INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245, Complainant, and **PACIFIC GAS & ELECTRIC,** Respondent Re: Arbitration Case No. 230. Discharge	**Opinion & Decision** **of** **Board of Arbitration** -oOo-

BOARD OF ARBITRATION

Union Members	Neutral Member	Company Members
Roger Stalcup IBEW Local 1245 3063 Citrus Circle Walnut Creek, CA 94596	Barbara Chvany Chvany, Silbert & Knowlton[LLP]	Margaret Short PG&E 2850 Shadelands Dr. Rm.100 Walnut Creek, CA 94598
Jim Lynn P. O. Box 25488 Fresno, CA 93729-5488		Bruce Tison PG&E P Street, 1st Floor Fresno, CA 93760

APPEARANCES

On Behalf of the Union:

Tom Dalzell, Esq.
IBEW Local 1245
3063 Citrus Circle
Walnut Creek, CA 94596

On Behalf of the Employer:

Stacy A. Campos, Esq.
PG&E
Law Department
P.O. Box 7442
San Francisco, CA 94120

INTRODUCTION

This dispute arises under the Labor Agreement between the above-captioned Parties (JX 3). Pursuant to the Labor Agreement, a Board of Arbitration was duly constituted and the Parties entered into a Submission Agreement for Arbitration Case No. 230 (JX 1; TR 1). A hearing was conducted on January 15, 1999, in San Francisco, California before the Board of Arbitration. At the hearing, the Parties had a full opportunity to examine and cross-examine witnesses, and to present relevant evidence and argument. The Parties stipulated that the matter was pursued through the grievance procedure of the Labor Agreement and is properly in arbitration for final and binding decision (TR 1-2; JX 1, 2). A verbatim transcript of the proceedings was taken.[1] The matter was submitted for decision upon receipt of post-hearing briefs on March 16, 1999.

The Grievant, Wesley "Randy" Craven, was an employee with 28 years of service with the Company (TR 84; JX 2, pp. 6, 13). He was terminated on February 26, 1998 for violating Standard Practice 735.6-1 involving alleged unauthorized use of a Company cellular telephone at a time he was on an active Decision Making Leave (DML) (JX 2, p. 18). At the time of the events leading to his termination, he was a journeyman fitter in Fresno, California. A grievance was filed concerning the termination (JX 2, p. 17). The dispute was not resolved in the lower steps of the grievance procedure, leading to this proceeding.

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[1] References to the transcript are cited herein as (TR #); references to Joint Exhibits and Employer Exhibits are cited as (JX #) and (EX #), respectively. There were no Union exhibits.

ISSUE

Was the Grievant, . C terminated for just cause; if not, what shall the remedy be? (JX 1; TR 1)

REMEDY REQUESTED

The Union requests that the grievance be granted and that the Company be ordered to reinstate the Grievant with a make-whole remedy. The Company seeks denial of the grievance in its entirety; and alternatively, if the grievance is granted, that back pay be denied. The Parties stipulated that, in the event a remedy is found to be owing, the Board would initially remand to the Parties for an exact computation and retain jurisdiction in the event of a dispute (TR 8).

RELEVANT AGREEMENT PROVISIONS

TITLE 7.1 Management of Company

> 7.1 The management of the Company and its business and the direction of its working forces are vested exclusively in Company, and this includes, but is not limited to, the following: to direct and supervise the work of its employees, to hire, promote, demote, transfer, suspend and discipline or discharge employees for just cause; ... (JX 3)

PERTINENT POSITIVE DISCIPLINE GUIDELINES

STEP THREE - Decision Making Leave (DML)

> The DML is the third and final step of the Positive Discipline System. It consists of a discussion between the supervisor and the employee about a very serious performance problem. The discussion is followed by the employee being placed on DML the following work day with pay to decide

whether the employee wants and is able to continue to work for PG&E, this means following all the rules and performing in a fully satisfactory manner.

