STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES' ASSOCIATION LABOR

ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTIONS,
Ohio State Reformatory (Mansfield, Ohio)

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
Local 11, AFSCME, AFL-CIO

GRIEVANCE: Brian K. McCauley (Discharge)

CASE NUMBER: G-86-224

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: February 20, 1987

APPEARANCES

For the Union	
Brian K. McCauley	Grievant
Dennis J. Cowell	Union Steward
Brian Ensminger	Corrections Officer
Daniel S. Smith	General Counsel OCSEA
John Porter	Counsel OCSEA
For the Employer	
Jerry L. Wente	Deputy Superintendent of Custody
Wallace L. Croskey	Personnel Officer
Richard Hall	Management Labor Representative
William Scott Lavelle	Assistant Attorney General

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between The State of Ohio, Ohio Department of Rehabilitation and Correction, Ohio State

Reformatory (Mansfield, Ohio), hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on January 20, 1987 at the office of the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO. The parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both parties indicated that they would not submit briefs.

ISSUE

Did the Employer have just cause to discharge the Grievant?

PERTINENT CONTRACT PROVISIONS

ARTICLE 24 - DISCIPLINE

Section 24.01 - Standard

"Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse." (Joint Exhibit 1, pages 34-35)

Section 24.02 - Progressive Discipline

"The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. Verbal reprimand (with appropriate notation in employee's file)
B. Written reprimand;
C. Suspension;
D. Termination.

"Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

"Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process." (Joint Exhibit 1, page 35)

* * * *

Section 24.04 - Pre-Discipline

"An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

"An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

"At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges." (Joint Exhibit 1, pages 35-36)

ARTICLE 29 - SICK LEAVE

Section 29.01 - Accrual

"Employees will earn eighty (80) hours of sick leave per year credited as of the pay period including December 1. Permanent part-time employees on pay status for less than a full year and full-time employees hired after the December 1 pay period will accrue sick leave prorated at three and one-tenth (3.1) hours per each eighty (80) hours of completed service. Sick leave shall be charged when used at one hundred percent ((100%) of regular rate of pay. Upon the effective date of this Agreement, the additional sick leave days will be prorated.

"Sick leave shall be granted to employees who are unable to work because of illness or injury of the employee or a member of his/her

immediate family or because of medical appointments or other ongoing treatment. The definition of 'immediate family' for purposes of this Article shall be: spouse, significant other who resides with the employee, child, grandchild, parents, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparents, brother, sister, brother-in-law, sister-in-law or legal guardian or other person who stands in place of a parent.

"A period of up to ten (10) working days of sick leave will be allowed for parenting during the postnatal period or following an adoption.

"The amount of sick leave charged against an employee's accrual shall be the amount used, rounded to the nearest one half (1/2) hour. Employees shall be paid for sick leave used at their assigned step including longevity. After employees have used all of their accrued sick leave, they may choose to use accrued vacation, compensatory time or personal days or may be granted leave without pay.

Section 29.02 - Notification

"When an employee is sick and unable to report for work, he/she will notify his/her immediate supervisor or designee no later than one half (1/2) hour after starting time, unless circumstances preclude this notification. The Employer may request that a physician's statement be submitted within a reasonable period of time. In institutional agencies or in agencies where staffing requires advance notice, the call must be made at least ninety (90) minutes prior to the start of the shift or in accordance with current practice, whichever period is less.

"If sick leave continues past the first day, the employee will notify his/her supervisor or designee every day unless prior notification was given of the number of days off."

Joint Exhibit 1, pages 47-48

CASE HISTORY

The Ohio State Reformatory is located in Mansfield, Ohio. The facility is a four (4) shift operation, houses twenty-eight hundred (2800) inmates, and employs two-hundred-seventy (270) corrections officers. Brian K. McCauley, the Grievant, has been employed at the facility as a corrections officer since August, 1982.

Prior to July 1, 1986, the effective date of the collective bargaining agreement (Joint Exhibit 1) between the parties, the Grievant was disciplined a number of times for violating the following Sick Leave Policy:

ORDER NO. P-100.01
EFFECTIVE DATE 07-08-84

"TO: Ohio State Reformatory Employees

"FROM: Eric G. Dahlberg
Superintendent

"SUBJECT: SICK LEAVE POLICY

"DATE: June 18, 1984

"All employees unable to report for duty at their scheduled time because of illness must notify the Control Room (419-526-2000) of that fact at least one hour prior to their scheduled starting time. Control will then notify the Personnel Office and the employee's supervisor, on the forms provided.

"Failure to comply with this procedure will result in the employee being carried absent without leave (A.W.O.L.).

"Any time sick leave is taken for a medical appointment, verification (appointment notice, bill or doctor's statement) must accompany the request for leave form.

"All requests for sick leave in excess of three (3) calendar days must also be accompanied by a physician's statement.

"Sick leave is not intended to be used as a supplement for personal leave or vacation. Abuse of sick leave will result in disciplinary action. Sick leave must be used in increments of hours only.

"Employees who call in sick and have exhausted their sick leave balance, will be carried absent without leave (A.W.O.L.) and subject to disciplinary action. The first instance may result in a verbal or written reprimand. Repeated absences without leave may result in further disciplinary action up to and including removal.

"Leave without pay (L.W.O.P.) will be granted only in exceptional circumstances (e.g., ill employees exhausting available sick leave and awaiting disability leave) and then only with the approval of the appropriate Institution Deputy Superintendent or Superintendent.

