

ARBITRATION AWARD SUMMARY

OCB Award Number: 301

OCB Grievance Number: 17-00-88/027-0147-01-09

Union: AFSCME

Ernest Parks

Department: Ind. Com.

Arbitrator: Nicholas Duda, Jr.

Management Advocate: David Norris

Union Advocate: John Porter

Arbitration Date: 6/7 + 6/13/89

Decision Date: 7/14/89

Decision: Granted

IN THE MATTER OF ARBITRATION  
UNDER THE CONTRACT

Between:	)	
The State of Ohio	)	Grievance No. 17--00-(88-10-
	)	-27-0147-01-09
THE STATE	)	
	)	Grievant: Ernest Parks
-and-	)	
	)	ND 844
Ohio Civil Service Employees	)	
Association, Local 11	)	
AFSCME, AFL-CIO	)	
THE UNION	)	

Before: NICHOLAS DUDA, JR., ARBITRATOR

OPINION AND AWARD:

July 14, 1989

**CASE DATA****SUBJECT**

Discharge ("Removal").

**APPEARANCES****FOR THE UNION**

John Porter, Associate General Counsel, Presenting the Case

Jim Pagani, Staff Representative

Ernest R. Parks, Jr., Grievant

Tom Davison, Steward, Witness

Ronald D. Adams, Chief Steward, Director District 6

**FOR THE STATE**

David S. Norris, Office of Collective Bargaining, Presenting the Case

John Tornes, Office of Collective Bargaining

Gretchen Green, Manager, Labor Relations, Industrial Commission

Denise Clark, Manager of Medical Section, Industrial Commission

**BACKGROUND**

This case concerns the discharge of Grievant, a twenty-eight year employee.

On September 1, 1988 Suanne Newell, Chief of Employee Benefits in the Industrial Commission, notified Grievant by letter that

...recommendation has been made to discipline you for neglect of duty and/or failure of good behavior and/or inefficiency and/or dishonesty and/or violation of Industrial Commission Code of Ethics based on the following:

Recently, you expedited and processed your own claim file and you also had another person order a claim file for a friend of yours for your review. You have failed to follow instructions and/or policies regarding your job responsibilities such as: handling inquiries, examination of claim files, failing to mark review sheet and failing to update data base information accurately. In addition, you have filed for an additional allowance of a workers' compensation claim for the same condition for which you received disability benefits. While applying for disability benefits you stated that your condition was not work related.

A hearing will be conducted on this matter on Friday, September 9, 1988...

The purpose of this hearing is to provide you with a chance to tell your side of the story, to refute and/or rebut the charges and to provide you with the evidence and facts on which the State is basing this proposed discipline.

The letter did not indicate the possible form of discipline.

Ms. Newell signed the letter as "Hearing Officer" designated to conduct the hearing and make recommendations. After the hearing Ms. Newell sent a written memorandum dated June 21, 1988 to Warren J. Smith, Industrial Commission Chairman, with her recommendation. On pages one and two Ms. Newell summarized testimony that had been given at the hearing concerning the "first charge which was {Grievant} expediting and processing his own Worker's Compensation claim."

On page 3 of her report, Ms. Newell summarized discussion at the hearing concerning charges two, three and four:

the second charge against [Grievant was that he] had another person order a file on a claimant who was a friend of [Grievant]....

Ms. Clark...presented the charges relating to [Grievant's] job performance....

The last charge was presented by Joaquin Rodgers, Personnel Officer in the Office of Human Resources [who] stated that [Grievant] had filed for an additional allowance on his BWC claim on an illness (the amputation) for which he had received disability benefits and had declared was not job related.

Ms. Newell opined Grievant's

...defense was weak. He used the following statements: 1) He walked another claim through the system and nobody said anything. 2) He didn't know he was doing anything wrong, he never read the Code of Ethics. 3) He was just representing himself.

Her conclusions and recommendation were as follows:

I am recommending that the charge of [Grievant] filing for Workers' Compensation Benefits on an illness for which he received Disability Benefits, be dropped. Should [Grievant] receive any Workers' Compensation benefits for the amputation, he will have to pay back all of the disability benefits. I am also recommending that we put out additional guidelines regarding the handling of employee claim files.

Based on the above, it has been determined that just cause exists for discipline.

She did not recommend any specific discipline.

On October 13, 1988, Warren Smith informed Grievant that he was removed. The full statement was as follows:

This letter is to inform you that you are hereby removed from employment as a Claims Examiner 2 in the Medical Section, Industrial Commission of Ohio.

After reviewing the recommendation of the hearing officer and others, it has been determined that just cause exists for this action.

The charges you have been found in violation of include neglect of duty and/or failure of good behavior and/or inefficiency and/or dishonesty and/or violation of the Industrial Commission Code of Ethics based on your attempts to process and expedite your own claims and the claim of a friend, your inefficient job performance and your inappropriate dealings with the public we service.

This removal is effective the close of business Thursday, October 20, 1988.

On October 21, 1988 the Union filed a grievance protesting the discharge as follows:

**Statement of Facts (for example, who? what? when? where? etc.):**

Grievant was removed from employment as a Claims Examiner 2 in the Medical Section of the Industrial Commission of Ohio as per letter dated October 13, 1988 and feels it was not for just cause.

**Remedy Sought:** Grievant wishes to be reinstated in his employment with the Industrial Commission of Ohio, the discipline removed from his record and that he be made whole.