The employee's decision is reported to their supervisor the workday after the DML. It is an extremely serious step since, in all probability, the employee will be discharged if the employee does not live up to the commitment to meet all Company work rules and standards during the next twelve (12) months, the active period of the DML ...

* * *

III. TERMINATION

A. Termination occurs when Positive Discipline has failed to bring about a positive change in an employee's behavior, such as another disciplinary problem occurring within the twelve (12) month active duration of a DML ... .

B. Notwithstanding the foregoing, if a performance problem which normally would result in formal discipline occurs during an active DML, the Company shall consider migating [sic] factors (such as Company service, employment record, nature and seriousness of violation, etc.) Before making a decision to discharge, all of which is subject to the provisions of the appropriate grievance procedure for bargaining unit employees. ... (JX 4)

SUMMARY OF STANDARD PRACTICE 735.6-1

. . . It is the policy of PG&E that employees shall at all times continue to practice fundamental honesty. Employees shall not, nor attempt to: . . . take or misuse Company property.

* * *

VIOLATION OF COMPANY POLICY WILL SUBJECT ANY EMPLOYEE TO DISCIPLINARY ACTION, UP TO AND INCLUDING DISCHARGE. . . .

Examples of misconduct include, but are not limited to, the following:

* Taking, borrowing, misusing or loaning company tools, equipment ...
* Using company telephones for personal business which results in long distance tolls or extra message units. (EX 1)

BACKGROUND

The Cellular Phone:

The Grievant was provided with a Company cellular telephone when he was a gas crew foreman and continued to utilize one while classified as an inspector (TR 10, 12-13, 41). He was later reassigned the position of fitter. (JX 2, 19, 20) According to the Grievant's Supervisor, Albert Martinez, fitters are not assigned Company cell phones (TR 10, 13, 41; JX 2, 19). The Grievant testified that he was aware of fitters who, at least at times, had Company cell phones (TR 84).

When the Grievant was reassigned to the fitter position, Martinez requested and obtained the pager the Grievant had utilized as an inspector (TR 26, 38, 79; JX 2, p. 15). According to Martinez, the Grievant should also have returned the cell phone at that time; however, Martinez did not request it nor did he tell the Grievant not to use it. (TR 26, 38, 79-80; JX 2, pp. 14, 15). The Grievant kept the phone, made no secret that he continued to use it, and was listed with the cell phone number on the Department directory (TR 27, 80; JX 2, pp. 14, 20).[2] Martinez testified that he noticed the Grievant had a cell phone, but he believed it was a personal phone (TR 22).[3]

In October 1997, Martinez was instructed to inventory all Company cell phones in his area (TR 10). He testified he was unable to account for one cell phone (TR 11).[4] Martinez requested a copy of the billing history for the "missing" phone (TR 11; JX 2, pp. 21-33). When he reviewed the billing data, Martinez noted that "quite a few" of the calls matched the Grievant's home number

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[2] The Grievant continued to be listed on the directory as late as November, 1997 (TR 23, 27; JX 2, p. 14).

[3] The record shows that the Grievant at one time had a personal cell phone. though the record is unclear as to whether it was during the same time period (TR 89).

[4] He did not consult the directory or call the number.

(TR 12). The next day, October 28, 1997, Martinez approached the Grievant and asked him about the phone (TR 12). The Grievant promptly returned it to Martinez (TR 12).

The Investigation and Disciplinary Decision:

Martinez reported the information he learned from the billing records to his director, and the matter was referred to Corporate Security (TR 12, 13; JX 2, p. 13). Mike Perry was assigned as the Investigator (TR 13, 43). The investigation included a review of the billing records as well as the Grievant's attendance records (TR 13-14, 44-48; JX 2, pp. 21-33, 35-37; EX 3).[5] Perry prepared a report of the investigation, which Martinez received and reviewed (TR 14, 48-49; JX 2, pp. 19-20).