"Under exceptional circumstances, supervisors may approve vacation, personal leave or compensatory time for employees who have exhausted their sick leave. Supervisors however, must submit in writing justification for their action. This justification must appear in the remarks section of the "Request for Leave Form" (ADM-4258).

"Supervisors should be fair and consistent with ALL employees when approving leaves under exceptional circumstances.

"This policy shall supersede all previous Memos and Orders regarding sick leave usage.

(signed)
Eric G. Dahlberg
Superintendent"

Employer Exhibit 13

On August 9, 1985, the Grievant was issued a written reprimand (Employer Exhibit 1) for violating the above mentioned policy and for his neglect in submitting the proper Request for Leave forms to cover his absences. Moreover, the Grievant was unable to charge one (1) of his absences because of his negative sick leave balance. The Employer also introduced evidence which allegedly indicated that the Grievant was verbally reprimanded for similar offenses on March 5, 1986 (Employer Exhibit 12).

On April 25, 1986, Jerry Wente, Deputy Superintendent, conducted a disciplinary interview that was requested by the Grievant's immediate supervisor, Captain Bryant. The interview consisted of an investigation dealing with the Grievant's failure to submit nine (9) leave requests for the period March 15, 1986 through April 23, 1986. At this meeting, the Grievant maintained that he had submitted Request for Leave forms for all the dates contained in the complaint other than April 5, 1986 and April 23, 1986. After reviewing the evidence, Wente recommended a three (3) day suspension for neglect of duty, that is, absent without leave (Employer Exhibit 12).

In response to this recommendation, Richard Hall, Administrative Assistant for Employee Relations, conducted a pre-disciplinary hearing on May 8, 1986. The Grievant responded to the allegations by noting that he had not directly submitted the requests to his immediate supervisor, but that he deposited the forms on his desk. The Grievant suggested that the forms might have mysteriously disappeared because an inmate working for Bryant could have stolen the forms. Hall testified that he reviewed the following issues with the Grievant during the hearing: the serious nature of the offense, the possible negative consequences associated with the Grievant's failure to properly submit Request for Leave forms, and the proper procedure that should have been followed by the Grievant.

Although Hall felt that the Grievant's explanation was a bit farfetched, he gave the Grievant the benefit-of-the-doubt by conditionally reinstating the Grievant. The conditions were contained in the following letter which was dated May 21, 1986:

"TO: Brian McCauley
Correction Officer 2

"FROM: Richard G. Hall
Administrative Assistant for Employee Relations

"SUBJECT: Disciplinary Hearing, May 8, 1986

"As a result of the evidence presented at your disciplinary hearing on May 8, 1986 you are ordered to do the following:

"1. You will submit whatever leave requests are necessary to cover the nine (9) days you were absent during the period March 15, 1986 thru April 23, 1986. You will submit these leave requests as soon as possible directly to the personnel office.

"2. Henceforth, you are ordered to personally hand your leave request to the supervisor who would normally approve such requests.

"This means that in the future you will be held responsible for insuring that your leave requests reaches your supervisor. This letter and the orders contained herein will be the final action taken with regard to the disciplinary charges.

FOR THE SUPERINTENDENT

(signed)
Richard G. Hall
Administrative Assistant for
Employee Relations"

Employer Exhibit 4

It should be noted that the above document was composed by Hall after a consultation took place with his immediate superior.

As a consequence of the above letter, the Grievant submitted a series of back-dated leave request forms (Union Exhibits 1A-E) on June 4, 1986. These forms referred to the days associated with his original reprimand. Also, the Employer paid the Grievant for the sixty-four (64) hours he had lost as a result of the incident by allowing him an opportunity to apply his personal and vacation leave pool.

Bryant submitted three (3) additional Request for Disciplinary Action forms to Wente during the months of June and July, 1986. All of the requests dealt with the Grievant's alleged failure to submit Request for Leave papers. The first request (Employer Exhibit 8) was dated June 6, 1986 and included the following dates: May 22, 1986, May 24, 1986, May 28, 1986, May 31, 1986, and June 1, 1986. The Grievant was purportedly notified of the above request on June 6, 1986. The second request (Employer Exhibit 9) was dated June 27, 1986 and the following dates were referenced by Bryant: June 18, 1986, June 19, 1986, June 21, 1986, June 22, 1986, and June 25, 1986. Bryant noted that the Grievant was informed of this report on June 27, 1986. The last request was dated July 11, 1986 and included the following dates: June 27, 1986, June 28, 1986, June 29, 1986, July 2, 1986, July 3, 1986, July 9, 1986, and July 10, 1986. The request indicates that Bryant notified the Grievant of his action on July 11, 1986.

On July 11, 1986, Wente held an investigatory interview with the Grievant to discuss the above mentioned disciplinary requests. It should be noted that Bryant also participated in this interview as well as the Grievant's Union representative. Wente testified that the Grievant claimed that he had placed the Leave Request Forms on Bryant's desk. This contention was allegedly challenged by Bryant because he maintained that he did not receive the forms. Wente recommended a five (5) day suspension for the above violations and submitted the following Recommendation For Disciplinary Action report in support of his findings.

"Findings and Recommendations of Deputy Superintendent:

"A meeting was held 7-11-86 with C/O B. McCauley concerning three separate requests for disciplinary action which I have received concerning his actions. Captain Bryant was present at this meeting.

"In a letter dated 5-21-86 from Richard Hall, C/O McCauley was ordered to submit leave requests directly to his supervisor. He has not done so. C/O McCauley was absent without leave on the following dates and failed to submit leave papers for these dates: 5-22, 5-24, 5-31, 6-1, 6-18, 6-19, 6-21, 6-22, 6-25, 6-27, 6-28, 6-29, 7-2, 7-3, 7-9, and 7-10-86. Since 4-25-86 C/O McCauley has lessed 141.7 hours.

