

#1101

**OPINION AND AWARD**

**IN THE MATTER OF THE ARBITRATION BETWEEN  
OHIO DEPARTMENT OF NATURAL RESOURCES  
-AND-  
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION**

RECEIVED / REVIEWED

JUN 22 2012

**APPEARANCES**

**For ODNR**

Patrick Brou, LE Staff Officer  
Richard G. Corbin, Deputy Director Human Resources  
Jacqueline Milsom, Labor Relations Specialist (OCB)  
Donovan Powers, Geographic Information Management Systems Administrator  
Jackie Sebastian, Labor Relations Officer 3  
Jeff Rowley, Chief Information Officer  
David Thompson, Network Administration Supervisor  
Jeff Webb, Information Specialist 2

OCSEA-OFFICE OF  
GENERAL COUNSEL

**For OCSEA**

Treva Knasel, Environmental Specialist 2 / Chief Steward  
Tim Rippeth, OCSEA Staff Representative  
Norm Spellman, Information Technologist III

**Case-Specific Data**

Hearing Held  
April 18, 2012

**Grievance Number**

25-20-20120213-0001-01-14

**Last Brief Received**

May 1, 2012

**Case Decided**

June 14, 2012

**Subject:** Removal—Cheating on Examination

**Decision**

**Grievance: DENIED IN PART AND SUSTAINED IN PART**

**Table of Contents**

1

2 I. The Facts .....3

3 A. Introduction.....3

4 B. Investigation.....4

5 C. ODNR’s Disciplinary Decision and the Ensuing Grievance.....4

6 II. The Issue.....5

7 III. Relevant Policies/Disciplinary Policy/Procedure.....6

8 A. Relevant Policies.....6

9 B. Relevant Contractual Provisions.....6

10 IV. Summaries of the Parties’ Arguments.....7

11 A. Summary of ODNR’s Arguments.....7

12 B. Summary of ODNR’s Arguments.....9

13 V. Evidentiary Preliminaries.....9

14 VI. Analysis and Discussion.....9

15 A. Introduction.....9

16 B. Grievant’s Statements.....9

17 1. “I’ll Say Yes to That”.....10

18 2. Self-Incrimination.....10

19 C. Grievant’s Conduct.....11

20 1. Perfect Examination Score.....11

21 2. Destruction of the CD.....12

22 D. Practice of Providing Examination Material to Employees.....12

23 E. Cumulative Impact of the Evidence.....12

24 VII. The Penalty Penalty.....13

25 A. Aggravative Factors.....14

26 B. Mitigative Factors.....14

27 C. Proper Measure of Persuasion.....14

28 VIII. The Award.....15

29

1 **I. The Facts**

2 **A. Introduction**

3 The parties to this disciplinary dispute are the Ohio Department of Natural Resources (“Agency”  
4 “ODNR”) and the Ohio Civil Service Employees Association (“Union” “OCSEA”), representing Mr.  
5 Norman Spellman (“Grievant”), an Information Technologist 3 with over twenty-five years of quality  
6 service and no active discipline.<sup>1</sup>

7 The instant dispute erupted after the Grievant and two coworkers applied for a position as an  
8 Infrastructure Specialist 2 in the Office of Information Technology.<sup>2</sup> Applicants for that position had to  
9 pass an evaluative interview (“Interview” or “Examination”) administered by the Grievant's Supervisor,  
10 Mr. David D. Thompson, and two other examiners.<sup>3</sup>

11 There is an expectation of privacy regarding **access** to the Agency’s computers but not to the  
12 **databases** thereon. Before the interview, Mr. Thompson kept hard copies of the questions and answers  
13 to the interview on a desk in his office, which he locked when he was not at work.<sup>4</sup> Also, before the  
14 Grievant’s interview and after the interviewers exchanged questions and answers, Mr. Thompson  
15 discovered that someone had remotely accessed his computer, which he rebooted to disconnect the  
16 intruder. ODNR secures its computers by assigning all employees specific user names and passwords  
17 for their assigned computers.

18 While preparing for his interview, the Grievant obtained a CD containing questions and answers  
19 virtually (if not actually) identical to those subsequently posed during his interview. The Grievant set a  
20 record by scoring perfectly on the interview.<sup>5</sup> Moreover, the substance and sequence of his answers  
21 virtually mirrored those on the answer key.

