#49

STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES' ASSOCIATION LABOR

ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, OHIO STUDENT LOAN COMMISSION
(Columbus, Ohio)

-and-

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

GRIEVANCE: Larrie Green (Arbitrability and Discharge)

CASE NUMBER: G86-1076

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: May 18, 1987

APPEARANCES

For the Employer

Karen A. Steele	Manager of Computer Services
Paul D. Cornell	Program/Analyst Supervisor
Michael P. Duco	Office of Collective Bargaining Observer
Donald E. Elder	Advocate

For the Union

Larrie Green	Grievant
Vickie Anderson	Steward
Linda Fiely	Associate General Counsel
Daniel Myers	Programmer/Analyst III
Steve Wiles	Staff Representative

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, Student Loan Commission (Columbus, Ohio), hereinafter referred to as the Employer, and the Ohio Civil Service Employee Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union/Association for July 1, 1986-July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on March 16, 1987 at the Office of Collective Bargaining. 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 submit briefs.

ISSUES

Was the grievance timely filed in accordance with the parties' Collective Bargaining Agreement?

Was the Grievance discharged for just cause and in accordance with the terms of the parties Collective Bargaining Agreement? If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 22 - PERFORMANCE EVALUATION

Section 22.01 - Use

"The Employer may use performance evaluations pursuant to the Ohio Administrative Code Chapter 123:1-29, except as modified

by this Article. If an Agency chooses to use a performance evaluation instrument different than that utilized by the Department of Administrative Services, it shall notify the Union and consult with it prior to implementing the new instrument.

Within one hundred twenty (120) days of the effective date of this Agreement, the Employer will enter into a comprehensive study to improve the present performance evaluation system. The Union will have full opportunity for input and consultation prior to and during the study."

Section 22.02 - Limits

"Measures of employee performance obtained through production and/or numerical quotas shall be a criterion applied in evaluating performance. Numerical quotas or production standards, when used, shall be reasonable and not arbitrary or capricious.

Performance evaluations shall not be a factor in layoffs.

Employees shall receive and sign a copy of their evaluation forms after all comments, remarks and changes have been noted. A statement of the employee's objection to an evaluation or comment may be attached and put in the personnel file." ... (Joint Exhibit 1, page 33)

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 24.05 - Imposition of Discipline

"The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-disciplinary meeting. At the discretion of the Employer, the forty-five (45) days requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment." (Joint Exhibit 1, pages 36-37)

Section 24.06 - Prior Disciplinary Actions

"All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an

employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement." ... (Joint Exhibit 1, page 37)

ARTICLE 25 - GRIEVANCE PROCEDURE

Section 25.05 - Time Limits

"Grievances may be withdrawn at any step of the grievance procedure. Grievances not appealed within the designated time limits will be treated as withdrawn grievances.

The time limits at any step may be extended by mutual agreement of the parties involved at the particular step.

The Employer's failure to respond within the time limits shall automatically advance the grievance to the next step." (Joint Exhibit 1, page 41)

Section 25.07 - Advance Grievance Step Filing

"Certain issues which by their nature cannot be settled at a preliminary step of the grievance procedure or which would become moot due to the length of time necessary to exhaust the grievance steps may by mutual agreement be filed at the appropriate advance step where the action giving rise to the grievance was initiated. An employee with a grievance involving a suspension or a discharge may initiate the grievance at Step Three of the grievance procedure within fourteen (14) days of notification of such action." ... (Joint Exhibit 1, page 42)

ARTICLE 43 - DURATION

Section 43.01 - First Agreement

"The parties mutually recognize that this is the first Agreement to exist between the Union and the Employer under ORC chapter 4117. To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws."

Section 43.02 - Preservation of Benefits

"To the extent that State statutes, regulations or rules promulgated pursuant to ORC Chapter 119 or Appointing Authority directives provide benefits to state employees in areas where this Agreement is silent, such benefits shall continue and be determined by those statutes, regulations, rules or directives." ... (Joint Exhibit 1, page 62)

CASE HISTORY

The Ohio Student Loan Commission is a state agency which administers the Federal Guaranteed Student Loan (GSL) and the Plus Loan programs. The single mission of the agency is to provide access to post-secondary education to students through student loans. At the present time, the GSL and Plus programs serve as the loaning mechanisms. It should be noted that the Commission's operating revenues are obtained from a fee charged to borrowers to cover the costs of potential claims.

L. Green, the Grievant, was hired by the Employer on April 15, 1985 as a Programmer Analyst II. Employer witnesses testified that this position was considered an entry level position. They also noted that a two (2) year associates degree with an emphasis in programming and/or equivalent field experience were necessary qualifications for this position. P. Cornell, Program/Analyst Supervisor, testified that the Grievant was selected because he had the appropriate educational qualifications. More specifically, the Grievant attained a two (2) year associates degree from Belmont Technical Institute.

Cornell testified that the programming activities within the Commission are conducted by approximately thirty (30) employees. The manpower pool consists of eighteen (18) programmers and twelve (12) operators and secretaries. The data processing

department is composed of the following four (4) programming teams: Columbus Repayment Center, Claims, Claims Accounting System, and Graduate Student Loan. It should be noted that the Grievant performed the majority of his programming activities for the Graduate Student Loan team.

The chain of command within the Graduate Student Loan team consists of a number of levels. At the top of the hierarchy, K. A. Steele serves as the Manager of Computer Services. She supervises Cornell, who in turn supervises a series of Programmer/Analyst classifications ranging from Programmer/ Analyst V to Programmer/Analyst II.

The Grievant testified that the assignments were given to him by Cornell in conjunction with more senior Programmer/Analysts. More specifically, Cornell testified that certain Programmer/Analysts with level IV classifications were assigned Group Leader responsibilities. The assignments dealt with the completion of certain aspects of larger projects that were being undertaken by individuals with greater levels of experience and expertise. The Grievant also maintained that his work was jointly reviewed by Cornell and the Group Leaders who gave him the assignment.

The Grievant also testified that as a Programmer/Analyst II he had a number of general duties. First, he was required to perform some maintenance in existing programs. Second, he wrote new programs as assigned by his supervisors, and documented that content of the programs and the files that were used in the development of the programs. It should be noted that the

Grievant's description accurately reflects the descriptions contained in the Ohio Classification Specification (Union Exhibit 2).