"C/O McCauley has no sick leave, no personal leave, and 24.2 hours of vacation. Therefore, he is A.W.O.L. for the above dates.

"Several attempts have been made to discuss this situation with C/O McCauley, but due to his continued absences any meeting has been delayed to this date. At this time I am recommending that C/O McCauley be given a five (5) day suspension for Neglect of Duty in being A.W.O.L.

(signed)
DEPUTY SUPERINTENDENT'S SIGNATURE
Jerry Wente

Union Exhibit 3

On July 16, 1986, Eric G. Dahlberg, Superintendent, attempted to inform the Grievant of a pre-disciplinary hearing that was to be held in Hall's office on July 23, 1986 (Employer Exhibit 5). The Grievant was not at work on the above date; as a result, the Employer reissued a duplicate copy (Employer Exhibit 6) and sent the document via certified mail to the Grievant's home (Union Exhibit 2). Employer witnesses testified that the conference did not take place as scheduled because the Grievant failed to attend the meeting.

Even though additional pre-disciplinary meetings were not scheduled, Hall prepared a Disciplinary Summary/Recommendation Sheet (Employer Exhibit 7) for the Superintendent. The following Finding of Fact and Comparable Discipline Practice statements were contained in the document:

* * * *

"FINDING OF FACT:
There exists substantial evidence that officer McCauley was absent without leave on May 22, 24, 31, June 1, 18, 19, 21, 22, 23, 27, 28, 29 and July 2, 3, 9, 10, 16, 17, 23 & 24, 1986. In addition he has failed to submit leave requests for these days as ordered and he does not have the accrued leave to account for the time off.

"It should be noted that the reason that all of these AWOLS are being handled at one time is because officer McCauley has called off numerous times that has resulted in the delay of processing this disciplinary action."

* * * *

"COMPARABLE DISCIPLINE PRACTICE:
Due to the accumulative nature of his attendance problems, his demonstrated lack of concern for his duties & the operation of the institution, a suspension of at least three days up to & including removal is clearly warranted."

(signed by Hall) 7-25-86
Administrative Hearing Officer Date

Employer Exhibit 7

The Superintendent reviewed Hall's findings and recommended removal of the Grievant. He based his decision on the Grievant's refusal to submit leave applications, and his failure to report for work or attend hearings (Employer Exhibit 7).

Richard P. Seiter, the Appointing Authority, and the Superintendent jointly issued the following Order of Removal on July 31, 1986:

"Mr. Brian K. McCauley:

"This will notify you that you are hereby removed from the position of Correction Officer 2 effective August 3, 1986.

"The reason for this action is that you have been guilty of NEGLECT OF DUTY in the following particulars, to wit: On May 22, 24, 31, June 1, 18, 19, 21, 22, 25, 27, 28, 29, and July 2, 3, 9, 10, 16, 17, 23, 24, 1986 you reported off duty stating you were sick or having personal problems. Since you had exhausted all of your sick leave and personal leave you were listed on Ohio State Reformatory payroll records as being absent without leave, A.W.O.L. this is a violation of institution policy and is neglect of duty on your part. In addition to being A.W.O.L. on the above dates you failed to submit leave request to your supervisor, as required in a letter sent to you on May 21, 1986. Such behavior is neglect of duty. Accordingly you are hereby removed from your position as a correction officer.

"Signed at Columbus, Ohio July 31 (Date), 1986

"Section 124.34 of the Revised Code, and instruction to the employee, are on the reverse side of this form.

(signed Richard P. Seiter)
Actual Signature of Appointing Authority

Richard P. Seiter, Director
Type Name and Title of Appoint Authority

(signed)
Eric G. Dahlberg,
Superintendent Ohio State Reformatory
Department of Rehabilitation & Correction"

Joint Exhibit 2A

On August 7, 1986, the Grievant filed a protest in response to the above removal order. He alleged that the discipline was excessive and asked for immediate reinstatement with back pay (Joint Exhibit 2B).

The parties were unable to resolve the dispute at the various stages of the grievance procedure (Joint Exhibits 2C-F).

The grievance is properly before this Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that by a preponderance of the evidence the Grievant failed to submit leave slips in accordance with established policy (Employer Exhibit 13), and the requirements contained in the conditional reinstatement order (Employer Exhibit 4).

The Employer maintained that an established procedure existed for turning in sick leave slips. Wallace Croskey, a personnel officer, testified that the Request for Leave procedure involved a series of steps. Specifically, an employee was required to submit his requests to his supervisor for proper consideration. Once the supervisor made a determination, he would submit the document to a deputy or an acting deputy for additional review purposes. The final decision would then be transmitted to the personnel office for posting onto an employee's master payroll document. It should be noted that Croskey admitted that the actual transmittal process did not always involve the individuals taking part in the decisionmaking process. He noted that documents were often transferred from office-to-office via couriers. The couriers were often corrections officers or inmates.

Croskey maintained that his personnel records did not indicate that the Grievant had submitted Request For Leave slips for the dates enumerated in the Removal Order (Joint Exhibit 2A). He alleged, moreover, that the established

procedure had worked for numerous other employees without any major complication.