**Step 1 Response (by Immediate Supervisor):**

Waived pursuant to article 25.07.

**Step 2 Response:** Waived pursuant to article 25.07.

After a Step 3 hearing, the Industrial Commission's Chief of Labor/Employee Relations denied the grievance on November 28, 1988. She stated her "Finding" as follows:

The grievant's processing of his own workers' compensation claim and his reviewing the claim of a friend is in violation of the Industrial Commission of Ohio and Bureau of Workers' Compensation Code of Ethics. The removal was commensurate with the offense and was issued for just cause.

After reviewing the grievance, the information and documentation presented during the meeting and the contract, I find that the agency has not violated the contract. The grievance is, therefore, denied in its entirety.

After appeal, a denial was issued on December 20, 1988, by the Office of Collective Bargaining:

The above grievance is denied for the reasons cited at Step 3. The agency has shown just cause to impose discipline. Given the nature of the offenses, the mission of the Industrial Commission and the need for ethical conduct to sustain public support, the discipline that was imposed was commensurate to the offense.

On December 30, 1988 the Union appealed to arbitration. At the arbitration hearing held on two days, the Parties stipulated the following facts and issue:

#### STIPULATIONS OF FACT

- 1) The grievance is properly before the arbitrator.
- 2) [Grievant] was a Claims Examiner 2 removed from employment at the industrial Commission on 10/20/88.
- 3) [Grievant] worked in the Medical Review Unit of the Medical Section from 5/87 until 10/20/88. He was on disability leave from 11/24/87 through 3/31/88.
- 4) [Grievant's] immediate supervisor was Denise Clark, Manager of the Medical Section, Central Office.

#### STIPULATED ISSUE

Was [Grievant] removed for just cause? If not, what shall the remedy be?

Testimony and evidence were taken on two days, June 7 and 13, 1989. There were five joint exhibits, twenty-three exhibits by the State, and five by the Union. Both Parties submitted post hearing statements.

Grievant testified that after his discharge he was without financial means to support himself so he applied for and was granted disability retirement. However he claims he is able to work if permitted to do so. There was no medical opinion on his ability to work.

#### POSITIONS OF THE PARTIES

##### STATE'S POSITION

...[Grievant] when applying for disability in November of 1987, indicated that his injury, i.e., the one that resulted in the amputation of his leg, was not the result of his employment with the state. When applying for Workmen's Compensation for the same injury, he is (sic) indicating that it is a work related injury...this is a falsification of an official document.

...the Employer has met its burden of just cause under Section 24.01 of the Agreement.

...the order of removal...by Chairman Warren Smith on October 13, 1988 charges [Grievant] with violations of the disciplinary grid for neglect of duty, failure of good behavior, inefficiency, dishonesty and violation of the Industrial Commission's Code of Ethics.

...These violations, according to the disciplinary grid, call for a range of discipline up to and including removal.

...the Agency Head,...makes the final decision on the recommended discipline. Mr. Smith made the decision that the charge of dishonesty was to be included in the offenses for which the grievant was charged....

...the specific areas of the code which were violated,...included 4121-15-02, 4123-15-02,...Section A addresses maintaining the public confidence which depends on employees being "impartial, fair, and act only in the interest of the people, uninfluenced by any consideration of self-interest..." Section B [says]...employees 'should be willing to accept restrictions on their conduct that may not be necessary of public employees in other agencies...They must not only avoid impropriety, but appearances of impropriety.'

Also violated was 4121-15-03, 4123-15-03, Section G...'The overall intent of this code of ethics is that employees avoid action, whether or not prohibited by the preceding provisions, which result in, or create the appearance of: (1) Using public office for private gain, or (2) Giving preferential treatment to any person, entity or group.'

The final area of the Code identified by Ms. Green as being violated was 4121-15-09, 4123-15-09,....It states: 'No employee shall have possession of a workers' compensation claim file unless the file is necessary to the performance of the employee's duties.'

...Grievant [blatantly violated] the Code of Ethics by processing his own claim. Ms. Clark identified ten irregularities in the processing of the claim....

[Grievant] knew the proper procedure for filing his own claim....

A review of what [Grievant] stands to gain from his actions has to be put in the thousands of dollars....if the C-86 Motion is approved, the grievant could stand to receive a lump sum of several thousand dollars as well as a yearly income of a couple of thousand dollars.

[Grievant] further violated the Code of Ethics and policies and procedures by obtaining the claim file of a friend....in direct violation of the Code of Ethics 4121-15-09, 4123-15-09, Prohibition Against Unnecessary Claim File Possession, and the 9/3/87 memorandum from Denise Clark...

Ms. Clark also testified to a number of incidents involving the grievant where his behavior as Claims Examiner and a representative of the Industrial Commission was totally inappropriate and unacceptable. The first incident was documented...in a handwritten memorandum to [Grievant] dated 5/9/88....

The third incident involved the grievant giving out grossly inaccurate information to an inquiry from a Congressman's office in July of 1988....

The final incident...occurred in September of 1988....

Denise Clark testified to a long litany of errors by the grievant in the processing of claims as part of his normal, routine duties as a Claims....In summary, these exhibits document very serious errors beginning in September of 1987 and continuing up to the point of his termination.

The Union has tried to raise the issue of disparate treatment.

In approximately twenty-four (24) years of service with the Industrial Commission on the part of the Union's three (3) witnesses, two (2) alleged instances were raised. Both of these examples are totally different from the instant case.