Martinez, in consultation with others in Human Resources and Labor Relations, determined that the Grievant had engaged in conduct warranting disciplinary action, specifically, misusing the cell phone by making personal calls, in violation of Company policy (TR 14, 31-32, 42, 61-62, 65). Martinez' testimony was confusing on the subject of precisely which calls formed the grounds for termination. At times, he testified that the basis for the discipline was not the personal calls "made during company hours," but those made when the Grievant was not at work (TR 31, 33-34). At other times, he testified that he did rely on the personal calls made during work hours in reaching the termination decision (TR 32, 34, 36-37).

Martinez and Bruce Tison, a Senior Labor Relations Representative, testified that the decision to discharge the Grievant was made in light of the Grievant's disciplinary status, *i.e.*, he was on an active DML and had received two coaching and counseling sessions (discussed below) (TR 15, 65). As Martinez testified, "...since the grievant was already on a DML, which is the last stages [sic]

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[5] The attendance records were utilized to determine whether any calls were made outside of the Grievant's scheduled work hours (TR 14).

of positive discipline, ... there was nowhere to go but to terminate him" (TR 14). Martinez met with the Grievant and provided him with written notice of his termination on February 26, 1998 (TR 22-23; JX 2, p. 18).

Company Policy:

Each year, the summary of Standard Practice 735.6-1, quoted above, is reviewed with employees, including the crews under Martinez' supervision (TR 18, 30, 34). An agenda for a meeting held January 7, 1997 was placed in evidence, reflecting review of that summary (EX 1). It is undisputed that the Grievant attended the meeting, in which a copy of the summary was distributed to employees (TR 21, 36; EX 1).

Martinez testified that, in the review, he told the employees Company cell phones are "for nonpersonal use" except if used after hours to contact a spouse when working overtime or in an emergency situation (TR 18, 20- 21, 36). These guidelines are not outlined in the meeting agenda, nor are they set forth in the Standard Practice, itself (EX 1; TR 71-72). The Grievant testified that he recalled no such specifics about cell phone use being addressed by Martinez (TR 78-79, 83-84). Martinez and Tison also testified that employees are not allowed to use their cell phones on non-work days, though this proscription is not set forth in the written policy and Martinez did not testify that he so advised employees in his policy review meetings (TR 21, 34-35, 42, 74; EX 1).

The other written policy governing use of telephones is contained in the Corporate Policy Handbook, which was mailed to employees on February 23, 1998, three days prior to the effective date of the Grievant's discharge. The record indicates the Grievant first received this policy after his termination (TR 91-92). Thus, this document is ineffective for the purpose of establishing advance notice to the Grievant. It is relevant, however, on the issue of what the Company considered

to be acceptable and unacceptable use of Company cell phones for personal phone at the time the Grievant's termination became effective. The pertinent portion of the policy states, as follows:

> Personal telephone calls: employees may make limited use of company telephones to contact family members or take care of personal matters. Any personal use should be occasional, not result in excessive charges to the company, and not interfere with normal work responsibilities. Individuals who abuse this privilege may have it revoked by their supervisor.
>
> (JX 2, p. 10)

Tison testified that a supervisor may not establish a policy that is inconsistent with the standard practice or corporate policy; but that a supervisor has discretion to define what constitutes "occasional" use (TR 74-76).

The 1993 Review Committee Decision in Case No. 1762 states, in part, "The local practice [Fresno Division] is clear, it is OK for employees who have cellular phones to make a few personal calls as needed as long as they are kept to a minimum. It is OK to use telephones as long as no costs are incurred for long distance charges" (JX 6).

The Telephone Calls:

The charges are based upon calls made in the time period from June 19 and October 18, 1997 (TR 52). The majority of outgoing calls made on the cellular telephone in question were to Company numbers. These were apparently work-related and were not relied on as grounds for discipline, though the Company generally asserts the Grievant was not authorized to utilize the cell phone once he became a fitter (TR 4, 33).