The Employer argued that the Grievant failed to provide any evidence supporting his claim that he did in fact fill out the forms and deliver them to Captain Bryant. The Employer maintained that the Grievant's assertion was questionable in light of the Employer's positive history with the existing procedure. Testimony provided by D. Cowell, the Grievant's Union Steward, and Brian Ensminger, the Grievant's friend and co-worker, indicated that the Grievant should have known about the proper delivery procedure because both had discussed the necessity for documentation with the Grievant.

The Employer claimed that the Grievant's version of the events should be discounted by the Arbitrator because it lacked credibility. The Employer maintained that the Grievant's testimony contained the following internal inconsistencies and contradictions.

First, the Employer alleged that the Grievant changed his testimony regarding the information conveyed to him at the May 8, 1986, meeting by R. Hall, a labor representative for the Employer. The Employer claimed that the Grievant initially stated that the issue of hand delivering leave slips to Bryant was never proffered by Hall. The Employer maintained, however, that subsequent testimony provided by the Grievant clearly indicated that Hall had informed the Grievant on May 8, 1986, that future documents had to be personally transmitted by the Grievant to Bryant.

Second, a number of inconsistencies dealing with the Grievant's submission of documents dealing with doctor visitations were also discussed by the Employer. The Employer alleged that the Grievant went to his physician a number of times, on or about his removal date, to obtain identical information (Union Exhibits 5 and 6). The Employer, moreover, contended that the Grievant's remarks concerning a listing of dates on a visitation statement

(Union Exhibit 4) should be given little weight. The Employer argued that the Grievant's comments dealt with dates that were not in the Grievant's possession upon his initial reception of the document. The Employer also charged that the material contained in these documents (Union Exhibits 4, 5 and 6) was superfluous to the present proceeding because it dealt with excuses surrounding the Grievant's absence record. The Employer emphasized that the Removal Order (Joint Exhibit 2A) dealt with the Grievant's alleged non-submission of leave slips, and that it did not concern the reasons for the Grievant's absenteeism record. In addition, the Employer argued that these documents, and the material contained therein, were hearsay evidence. The Employer stated that it did not have an opportunity to cross-examine the physician in terms of the veracity of the documents and their contents.

Third, the Employer claimed that the Grievant altered his testimony regarding the attachment of doctors slips to the series of Request For Leave slips submitted on June 4, 1986 (Union Exhibits 1A-E). The Employer contended that the Grievant originally testified that he had attached doctors statements to these slips (Union Exhibits 1A-E) but that they had also disappeared. The Grievant purportedly retracted this statement in a subsequent portion of his testimony.

Fourth, the Employer maintained that the Grievant's actions clearly evidenced that he had received the May 21, 1986 memorandum, and understood its contents (Employer Exhibit 4). The Employer alluded to the conflicting testimony provided by the Grievant and Hall to support this premise. The Employer argued that the Grievant's actions controverted his contention that he neither received the May 21, 1986, directive (Employer Exhibit 4), nor was he informed of its contents by Hall. The Employer noted that the Grievant complied with one (1) of the two (2) provisions contained in the directive on or about June 4, 1986. That is, the Grievant acknowledged that he turned in

the back-dated Request For Leave slips (Union Exhibit 1A-E). In the Employer's opinion, this behavior bolstered Hall's testimony that he communicated and/or delivered the directive on or about May 21, 1986. The Employer argued, moreover, that the Grievant's testimony that he only met with Employer representatives on May 8, 1986, and July 11, 1986, further bolstered its argument. This acknowledgment indicated to the Employer that some form of notice was provided by the Employer prior to July 4, 1986. Thus, in the Employer's opinion, it was very likely that Hall had personally communicated the conditions associated with the reinstatement, and that he hand delivered the directive to the Grievant.

Last, the Employer argued that the Grievant's credibility was further reduced because of his direct avoidance of the pre-disciplinary hearing scheduled by Wente for July 23, 1986 (Employer Exhibits 5 and 6). The Employer maintained that the Grievant should have attempted to contact an Employer representative upon receiving the certified letter (Employer Exhibit 6) notifying the Grievant of the meeting. The Employer noted that a reasonable person, confronted with allegations similar to those discussed at a previous conference (Employer Exhibit 4), should have engaged in some form of purposeful activity, rather than waiting to be removed or disciplined.

The Employer argued that it had satisfied the just cause requirement contained in the collective bargaining agreement's discipline article (see page 2 of this Award for Article 24 - Discipline, Section 24.01 - Standard), even though the principle of progressive discipline (see pages 2 and 3 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline) had not been fully complied with by the Employer. The Employer maintained that the Grievant's conduct prevented the Employer from effectuating its progressive discipline responsibilities. More specifically, Wente testified that he had attempted to schedule several meetings between June 6, 1986, and

June 27, 1986. He claimed that on more than one occasion meetings had to be rescheduled because the Grievant was absent on the date of the meeting. Wente also alleged that each absence generated a subsequent request for a disciplinary hearing, because the Grievant's behavior represented a continuing violation of the leave slip policy (Employer Exhibit 13). The Employer claimed that the Grievant's non-compliance with the Employer's July 23, 1986 meeting request (Employer Exhibits 5 and 6) evidenced the type of behavior which the Grievant engaged in prior to his removal.

The Employer also alleged that its ability to adhere to its progressive discipline responsibilities (see pages 2 and 3 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline) prior to the effective date of the Agreement (Joint Exhibit 1) was reduced because of Section 124-03-05 of the Ohio Administrative Code. More specifically, the Merger and Bar Rule required the appointing authority to merge any subsequent discipline into an existing order, or potentially lose the opportunity once an existing order was signed. The Employer argued that, if it failed to abide by this section of the Ohio Administrative Code, it would have been forced to re-initiate the process. The Employer claimed that the existence of this rule inhibited the Employer's disciplinary discretion because the continuing nature of the Grievant's activities could have prevented the Employer from disciplining the Grievant for future acts of like misconduct.