Prior to the effective date of the Collective Bargaining Agreement (Joint Exhibit 1), and subsequent to the enactment of this document (See Page 2-3 of this Award for Article 22: Performance Evaluation, Section 22.01 - Use), the Employer had an obligation to evaluate its employees. The Ohio Administrative Code (OAC) Rule 123:1-29-01 contains the following sections which specify the Employer's responsibilities regarding performance evaluations:

123:1-29-01 Performance evaluation

"(A) Classified state and county welfare employees serving in a classification established pursuant to division (A) of section 124.14 of the Revised Code and all other county agencies and general health districts shall be rated or evaluated with respect to performance efficiency twice during the employee's probationary period and once during each calendar or anniversary year.

(B) The first performance evaluation shall be completed within thirty days of the conclusion of the first half of the probationary period. The second evaluation shall be completed within thirty days of completion of the probationary period, unless the employee is given a probationary removal, in which case the final evaluation will be made at the time of the removal. The final probationary evaluation shall state whether the employee is to be retained or probationarily (sic) removed. No probationary performance evaluation will be accepted or processed.

(C) All employees specified in paragraph (A) of this rule who have completed their probationary periods shall be evaluated once a year. The annual evaluation shall measure the employee's performance for the year immediately preceding the valuation date or for that portion of the year after the completion of the probationary period. Employees shall be evaluated within the sixty-day period of thirty days prior to and thirty days subsequent to their anniversary date, provided, however, that the director may authorize an appointing athority (sic) to have all annual evaluations for his employees completed on an alternate schedule different than that prescribed by these rules. For purposes of this rule, "anniversary date" shall be calculated from the date of commencement of continuous service.

(D) Each employee shall be evaluated by his immediate supervisor. If an employee has been reassigned to a new supervisor within one month of the evaluation date, the new supervisor should consult with the previous supervisor in completing the evaluation if possible. If an employee receives approximately equal supervision from two persons, both supervisors shall cooperate in and sign the evaluation." ... (Employer Exhibit 5)

In accordance with the above provisions, the Employer evaluated the Grievant two (2) times during his probationary period. The first probationary evaluation took place on July 14, 1985 which was the mid-probationary terms (Joint Exhibit 12). The following rater's comments were contained on the form:

"RATER'S COMMENTS

Larrie has been working very hard. He needs to spend more time in problem determination and to build up more programming skills.

Signature W. G. Schreck Date: 7/22/85"

(Joint Exhibit 12)

It should be noted that the document indicates that K. Steele agreed with the above comments. D. H. Harmon, the Appointing Authority, also concurred with the Rater's evaluation by noting that he agreed with the evaluation (Joint Exhibit 12).

On October 11, 1985 the Employer conducted a final probationary performance evaluation (Joint Exhibit 13). The following Rater's comments were contained in the evaluation form:

"RATER'S COMMENTS

Larrie is making good improvement. What few problems that still exist should be resolved through experience.

Signature Paul Cornell/Karen Steele Date: 11/8/85"

(Joint Exhibit 13)

It should be noted that the Appointing Authority agreed with the Rater's and Reviewer's comments (Joint Exhibit 13).

On April 15, 1986 the Employer conducted a performance evaluation which reviewed the Grievant's annual performance (Joint Exhibit 14). This evaluation was allegedly conducted in accordance with Ohio "Administrative Code (OAC) Rule 123:1-29-01 (Employer Exhibit 5). The evaluation was not as positive as the evaluations conducted during the Grievant's probationary period (Joint Exhibits 12 and 13). More specifically, Cornell made the following assessment of the Grievant's performance:

"RATER'S COMMENTS

During his first year Larrie has been slow to adapt to data processing concepts and programming. At last evaluation, we recommended Larrie take additional programming courses. Larrie has taken some courses at OSU. I feel at this time in Larrie's data processing career, with a degree from Belmont Tech, and additional courses at OSU, he should have excelled technically much more quickly. The problem areas are VSAM procedures, table handling and JCL. I feel Larrie needs more programming experience before being promoted to the next P/A level.

Signature Paul Cornell Date: 4/27/86"

(Joint Exhibit 14)

In the Reviewer's Comments portion of the document, however, Steele agreed with the above comments but also initiated a

special evaluation procedure. Steele's comments included the following recommendations:

"REVIEWER'S COMMENTS

I agree with the above comments. Although Larrie has taken recommended courses to help him in deficient areas, there is no recognizable difference in his work. I am recommending special reviews be conducted every 90 days to track consistant (sic) and immediate improvement in his work.

Signature Karen Steele Date: 4/29/86"

(Joint Exhibit 14)

The evaluation form also indicates that on May 1, 1986 the Appointing Authority reviewed the above comments and concurred with the rater's and reviewer's comments (Joint Exhibit 14).

It should be noted that as a result of the annual evaluation (Joint Exhibit 14), the Employer initiated a log (Employer Exhibit 4) of the Grievant's activities. Cornell testified that the document contained minutes regarding project updates and meetings with the Grievant. Cornell, moreover, stated that the Grievant was periodically provided with copies of the log (Employer Exhibit 4).

On July 15, 1986 the Employer conducted a special evaluation of the Grievant's performance (Joint Exhibit 15) in accordance with the recommendations contained in the Grievant's annual evaluation (Joint Exhibit 14). The following Rater's Comments authored by Cornell on October 8, 1986 indicate that he had certain misgivings about the Grievant's performance:

"RATER'S COMMENTS

On 4-29-86 Larrie received his annual evaluation. At that time, I felt he should have excelled technically much quicker and I stated that problem areas. At that time, Karen recommended special reviews be conducted every 90 days to track consistent & immediate improvement. During this 90 days, I have documented Larrie's progress & his work and feel the documentation explains Larrie's progress. As of 4/29/86, I felt Larrie's problem areas were VSAM procedures, table handling, & JCL. I feel Larrie has not excelled or shown significant improvement in these areas, but more important he has had real problems with COBOL logic. The quantity of work was lowered because only two programs have been worked on during this 90 day period. I feel Larrie needs to improve his programming skills and abilities before being promoted to the next Programmer/Analyst level. I also feel continued 90 day evaluations are needed.