...there was no disparate treatment on the part of the Industrial Commission....

...this Advocate is unaware of any cases arbitrated under the State's Collective Bargaining agreements where the Arbitrator has awarded an employee overtime for hours that he/she never worked or was never scheduled to work....

The State has settled dozens of grievances involving back pay for employees. In every one of those settlements the employee is awarded the appropriate amount of pay "not to include any overtime the employee might have been scheduled to work."...

...the Employer seriously questions the grievant's ability to return to work. The grievant himself has testified that he is in a status of disability retirement. He has testified that he has been declared "permanently and completely disabled" by three (3) physicians, one of which was his personal physician....

It is imperative that you uphold the Employer's decision to remove [Grievant]. To do otherwise would set a profoundly negative standard for ethical and professional conduct of employees. It would also raise the suspicion of the public toward the integrity of the Industrial Commission in the performance of its charged duties in the impartial determination of claims. A devastating message would be sent in that an insider, an employee, within the system can be the beneficiary in the processing and the decision on his own claim.

...the Employer respectfully requests that the Arbitrator deny the grievance in its entirety.

#### UNION'S POSITION

The removal...was not for just cause. [Grievant] was a 28 year old employee of the State....It would only be fair that an employee with such an excellent work record be allowed to work out the last few years he has before his retirement....he has testified under oath that he feels that his doctor would release him to return to work if his removal is overturned. The Union is asking the arbitrator to allow [Grievant] to return to work for a few years so that he can retire with a decent living income.

Let us deal with the charges, one by one,.... By analyzing the flimsy bases for most of the charges, and by highlighting the appropriate penalties which the Industrial Commission disciplinary grid calls for, the Union has demonstrated the weaknesses of the State's case....the Industrial Commission penalizes Management personnel less than bargaining unit personnel for more severe offenses....the removal of [Grievant] is not progressive nor was it commensurate with the offense.

...Gretchen Green,...testified that four different work rules were violated. The first rule violated...was insubordination and/or neglect of duty,...Ms. Green testified that the basis of that charge was that [Grievant] violated the Code of Ethics by processing his own Workers' Compensation claim. The appropriate penalty for a first offense is a written reprimand or suspension,...even if guilty of this charge, [Grievant] should have received only a suspension, at most, for a first offense,...the Code of Ethics is so vague as to not put a person on notice that the processing by an employee of his/her own claim would be a violation of this section.

The second offense...charged...was "Failure of good behavior and/or neglect of duty"....The basis for this charge was that [Grievant] ordered to be sent to him his own claim file and that of a friend of his. This charge is not appropriate for two reasons. The information in [his] claim file is not confidential as it relates to [Grievant]. [Grievant] has every right to review his own claim file. He may not have gone through the proper route in getting his own claim file, but that still doesn't make him guilty of this specific charge. With regard to the ordering of his friend Mr. Maggied's file, the Union demonstrated that Mr. Maggied was entitled to the information in his file. [Grievant] testified, and his testimony was un rebutted that Mr. Maggied stated that he had no attorney representing him....this specific work rule violation was not proved. If [Grievant] did anything wrong it was in ordering Mr. Maggied's file....the appropriate penalty for a first offense is counselling or a written reprimand....

The third charge...is that he violated work rule number 7 in that he was guilty of neglect of duty and/or inefficiency for carelessness in processing claim files, by making errors....Even if this charge can be construed to cover [his] errors in processing cases, the State failed to show that [Grievant] had a high error rate. The State attempted to use mistakes committed by [Grievant] over a one year period. [He] was never given progressive discipline for his prior errors....even if management did demonstrate that [he] committed 15 errors in processing cases in a one year period, the State provided no evidence of how this error rate compared with that of other claims examiners. Even if he was guilty of this charge, the appropriate penalty for [Grievant] would be counselling,...

The final charge...is that he violated work rule number 19, dishonesty and/or failure of good behavior for willfully falsifying any official documents. The Union demonstrated that without a doubt [Grievant] did not violate this rule....at the pre-disciplinary hearing management stated that the only basis for the charge of dishonesty was that [Grievant] filed the disability claim and worker's compensation claim....the Arbitrator cannot uphold [Grievant's] removal on the basis that [he] was dishonest for processing his own claim....Management has not alleged that any official document was falsified, other than the disability and worker's compensation applications....the hearing officer recommended that this charge be thrown out and in fact the recitation of the basis for this charge was dropped in the removal letter.

...there are only three charges left, the maximum penalty for which is only a suspension....the code of ethics statement fails to give notice to the employee of exactly what behavior an employee can be disciplined for....the Hearing Officer,...stated that employees should be given additional guidelines regarding the processing of employee claims....Management has not demonstrated that [Grievant] knew it was wrong to process his own claim....

Thus the only charge which can still stand is carelessness in processing claims. Admittedly the grievant made errors in processing claim files....[Grievant] had never been disciplined for making mistakes prior to his removal. Thus the appropriate penalty would have been counselling, according to the grid....Some of the processing mistakes by [Grievant] occurred more than a year before his removal. Section 24.02 of the contract requires that management initiate disciplinary action as soon as is reasonably possible. Management's action were not reasonable in this regard. Management also failed to affirmatively demonstrate that [Grievant's] error rate was higher than that of other employees....[Grievant's] job performance was also hindered by the fact that he went on a 5 month medical leave immediately after his initial computer training.