---

<sup>1</sup> Union’s opening statement.

<sup>2</sup> Joint Exhibit 2, at 2; Joint Exhibit 6, at 1, 5.

<sup>3</sup> Joint Exhibit 6, at 6.

<sup>4</sup> Joint Exhibit 7, at 8-13.

<sup>5</sup> Joint Exhibit 7, at 14.

1 During all times relevant to this dispute, the Grievant and Mr. Jeff Webb were Information  
2 Technologists with both direct and remote access to state computers and their databases, including Mr.  
3 Thompson's computer.

#### 4 **B. The Investigation**

5 Shortly after the Grievant's perfect score, Management launched an investigation to determine if,  
6 before the interview, he had accessed the questions and answers on the examination, and, if so, how?  
7 Additionally, there was an issue of whether the Grievant knew or should have known that the CD material  
8 was the actual answers to the examination. During the investigation, the Grievant told Mr. Thompson  
9 that he (the Grievant) "couldn't believe that he was in this situation and that he would go out like this . . . .  
10 [T]hat he was going to *bring the whole house of cards down*."<sup>6</sup>

11 When asked how he obtained the questions and answers, the Grievant said Mr. Webb gave him the  
12 CD containing examination information and said, "This will help you in your interview." In stark  
13 contrast, Mr. Webb repeatedly and emphatically denied having given the Grievant any preparatory  
14 material for the interview. The Grievant denied any *actual knowledge* that the CD contained examination  
15 materials. Nevertheless, when asked whether he *thought* the CD *could have* contained answers to the  
16 interview, he answered, "*I will say yes to that*." Remarkably, the Grievant said he destroyed the CD after  
17 using it.

#### 18 **C. ODNR's Disciplinary Decision and the Ensuing Grievance**

19 Based on the foregoing investigation, ODNR charged the Grievant with: "D. Failure of Good  
20 Behavior—(1) Failure of good behavior. D. Failure of Good Behavior—(19) *Intentional misuse or*  
21 *disclosure* of confidential information or material."<sup>7</sup>

---

<sup>6</sup> Joint Exhibit 8, at 5 (emphasis added).

<sup>7</sup> Joint Exhibit 2, at 1.

1 On or about February 3, 2012, the Agency held a pre-disciplinary hearing, during which it found  
2 the Grievant guilty as charged and fired him on February 6, 2012.<sup>8</sup> On February 11, 2012, the Union  
3 filed Grievance No. 25-20-20120213-0001-01-14, timely challenging the Grievant's removal as lacking  
4 just cause.<sup>9</sup> On February 21, 2012, the Parties held a Step-3 hearing to review the propriety of the  
5 Grievant's discharge. On March 26, 2012, ODNR denied the Grievance.<sup>10</sup>

6 After grievance negotiations collapsed, the Parties selected the Undersigned to hear the instant  
7 dispute. That hearing occurred on April 18, 2012 at the home office of OCSEA in Westerville, Ohio.  
8 The hearing commenced at approximately 9:00 A.M. At the outset of that hearing, the Parties agreed  
9 that the instant dispute was properly before the Undersigned.

10 During the arbitral hearing, the Parties' advocates made opening statements and introduced  
11 documentary and testimonial evidence to support their positions in this dispute. All documentary  
12 evidence was available for proper and relevant challenges; all witnesses were duly sworn and subjected  
13 to both direct and cross-examination. The Grievant was present throughout the proceedings. When  
14 Management rested its case-in-chief, the Union elected not to present a case-in-chief. At the close of the  
15 hearing, the Parties agreed to submit written closings, the last of which reached the Undersigned on May  
16 1, 2012, at which time the Arbitrator closed the record.

## 17 II. The Issue

18 Whether the Grievant was discharged for just cause, if not what shall be the remedy?  
19

## 20 III. Relevant Policies/Disciplinary Policy/Procedure

### 21 A. Relevant Policies

#### 22 GENERAL

23 Employees of the Ohio Department of Natural Resources (ODNR) should maintain high standards of  
24 behavior, conduct, and work performance befitting the trust and responsibility imposed on them as public

---

<sup>8</sup> Joint Exhibit 2, at 1.