_____ _____

Signature Paul Cornell Date: 7/8/86"

(Joint Exhibit 15)

Steele agreed with Cornell's evaluation but made some additional comments which were contained in the Reviewer's Comments section of the evaluation:

"REVIEWER'S COMMENTS

Knowing the extent of the two assigned projects of which the last should have been completed weeks ago and still is not, I cannot help but agree with all of Paul Cornell's comments. Larrie was allowed to set his own time goals and still could not meet them. He has not demonstrably shown improvement in any problem areas. I recommend another special review to be done in 90 days; during this time the log will continue to be kept and the meetings to review assignments and their progress will also continue. However, during this 90 day period, progressive discipline will start.

_____ _____

Signature Karen Steele Date: 7/9/86"

(Joint Exhibit 15)

Upon review of the above comments, the Appointing Authority concurred with the evaluation and provided the following comments:

APPOINTING AUTHORITY ACTION

I concur. The Commission offers a good environment for professional growth, but we must be able to meet the standards of the agency in terms of quality and quantity.

Signature David H. Harmon Date: 7/10/86"

(Joint Exhibit 15)

It appears the Employer never initiated a second special evaluation.

A number of disciplinary actions, however, were issued by the Employer after the contents of the special evaluation (Joint Exhibit 15) were communicated to the Grievant. On September 22, 1986 the Employer issued the following verbal reprimand to the Grievant:

"TO: LARRIE GREEN, PROGRAMMER/ANALYST

FROM: PAUL CORNELL, PROGRAMMER/ANALYST SUPERVISOR

SUBJECT: VERBAL REPRIMAND

Based on your last 90 day special evaluation, you were informed that if we did not see improvement concerning job related skills (Cobol programming logic) and completing assignments, we would start progressive discipline. This verbal reprimand is for not completing your present assignment by September 17, 1986 as discussed on September 19, 1986."

(Joint Exhibit 20)

A notation in the above document indicates that the Grievant had reviewed the action but that he did not agree with it as to form and content.

On October 2, 1986, the Grievant received a written reprimand from Cornell because he allegedly failed to complete an assignment by October 2, 1986. The written reprimand contained the following comments:

"Based on your last 90 day special evaluation, you were informed that if we did not see improvement concerning job related skills (COBOL Programming Logic) and completing assignments, we would start progressive discipline. This written reprimand, the second step of progressive discipline is for not completing your present assignment by October 2, 1986."

(Joint Exhibit 21)

On October 23, 1986, D. H. Harmon, the Executive Director, sent the Grievant the following document, which notified the Grievant about an upcoming pre-disciplinary conference:

"October 23, 1986

Larrie Green, Programmer
Computer Services
4th Floor

Dear Larrie:

Notice is hereby given that it is my intent to remove you for incompetence, based on the following evidence:

That, even after additional training since employed at the agency, you still cannot logically program assignments given to you, thereby repeatedly missing assignment deadlines. Further, in virtually all programming assignments given to you, you have submitted programs as being "correct" and "complete", when they were neither, causing further delays in these program completions and the ultimate submission of them

to the users of your programming team, according to a prearranged, previously accepted time table.

A hearing on this matter will be conducted at 10:00 A.M. October 30, 1986 in the 8th floor conference room in our agency. At this meeting, you may substantiate why you believe the proposed removal is not justified. Should you decide to exercise your right to such a hearing, you may obtain the assistance of counsel or other representative, present witnesses on your behalf and question any witnesses. We will also have the opportunity to submit evidence and call witnesses to support our proposed action.

After the hearing, I will consider the evidence and testimony submitted at the hearing and make a written recommendation. You shall be provided a copy of the written decision.

This letter is the only formal notice you will received regarding the hearing. If there are any changes, we will notify you. Absent any extenuating circumstances, failure to attend this meeting, as scheduled, will result in a waiver of your right to a hearing.

Sincerely,

David H. Harmon
Executive Director"

(Joint Exhibit #2)

As a consequence of the October 30, 1986 conference, the Grievant was notified on October 31, 1986 that he was being terminated for incompetence (Joint Exhibit 3). The Removal Order cited the Grievant's incorrect programs and missing deadlines as established as the reasons for the termination action (Joint Exhibit 4).

It appears that some controversy exists surrounding the circumstances and the date of the Union's official response to the above termination (Joint Exhibit 4). Two (2) Official Grievance Forms were introduced at the hearing. The first form was allegedly presented to Harmon by V. Anderson, a Union

Steward, on or about November 18, 1986.* (Joint Exhibit 19). This document contained the following grievance statement and adjustment required:

> "... STATE OF GRIEVANCE:
>
> List applicable violation: Ohio Revised Code 123:1-19-01 and 02, 123:1-29, Collective Bargaining Law Chapter 4117.11 and Articles 2, 6, 22 and 24 of the Contract between the State of Ohio and OCSEA.
>
> Adjustment required: Larrie Green be reinstated in employment, 90-day evaluation cease, back pay from the date of termination to reinstatement and made whole. ...

(Joint Exhibit 19)

The document also contained some notations which indicated to the Union that Harmon had granted an extension. On November 21, 1986, the second Official Grievance Form was presented to Harmon by Anderson. The two (2) forms are identical other than the inclusion of the following comment within the Statement of Grievance:

> "... On October 31, 1986 Larrie Green's employment with the Ohio Student Loan Commission was terminated ....."

(Joint Exhibit 5)

The parties, in accordance with the Advance Grievance Step Filing section of the Agreement (See Page 5 of this Award for Article 25 - Grievance Procedure, Section 25.07 - Advance Grievance Step Filing), mutually agreed to initiate the grievance process at Step 3. A meeting was allegedly held on November 25,

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*NOTE: The Union's brief contained a different date (i.e. November 11, 1986) but a review of the transcript by this Arbitrator indicates that Anderson specifically mentioned this date (Union Brief), page 2).

1986; it involved Harmon and the Grievant's representatives (Joint Exhibit 6).