The employer also failed to follow Section 24. 02...in that it did not mete out progressive discipline to the grievant....

...there was disparate treatment in the discipline of the grievant....Thus even if the disciplinary grid allowed [Grievant] to be disciplined for dishonesty (and it does not), the most discipline the grievant should receive is a short suspension, because management is guilty of disparate treatment.

For all of these reasons, the Union requests the Arbitrator to disaffirm [Grievant's] removal....make [him] whole by ordering that he be paid for the difference between what he received in disability retirement pay and what he would have received had he kept on working, including overtime pay....also be credited with the sick, vacation and personal leave he would have accrued from the time he was removed up until the date of the arbitrator's decision. After the date of the arbitrator's decision, [Grievant] would be due nothing unless he is able to return to work, in which case the Industrial Commission should be required to reinstate him.

## **RELEVANT LABOR AGREEMENT 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....

#### **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 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.

#### **Section 24.04 - Pre-Discipline**

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....

#### **Section 24.05 - Imposition of Discipline**

The Agency Head...shall make a final decision on the recommended disciplinary action...

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

#### **Section 43.03 - Work Rules**

After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable....

### **CODE OF ETHICS**

#### **The Industrial Commission of Ohio Bureau of Workers' Compensation**

**Effective January 1, 1978**

#### **POLICY**

- (A) ...Each employee, of whatever position, should therefore, maintain the highest standards of personal integrity, since the public often judges the actions of an employee as reflecting the standards of the employing agency.
- (B) ...They should be willing to accept restrictions on their conduct that may not be necessary of public employees in other agencies, who are not in similar position of trust....

#### **STANDARDS OF CONDUCT**

...The overall intent of this code of ethics is that employees avoid any action, whether or not prohibited by the preceding provisions, which result in, or create the appearance of:

- (1) Using public office for private gain, or
- (2) Giving preferential treatment to any person, entity, or group.

#### **PROHIBITION AGAINST UNNECESSARY CLAIM FILE POSSESSION**

No employee shall have possession of a workers' compensation claim file unless the file is necessary to the performance of the

employee's duties....

**EXERPTS FROM APPLICATION FOR DISABILITY LEAVE BENEFITS - GRIEVANT'S STATEMENT  
ON NOVEMBER 9, 1987**

**NATURE OF ILLNESS**

**6. Describe your disability**

Gangrene right foot amputated

**7. Was disability due  
to an injury?**

**If yes, date of  
injury**

**How and where did  
accident happen?**

Yes

No

[no entry]

[no entry]

**WORK RELATED CLAIMS**

**14. Was your current illness/injury received in the course of and  
arising out of your employment with the State of Ohio and/or  
any other employer? Yes No. If YES, please read and  
complete questions 15 and 16.**

[note: Grievant did not answer this question]

**15. Is this a reoccurrence of a previous injury? Yes No.  
If YES, did you previously file for BWC lost time wages. Yes  
No Medical benefits? Yes No. Did you receive any  
compensation on the initial BWC claim? Yes No**

[note: Grievant did not answer this question]

**MOTION PREPARED AND SIGNED BY GRIEVANT IN AUGUST 1988**

**BUREAU OF WORKERS' COMPENSATION  
AND  
INDUSTRIAL COMMISSION OF OHIO**

**MOTION BY GRIEVANT IN AUGUST, 1988**

Employer Northway Cab. Co. Claim No. 2-151561  
PEL 20993

I move to additionally allow the claim(s) for the condition(s)  
referred to as "right foot injury which aggravated pre-existing  
diabetes resulting in amputation of the right foot to 6 inches below  
the knee.

**THE INDUSTRIAL COMMISSION OF OHIO  
POLICY AND PROCEDURE MEMO  
DISCIPLINE**

Disciplinary action will be imposed for just cause and will be commensurate with the offense. The Industrial Commission will follow the principles of progressive discipline...

The progressive disciplinary guidelines (following) are not all inclusive as other infractions may constitute justifiable grounds for disciplinary action.

Violations		1st	2nd	3rd	4th	5th
Insubordination and/or Neglect of Duty	Failure to follow written policies of the Appointing Authority or Division Chief. Violation of the Code of Ethics.	Written or Suspension	Suspension	Removal		
Failure of Good Behavior and/or Neglect of Duty	Providing or discussing confidential and/or personnel information with unauthorized persons	Counseling	Written or Suspension	Suspension or Removal	Removal	
Neglect of Duty and/or Inefficiency	Carelessness with mail, warrants, claim files, and equipment.	Counseling	Written or Suspension	Suspension or Removal	Removal	
Dishonesty and/or Failure of Good Behavior	Willfully falsifying any official document.	Suspension or Removal	Removal			

## ANALYSIS

### FINDINGS OF FACT

About 28 years ago Grievant began work with the State. Over the years he worked in a number of departments and had never been issued any written discipline.

In 1982 he transferred to the Industrial Commission. For the next five years he worked in the Appeals Unit handling Worker's Compensation cases as a Clerk-Examiner on Worker's Compensation case appeals. According to Grievant's annual performance evaluations in the Appeals Unit his work always met or exceeded the work requirements in respect to the nine factors on that evaluation.

In April 1987 he bid for and was awarded a job as Claims Examiner in the Medical Section doing much the same type work that he had done in the Appeals section.