<sup>9</sup> Joint Exhibit 3, at 1.

<sup>10</sup> Joint Exhibit 3, at 2-4.

1 servants. Employees who fail to abide by standards established herein may be subject to appropriate  
2 disciplinary action initiated in accordance with ORC Section 124.34, Department of Natural Resources  
3 policies, the Collective Bargaining Agreements or any other appropriate procedures governing discipline.  
4 When implementing discipline as corrective action, each ODNR Division/Office shall undertake  
5 disciplinary measures for the purpose of correcting an offending employee's inappropriate conduct.

6  
7 \* \* \* \*

8 **RESPONSIBILITIES**

9 Employees are responsible for complying with and adhering to all work rules, policies, procedures, and  
10 directives of the Department. . . The employees are expected to conduct themselves in a manner both on  
11 and off duty that does not adversely affect the ability of the employee to perform the duties of their  
12 position. . . .

13 **DISCIPLINARY GUIDELINES<sup>11</sup>**

Failure of Good Behavior	1 <sup>st</sup> Offense	2 <sup>nd</sup> Offense	3 <sup>rd</sup> Offense
1. Failure of good behavior	Oral-Removal	Suspension-Removal	Removal
19. <i>Intentional misuse</i> or disclosure of confidential information or material	Written-Removal	Removal	

14  
15 **B. Relevant Contractual Provisions<sup>12</sup>**

16 **ARTICLE 24-DISCIPLINE**

17 **24.01-Standard**

18 Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the  
19 burden of proof to establish just cause for any disciplinary action.

20 **24.02-Progressive Discipline**

21 The Employer will follow the principles of progressive discipline. Disciplinary action shall be  
22 commensurate with the offense.

23 **IV. Summaries the Parties' Arguments**

24 **A. Summary of ODNR's Arguments**

- 25 1. ODNR removed the Grievant for just cause.
- 26 2. The Grievant was in possession of test material.
- 27 a. He told Mr. Brown that the material on the CD matched the actual test material<sup>13</sup> that Mr.
- 28 Brown presented to him.

<sup>11</sup> Join Exhibit 4, at 1, 2, 3, 5.

<sup>12</sup> Joint Exhibit 1, at 84-85.

<sup>13</sup> Joint Exhibit 13.

- 1 3. The Grievant's perfect score and near perfect bullet point responses with multiple sets of correct  
2 answers triggered an investigation, which established that the Grievant's CD contained the test  
3 material
- 4 4. The Grievant never clarified several comments he made to Mr. Thompson. He said he could not  
5 believe he allowed someone to put him into a position that he couldn't believe he was in and that  
6 he would go out like this.<sup>14</sup> He would bring the whole house of cards down. The Grievant said  
7 he spoke to his wife and his clergy about his dilemma, presumably relating to his having the test  
8 material. The Grievant never notified Mr. Thompson that he (the Grievant) had a totally unfair  
9 advantage over other applicants.
- 10 5. The Grievant's silence aggravates the situation.
- 11 6. The Grievant's conduct undermines his claim not to have known that the CD contained test  
12 material. For example, he memorized that material, suggesting that he was not innocently  
13 studying material provided by chance.
- 14 7. The Grievant refused to cooperate with Management.
- 15 a. He never explained how he obtained the CD. Mr. Webb credibly denied that he gave the  
16 Grievant the CD.
- 17 b. He had three opportunities, during interviews, to explain the surrounding circumstances  
18 that triggered his removal. In the first interview, for example, Mr. Brown asked the  
19 Grievant, "What information are you referring to that you had prior to the interview?"  
20 The Grievant answer, "Oh just information, to tell you the truth it was information that  
21 we work with on a daily basis. I have been doing this for a long time and I have exposure  
22 to everything on that interview every day. I can't say that there were much, this is hard to  
23 describe, don't want to be self-incriminating, I suppose that if everyone had these  
24 questions I think that everyone would have done very well." His concern about self-  
25 incrimination suggests guilt.
- 26 8. The Grievant knew he was acting inappropriately.
- 27 a. He spoke to his wife and clergy about his situation.
- 28 b. He allegedly destroyed the CD after memorizing its contents.
- 29 c. He never voluntarily notified Mr. Thompson about the CD or its contents.
- 30 9. Removal in this case is proper under Article 24.02.
- 31 a. Cheating on a promotional exam portends either a paucity of conscience or a feeling of  
32 entitlement, or both, and mocks a merit-based evaluative process.
- 33 b. Information technology professionals enjoy elevated access to the Agency's computers  
34 and, as a quid pro quo, must meet corresponding levels of responsibility and trust. Yet,  
35 the Grievant could not have obtained this CD absent fraudulent conduct, his or a co-  
36 worker's.
- 37 .
- 38 10. In summary, the Grievant:
- 39 a. Without evidentiary support, the Grievant claimed Mr. Webb provided the CD.
- 40 b. Allegedly destroyed the CD.
- 41 c. Volunteered no details about his interaction with Mr. Webb regarding the test material.
- 42 d. Never explained his enigmatic (implicitly inculcating) statements to Mr. Thompson.
- 43 11. Arbitrator Brookins supported ODNR's position in a prior opinion, stating:
- 44 "The Union further contends that the Grievant's misconduct merely offended  
45 sensibilities. To the contrary, the foregoing discussion reveals the Grievant's misconduct  
46 and mendacity left a justifiably tattered employer-employee relationship in its wake.  
47 And, the Agency's justifiable loss of trust in an employee who held a strategic position of  
48 trust would very likely hamper operational efficiency."<sup>15</sup>