It is undisputed that the phone records indicate the Grievant utilized the phone to make and receive personal calls. Most such calls were made or received while he was at work, but some were placed when he was off duty. Specifically, three calls occurred on August 18 when he

was on floating holiday; and nine calls were on August 29, when he was sick. (TR 31, 48, 87, 90; EX 3; JX 2, pp. 14, 19, 25, 27). The Grievant did not remember the calls he apparently placed while he was off-duty, and had no explanation for them (TR 80, 86-87, 88; JX 2, p. 14). He testified that placing personal calls on the cell phone while not at work was not something he normally did (TR 88); and that he usually left the phone and battery charging at an inspector's desk in the office (TR 86, 89).

Approximately eleven (11) calls were placed to the Grievant's residence in the 18-week period under review (TR 29; JX 2). Martinez testified that he considered this to be "quite a few" (TR 29). There is no evidence that the personal calls placed by the Grievant resulted in long distance tolls, that message units is a concept applicable to cell phones, or that the cost of the personal calls was a significant consideration in the decision to terminate (TR 30-31, 40, 52-53, 70, 80). The Grievant did not believe that the personal calls he made resulted in any long distance charges to the Company, and he assumed that they cost the Company "practically nothing" (TR 81).

Other employees had access to the cell phone in question. One employee, P , was is shown in the billing records to have placed several personal calls (TR 17, 37, 40, 48, 51; EX 3). P was issued an Oral Reminder for his actions, which action was not grieved (TR 18, 37, 40, 65-66, 86; JX 2, p. 15). P had no other discipline at the time (TR 37).

The following tables give further details concerning the usage of the cellular telephone in the period June 19, 1997 to October 28, 1997 for outgoing calls:

DESCRIPTION -- TOTAL CALLS	NO.	COST
Calls to Company telephone numbers	109	N/A
Total Non-Company calls	88	N/A
Total outgoing calls	197	N/A
Total incoming calls	66	N/A
Grand Total (incoming and outgoing calls)	263	Total Cost $63.15

DETAIL RE OUTGOING NON-COMPANY CALLS	NO.	COST
Calls Attributed to Parsons	14	N/A
Unidentified calls[6]	36	N/A
On duty calls attributed to Grievant (approx)	27	$6.78
Calls made while off-duty	11	$2.61

(TR 27-28, 33, 38-39, 49-52; JX 2, pp. 19-20, 52, 56; JX 3)

The Union points out that the frequency of the Grievant's outgoing personal calls was approximately two per week (38 in a 19 week period); and that the cost to the Company of the Grievant's allegedly excessive personal calls was less than 60 cents a week. (TR 67, 68). Many of the calls cost 15 cents (TR 81; JX 2). Tison and Martinez testified they considered the frequency of the Grievant's personal calls to exceed "occasional" (TR 28-29, 32, 68–69, 71).

Others' Use of Cell Phones:

The Grievant testified that he was familiar with the practice of other employees in the Department concerning use of cell phones in the period of June through October 1997, and that

[6] Not established to be connected with or made by the Grievant (TR 51-52).

all made occasional personal telephone calls, whether on their or others' assigned cell phones (TR 79, 85-86). Martinez did not compare the frequency or cost of the Grievant's use of the cell phone for personal calls with the use of the other approximately dozen cell phones in the department (TR 28).

Several years before the Grievant's termination, a Fresno Division employee was terminated for making approximately $2,400 worth of personal calls on a Company cell phone. The discipline was reduced to a DML in the grievance process. (Review Committee Case No. 1762) (TR 53, 57-59, 64; JX 6) Other employees have been issued Oral Reminders or Written Reminders for misuse of Company telephones and cell phones (TR 64).

Other employees on DMLs who have committed offenses warranting a disciplinary step have been discharged, and the terminations have been upheld in arbitration (Arb. Case No. 167 -- Chvany; Arb. Case No. 215 -- Brand) and by the Review Committee (Case No. 2056-2057).

Prior Discipline:

There is no dispute that the Grievant was on an active DML at the time of the events outlined above. The discipline had been imposed in June 1997 for his role in the theft of a trailer hitch (TR 15, 35, 63; JX 2, p. 8). His length of service and past record were considered as mitigating factors in reaching the decision that a DML was the appropriate level of discipline for that prior offense (TR 63).