The Medical Section administers acquisition of impairment evaluations and related medical opinions for Worker's Compensation claims. Contract physicians perform the medical evaluations. In addition to obtaining the medical opinions, the Medical Section assists the Bureau of Workers' Compensation in determining eligibility and reasonableness of compensation payments of various kinds.

The Medical Section screens, reviews, docket and processes approximately 500 routine examinations, 500 in-house specialist examinations and 800-900 claim reviews per month. As a Claims Examiner, Grievant's duties included screening claims, reviewing medical opinions, routing claims to the appropriate station, handling public inquiries about claims and claim information, mailing copies of dispositions, etc. During the course of the

day Grievant processed approximately 20-40 different claims. The other clerk who worked with Grievant on these tasks did at least as many claims per day and possibly more; Grievant testified that he handled more phone inquiries.

Grievant received his probationary job evaluation by his supervisor, Dennis Clark, in July 1987. At that time Ms. Clark considered him as meeting requirements in respect to all nine evaluation factors. Thereafter she performed only one other employee performance evaluation for Grievant, on September 1, 1987. On that evaluation Ms. Clark rated him slightly higher on all factors except initiative where she had moved Grievant from "considerable" to "highly motivated", the highest category. Her comment was that Grievant

...continues to approach his work earnestly. He has steadily increased his production and has gained knowledge in claims examining and processing. He has been commended for assisting the public, but continues to need to improve communication and cooperation with other departments/employees. Suggest continued efforts to improve neatness and thoroughness. [Grievant] is a valued member of the medical section staff.

In October, 1987 the Medical Unit had a significant operational change involving the use of computers. In preparation for the change Grievant and other employees attended a three day seminar conducted by NCR, who provided the computer representative. After the unit was installed he attended another half day seminar.

At about this time Grievant, whose health had not been good generally, experienced serious problems with his foot and leg. He continued to come to work until November 7, 1987, several days before being hospitalized. On November 9, 1987 he submitted an application for disability leave benefits. On the form item asking for a description "of your disability". He entered "Gangrene right foot amputated." That section on "Nature of Illness" asked for other information. Item 7 asked "Was disability due to an injury?" In

response he checked "No". The form had a section entitled "Work related claims". Item 14 in that Section asked "Was your current illness/injury received in the course of and arising out of your employment with the state of Ohio and/or any other employer?" He checked "No". Question 15 said "Is this a reoccurrence of a previous injury?" He checked "No" on this question also. The Employee Certification/Authorization section had Item 20 which stated the following information to the claimant:

I understand that if my injury/illness was received in the course of and arising out of my employment it is my duty to pursue my claim for loss of time and wages with the Bureau of Worker's Compensation.

Prior to leaving on disability leave Grievant had not been disciplined in any way by Denise Clark who provided close supervision of his activities and was aware of his performance. She did counsel him on a few occasions on correct performance of work as she did with her other employees consistent with her comments in the September 1, 1987 evaluation she had made.

Grievant returned to work in April, 1988.

During the five months of his absence the new computer system had begun functioning as intended and employees had improved their proficiency in using the system. Grievant was still relatively inexperienced in the system and made a number of errors.

In April, 1988, a few weeks after he returned to work, Ms. Clark gave Grievant a memorandum concerning the subject "accuracy and thoroughness"

Ernie, you must be more thorough and accurate about your work....Numerous claims are in transit or received in other locations last week, when you were processing reports about ADS was not updated to dunn or delete. This causes me, you and others in our section much unnecessary work, as well as wasted time and effort. I have since corrected ADS on the attached claim. I very much appreciate your commitment to your work and the goals of our section, however inaccurate file processing causes big problems. Concentrate and take the time to be thorough. I'm sure you will.-  
Denise"

Ms. Clark recognized a need to provide close supervision and counseling for Grievant and did so. She did not consider that his actions required discipline and did not impose any. His mistakes involved use of the computer and observance of new special instructions, time limits, distribution requirements and other ministerial requirements established in recently established memos, procedures and specifications required by Ms. Clark to improve system performance.

In addition to his mistakes Ms. Clark was concerned about several incidents reported to her involving Grievants' conduct which Clark felt reflected negatively on the Section. One of those incidents was on July 5, 1988. Several employees reported to Ms. Clark that they had overheard Grievant telling a claimant over the telephone "that the doctor who was working on his claim is pregnant and is not doing a lot of work now". Ms. Clark spoke with Grievant in her office. She "advised [Grievant] that he should never give personal information about a doctor, that he should rarely, if ever, give personal information about himself, and that he should simply answer the inquiry and where possible do what he can to resolve the problem."

Another complaint Ms. Clark had about Grievant involved a legislative inquiry. The Industrial Commission has a procedure whereby inquiries from legislators are reported on a "Legislative Intake Form" which has a space for the name of the legislator inquiring, the date of inquiry, the problem or request, the name of the claimant, the claim number, person within the Industrial Commission contacted and the course of action which would be taken. The procedure requires a reply to the legislator within one day.

Congressman Applegate's office made an inquiry on July 21, 1988 concerning reimbursement from "Workers' Compensation for nursing fees" for a certain claimant and claim number. The inquiry from Congressman Applegate's

office was passed along to several people in the Industrial Commission for an answer. Somehow answering the inquiry took several days. On August 1 Grievant responded that as far as he could tell "The nursing fees would be paid today but that it would be a couple of weeks before the Claimant received his check." That information was sent to the Congressman's office. When no check was received by August 25, the legislator's office complained to the Industrial Commission's legislative liaison about the handling; the liaison passed the complaint along to the Chairman of the Industrial Commission with a copy to Denise Clark. Denise Clark considered Grievant's handling inadequate in that case.