<sup>14</sup> (See Joint Exhibit 8, page 5 final answer)

<sup>15</sup> Arbitral Opinion No. 1699, July 30, 2003.

1  
2 **B. Summary of OCSEA's Arguments**

- 3 I. ODNR removed the Grievant for other than just cause.
- 4 a. ODNR wrongly accused the Grievant of accessing Mr. Thompson's computer. The  
5 Grievant acquitted himself with honor in this case. He was an intelligent, hardworking,  
6 "by the book," long-tenured employee with an impeccable work record.
- 7 b. Mr. Thompson is not a credible witness. For example, he testified that he never gave any  
8 interviewee in this case the questions and answers to the examination. However, the  
9 investigator in this case, Mr. Brown, testified that Mr. Thompson said that he gave Ms.  
10 Sara Pettay the questions and answers.
- 11 c. Mr. Thompson's testimony establishes that he failed to secure hard copies of the  
12 questions and answers in his possession.
- 13 d. Mr. Thompson stated that one could not track remote access, but the Department Chief  
14 disagreed.
- 15 e. In this case, Investigator Brown, Mr. Thompson, and Mr. Donovan Powers were  
16 complicit in a cover-up.
- 17 f. Mr. Brown refused to give the Union his notes and the tape from the interview with the  
18 Grievant.
- 19 g. Mr. Webb was a nervous witness. Although he had assisted in a cover-up, Mr. Webb  
20 regrets this entire situation.
- 21 h. The testimony of Mr. Jeff Rowley, Chief of the I.T. Department, establishes two salient  
22 points. First, the Grievant never accessed any supervisors' computer, since logs from the  
23 Grievant's computer revealed no evidence that it had accessed other computers. Second,  
24 before Management could access the logs to Mr. Webb's computer, he reimaged it,  
25 thereby erasing all evidence of whether that computer had remotely accessed other  
26 computers. Third, notwithstanding Mr. Thompson's testimony to the contrary, Mr.  
27 Rowley's testimony established that remote access is traceable.
- 28 i. Only after ODNR launched an investigation did the Grievant become aware of the  
29 nature of the information on the CD.
- 30 j. In the I.T. Department, it was common knowledge that questions for interviews  
31 were neither secret nor secure and that Management gave them to other  
32 employees. The Grievant, therefore, assumed that information on the CD was  
33 public and that Mr. Webb had ethically obtained them.

34  
35 **V. Evidentiary Preliminaries**

36 Because this is a disciplinary dispute, ODNR has the burden of proof. More important, ODNR has  
37 the burden of persuasion and, hence, must establish the alleged misconduct by preponderant evidence in  
38 the arbitral record as a whole, doubts about the Grievant's guilt will be resolved against ODNR.  
39 Furthermore, ODNR must demonstrate that removal was the proper measure of discipline in this dispute.  
40 The Union has the burden of persuasion regarding its affirmative defenses, doubts about which will be



1 resolved against the Union. Finally, the Undersigned draws no adverse inferences from the Union's  
2 decision not to offer a case-in-chief, which precluded the Grievant from testifying.