On December 9, 1986, Harmon denied the Grievance and issued the following Step 3 response:

> "The following will constitute the response of the Ohio Student Loan Commission to the Step 3 grievance filed by and on behalf of Mr. Larrie Green, a former employee of the Commission. Agency management met with Mr. Green and his representatives on 11/25/86 in an attempt to resolve the grievance.
>
> The grievance first alleges a violation of section 123:1-19-01 of the Ohio Revised Code. This section of the ORC deals with the nature of probationary periods for the classified civil service of the state. There can be no question of a violation of this section as Mr. Green was no longer in a probationary period. Any reference to his last months at the Commission as "probationary" refer to the ongoing reassessment of his ability; he was on probation only in a generic sense rather than the specific legal sense as specified in Section 123:1-19-01 of the ORC. I find, therefore, no violation.
>
> The grievance next alleges a violation of section 123:1-29 of the Ohio Revised Code. This section deals with performance evaluations. In our meeting on 11/25/86 the union alleged violations of sections 123:1-29-01-C and 123:1-29-02. The first clause cited requires the annual evaluation of all employees; it was the position of the union that this requirement infers a prohibition against additional evaluations -- this in spite of the fact that the evaluation form itself includes provisions for special evaluations, we cannot agree that they are prohibited and cannot, therefore, agree that there was any violation. In reference to the second allegation, the union failed to provide any specific claim of violation. In reviewing this section of the ORC, I find that the Commission complied with all the requirements set forth therein. I cannot, therefore, agree that there was any violation.
>
> The grievance next alleges a violation of Chapter 4117.11 of Ohio's collective bargaining law. In our meeting of 11/25/86 the union specified violations of sections 4117.11(A) (1) and (4). This allegation claims that Mr. Green was removed as a result of having filed a grievance. Given the fact that the Commission has reviewed numerous grievances since the advent of collective bargaining without <u>ever</u> taking retaliatory action we find this allegation to be

absolutely without merit or foundation. I find, therefore, no violation.

The grievance next alleges a violation of Article 2 of the contract. This article prohibits discrimination. In the meeting on 11/25/86 the union claimed that the Commission removed Mr. Green because he is Black. The union offered no testimony or evidence to substantiate this allegation and the Commission takes strong exception to the allegation. The Commission has never been found to be guilty of discriminatory practices or behavior. The Commission is strongly committed to affirmative action and has aggressively pursued its goals in this area. The Commission did not discriminate against Mr. Green in this matter, for reasons of race or any other reason. We, therefore, reject any allegation of discrimination as being utterly without foundation.

The grievance next alleges violation of Article 6 of the contract, which deals with probationary employees. The union claimed, in the 11/25/86 meeting, that the Commission violated this article by requiring Mr. Green to serve a second probationary period. For the same reasons cited above, we cannot agree that there was any violation; Mr. Green has finished his probationary period some time prior to the reassessment of his competence.

The grievance next alleges violation of Article 22 of the contract, which deals with performance evaluations. In the 11/25/86 meeting it was the contention that the Commission's use of the special evaluation process constituted the use of "...a performance evaluation instrument different than that utilized by the Department of Administrative Services...", which would require consultation with the union prior to use. All evaluations were conducted on a form provided by the Department of Administrative Services (Form # ADM-4257); we find, therefore, no violation of this article.

The grievance finally alleges violation of Article 24 of the contract, which specifies disciplinary procedures. It was the contention of the union that the Commission failed to follow the steps required in the progressive discipline sequence. It is the Commission's position that Mr. Green's removal was not a disciplinary action, any mistaken references to the disciplinary process by agency management notwithstanding. Given the fact that this was not a disciplinary action, the agency was under no obligation to follow the required steps of progressive discipline.

In summary, we find that the grievance presents a number of inaccurate and/or untrue allegations. We find no

evidence of any agency wrongdoing. The grievance, therefore, is denied."

(Joint Exhibit 6)

The parties were unable to resolve the dispute at Step 4 of the grievance procedure (Joint Exhibits 7 and 8). On January 28, 1987, the Union subsequently requested that the grievance be taken to arbitration (Joint Exhibit 9).

THE ARBITRABILITY ARGUMENTS

The Position of the Employer

It is the position of the Employer that the Grievance is not properly before the Arbitrator because it was not filed in a timely manner (Employer Brief, Page 1). The Employer argued that the Grievant and the Union were notified that the Grievance was to be terminated on October 31, 1987. Yet, the Union initiated the grievance procedure on November 21, 1987, which was twenty-one (21) days after the official removal date. The Employer maintained that the Agreement (See page 5 of this Award for Article 25 - Grievance Procedure, Section 25.07 - Advance Grievance Step Filing) provides for a fourteen (14) day notification requirement, which the Union breached because of its tardy filing of the Grievance.

The Employer also argued that Harmon's time extension did not explicitly waive the notification requirement contained in the Agreement (See Page 5 of this Award for Article 25 - Grievance Procedure, Section 25.07 - Advance Grievance Filing Step) (Employer Brief, Page 2). The Employer maintained that

Harmon did not have the authority to override specific contract language negotiated by the parties. The Employer, moreover, claimed that even if Harmon's extension was bona fide, the Union still exceeded the filing deadline by four (4) days.

The Employer stated that its failure to raise an objection concerning the timeliness issue, during the lower steps of the grievance procedure, does not prevent it from raising such an objection at the arbitration hearing (Employer Brief, Page 2). The Employer alleged that a challenge to an arbitrator's jurisdiction can be initiated at anytime when the Agreement (Joint Exhibit 1) contains specific time limits. The Employer, moreover, stated that its challenge was justified because the Union failed to provide any evidence of discriminatory intent.

The Position of the Union

It is the position of the Union that the grievance (Joint Exhibit 19) is arbitrable. The Union based its argument on a number of diverse theories.

The Union maintained that the Employer's action served as an explicit waiver of the time limits contained in the Agreement (Joint Exhibit 1). The Union noted that the Agreement provides for an extension of the time limits if it is mutually agreed to by the parties at a particular step of the grievance procedure. See Page 5 of this Award for Article 25 - Grievance Procedure, Section 25.05 - Time Limits). The Union maintained that Harmon agreed to extend the fourteen (14) day time limit when he was presented with this request at the third step of the grievance

procedure by Anderson. (See Page 5 of this Award for Article 25 - Grievance Procedure, Section 25.07 - Advance Grievance Step Filing). The Union argued that Anderson's testimony was uncontested in terms of the circumstances surrounding the extension. The Union, moreover, suggested that the amended grievance form (Joint Exhibit 19) contained a notation which clearly evidenced that the parties' representatives had mutually agreed to an extension.