The Applegate case is significant in another respect. It is further evidence of a point made throughout the hearing on this case that the Industrial Commission has a normal procedure for handling the many cases coming before it; but it seeks to avoid complaints and respond to complaint or inquiry by expediting or taking out of sequence the processing of claims raised by inquiries from claimants, claim representatives, legislative representatives, etc. according to priority based on source of inquiry. In general, the system seeks to expedite handling of cases for which specific complaints or inquiry is made.

Ms. Clark did not consider that any discipline was necessary or appropriate for any of Grievant's conduct until she discovered in August, 1988 that a check was being issued to Grievant's personal physician for services that physician had performed examining Grievant in the capacity of consultant to the Commission on a Worker's Compensation claim for Grievant. Ms. Clark knew that that physician was also Grievant's personal physician.

Before returning to work, Grievant had started discussing with his doctors (surgeon and his personal physician) the possibility that the gangrenous condition had stemmed from a prior accident or injury. They

speculated that the gangrenous condition might have resulted from an injury he had received in 1958 while he was employed as a cab driver for the Northway Cab Company or in another injury he had received prior to 1982 while employed in the Industrial Relations Department of the State. Both injuries had been the subject of separate Workers' Compensation claims granted by the Industrial Commission over the past years.

Grievant anticipated substantial medical expenses in connection with his amputation and subsequent care e.g. prosthesis, etc. After returning to work in April he decided to seek a reopening of one or both Worker's Compensation cases for a determination on whether he would be eligible for additional benefits. He asked an employee to get his claim file and then prepared a motion to have the prior claims reopened. For the motion he attached a letter from his surgeon and personal physician. He also referred to the latter for a consultant's opinion, which the doctor provided. (The check to pay for the consultant opinion attracted Ms. Clark's attention mentioned above).

When she discovered the check she undertook an investigation of Grievant's current Workers' Compensation claim and his handling in connection with that claim. She discovered, largely through admissions by Grievant, that he had initiated a motion to reopen, obtained his file, and processed the claim by requesting a medical opinion all while retaining the file. She believed that this action violated a memo she had issued on September 3, 1987.

When pulling files for requisitions and other inquiries be certain that the requestor (i.e. employer or claimant representative, etc.) is recognized in the claim file as a party privileged to review the file. If this information is not apparent in the file, check the computer to ascertain the authorized representatives.

Grievant had made a data entry such that his claim "would not be randomly assigned to another claim examiner." Ms. Clark also became aware, apparently from Grievant that he had obtained for a friend, the friend's Workers' Compensation file and had allowed him to look at it.

The State employees with whom Denise Clark reviewed this matter decided that Grievant had "wilfully falsified an official document" by answering "No" on the question 14 "Was your current illness/injury received in the course of or arising out of employment with the State of Ohio and/or any other employer?" Proof in Ms. Clark's eyes was his later application for Workers' Compensation.

According to grievant he had processed his own Worker's Compensation file in the past with his supervisor's knowledge and permission and knowledge of other supervisors but was never told such conduct was wrong. This testimony was not refuted.

On or about January 27, 1989, several months after Grievant's removal, the Legal Section Office Manager, a non-bargaining unit person carried her sister's Industrial claim file to the medical section rather than having it handled in the normal manner. The Office Manager's purpose was to expedite processing of her sister's claim. That matter was reviewed for discipline. Before any discipline was decided the Chairman of the Industrial Commission issued a written memorandum on February 27, 1988 to all employees concerning "Proper Handling of Claims".

#### PROPER HANDLING OF CLAIMS

Recently a number of incidents have occurred which necessitates a review of proper handling of claims by Industrial Commission employees.

We, as public employees, are always under the close scrutiny of the public. We must, therefore not only avoid improper handling of claims but also avoid the appearance of impropriety.

Some examples of this type of handling would be handling one's own claim, or handling a relative's claim, both of which would give the appearance of impropriety. No claim should receive any partial treatment or treatment different from the norm unless there is a proven hardship or to correct some undue delay. Actions on claims such as those described above require Section Manager approval.

Employees need to be impartial in the handling of claims and avoid all favoritism. Employees are informed of the Code of Ethics during orientation and are expected to abide by it. Your attention to this matter is required.

Several weeks later the Legal Office Manager received a written reprimand as follows:

This is to serve as a written reprimand for neglect of duty and failure of good behavior.

On or about January 27, 1989, you had hand carried your sisters Industrial claim file to the Medical Section, rather than placing it on the Legal out going shelf to be taken by a Clerical Specialist. You had admitted in your affidavit, of walking this claim to the Medical Section, due to the persistence of the claimant.

Any further incidences of this nature will result in stronger disciplinary action.

#### EVALUATION

In Ms. Newells letter to Grievant dated September 1, 1988 she notified him "that a recommendation had been made to discipline you for neglect of duty and/or failure of good behavior and/or inefficiency and/or dishonesty and/or violation of Industrial Commission's Code of Ethics based on..." specified allegations and conclusions of fact. Ms. Newell's letter did not inform Grievant about "the possible form of discipline" as required by Article 24.