## 3 **VI. Analysis and Discussion**

### 4 **A. Introduction**

5 Although the Agency offers several arguments to support the Grievant's removal, the pivotal issue in  
6 this dispute is his alleged *intentional misuse* of confidential material. To establish the element of intent,  
7 ODNR must show that: (1) The material in question (information on the CD) was "confidential;" and (2)  
8 The Grievant "intentionally" "misused" it. Since the "material" in question is questions and answers to  
9 the examination, there is no question but that it was "confidential."<sup>16</sup> Therefore, the first prong of the  
10 charge is established. To establish the element of intent, ODNR must show by preponderant evidence  
11 that the Grievant either *knew or should have known* that the information on the CD entailed questions  
12 and answers to the examination ("Culpable Knowledge"). Finally, ODNR must demonstrate that the  
13 Grievant "misused" that information, which, in the instant case, involves a showing that the Grievant used  
14 the CD information to prepare for his examination. Since there is no direct evidence of the Grievant's  
15 culpable knowledge, the Agency stresses his *statements and conduct* before and during the investigation.  
16 From this circumstantial evidence, the Agency seeks to infer culpable knowledge. Therefore, an analysis  
17 of those statements and conduct is indicated.

### 18 **B. Grievant's Statements**

19 Although ODNR cited many statements by the Grievant, those discussed below more directly  
20 address whether he knew or should have known that the CD information was the same as the questions  
21 and answers on the examination ("Culpable Knowledge").

22  

---

<sup>16</sup> The Union essentially (but unsuccessfully) challenges this conclusion by arguing that Mr. Thompson did not properly secure the examination information. (See p. 12 below).

1 **1. "I Will Say Yes To That"**

2 When Investigator Brown asked the Grievant "[W]hether he **thought** the CD *could have* contained  
3 answers to the interview, [The Grievant answered], "**I will say yes to that.**"<sup>17</sup> During the arbitral hearing,  
4 the Agency argued that the Grievant's answer was tantamount to an admission of culpable knowledge.  
5 The Union never directly addressed this issue.

6 The statement does not demonstrate culpable knowledge; it reveals the Grievant's awareness that the  
7 CD *could* contain specific questions and answers for the examination. The degree of certainty in "could  
8 have" is insufficient to establish culpable knowledge. Nevertheless, the Grievant's admission clearly  
9 reveals that at some level he *questioned/suspected* the legitimacy/propriety of the CD information.<sup>18</sup>

10 **2. Self-Incrimination**

11 In response to one of Mr. Thompson's questions, the Grievant said: "I can't say that there were  
12 much, this is hard to describe, don't want to be *self-incriminating*, I suppose that if everyone had these  
13 questions I think that everyone would have done very well." The Agency argues that the Grievant's  
14 concern about "self-incrimination" reveals a guilty mind (culpable knowledge) about the CD  
15 information.<sup>19</sup> Specifically, ODNR essentially asserts that concerns about misconduct trigger concerns  
16 about self-incrimination. The Union does not directly address this point.

17 The Arbitrator agrees that concerns about *self-incrimination* betray uneasiness about underlying  
18 issues. Still, such emotions do not specifically prove culpable knowledge; they disclose an *awareness of*  
19 *possible direct or indirect* exposure of worrisome events.

---

<sup>17</sup> Joint Exhibit 13, at 6.

<sup>18</sup> Of course one could ethically argue such suspicion obliged the Grievant to notify Management about the situation. In the instant case, however, ODNR did not charge him with violating any duty of disclosure.

<sup>19</sup> Investigator Brown asked the Grievant:

"What information are you referring to that you had prior to the interview." [and] the Grievant said "Oh just information, to tell you the truth it was information that we work with on a daily basis. I have been doing this for a long time and I have exposure to everything on that interview every day. I can't say that there were much, this is hard to describe, don't want to be *self-incriminating*, I suppose that if everyone had these questions I think that everyone would have done very well."