DML is the third and final step in the Positive Discipline Program. After a discussion with the supervisor, the employee is provided a workday with pay to decide if he or she wishes to remain employed. If the employee decides to continue employment, a commitment must be made to abide by all work standards and policies. If the employee fails to meet this commitment

during the 12-month active period of the DML, termination could result. (TR 62-63) The Positive Discipline guidelines provide for the Company to consider mitigating factors in determining whether to proceed with termination (JX 4; TR 75). The Grievant testified that he was aware that while on DML he was expected to abide by all Company policies (TR 81, 83).

Martinez gave the Grievant two coaching and counseling sessions since he was on active DML, one concerning the manner in which he called in to request vacation (TR 15-16, 65; JX 2, p. 8), the other concerning keeping the Company apprised of his therapy appointments (TR 16). While the Grievant recalled conversations with Martinez on these subjects, he testified that he did not know these discussions were deemed to be coaching and counseling sessions (TR 77-78, 82-83). The Company acknowledged that, absent the prior discipline summarized above, the Grievant would not have been terminated for his use of the Company cell phone (TR 6, 17, 65). He would have received a lesser form of discipline, such as an Oral Reminder (TR 17, 65).

POSITIONS OF THE PARTIES

The Company:

- The Company had just cause to terminate the Grievant and the decision of the Company should not be disturbed by the Arbitration Board.
- The rule violated by the Grievant was patently reasonable and the Grievant was adequately warned of the consequences of violating the rule.
- The Grievant no longer held a position that entitled him to use the cellular telephone. He used the phone in question for personal calls while at work and off-duty. This is not a proper business use of the cellular phone under the applicable policy.

⇨ The cost of such use is passed on to the Company and, ultimately its customers. The Company has a legitimate interest in prohibiting such unauthorized use. The Union's argument that the cost of the Grievant's calls was nominal misses the point. Even with the volume discount the Company receives, it could cost several hundred thousand dollars if employees were permitted to make personal calls.

⇨ There can be no dispute that the Grievant violated the Company policy on the use of cellular telephones. A full and fair investigation so established, including a review of the Grievant's time and attendance records, and the record of calls made to and from the phone at issue. The Grievant admitted making and receiving personal calls on the telephone, including after his shift ended and when he was on paid leave, vacation or holiday.

⇨ Calls made from the telephone include individuals with a personal relationship to the Grievant. His feigned amnesia about the calls on non-work days demonstrates he is aware that the conduct was in violation of Company policy.

⇨ The Grievant's claim that "everybody" used such phones for personal calls is not supported by other witnesses. There is no evidence that the Grievant was singled out for disparate treatment. Other employees have been disciplined for violating the cellular telephone policy. Other employees with long service have been terminated for other types of violations committed while at the DML step.

⇨ The Grievant was on a DML for a serious infraction at the time he violated the cellular phone policy. He had received two coaching and counseling sessions while on the DML. The only disciplinary step remaining in the Positive Discipline Program was termination.

The mitigating fact of his length of service was taken into consideration in assessing the earlier discipline and prior to terminating his employment.

⇨ Despite being warned that he must abide by all Company rules and policies while on DML, the Grievant chose to violate the phone policy. Prior arbitration awards involving these Parties show that other long-service employees' terminations have been sustained where they committed violations while on DML. (Arbitration Decisions in Cases 167, 215). A Pre-Review Committee decision in Case 2056 is also consistent with this result.

⇨ The Grievant's discharge was neither arbitrary nor unfair. There is no basis for overturning the Company's disciplinary decision. The grievance should be denied.

The Union:

⇨ The negotiated Positive Discipline guidelines require that the Company consider mitigating factors before making a decision to discharge. The failure to do so is subject to challenge in the grievance procedure.

⇨ Given the Grievant's 28 years of service and the negligible nature of the alleged violation, the Grievant should not have been terminated. At most, a coaching and counseling or revocation of his telephone privileges would be the appropriate response, consistent with the Corporate Policy implemented just prior to the Grievant's termination.