As summarized in the background above Ms. Newell's memorandum to Chairman of the Industrial Commission covered in considerable detail the testimony at the hearing about the facts underlying the recommendation to discipline. Her conclusions as to misconduct by Grievant related to his "actions in processing and expediting his own claim...in reviewing a friend's claim...and careless and inaccurate work and negative comments." However she recommended "that the charge of [Grievant] filing for Worker's Compensation benefits on an illness for which she received disability benefits, be dropped." (underline supplied)

A fair reading of her recommendation is that she found just cause for discipline based on Grievant's processing and expediting his own claim, "reviewing" his friend's claim, carelessly working and inaccurately work and making negative comments. She did not rely on "wilfully falsifying any official document," which does not appear in the record until the State asserted it at the arbitration hearing as the basis for the alleged dishonesty violation.

Ms. Newell did not recommend any specific discipline.

The Chairman's letter of removal mentions that he had reviewed the recommendation "of the hearing officer and others as the basis for his determination that just cause exists for removal. (underline supplied) The basis for the removal action "suggested by others" is not related. In any event the Chairman said "the charges you have been found in violation of include neglect of duty and/or failure of good behavior and/or inefficiency and/or dishonesty and/or violation of the Industrial Commission Code of Ethics. Based on your attempts to process and expedite your own claims and the claim of a friend, your inefficient job performance and your inappropriate dealings with the public we serve." The Chairman did not base the removal on the fact that Grievant filed an additional allowance of a claim "for worker's compensation for the same condition for which you received disability benefits," mentioned in Ms. Newell's original September 1, 1988 notice of hearing, but which she recommended be dropped in her report to the Chairman. In the absence of that mention the Arbitrator concludes that Chairman Smith accepted the hearing officer's recommendation to "drop" the falsification charge.

At the arbitration hearing the State charged Grievant with four violations.

1. Insubordination and/or Neglect of Duty - Failure to follow written policies of the Appointing Authority or Division Chief. Violation of the Code of Ethics.
2. Failure of Good Behavior and/or Neglect of Duty - Providing or discussing confidential and/or personnel information with unauthorized persons.
3. Neglect of Duty and/or Inefficiency - Carelessness with mail, warrants, claim files, and equipment.
4. Dishonesty and/or Failure of Good Behavior - Wilfully falsifying any official document.

Just Cause is required by Section 24.01 of the Labor Agreement. To establish just cause in this case the State must clearly and convincingly show:

1. Acts by Grievant
2. which constitute the violations charged,
3. and that removal of Grievant was consistent with
  - a. The Commission's Progressive Disciplinary Guidelines, and
  - b. Labor Agreement requirements, particularly sections 24.02 and 24.04.

Furthermore, removal cannot be arbitrary, unreasonable or discriminatory under the circumstances of this case.

Each of the four violations alleged at Arbitration will be considered below.

1. **Failure to follow written policies of the Appointing Authority or Division Chief. Violation of the Code of Ethics.**

On October 4, 1982 Grievant signed a statement acknowledging receipt of the pamphlet containing the Code of Ethics of the Industrial Commission of Ohio, Bureau of Workmen's Compensation, which was effective January 1, 1978.

By signing the statement Grievant certified that "I have read the above numbered rules in their entirety." That pamphlet has sections quoted above which the State alleges were violated by Grievant and justify the subject discipline.

A specific section of the Code of Ethics is entitled "Prohibition Against Unnecessary Claim File Possession". It provides that "No employee shall have possession of a worker's compensation claim file unless the file is necessary in the performance of the employee's duties."

Grievant's processing of his own compensation claim and his reviewing the claim of a friend was held in the Third Step hearing to be a violation of the Code of Ethics and just cause for the removal, which the Chief of Labor/Employee Relations considered "commensurate with the offense and for just cause."

A claim file is necessary to processing a claim, whether the processing is performed by an examiner on his own claim, a friend's claim or someone else's claim. Therefore the mere fact that Grievant possessed his own claim does not per se constitute a violation of the "Prohibition Against Unnecessary Claim File Possession". For an Examiner possessing his own file to be wrong, there would have to be a showing that processing by the Examiner of his own claim was a violation; that is not prohibited clearly by the Code of Ethics. Grievant actually was processing his own claim. At the time he was doing so there was no clear cut rule prohibiting an employee from "handling one's own claim, or handling a relative's claim."

Grievant processed his own claim just as he had done in the past to the knowledge of supervision. Processing claims is a responsibility of his position. Until months after Grievant's removal there was no specific rule prohibiting handling one's own claim. In fact the hearing officer for

Grievant's discipline expressly recommended to the Chairman "that we put out additional guidelines regarding the handling of employee claim files, thereby acknowledging at least the ambiguity in the situation." Publication of the clear order was not done immediately and only after a supervisor was later discovered handling a relative's claim. Then the specific instruction was publicized with the statement "your attention to this matter is required." It was noteworthy that the supervisor was thereafter, and retroactively, disciplined but only with a written reprimand.

In her September 3, 1987 memo Ms. Clark told staff "when pulling files for...inquiries be certain that the requestor (i.e. employer or claimant representative, etc. is...a party privileged to review the files." A claimant such as Grievant, or his friend, is privileged to see his own file. Ms. Clark's memo was not violated.

The list of things which Grievant did for his own claim really constitutes matters which he normally does in processing claims although he may have been careless about minor ministerial matters.

As pointed out by the Union Grievant did not receive any benefits to which he was not entitled by partially processing his own claim.