In the opinion of the Employer, the Grievant's conduct was so abhorrent that coupling a directive with a suspension notice would have defied logic. The Employer maintained that the Grievant repeatedly engaged in similar activity after being told of the possible negative consequences associated with this behavior. The Employer claimed that as late as July 11, 1986, the Grievant was aware of the Employer's expectations regarding the submission of Leave Request forms. The Employer emphasized that the Grievant's own

testimony supported this allegation, and yet he failed to comply with the Employer's directives.

The Employer maintained that Wente's recommendation for a five (5) day suspension (Union Exhibit 3) had no binding effect. The Employer noted that his recommendation was one step within the decisionmaking process, and that the superintendent, and ultimately, the Appointing Authority reviewed the matter and determined that removal was the appropriate penalty. The Employer also emphasized that Wente's recommendation (Union Exhibit 3) was based on the facts that he had gathered up to July 11, 1986. As a consequence, Wente could not have known that the conference he had with the Grievant would not modify his derelict behavior.

The Employer claimed that it was standing by the Removal Order (Joint Exhibit 2A) as written. The Employer maintained that it was not attempting to broaden the scope of its charges by introducing evidence that dealt with alleged activities engaged in by the Grievant beyond July 24, 1986. In a like fashion, the Employer claimed that the evidence dealing with the Grievant's failure to properly call in was provided to underscore the totality of the Grievant's negligent behavior. The Employer, moreover, stated that it had introduced some of this evidence in response to specific Union queries regarding the Grievant's work record.

The Employer emphasized that their sick leave policies (Employer Exhibit 13, see pages 3 and 4 of this Award for Article 29 - Sick Leave, Section 29.01 - Accrual and 29.02 - Notification) were very important because of their business necessity ramifications. Wente testified that when employees failed to report to work they placed a heavy burden on the facility's operational requirements. He noted that such a condition necessitated excessive overtime and often resulted in the partial shutdown of particular posts.

Finally, the Employer argued that the above evidence and testimony clearly demonstrated that the Grievant did not warrant an additional chance.

Position of the Union

It is the position of the Union that the Grievant did submit leave slips in an appropriate manner. The Union, moreover, argued that the Employer did not have just cause to discharge or remove the Grievant.

For a number of reasons, the Union claimed that by a preponderance of the evidence the Grievant did properly submit sick leave forms. First, the Union alleged that the Employer's allegations were deficient because it failed to properly rebut the Grievant's version of the events. The Union claimed that Bryant's failure to testify at the hearing prevented the Employer from establishing that he did not receive the Grievant's Request For Leave slips. The Union also noted that the Employer failed to offer a reason for Bryant's absence other than his retirement status.

Second, the Union contended that testimony provided by a number of witnesses supported the Grievant's claim that he had delivered the documents, but that they were lost, misplaced, or stolen. The Union emphasized that Request For Leave slips were often transmitted for approval purposes by couriers, and that these couriers were often inmates. Two (2) Union members reinforced the Grievant's proposition. Cowell testified that as a Union official he had submitted grievances alleging problems with the Employer losing Request For Leave forms. In addition, Ensminger claimed that Bryant had lost his Request For Leave form which prevented him from exercising his vacation request. The Union stated that further support was provided by Croskey when he admitted that procedural defects had come to his attention on several occasions.

The Union challenged the Employer's claim that progressive discipline was not effectuated because of the Grievant's alleged avoidance behavior. The Union maintained that this claim was unjustified because management representatives never attempted to directly contact the Grievant. Testimony provided at the hearing indicated to the Union that communication for upcoming disciplinary conferences was transmitted via documents attached to the Grievant's time card. The Union also emphasized that the Employer's allegations were based on Wente's vague recollections rather than specific documented evidence. The Union argued that Wente could not recall the dates associated with the meetings he attempted to schedule, and the frequency of his attempts. The Union alleged that the Employer's payroll records (Employer Exhibit 1) clearly indicated that the Employer did not engage in any serious effort to contact the Grievant. Specifically, Wente testified that the Employer initially attempted to contact the Grievant on or about June 6, 1986. The Union noted that the personnel records (Employer Exhibit 1) evidenced that the Grievant was working for nine (9) days subsequent to this initial attempt. In the Union's opinion, the Employer had an opportunity to confer with the Grievant while he was working; and that its failure to contact the Grievant during this time period limited its progressive discipline argument.

The Union contended that the Employer's lack of diligence reduced its argument that it was concerned with providing the Grievant with a fair hearing. The Union maintained that the Employer's lack of concern was clearly evidenced by the actions engaged in by Hall on July 25, 1986 (Employer Exhibit 7), and the subsequent issuance of the Removal Order (Joint Exhibit 2A). The Union argued that both of these events were undertaken without the requisite pre-disciplinary conference (see page 3 of this Award for Article 24 - Discipline, Section 24.04 - Pre-Discipline), and thus the Grievant was never provided with an opportunity to counter the Employer's allegations.

The Union argued that the Employer's Merger and Bar (Ohio Administrative Code, Section 124-03-05) hypothesis was also unconvincing. The Union noted that prior to July 1, 1986, the designated Appointing Authority was Eric G. Dahlberg, the Superintendent of the Ohio State Reformatory. The Union argued that the potential delays discussed by the Employer were relatively meaningless. More specifically, the Union maintained that Dahlberg, Wente, and Hall were housed in the same facility, and that the Central Office was not involved in the disciplinary process. Thus, in the Union's opinion, the procedural maladies discussed by the Employer were exaggerated.