1 **C. Grievant's Conduct**

2 ODNR argues that the following examples of the Grievant's conduct also constitutes a basis for  
3 Culpable knowledge.<sup>20</sup>

4 **1. Perfect Examination Score**

5 ODNR contends that the Grievant's nearly perfect examination score demonstrates that he  
6 memorized the material, which, in turn, according to ODNR, betrays culpable knowledge. Otherwise,  
7 why would the Grievant prefer categorical *memorization* rather than review of the *study* material? The  
8 Union maintains that the Grievant's perfect score was due as much to the examiners' grading as to the  
9 Grievant's memorization of the CD material.

10 Even if the perfect score bolstered the conclusion that the Grievant's study materials closely tracked  
11 the examination materials,<sup>21</sup> the score hardly supports a reasonable inference of culpable knowledge.

12 **2. Destruction of the CD**

13 Finally, ODNR contends that the Grievant's destruction of the CD after using it was an effort to  
14 conceal the information thereon. According to ODNR, the effort and the alleged motive betray a guilty  
15 mind, which, in turn, establishes culpable knowledge. The Union offers little argument and no evidence  
16 that directly addresses this contention.

---

<sup>20</sup> Management also suggests that the high degree of similarity (in substance and order) between the examination's answers and the Grievant's suggest access to test materials and hence, culpable knowledge. However, such similarity does not *prove* culpable knowledge. Instead, it might trigger a reasonable suspicion *in Management's mind* that the Grievant's study aids *could have* included examination materials. Culpable knowledge addresses the Grievant's knowledge *before* (rather than after) he took the examination.

<sup>21</sup> During a discussion with Mr. Thompson, the Grievant acknowledged a strong substantive overlap between the CD information and the examination materials.

1 ODNR is correct to a point. The Grievant's unexplained decision to destroy the CD after  
2 memorizing the contents is indeed highly suspicious and engenders nagging concerns when juxtaposed  
3 against his aforementioned speech and conduct.

#### 4 **D. Practice of Providing Examination Material to Employees**

5 The Union argues globally that the Grievant had no reason to suspect the propriety of the CD  
6 information because the Agency had provided other employees with such information. Specifically, the  
7 Union maintains that, "[I]t was *common knowledge* in the I.T. department that questions for interviews  
8 were not secret or secure"<sup>22</sup> and that the Agency gave at least two employees such information.

9 While cross-examining Mr. Thompson, the Union *unsuccessfully* sought to establish that  
10 Management gave Ms. Sara Pettay examination information and that the Agency historically gave  
11 employees examination information. The Agency conceded, however, that it gave Ms. Yolanda Bracken  
12 examination information because of her special circumstances.

13 Preponderant evidence in the arbitral record as a whole does not show that the Agency  
14 customarily gave examination material to employees, nor is there proof that examination material was not  
15 secure in ODNR. In an attempt to show otherwise, the Union points out that Supervisor Thompson kept  
16 on his desk a hard copy of the examination material used in the Grievant's interview.<sup>23</sup> Supervisor  
17 Thompson admitted leaving his office unlocked with the examination material on his desk when he was at  
18 work and locking his office when he was away from work. The Union properly notes that a desktop is  
19 not the most secure place for examination material. But that is not proof that such material was *generally*  
20 unsecured. It shows only that Supervisor Thompson's handling of the material is subject to challenge.  
21 Finally, irrespective of the security of examination material, the bottom-line is that no employee entitled  
22 to use that material when preparing for an examination.

---

<sup>22</sup> Union Closing Argument, at 4.

<sup>23</sup> Union Closing Argument, at 1.

1 **E. Cumulative Impact of the Foregoing Evidence**

2 As discussed above, when taken individually, none of the Grievant's individual statements or  
3 conduct demonstrates culpable knowledge. Still, the remaining question is whether those statements and  
4 conduct coalesce to establish preponderant evidence of culpable knowledge. For the reasons discussed  
5 below, the Arbitrator holds that that they do. In other words, the cumulation of the Grievant's statements  
6 and conduct supports a reasonable inference of culpable knowledge. Stated differently, the statements and  
7 conduct show that more likely than not the Grievant either knew or should have known that the CD  
8 information contained specific questions and answers to the examination.