Under these circumstances the State has not shown clearly and convincingly that Grievant violated the Code of Ethics or failed to follow written policies of the appointing authority or division chief when he processed his own claim.

**2. Providing or discussing confidential and/or personnel  
information with unauthorized persons.**

The basis for this charge is that Grievant requested a file for a friend who wished to see his own Workers' Compensation file. This aspect has just been considered. Grievant did not process his friends claim. He answered an

inquiry about the contents of a case file from the involved claimant. That Claimant was entitled to see the contents of his own case file. As a matter of fact a normal part of Grievant's duty is to answer inquiries about case status and case contents to persons privileged to know the case contents. No confidentiality was breached when Grievant enabled his friend to see the friend's own case file.

Apparently the State also alleges that by letting his friend see the case file Grievant violated the Code of Ethics by "giving preferential treatment to any person, entity or group." The fact is that the Commission system is geared, broadly speaking, to give a kind of "preferential treatment" to persons who inquire or ask for same. Witness the procedure for answering legislators' requests within 24 hours. In the absence of specific prohibition, answering requests of privileged persons for claim information cannot reasonably be held to be a violation of the prohibition against giving preferential treatment to any person, entity or group. As pointed out by the Union, Grievant's job was to answer requests by phone and otherwise about case status and information just as he did for his friend.

### **3. Carelessness with mail, warrants, claim files, and equipment.**

According to Ms. Clark, Grievant made mistakes both before and after his disability leave. When he returned from his amputation leave progress on the new system had bypassed him considerably. He admittedly made mistakes but even his supervisor did not discipline him because she thought that orientation and training and counseling were the appropriate courses. But for discovering that he had processed his own claim she would not have complained about his mistakes. The carelessness charge was really an afterthought. Most of the errors had already been handled and had become stale. Untimely discipline is barred by Section 24.02 of the Agreement; the discipline was

not initiated as soon as possible as required by section 24.02. Furthermore there was no persuasive evidence based on reasonable standards that the number or type of "carelessness" by Grievant was unusual or inordinate.

**4. Wilfully falsifying any official document.**

In the first place, this allegation was not a basis of the removal. Ms. Newell expressly recommended "that the charge of [Grievant] filing for Workers' Compensation Benefits on an illness for which he received Disability Benefits, be dropped." When Warren Smith sent his notice of removal he mentioned the other factual basis but not the filing for Worker's Compensation benefits. Furthermore the Step Three and Step Four denials relied only on "Grievant's processing of his own Worker's Compensation claim and his reviewing a claim of a friend." There was no reliance on either the alleged "falsification" or on "carelessness with mail, warrants, claim files and equipment."

Second, there is no evidence on which one could conclude that there was a wilful falsification. The Motion to reopen the Worker's Compensation months after the disability leave does not in and of itself prove a wilful falsification.

As a matter of fact the employee should seek Workers' Compensation if appropriate, then "pay back disability benefits," as recognized by Newell.

Under these circumstances, the state has not clearly and convincingly shown a violation of any of the violations on which the removal was issued or on either of the two bases on which the grievance was denied in Steps Three and Four.

Even if a violation had been shown, removal was not appropriate for several reasons. First Grievant had not been adequately informed of the consequences of his behavior in advance. Assuming Grievant had read the

Ethics Code when it was first given to him in 1982, the statement is vague and ambiguous as to his situation and his conduct in this situation. As pointed out the Code does not specifically forbid an employee from processing his own file or requesting a file of another person as long as no preferential treatment is given and none has been shown. Secondly the rules and penalties for ethical violations have not been applied even-handedly, reasonably and without discrimination. Only a few employees have been disciplined although there is evidence of similar misconduct by other employees and even the little discipline imposed has been much less than given Grievant.

The penalty for failure to follow written policies or violation of the Code of Ethics on the first offense is merely a written reprimand or suspension. Removal is not prescribed until the third offense. Thus even if the violation had been shown removal was inappropriate.

Essentially the same thing is true for alleged violation two, "providing or discussing confidential information with unauthorized person." The first occurrence is merely counseling or written reprimand. In this regard we note that the Legal Section Manager received only a written reprimand although her violation occurred after express prohibition of handling a person's own claim or the claim of relative.

Finally removal of an employee after twenty-eight years of good service with no prior discipline is unreasonable, arbitrary and capricious.

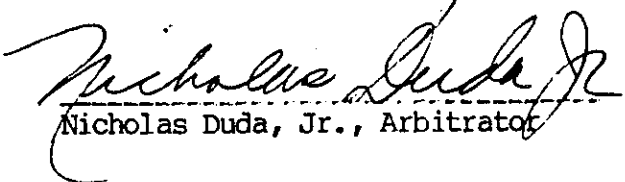
#### **CONCLUSION**

Removal was without just cause. Accordingly the Grievant must be re-employed.

**AWARD**

Inasmuch as the Grievant was not removed for just cause, the grievance is sustained. The State is directed to take the following action:

1. Rescind Grievant's removal;
2. Reinstate him to his former position with all his accrued continuous service;
3. For the period from date of his removal to July 21, 1989:
  - a. Make Grievant whole for all wages and benefits he did not receive because of the improper removal, less the amount of disability retirement pay received; and
  - b. Credit Grievant with appropriate sick, vacation and personal leave.
4. Return Grievant to active employment when and if he meets normal and customary medical examination and requirements for return to work after an extended absence.

  
Nicholas Duda, Jr., Arbitrator