The Union contended that the penalty assessed by the Employer was too severe in light of the five (5) day suspension recommended by Wente on July 11, 1986 (Union Exhibit 3). The Union alleged that Wente's recommendation was based upon the Grievant's work-related history prior to July 11, 1986. The Union maintained that Wente supported the level of the penalty by remarking that it was commensurate with the discipline he had assessed in similar situations.

In the Union's opinion, Wente's testimony raises a great deal of doubt about the propriety of the Employer's decision to increase the penalty. The Union claimed that the removal decision was based upon four (4) additional violations (July 16, 1986, July 17, 1986, July 23, 1986 and July 24, 1986) which were not reviewed by the Employer as of July 11, 1986. The Union argued that these additional incidents did not call for the enhancement of the penalty to a removal status. The Union contended that if the Employer felt that these additional incidents warranted a more severe penalty, then the Employer should have abided by the progressive discipline language contained in the Agreement (see pages 3 and 4 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline).

The Union claimed that the Grievant's testimony was highly credible, while the testimony provided by the Employer's witnesses was suspect. The Union alleged that the Grievant's testimony was consistent throughout the hearing even though the questions that were asked were often vague and lacked specificity. With respect to the testimony provided by the Employer's witnesses, the Union suggested that their recollections were highly selective. That is, they seemed to recall what they had told the Grievant, but failed to recall the Grievant's responses to their allegations.

The Union claimed that several factors mitigated against the removal of the Grievant. The first factor dealt with the Grievant's high blood pressure problems. The Union alleged that during the period in question the Grievant was experiencing these problems because the proper medication had not been determined by his physician. In support of this premise, the Union introduced several statements documenting the Grievant's office visits (Union Exhibits 4, 7, 8, 9); two (2) documents dealing with the Grievant's return-to-work status (Union Exhibits 5 and 6); and other Explanation of Benefits forms (Union Exhibits 10B-H). The Union maintained that even though these documents represented a form of hearsay evidence, the variety of the documents strongly reinforced the Grievant's reasons for being absent. The Union claimed that Ensminger's testimony concerning the Grievant's physical condition also bolstered the contention that the Grievant was extremely ill.

The second factor concerned the Grievant's disciplinary record. The Union argued that the Grievant's previous disciplinary record was limited to similar types of leave slip offenses (Employer Exhibit 12). The Union contended that since the Grievant's record was void of other violations, the removal decision was too severe.

The Union argued that it was manifestly unfair for the Employer to introduce allegations of neglect of duty which dealt with issues that were not

contained in the Removal Order (Joint Exhibit 2A). The Union referenced the Employer's allegations dealing with call-in requirements and other leave request incidents. The Union maintained that the Grievant was not given an opportunity to address these issues at a pre-disciplinary hearing. As a consequence, the Union urged the Arbitrator to limit the scope of his inquiry to the specific allegations contained in the Removal Order (Joint Exhibit 2A).

For the reasons cited above, the Union argued that the Employer failed to support its just cause responsibilities, and thus, its Removal Order (Joint Exhibit 2A) was unfounded. The Union also argued that at a minimum the Removal Order (Joint Exhibit 2A) should be disaffirmed by the Arbitrator, and a reduced penalty should be assessed.

THE OPINION AND AWARD

From the evidence and testimony introduced at the hearing, it is the opinion of this Arbitrator that the Employer had just cause to discipline the Grievant. The Employer's failure to adhere to several disciplinary provisions (see pages 2 and 3 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline and Section 24.04 - Pre-Discipline) however, necessitates a modification of the penalty.

Circumstantial evidence is evidence which raises an inference regarding some fact other than testimony which is offered as evidence to the truths of the matters asserted by a party. Numerous arbitrators have concluded that circumstantial evidence has great validity and can be used to determine whether known facts raise reasonable concerns about the occurrence under investigation (A.P. Green Refractories Co., 67-1 ARB P 8338, Krimsley, 1967; Caterpillar Tractor Co., 77-2 ARB P 8515, Dolnick, 1977; Mead Corp., 66-2 ARB P 8511, Keefe, 1966). In evaluating the circumstantial evidence offered by the Employer, this Arbitrator has concluded that the following significant

inferences indicate that the Grievant was properly notified of his responsibilities; and that he failed to turn in sick leave requests for the dates specified in the Removal Order (Joint Exhibit 2A).

It is the opinion of this Arbitrator that the Grievant was properly notified of the possible negative consequences associated with his refusal to submit sick leave requests to Bryant. The Union's argument that the Grievant never received the May 21, 1986 document (Employer Exhibit 4); and that he never had a conversation with Hall concerning the contents of the document seem highly unlikely. Specifically, the Grievant's actions on or about June 4, 1986, evidence a clear understanding of his responsibilities. On this date, the Grievant complied with one of the conditions contained in the May 21, 1986 135534 (Employer Exhibit 4) by submitting back-dated leave request slips (Union Exhibit 1A-E) to cover for his behavior during March and April, 1986. It is quite evident to this Arbitrator that between May 8, 1986 and June 4, 1986 some form of communication took place which encouraged the Grievant to submit these slips (Union Exhibit 1A-E). It seems virtually implausible that the Grievant would engage in activities which conformed with one of the provisions without having knowledge of the provision dealing with proper delivery of sick leave slips.

