented the proverbial "shot across the bow," a warning of the seriousness of one's actions. Although the Grievant was counseled and not suspended, I find that counseling after just five (5) months of employment makes more sense than immediately suspending an employee so new to the

Department. At this stage in an employee's career it was a "rookie mistake" which called for an exercise of leniency. However, once the Grievant knew what was appropriate, he was no longer a "rookie." And, in no way does it change the fact that what the Grievant did was for all intents and purposes theft-related conduct. What is lacking in the Employer's response is a statement of consequences for continued conduct of this nature. However, when an employee is warned concerning theft-related conduct and made aware that it is considered theft, warnings of discipline concerning future actions of theft are not necessary. When it is made clear to an employee that what he did (i.e. theft-related act) is indeed theft, then it can be reasonably assumed that the employee now understands right from wrong and comprehends that any act of a similar nature is indeed theft. The Grievant is a college-educated employee who is a teacher. If can be assumed that he has more than sufficient grounding in the mores of society to be held responsible for future conduct.

In these matters, "intent" remains an important element to evaluate in considering a discharge for theft or theft-like offenses. Based upon the evidence and testimony, the Employer established a prime facie case that the Grievant was aware of his actions. The shear volume of un-logged calls to the Grievant's mother and brother (numbering in excess of 270 in a fourteen and one-half (14 1/2) month period) is significant (Joint

Exh 2b). Moreover, not logging this volume of calls, and giving inconsistent responses concerning them during the course of the Employer's investigation, coupled with the Grievant's previous problems at CCI, seriously undermines his credibility and position in this matter. What was also damaging to the Grievant was his inconsistent responses and evasiveness in the conduct of the investigation and remarkably during the hearing. The Grievant's first stated his lengthy telephone call to Canada was to the University of Montreal. It was subsequently discovered that the call was made to a cellular telephone of a private citizen in Canada. The Grievant stated he made many of the telephone calls as part of dealing with his ill father and the family business. In some situations, a particularly distressing personal situation could certainly cloud anyone's judgment and may serve to mitigate their actions. Yet, when asked a simple question about the date of his father's death, the Grievant could not recall the specific date he died. All during his testimony the Grievant appeared to be shaping his responses to fit facts that favored his position.

The Union raised procedural errors made by the Employer. While it is clear that some errors were made in the Employer's investigation, they are not fatal to establishing the Employer's case. They do not rise to a level of setting aside the fact that the Grievant made over 270 unauthorized telephone calls that he did not log. And, errors in the

investigation do not excuse the Grievant's lack of veracity in accounting for his behavior. The evidence in this matter supports the Employer's position that the Grievant is no longer a trustworthy employee. In spite of the Union's spirited defense, it is clear that what the Grievant did was intentional and with foreknowledge/experience of what was appropriate. The Grievant may very well have been affected by personal problems regarding his family. Yet, these problems were obscured by the Grievant's own conduct during the investigation and arbitration hearing. He damaged his own credibility to such an extent that it is unclear what to believe.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 11th day of May 2005.

Robert G. Stein, Arbitrator