The Union also argued that the Employer implicitly waived the time limit requirements (See Page 5 of this Award for Article 25 - Grievance Procedure, Section 25.05 - Time Limits) by failing to object to the alleged impropriety at any of the subsequent steps of the grievance procedures (Union Brief, Page 2). The Union emphasized that the grievance (Joint Exhibit 19) was reviewed at Step 3 (Joint Exhibit 6) and Step 4 (Joint Exhibit 8) by Employer representatives; and that the Employer failed to raise an untimeliness objection.

The Union claimed that the Employer could not require a strict enforcement of the time limits because it had relaxed the time limits in the past. In the opinion of the Union, a reliance in the time limits contained in the Agreement (See Page 5 of this Award for Article 25 - Grievance Procedure, Section 25.07 - Advance Grievance Step Filing) could only take place if the Employer had placed the Union on notice (Union Brief, Page 4). Anderson's testimony allegedly supported this claim. She noted that the parties had often mutually agreed to extend the time limits.

Finally, the Union claimed that additional mitigating circumstances need to be considered by the Arbitrator (Union Brief, Page 5). The Union, more specifically, maintained that the relationship between the parties lacked maturity. The Union also emphasized that three (3) weekends occurred between the date of discharge (Joint Exhibit 4), and the date that the Union filed the grievance (Joint Exhibit 19).

ARBITRABILITY OPINION AND AWARD

From the testimony presented and the exhibits introduced at the hearing, it is the opinion of this Arbitrator that the grievance (Joint Exhibit 5) is arbitrable.

Anderson's testimony and the grievance forms provided by the parties (Joint Exhibits 5 and 19) strongly support the conclusion that Harmon granted an extension, and that the parties mutually agreed to an extension, on November 18, 1986. Anderson testified that she was not initially in charge of the Grievant's verbal (Joint Exhibit 20) and written (Joint Exhibit 21) reprimands. Anderson explained that she was given the assignment because another Union Steward, Julia Lowe, was removed from the case because she was experiencing some personality problems with management personnel. Anderson, moreover, contended that on November 18, 1986 Harmon suggested to her to focus on the removal (Joint Exhibit 4) rather than the reprimands (Joint Exhibits 20 and 21).

The above summary is strongly supported by the notation contained in the initial grievance form (Joint Exhibit 19). The document is dated November 18, 1986, contains the team extension,

and is initiated by Harmon and Anderson. The joint initials, moreover, evidence a mutual intent by the parties for an extension.

The filing and the content of the amended grievance form (Joint Exhibit 5) further support Anderson's version of the events. Anderson would not have had any justification for filing the amended form if a conversation had not taken place with Harmon. In addition, the contents of the amended form reinforce Anderson's confusion surrounding the reprimands (Joint Exhibits 20 and 21) and the removal order (Joint Exhibit 4). The amended form contains specific language in the Statement of Grievance which references the Grievant's termination on October 31, 1986. The amended language, therefore, indicates to this Arbitrator that Anderson complied with Harmon's suggestion regarding the focus of the grievance.

It is also this Arbitrator's opinion that Harmon had the authority to extend the time limits on behalf of the Employer. The Agrement provides for extension opportunities if mutually agreed to by those involved at a particular step of the grievance procedure (See Page 5 of this Award for Article 25 - Grievance Procedure, Section 25.05 - Time Limits). It appears to this Arbitrator that as Executive Director of the Commission, Harmon has the responsibility of responding to grievances at Step 3 of the grievance procedure (Joint Exhibit 1, Page 39). He did, in fact, respond to the grievance at Step 3 as evidenced by a document presented at the hearing (Joint Exhibit 6). Thus,

Harmon was legitimately involved at Step 3, and had the authority to mutually agree to an extension.

Finally, since this Arbitrator has determined that a bona fide extension had been mutually agreed to by the parties, a discussion of the Union's argument dealing with the Employer's waiver of a procedural defect would be superfluous.

ARBITRABILITY AWARD

The grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it removed the Grievance for just cause, and that it did adhere to the principles of progressive discipline.

The Employer argued that it was not barred from relying on any incidents that occurred prior to the date of the written reprimand (October 2, 1986) (Joint Exhibit 21) as a basis for removal (Employer Brief, Page 3). In the Employer's opinion, the Merger and Bar Rule contained in Ohio Administrative Code Rule 124-3-05 (Union Exhibit 8), has not been incorporated into the Agreement via the Preservation of Benefits provision (See Page 6 of this Award for Article 43 - Duration, Section 43.02 - Preservation of Benefits). The Employer emphasized that this provision does not incorporate the Merger and Bar Rule (Union Exhibit 8) because it is not a benefit. According to the Employer, benefits have peculiar personal value to employees, and normally involve the employer's purse. The Employer maintained that the merging of incidents prior to the written reprimand

(Union Exhibit 21) is not a benefit which deals with the Employer's purse.

A recent legal decision was cited by the Employer which allegedly invalidated the Merger and Bar Rule (Union Exhibit 8) (Employer Brief, Page 8). In Western Reserve Psychiatric Habilitation Center v. Edward Bolden [No. 12388 (9th Dist Ct App, Summit, 5-14-86)] the Court of Appeals held that the State Personnel Board of Review exceeded its statutory authority by promulgating a substantive rather than a procedural rule. The Court, moreover, held that the rule was unreasonable because it cast a wide net; failed to consider an employer's motivation in imposing discipline; and the circumstances surrounding the sequence of discipline imposed by the employer.

The Employer argued that even if the Arbitrator ruled that the Merger and Bar Rule (Union Exhibit 8) was applicable in this particular instance, the Grievant's work history prior to the date of the written reprimand (Joint Exhibit 21) should be reviewed and given its proper weight (Employer Brief, Page 4). The Employer claimed that the work history would help establish a pattern of incompetency.