Although the above analysis indicates to this Arbitrator that the Grievant was properly notified prior to July 11, 1986, additional testimony suggests that notification was also reinforced in a subsequent meeting. Both Wente and Hall testified that the contents of the May 21, 1986 document (Employer Exhibit 4) were discussed on July 11, 1986. The Grievant, moreover, testified that these individuals discussed the conditions contained in this document, even though he alleged that he never received it. Additional support for this notion was provided by Cowell. He also maintained that Wente

advised the Grievant to submit forms to Bryant, and that he advised the Grievant to get some form of documentation.

A critical factor in this case dealt with the Employer's failure to provide Bryant as a witness to substantiate the allegations contained in the Removal Order (Joint Exhibit 2A). Bryant's presence at the hearing would have strengthened the Employer's arguments. Documentation provided by the Employer, however, dealing with the initiation of the disciplinary process, strongly suggests that Bryant never received the aforementioned sick leave slips. More specifically, Bryant initiated the disciplinary process on three (3) separate occasions by completing Request For Disciplinary Action forms (Employer Exhibits 8, 9 and 10). Information contained in these documents indicate that he suggested that Wente hold a disciplinary conference with the Grievant. The documents also referred to specific dates and stated that the Grievant failed to submit leave request documents for these dates.

In this Arbitrator's opinion, it seems highly unlikely that Bryant would have initiated the disciplinary process if he had received the documents from the Grievant. It should be noted that the submission of Request For Disciplinary Action forms is part of a well-established and routine practice engaged in by supervisors when they perceive that employees have engaged in activities which warrant discipline. The Union failed to offer any evidence suggesting that Bryant had a history of submitting any arbitrary or frivolous discipline related requests. As a consequence, there is a strong inference that the Grievant failed to turn in leave request slips.

Testimony provided by Croskey supported the above analysis. His review of the facility's personnel records indicated that a number of complaints had been occasionally lodged by employees concerning the non-delivery of leave request slips. Croskey maintained that no other employee had complained about this problem as frequently as the Grievant. The Union failed to provide a

sufficient amount of evidence to rebut Croskey's contentions. Although testimony was provided by a number of Union witnesses, their statements were not supported by grievance submissions or labor-management agenda minutes.

Arbitrators often focus upon the consistency or inconsistency of testimony in evaluating the credibility of witnesses (Ready Mix Concrete Co., 73-1 ARB 8082, Mulhall, 1973; American Air Filler Co., 1975 ARB 8024, Hilpert, 1975). In the opinion of this Arbitrator, the Grievant's version of the events lacked credibility because on a number of relevant issues his testimony was inconsistent.

First, the Grievant's testimony was terribly inconsistent with respect to the leave request slips he submitted on June 4, 1986 (Union Exhibits 1A-E). Under cross-examination the Grievant initially testified that he did not attach doctors slips to the documents he submitted in March and April, 1986. He noted that he followed this procedure because he was not absent for more than three (3) days. When he was asked whether he attached doctors statements to the slips he re-submitted on June 4, 1986 (Union Exhibits 1A-E), he stated that he did because he was under a doctor's care. It should be noted that these slips also mysteriously disappeared. This testimony seems to conflict with other testimony introduced at the hearing which indicated that the Employer allowed the Grievant to apply accrued vacation days to cover absences for the period March 15, 1986 to April 23, 1986. This Arbitrator fails to see the necessity of attaching doctors statements to vacation leave slips and thus concludes that the Grievant's explanation is highly suspect.

Second, the testimony provided by the Grievant concerning his visits to a doctor's office is also inconsistent with the documents he provided for verification purposes (Union Exhibit 4). More specifically, the Grievant alleged that he visited the doctor's office on several occasions in August of 1986. A review of the Grievant's visitation statement (Union Exhibit 4) by

this Arbitrator indicates that he had several appointments scheduled for August, 1986, but that he failed to show up (i.e., failed appointment) on the designated dates.

Last, the Grievant also changed his testimony regarding the enclosures attached to the July 17, 1986 conference notice (Employer Exhibit 6). He was initially asked about the contents of the document and he stated that it contained a notice from Wente. After some additional cross-examination he acknowledged that there were additional enclosures dealing with a series of disciplinary recommendations (Employer Exhibits 8, 9 and 10; Union Exhibit 3).

The Grievant's testimony regarding the date that he received the certified mail document (Employer Exhibit 6) also cast suspicion upon his credibility. Specifically, the Employer provided a receipt for certified mail which indicated that it had mailed the document to the Grievant's home on July 17, 1986 (Union Exhibit 2). It should be noted that the Grievant testified that he received the notification from the post office (Union Exhibit 2) on the same day that the conference was scheduled (Employer Exhibit 6). Moreover, the Employer maintained that it was notified that the Grievant had obtained the document on July 24, 1986 (Union Exhibit 2). The coincidental reception of the document on the date of the disciplinary conference, and the excessive time lag involved in the delivery and receipt of a document at two (2) addresses within the same city limits boundary, seems too convenient and virtually improbable.