⇨ The policy concerning the use of cellular telephones is not as clearly articulated as the Company argues. The Standard Practice prohibits use of Company telephones resulting in long distance charges or extra message units.

⇨ The Corporate Policy in effect at the time of the Grievant's termination allows "limited use" of company telephones for personal reasons, as long as the use is occasional, does

not result in excessive charges, and does not interfere with work responsibilities. The record fails to show that the Grievant's use of the cellular phone violated this policy.

- ⇨ If the privilege is abused, the Corporate Policy calls for revocation of the privilege, not discipline.
- ⇨ The Grievant denies that his supervisor articulated a more stringent policy regarding cell phones, as Martinez claimed. The agenda of the meeting supports the Grievant's version of events. A supervisor may not establish a policy inconsistent with Company standard practice or corporate policy.
- ⇨ The policy or practice as described by Martinez is also contradicted by the precedent-level grievance decision by the Parties in a prior case involving misuse of a cellular phone.
- ⇨ The Company's argument that the Grievant should not have had the cell phone at all since being reassigned from the Inspector position is without merit. Martinez requested the return of his pager, but never told him not to use the cell phone. While Martinez may have thought the Grievant's continued use of the phone was clearly improper, this was never communicated to the Grievant.
- ⇨ The Grievant made no secret that he used the phone and, in fact, was listed on a Department phone list as late as November 1997. Instead of looking at that list, or simply calling the phone, the Company undertook an unnecessary investigation.
- ⇨ When the Grievant was confronted, he immediately returned the phone. He never attempted to hide the fact that he had it. He openly charged the phone on the inspector's desk and regularly left it in a desk drawer in the office.

- ⇨ The Grievant readily admitted to the Security Investigator that he had made some personal calls. The record shows that only a relatively small number of calls attributable to the Grievant were personal, and the cost to the Company was nominal.
- ⇨ The Grievant testified without contradiction that all employees in his Department use cell phones for personal calls.
- ⇨ The Grievant's use of the phone did not violate Standard Practice 735.6-1 because it resulted in neither long distance tolls nor extra message units. Nor did it violate the Corporate Policy Handbook, because the use was limited, occasional, did not result in excessive charges, and did not interfere with his work duties.
- ⇨ Much emphasis was placed on the fact that the Grievant made and received a total of 11 personal calls on two non-workdays. These calls violated no Company rule. The Standard Practice does not prohibit use of a cell phone on non-workdays, nor is this prohibited by the Corporate Policy or the Parties' agreement in Review Case No. 1762. Even if these calls should not have been made, they are the only ones that are arguably outside the policy. They cost the Company $2.63.
- ⇨ At most, the Company established a trivial transgression, which clearly fails to justify the termination of an employee with 28 years of service.

DISCUSSION

Upon detailed review of the record as a whole, the Board of Arbitration does not find just cause for the termination of the Grievant's employment.

First, the evidence fails to show that the Grievant had adequate notice that his retention and use of the cell phone once he became a fitter was unauthorized. Martinez never requested the phone or told him he no longer had permission to use it. The Grievant openly utilized the phone while at work, charged it at the office, and was listed on the department directory. He frequently used the phone for Company related calls, as shown by the phone records.

Second, the record fails to show that the nature of Grievant's proven use of the cell phone while at work to receive and to make personal telephone calls constituted a violation of the cited Standard Practice, the Corporate Policy in effect at the time the Grievant was terminated, or the local practice concerning the use of cell phones.

It is significant to note that neither of the written policies in effect at the time the Grievant was terminated prohibit employee use of Company cell phones for personal calls, nor do they contain the more stringent standards of use that Martinez asserts he communicated to those under his supervision. The summary of Standard Practice 735.6-1, distributed to employees, proscribes "using company telephones for personal business which results in long distance tolls or extra message units." As found above, the Grievant's cell phone use was not shown to have breached these conditions.