The Employer argued that a number of alternatives placed the Grievance on notice of the possible and probable consequences of his inability to perform at a competent level of performance. First, the Employer alleged that notification requirements were followed via the principles of progressive discipline as set forth in the Agreement (See Pages 3-4 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline. The

Employer emphasized that it issued verbal (Joint Exhibit 20) and written (Joint Exhibit 21) reprimands which should have modified the Grievant's incompetent performance (Employer Brief, Page 5). The Employer, moreover, asserted that the steps contained in the progressive discipline provision were not adhered to because it determined that it would not accomplish the desired result. This determination was based on the extensive assistance provided by the Employer in the form of training and counseling. An evaluation of these efforts, in light of the Grievant's lack of progress, led the Employer to the conclusion that termination was commensurate with the incompetency offense.

Second, the Employer claimed that the special evaluation procedure (Joint Exhibit 15) was established to assist the Grievant (Employer Brief, Page 8). Assistance was allegedly provided by identifying certain performance deficiencies, and by informing the Grievant of the tasks he should engage in to meet minimum performance standards. The Employer also argued that the procedure was not implemented to harass the Grievant and that other employees had been placed this status.

Third, the Employer maintained that the log (Employer Exhibit 4) was established to provide the Grievant with performance updates, and that copies of the log (Employer Exhibit 5) were provided on a periodic basis. Cornell testified that the log (Employer Exhibit 5) was used as a counseling tool. He also noted that an entry in the log (Employer Exhibit 5, Page 2) evidenced that the Grievant felt that he had everything he needed

to perform his job in an appropriate manner (Employer Brief, Page 8).

Last, the Employer argued that the Grievant's training efforts were a result of the negative feedback provided to him concerning his need to improve his performance (Employer Brief, Page 11). The Employer stated that it had assisted the Grievant by providing him with paid time off and tuition reimbursement for a COBOL course. The Employer disagreed with the Union's contention that the Grievant engaged in the training for promotion opportunity reasons (Employer Brief, Page 7). The Employer contented that the training was engaged in for rehabilitation purposes because the Grievant's educational background was somewhat limited.

The Employer contended that its incompetence determination was based on the tardiness of the computer programs written by the Grievant, and the format and substance deficiencies contained in this finished product (Employer Brief, Page 9). The notations contained in the log (Employer Exhibit 5) were used as the primary documentation instrument. The Employer contended that it reviewed the entire document before deciding to remove the Grievant for incompetence (Employer Brief, Page 8). Cornell testified that even though the Grievant was given an opportunity to establish his own goals, he was unable to meet the majority of the deadlines. His examination of the log (Employer Exhibit 5) for the period May 6, 1986 to October 30, 1986 indicated that the Grievant was assigned a total of eight (8) projects. Of these eight (8) projects, however, the Grievant completed six (6)

projects, and a total of two (2) projects were completed in a timely manner. One (1) of the assigned projects was never completed, while another project was shelved because the user changed the program's specifications (Employer Brief, Page 8).

The Employer did not agree with the Union's arguments concerning the mitigating and extenuating circumstances surrounding the Grievant's performance (Employer Brief, Page 9) with respect to the Grievant's debilitating ankle injury, the Employer argues that it should not have impacted the Grievant's analytical ability. Myers testimony concerning the availability of desk top manuals for the Graduate Student Loan team was also contested by the Employer. The Employer alleged that none of the team members had access to such a convenience, yet, their performance was not deferred by this circumstance. The Employer, moreover, claimed that the Grievance could have accessed the same material by obtaining a computer generated copy.

The Employer maintained that the Grievant's removal was not related to his promotion efforts (Employer Brief, Page 9). The Employer claims that these events were totally unrelated, and that the Union failed in its attempt to substantiate this nexus.

The employer contended that its performance expectations were reasonably related to its business efficiency objectives (Employer Brief, Page 10). The employer claimed that the Grievance was responsible for the readability, runability, and the timeliness of the projects assigned to him by his superiors. The Employer, moreover, emphasized that if these responsibilities

are not fulfilled the users would not be provided with accurate and timely service.

The Employer maintained that the Arbitrator should not substitute his judgment for that of management. The Employer argued that since the Agreement imposed a just cause standard (See Page 3 of this Award for Article 24 - Discipline, Section 24.01 - Standard), and the Employer's action was not arbitrary, capricious, nor unreasonable, the Arbitrator should uphold the discharge (Employer Brief, page 6).

The Position of the Union

It is the position of the Union that the Employer failed to meet its burden of proof in establishing that the Grievant's discharge was for just cause (Union Brief, Page 8).

The Union argued that Ohio Administrative Code Rule 124-3-05 (Union Exhibit 8) and the provisions contained therein, have been incorporated into the Agreement via the Preservation of Benefits clause negotiated by the Parties (See Page 6 of this Award for Article 43 - Duration, Section 43.02 - Preservation of Benefits). The Rule contained the following provisions.

"124-3-05 - Merger and bar

(A) All incidents, which occurred prior to the incident for which a non-oral disciplinary action is being imposed of which an appointing authority has knowledge and for which an employee could be disciplined, are merged into the non-oral discipline imposed by the appointing authority. Incidents occurring after the incident for which a non-oral disciplinary action is being imposed, but prior to the issuance of the non-oral disciplinary order, are not merged and may form the basis for subsequent discipline.

(1) For purposes of this rule, knowledge of an appointing authority will include knowledge of those persons with authority to impose non-oral discipline for the appointing authority.

(2) For purposes of this rule, non-oral discipline includes written reprimands and suspension orders. It does not include a written memorandum or oral counseling or written warnings.

(B) Except as provided in rules 124-3-01 and 124-9-04 of the Administrative Code, once discipline is imposed for a particular incident, that incident shall not be used as the basis for subsequent discipline."

(Joint Exhibit 8)

The Union maintained that all incidents occurring prior to the written reprimand (Joint Exhibit 21) should have been merged into this non-oral disciplinary action. It is therefore the Union's opinion that the Employer was barred from relying on these incidents as a basis for removal (Union Brief, Page 13).