It is a well established arbitral principle that arbitrators have the authority to modify a penalty when the agreement between the parties fails to expressly prohibit such an alternative and the arbitrator has found the penalty to be too severe or improper (73 LA 32, Rothschib; 54 LA 1231, Feller; 49 LA 190, Koven). This view was elaborated by Arbitrator Harry H. Platt:

"In many disciplinary cases, the reasonableness of the penalty imposed on an employer rather than the existence of proper cause for disciplining him is the question that the arbitrator must decide. This is not so under contracts or submission agreements which expressly prohibit an arbitrator from modifying or reducing the penalty if he finds that disciplinary action was justified, but most current labor agreements do not contain such limiting clause. In disciplinary cases generally, therefore, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe, under all the circumstances of the situation. The right is deemed to be inherent in the arbitrator's power to discipline and in his authority to finally settle and adjust the dispute before him."
(Platt, H.H. "The Arbitration Process in the Settlement of Labor Disputes," American Judicial Society, 1947, 31, 58)

A review of the collective bargaining agreement (Joint Exhibit 1) indicates to this Arbitrator that it does not contain a prohibition dealing with an arbitrator's authority to modify a penalty initiated by the Employer. Thus, the modification of the Employer's penalty seems to be within the Arbitrator's realm of authority.

The Arbitrator's decision to modify the penalty is based upon the Employer's failure to abide by several discipline provisions contained in the Agreement (see pages 2 and 3 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline, and Section 24.04 - Pre-Discipline).

In the opinion of this Arbitrator the Employer was partially at fault for the Grievant's failure to process discipline in a timely manner. In other words, the Employer had several opportunities to schedule and conduct pre-disciplinary conferences; but the Employer was derelict in fulfilling this responsibility. This negligence violated the Grievant's right to a meeting prior to the imposition of a suspension or a termination (see page 3 of this Award for Article 24 - Discipline, Section 24.04 - Pre-Discipline).

Evidence and testimony presented at the hearing indicate to this Arbitrator that violations took place before and after the effective date of

the collective bargaining agreement (Joint Exhibit 1).* More specifically, Wente testified that he initially attempted to contact the Grievant on a number of occasions after Bryant's initial request for discipline on June 6, 1986 (Employer Exhibit 8). The veracity of these attempts, however, are somewhat suspect. A review of the Grievant's personnel chart (Employer Exhibit 1) clearly indicates that the Grievant was working, and, thus, available for a conference for eight (8) consecutive days beyond Wente's initial attempt. A similar conclusion can be drawn when one reviews the Grievant's attendance record (Employer Exhibit 1) for available meeting dates on or about July 17, 1986. This date refers to the date of the final conference notice (Employer Exhibit 6). The Grievant was in attendance on three (3) consecutive days following July 17, 1986. Wente provided testimony which indicated that the Employer had solicited employees for disciplinary conferences during working hours. As a consequence, the Grievant should have been available for a meeting if the Employer had initiated a conference.

The Employer also violated the progressive discipline provision (see page 3 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline) by removing the Grievant without assessing a prior suspension. Generally speaking, most arbitrators will require progressive discipline if it is mandated by the contract. (American Petrofina Co., 61 LA 861, Marlatt, 1973; Electra-Gas Appliance Corp., 64 LA 1185, Rinaloo, 1975). There are, however, some exceptions such as "malum in se" offenses which are typically excluded from progressive discipline considerations. In the opinion of this Arbitrator, the Grievant's offenses cannot be equated with the offenses typically contained in the "malum in se" category. These offenses normally

*NOTE: Evidence and testimony introduced at the hearings indicate to this Arbitrator that these rights existed prior to the effective date of the Agreement and were eventually negotiated into the Agreement by the parties.

call for summary discharge and deal with serious offenses such as theft, striking a foreman, and malicious destruction of company property.

Even if the Employer had concluded that the Grievant was continually unavailable for a conference, the Employer was still obligated to suspend the Grievant. If the Grievant had failed to respond to the suspension notice, then the Employer could have potentially elevated the suspension to a removal. In this particular instance the Employer assumed that all other corrective actions, short of discharge, were futile. The facts surrounding this case indicate to this Arbitrator that the assumption was premature because the Agreement requires that lesser measures need to be undertaken when dealing with these types of circumstances.

In conclusion, the Employer failed to comply with several disciplinary provisions dealing with pre-disciplinary conferences (see page 3 of this Award for Article 24 - Discipline, Section 24.04 - Pre-Discipline) and progressive discipline requirements (see pages 2 and 3 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline). In this Arbitrator's opinion, however, these defects do not vitiate the Employer's action in its entirety because the Grievant was also at fault.

The evidence and testimony provided at the hearing clearly indicate that the Grievant failed to turn in sick leave requests. This behavior is especially abhorrent to this Arbitrator in light of the benefit-of-the-doubt provided the Grievant by the Employer on May 21, 1986 (Employer Exhibit 4). Also, the Grievant failed to avail himself of sick leave provisions (see pages 3 and 4 of this Award for Article 29 - Sick Leave, Section 29.01 - Accrual) negotiated by the parties. The Grievant should have investigated the possibility of using compensatory time, personal days, or leave without pay if his medical condition deteriorated so dramatically.

It should be noted that in fashioning the remedy the Arbitrator considered, but did not place much weight on, Wente's five (5) day suspension recommendation (Union Exhibit 3). The discipline decisionmaking process utilized by the Employer is a multi-tiered structure, with the ultimate authority for discipline vested in the office of the Agency Head (Joint Exhibit 1, pages 36 and 37). Thus, a recommendation at the lower tier might be approved, but an equally strong likelihood exists that it might be overturned. In addition, The Grievant's activities subsequent to July 11, 1986 substantially changed the circumstances surrounding the allegations. As a consequence, a more severe penalty is warranted.

AWARD

The grievance is sustained in part and denied in part. The Arbitrator directs the Employer to reinstate the Grievant to his former position without back pay and with full seniority forthwith.

February 20, 1987

Dr. David M. Pincus
Arbitrator