The Corporate Policy also does not prohibit use of cell phones for personal calls, but requires that they be limited, occasional, not result in excessive charges, and not interfere with work duties. The use of the cell phone in this case may reasonably be characterized as occasional and limited. While the total numbers, at first glance and without reference to time frame, may not appear to be occasional, when analyzed on the basis of weekly or monthly usage, the conclusion changes. Two or three outgoing personal calls a week, at a total cost of 60 cents or

less a week, does not demonstrate the type of excessive usage or cost that a reasonable person should know is inappropriate, as contrasted with the facts in Review Committee File No. 1762, for example. There was no evidence to suggest his work performance was adversely affected. In short, the Grievant's Company cell phone usage while at work was not proven to have exceeded the limitations set forth in the Corporate Policy.

While the Company contends that the Corporate Policy is irrelevant because it was issued after the Grievant made the calls in question, it affirms the practice that was in place as early as 1993. The Review Committee found in Case No. 1762 that it was acceptable under the established practice for employees to make a few personal calls as long as the usage was not excessive in number or cost. The Grievant's phone usage was not shown to be inconsistent with this mutually recognized practice. The Employer relies upon Martinez's oral communication of a more detailed policy to the employees under his supervision to justify a conclusion that the Grievant's cell phone usage was improper. The Grievant recalls no such discussion. The Company bears the burden of proving notice of this policy. No corroboration of Martinez's testimony on this point was offered. The documentation in evidence concerning the meeting contains no support for Martinez's testimony, and no corroborating testimony was presented from any others present at the meeting. Moreover, Martinez's unwritten guidelines concerning cell phone use are found to be more stringent than the written policies in evidence, and more stringent that the actual practices as described in the Grievant's unrebutted testimony and the Review Committee Decision in Case No. 1762. As Tison testified, a supervisor may not impose a policy that is inconsistent with Corporate Policy.

The remaining but more troublesome question is the Grievant's use of the cell phone while off-duty. While this usage is not expressly proscribed by written policies in evidence, such usage is something that an employee is likely to know would be unacceptable. Even the Grievant acknowledged that he would not normally use the cell phone in this manner.

On the other hand, the evidence shows the amount of off-duty use by the Grievant was *de minimis*, particularly if viewed in isolation as justification to terminate the employment of an employee with 28 years of service. A total of eleven calls made on two dates in a 19-week period, amounting to a grand total of less than $3.00, does not spell discharge even given the Grievant's disciplinary status at the time.

Section III.B of the Positive Discipline Guidelines requires the Employer to weigh mitigation factors, such as length of service and the nature and seriousness of the violation, in determining whether discharge is appropriate for a violation committed while on active DML. Reasonable consideration of those factors in the instant case compels the conclusion that just cause for termination is absent. Given the nature of the steps of the Positive Discipline Guidelines, a basis for denying the Grievant back pay has not be established. Accordingly, the following decision is rendered:

DECISION

1. The Grievant, . C was not terminated for just cause. The grievance is granted.

2. As a remedy, Mr. C shall forthwith be reinstated to his former position with full seniority, back pay and benefits, payable in the amounts and manner prescribed by the Labor

Agreement. The award of back pay and benefits (a) shall run from the effective date of his termination to the date of his reinstatement (or bona fide offer of reinstatement, if offer is refused); (b) shall be less any outside earnings, taxes and other appropriate deductions; and (c) shall be subject to the usual duty to mitigate damages.

3. Calculation of the exact amounts due Mr. C pursuant to Paragraph 2, above, is hereby remanded to Parties pursuant to their stipulation reached at the hearing (TR 8). The Board of Arbitration retains jurisdiction over implementation of the remedy in the event a dispute arises that the Parties are unable to resolve.

Barbara Chrosy Neutral Board Member	Concur	~~Dissent~~	7/8/99 Date
Roger Stalcup Union Board Member	Concur	Dissent	7/14/99 Date
James A. J... Union Board Member	Concur	Dissent	7-16-99 Date
Bruce A. Nixon Company Board Member	Concur	Dissent	7/20/99 Date
Margaret Ahrt Company Board Member	Concur	Dissent	7/20/99 Date