The Union challenged the Employer's incompetency arguments by critically analyzing the various project notes contained in the log (Employer Exhibit 4) (Union Brief, Pages 8-11). The Union noted that the Grievant met the deadline that he had established for the first project. The Grievant's second project, however, was not completed per the initial deadline established by the Grievant. The Union emphasized that deadline modifications were necessary because the original project specifications were altered; the Grievant had an ankle injury which caused one (1) absence day; the ankle injury had a continuing impact on his performance; and other unforeseen complications arose. The third project, however, was completed in a timely fashion, while the fourth project was placed on hold. The Grievant completed the fifth project one (1) day after the projected deadline.

The Union claimed that the Grievant had problems with the sixth and seventh projects because the assignments were extremely

difficult. The Union noted that the sixth assignment exposed the Grievant to a number of files; files which were unfamiliar to the Grievant. This lack of familiarity allegedly necessitated additional assistance requests and slowed the Grievant's performance response time. The Union claimed that timely completion of the seventh project was thwarted by specification allegations. The Union also maintained that the Grievance spent same time on the fourth project, which was previously placed on hold.

In addition to the specifics discussed above, the Union argued that other general conditions reduced the veracity of the Employer's incompetency arguments. Testimony presented by Myers, a Programmer/Analyst III, provided several valid explanations for some of the extensions that took place. First, Myers testified that the Graduate Student Loan team was not provided with the necessary file documentation manuals. This condition allegedly engendered an excessive amount of search activities. It also encouraged programming errors which necessitated further extensions increased as a function of assignment difficulty (Union Brief, Page 10). He noted that assignments requiring four (4) or five (5) days worth of work were often extended and frequently adjusted.

In the Union's opinion, the Employer failed to establish its incompetency argument because the programming errors used as justification for the Grievant's removal were errors involved the readability of the programs, rather than their runability (Union Brief, Page 11). The Union noted that Myers provided specific

examples of this condition in his review of the Employers' Log (Employer Exhibit 4). The Union maintained that further support was provided in the form of sample programs which contained similar programming defects (Union Exhibits 11, 12, and 14). These programs were of extreme interest to the Union because they were constructed by a senior Graduate Student Loan employee.

The Union also questioned the propriety of the Employer's incompetency hypothesis on the basis of the evaluation process employed by the Employer (Union Brief, Pages 11-12). The Union claimed that Employer witnesses were unable to explain the standards used to establish appropriate levels of performance or competence. The Union emphasized the results obtained via the performance evaluation instrument (Joint Exhibits 12, 13, 14 and 15) were not adequately explained by Employer representatives. In addition, Cornell's testimony and his remarks in an evaluation form (Joint Exhibit 15) indicated to the Union that he employed a performance standard which required the Grievant to excel. In the Union's opinion, an employee need not excel in order to be retained by the Employer (Union Brief, Page 12).

The Union maintained that even if the Employer established that the Grievant was incompetent, it violated the Agreement's Progressive Discipline provision (See Pages 3-4 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline) (Union Brief, Page 14). This violation allegedly took place because the Employer issued a removal notice (Joint Exhibits 3 and 4) rather than a suspension, in violation of the Agreement.

In a related matter, the Union argued that the Employer placed the Grievant in a double jeopardy situation (Union Brief, Pages 13-14). The Union claimed that the assignments referred to by the Employer in the verbal (Joint Exhibit 20) and written (Joint Exhibit 21) reprimands cannot be used to justify the removal order (Joint Exhibit 8).

The Grievant claimed that the Employer accelerated the disciplinary process to preclude the possibility of a future promotion (Union Brief, Page 15). The Union alleged that circumstances surrounding the termination strongly supported this belief. The Union noted that the internal competition had previously retarded several of the Grievant's attempts to transfer out of his position (Union Exhibits 3, 4 and 5). The Union, moreover, stated that the Grievant's promotional attempts during October, 1986 were initiated without internal competition. The Grievant testified that prior to his dismissal a meeting was scheduled to discuss a vacancy but that it was cancelled by the Employer.

Based on the above arguments, the Union requested the Arbitrator to disaffirm the Grievant's dismissal, and to reinstate the Grievant with full back pay and all associated benefits. The Union also requested the Arbitrator to modify the penalty to a lesser offense if the Arbitrator concludes that discipline was warranted.

THE OPINION AND AWARD

It is the opinion of this Arbitrator that the Employer did not have just cause to discharge the Grievant for incompetency.

The Arbitrator concludes that the discharge should be overturned because the Employer: could not substantiate the allegation of incompetence; neglected to provide the Grievant with proper supervision which is necessary for learning how to do the job correctly; and failed to provide the Grievant with proper notice concerning the consequences associated with his level of performance.

Although the Employer introduced a massive body of documentation and testimony to support the incompetency allegation, the Employer did not adequately establish the standard of competency it employed to make its determination. Part of the ambiguity surrounding this issue deals with the standard employed by the Employer during the Grievant's probationary period (Joint Exhibit 12 and 13), as compared to the one employed for the annual (Joint Exhibit 14) and special (Joint Exhibit 15) evaluations. When the Employer permitted the Grievant to pass the probationary period, the Employer, in effect, concluded that the Grievant possessed the minimal qualifications and potential for future development. The comments contained in the probationary evaluation forms indicate that the Grievant was progressing in an admiral manner, and that with additional experience the few problems that still existed could be resolved (Joint Exhibit 13). Some six (6) months later, however, the Grievant's annual evaluation evidenced a disaffection with his performance for the entire year (Joint Exhibit 14). The Grievant was eventually terminated approximately six (6) months after his annual evaluation.

This series of events indicates that the Employer's performance standard was unreliable. The Employer cannot contend that the Grievant's performance was unsatisfactory after it had accepted a comparable level of performance during the probationary period. (Kaiser Permanente Medical Care Program, 70 LA 799, Werd, 1978). The relatively short time period, moreover, did not provide the Employer with an ample opportunity to assess the Grievant's performance potential.