9 First, the Grievant explicitly recognize that the CD "*could have* contained" such information.  
10 Second, he expressed reluctance to reveal too much information about circumstances surrounding the CD,  
11 lest he incriminate himself, thereby suggesting the existence of *some misconduct* related to the CD. Both  
12 the risk and fear of self-incrimination rest solely with the Grievant, the misconduct or wrongdoing that  
13 trigger the fear of self-incrimination point solely to him. Finally, when combined with the two foregoing  
14 statements, the Grievant's *unexplained destruction* of the CD constitutes *preponderant evidence* that,  
15 more likely than not, he had culpable knowledge. That is, he either knew or should have known that the  
16 CD contained specific questions and answers to the examination. Furthermore, nothing in the arbitral  
17 record proves that it was either customary or otherwise appropriate for employees, including the Grievant,  
18 to use such information when preparing for an examination. Consequently, as a reasonable person, the  
19 Grievant either knew or should have known that using such information to prepare for his examination  
20 was inappropriate.

21 **VII. The Penalty Decision**

22 Preponderant evidence in the arbitral record demonstrates that the Grievant had culpable  
23 knowledge when he used information on the CD to prepare for the interview. His intentional use of such  
24 material was inappropriate and, hence, constituted misconduct. Thus, some measure of discipline is

1 indicated. Assessment of the proper measure of discipline involves an evaluation of the mitigative and  
2 aggravative factors surrounding the Company's decision to terminate the Grievant. The Arbitrator shall  
3 not modify ODNR's disciplinary measure, unless it is unreasonable, arbitrary, capricious, discriminatory,  
4 in bad faith, or abusive of discretion. Assessment of the propriety of the disciplinary measure  
5 (termination) requires evaluation and balancing of the aggravative and mitigative circumstances  
6 surrounding the Agency's disciplinary decision.

7 **A. Aggravative Factors**

8 The aggravative factors in this case are the Grievant's use of inappropriate study aids and his position  
9 as an Information Technologist 3. The Grievant's *intentional* use of inappropriate materials to prepare for  
10 examination is fundamentally dishonest, thereby permeating the core of any employee-employer  
11 relationship. The second aggravative factor substantially compounds the negative impact of the first. The  
12 As a Technologist 3, the Grievant held a highly visible position of substantial trust, his breach of that  
13 trust would be intolerable in virtually any employee-employer relationship.

14 **B. Mitigative Factors**

15 The major mitigative factors are also substantial. The Grievant was a twenty-five year employee  
16 with a good record of performance and, heretofore, an unblemished disciplinary record.

17 **C. Proper Measure of Discipline**

18 Despite the strength of the mitigative considerations, however, the balance of aggravative and  
19 mitigative factors indicate a heavy dose of discipline. Trust at some level is the indispensable lubricant  
20 (the lynchpin) for all employee-employer relationships, regardless of the position held by the employee.  
21 The *level* of trust increases proportionately with either the level of an employee's position or the *nature*  
22 of the employee's duties therein, or both. In the instant case, as an Information Technologist 3, the  
23 Grievant held a position of profound trust and sensitivity that demanded a correspondingly high degree of

1 responsibility and sound judgment. Clearly, the Grievant's conduct undermined ODNR's trust in him.  
2 Nevertheless, twenty-five years of service, outstanding performance, and no active discipline are weighty  
3 mitigative factors not to be cavalierly dismissed. In other words, the Grievant apparently followed the  
4 "straight and narrow" for twenty-five years. Therefore, the Arbitrator hereby reinstates him with without  
5 back pay or any other job-related benefits to which he would have been entitled but for his removal.  
6 More important, the Arbitrator is reinstating the Grievant subject to a *last chance agreement* that  
7 prohibits him from engaging in any dishonest, unethical, or immoral conduct for two years after his  
8 reinstatement pursuant to this award. Finally, the Grievant's seniority shall remain undiminished as if he  
9 were never terminated.

#### 10 **VIII. The Award**

11 For all of the foregoing reasons, the Grievance is hereby **DENIED IN PART and SUSTAINED**  
12 **IN PART.**

13  
14 *Robert Brookins*

15 Labor Arbitrator, Mediator, Professor of Law, J.D., Ph.D.