Further support for the above analysis was provided by documents introduced at the hearing and Cornell's testimony. The Grievant's annual evaluation contained Cornell's raters comments which indicated that the Grievant should have "excelled technically" (Joint Exhibit 14). Similar comments were made by Cornell in the Grievant's special evaluation form. Cornell further muddied the standard issue by noting that the Grievant "needed to improve his programming skills and abilities before being promoted to the next Programmer/Analyst level" (Joint Exhibit 15). A review of the record, moreover, indicates that Cornell uttered similar comments at the hearing. In this Arbitrator's opinion, the Employer's performance expectations were unclear because the standard used for evaluation purposes was ambiguous at best. The retention/termination decision should not have been based on either promotional expectations or on a standard of excellence.

The Employer's competency claim was also partially based on the scales contained in the evaluation forms (Joint Exhibits 12, 13, 14 and 15). Cornell, however, had a great deal of difficulty

explaining the relationship between the rating methodology and his accompanying remarks. His testimony indicated that he was unclear whether the dimensions should be weighed in terms of importance, or were viewed as mutually exclusive performance dimensions. Under cross-examination, moreoever, he was unable to provide a cogent explanation for his definition of competency vis-a-vis the use of the scales. Since these forms are used extensively by the Employer for evaluation decisions, the raters should be extensively trained in terms of the purpose of the form and the meaning of the dimensions. The performance forms are not per se invalid, but reliable evaluation results will never be attained unless the raters are adequately trained. Some of the above ambiguity might have been reduced if the Employer had provided additional witnesses at the hearing. Unfortunately, Harmon and Steele were not at the hearing to clarify their performance evaluation statements, and the utility of the performance evaluation scales.

The Employer initiated the log (Employer Exhibit 4) purportedly to counsel the Grievant and to document the Grievant's progress on a variety of assignments. In the opnion of this Arbitrator, the counseling dimension was not emphasized by either Cornell or the other management representative involved in the process. The process employed was highly evaluative and any feedback that was provided took place after the fact. The Grievant, more specifically, was given an assignment, allowed to ask questions, and was asked to develop a goal in terms of a completion date.

Goal setting is an admirable managerial tool. Goal setting as practiced by the Employer in this instance, however, was highly defective because it did not provide for relevant dialogue between the Grievant and his superiors. This Arbitrator has a great deal of difficulty understanding the reasonableness and accuracy of this competency determination vehicle. How can a Programmer/Analyst II, with less than one (1) year experience, be expected to establish meaningful goals, without any feedback from his supervisors in terms of the propriety of these goals. The process seemed to serve a self-fulfilling prophecy. When the Grievant met the goals that he had established, he was criticized by management personnel for setting unrealistic goals. An explicit example of this process, and its defects, can be found in Cornell's notes dealing with the first project (Employer Exhibit 4, Page 1). In this Arbitrator's opinion, the process did not adequately place the Grievant on notice regarding the minimum time requirements for the various projects.

The Employer's log procedure also dampened the Grievant's developmental potential by stifling his ability to interact with other programmers. Myers testified that Cornell admonished him for helping the Grievant with a project. The veracity of Myers' allegation is supported by a log entry dealing with the second project (Employer Exhibit 4, Page 3). Thus, the Grievant was unable to take full advantage of the expertise of his fellow programmers. This condition is in total contradiction with the purported policy of the Employer to encourage the flow of

information between its employees. Again, it seems that the counseling feedback loop was not available to the Grievant.

Testimony and evidence provided at the hearing also indicate to this Arbitrator that the majority of the Grievant's mistakes dealt with readability rather than runability programming errors. Although these readability errors needed correction, removal of the Grievant on these grounds seems excessively harsh. This conclusion was based on an analysis of the problems documented in the log (Employer Exhibit 4) and other programs submitted for comparison purposes (Union Exhibits 11 and 12). The Grievant and Myers provided testimony which indicated that K. Schafer, a Programmer/Analyst IV and a group leader, had similar programming defects in his programs. The defects consisted of TOPDOWN structure problems and the excessive use of GOBACK routines. A review of these programs by this Arbitrator affirmed the contensions made by these Union witnesses. This analysis is particularly disturbing since Schafer had certain supervisory responsiblities, and had extensive programming experience as evidenced by his Programmer/Analyst rank.

The Grievant's review of the log entries also indicated to this Arbitator that many of his difficulties were engendered by inaccurate information provided by his supervisors. Even if these inaccuracies were not provided with malicious intent, they do evidence the problems that may be created when reciprocal communication is not emphasized by the Employer.

This Arbitrator was also extremely impressed with the Grievant's demeanor and his analysis of the various programs

introduced at the hearing. His knowledge of the programming lexicon and his ability to convey the meaning of complicated programming routines, heightened the credibility of his testimony.

Inherent in the concept of just cause is the concept of progressive discipline. Progressive discipline has two major objectives. The first objective deals with progressive discipline as a system of penalties for misconduct, while the second involves the notification characteristics of such a system. The parties negotiated clear and unambiguous language dealing with progressive discipline (See Pages 3-4 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline). Although there are exceptions to the general rule which requires the orderly imposition of heavier penalties, the Employer's rationale for skipping the suspension step in this instance was totally unsupported by the evidence. Thus, in this Arbitrator's opinion the Employer violated the Agreement (Joint Exhibit 1) by not providing the Grievant with proper notice.

This Arbitrator, however, does not agree with the Union's interpretation of the Merger and Bar Rule (Union Exhibit 8). The Preservation of Benefits provision (See Page 6 of this Award for Article 43 - Duration, Section 43.02 - Prerservation of Benefits) provides for incorporation of benefits where the Agreement (Joint Exhibit 1) is silent. In this Arbitrator's opinion the Agreement (Joint Exhibit 1) is not silent with respect to the provisions contained in the Merger and Bar Rule (Union Exhibit 8). The parties negotiated a just cause provision (See Page 3 of this

Award for Article 24 - Discipline, Section 24.01 - Standard) as well as a progressive discipline provision (See Pages 3-4 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline). If the Arbitrator concurred with the Union's contention, he would be trampling upon the two provisions mutually agreed to by the parties.

AWARD

1. The Grievant was not discharged for cause on October 31, 1986.

2. The Arbitrator is compelled to rule that the Grievant be reinstated with full back pay, and benefits, less any income he may have earned, and/or received as supplementary income from governmental agencies, during his absence.

May 18, 1987

Dr. David M. Pincus
Arbitrator