#936

IN THE MATTER OF ARBITRATION

BETWEEN

Ohio Civil Service Employees Association, AFSCME, Local 11	)	CASE NO. 27-25-(930316)-513-01-03
	)	GRIEVANT: STEVEN McGRAW
and	)	
Ohio Department of Rehabilitation and Correction	)	OPINION AND AWARD

APPEARANCES:

On Behalf of the Union

Don Sargent	Staff Representative
Steven McGraw	Grievant
Patricia McGraw	Witness
Charles Robinson	Witness
Edrie Price	Witness
Lt. Larry Smith	Witness
Charles Nelson	Witness
Sherril Jane Colegrove	Witness
David Justice	Steward

On Behalf of the Employer

Joseph B. Shaver	Chief, Bureau of Labor Relations, Department of Rehabilitation and Correction
Georgia Brokow	Office of Collective Bargaining, Second Chair
Arthur Tate	Warden, Southern Ohio Correctional Facility
Frank Philips	Captain, Southern Ohio Correctional Facility
Sgt. Harold Stump	Witness
Lt. Scott Evans	Witness
Margaret Stevens	Witness
Mona Parks	Witness
Rosanne Clagg	Witness

LAWRENCE R. LOEB, Arbitrator
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I. STATEMENT OF FACTS

Sometime prior to October 20, 1992, the Grievant, a Corrections Officer 2 assigned to the Southern Ohio Correctional Facility, submitted a vacation leave request for November 4, 5 and 9, 1992 in order to accompany his girlfriend on a vacation she planned to take to Pigeon Forge, Tennessee. At the time he submitted the request, the Grievant only had eleven hours of vacation time available to him. Therefore, his request was denied. At that time, the Grievant also had 12.9 hours of personal leave and 19.54 hours of compensatory time available which, together with his vacation time, would have been more than sufficient to enable him to accompany his girlfriend to Tennessee had he requested to be allowed to use the time and had the Employer consented to the request. The Grievant never asked to use any of that time, though. Instead, on October 20, 1992 he submitted a form from his National Guard unit advising the Employer that he would be on National Guard training from October 26 through November 6, 1992. The form bore the signature of a First Lieutenant whom the document identified as the unit's commander. Since the document was identical to the others which the Employer had received from that unit in the past and because it appeared to be correct on its face, the Employer granted the Grievant the time off to perform military duty and thought nothing more of the matter until November 4, 1992 when Management made an effort to contact the Grievant at the Guard in order to discuss a bid he had submitted.

Upon doing so, the Grievant's supervisors were told that the Grievant was not at the unit and was not authorized to be off on two weeks' training. The following day the Employer obtained a statement from the officer who had allegedly signed the Grievant's work excuse. The Lieutenant, who at the time was the unit's Assistant Adjutant not the Commanding Officer, informed the Employer that:

> 1. According to our records, the work exemption for Steven M. McGraw to perform military duty was not produced at this unit for the dates indicated.

2. SPC McGraw is not currently performing duties with this organization. His next scheduled drill assembly is 21, 22 Oct 92. (sic)

The officer's signature on his statement bore little resemblance to the signature on the work excuse which the Grievant had submitted to Management on October 20, 1992.

After a further investigation by the National Guard, the Assistant Adjutant provided a second statement to the Employer. Dated January 4, 1993, the statement declared in pertinent part:

a. SPC McGraw was not properly authorized to perform duty by this unit. He was not on orders of any kind and the work excusal was produced through clerical incompetance (sic) without the knowledge of either the unit administrator or myself. If you compare the signature on the work excusal with other signatures I have provided in this correspondence, it is an obvious forgery. Furthermore, I was not even commanding the unit at the time the document was produced. The individual who produced the work excusal has been counselled and procedures have been implemented to ensure this situation does not occur again. (Emphasis added)

b. As I stated, SPC McGraw was not properly authorized to perform duty, however, my investigation of the issue indicates that he did perform some duties for the National Guard during the period of his work excusal. As he did not work at this location, the exact dates he worked cannot be verified. McGraw was working for his Section Sergeant who was unaware that he was not authorized to perform duty.

c. When I questioned SPC McGraw in regard to this matter, he indicated that he had believed the work excusal itself constituted authorization to perform duty. I explained to him that this was not the case and that he should never again perform any duties beyond scheduled drill assemblies without written documentation placing him on duty.

d. I cannot make any statement regarding the sincerity of McGraw's intentions in this matter. He appeared to be sincere in believing that he was performing authorized duty, yet at no time did he make any inquiry as to receiving pay for the time served which is rather unusual.

The discussion referred to in the last paragraph of the Lieutenant's letter took place on November 9, 1992. Less than a week later the Grievant went out on medical leave and did not return to active duty with the Employer before his termination in March, 1993.

Although the individual who gave the Grievant the work excuse repeatedly stated that the form was unsigned when he gave it to the Grievant and that he instructed him to take it to the Lieutenant for his signature, there is little doubt that the work excuse was signed with the forged signature at the time that the Grievant obtained it as the Employer continued to receive similar documents from that Guard unit through early January, 1993, all of which bore the forged signature of the same officer.

Believing that the Grievant had either forged the Lieutenant's signature to the work excuse or induced someone else to do it for him as part of a plan to gain sufficient time off to permit him to accompany his girlfriend to Tennessee, the Employer, on January 4, 1993, issued a request for disciplinary action which resulted in the Grievant being notified two days later that the Employer was charging him with violating Rules 1, 3a, 16, 24 and 35 of the Standards of Employee Conduct. Specifically, the January 6, 1993 notice informed the Grievant that he had violated the following rules for the following reasons:

> Rule 1 - Any violation of ORC 124.34 - .... dishonesty.....neglect of duty.....
>
> Rule 3a - Being Absent without proper authorization (AWOL)
>
> Rule 16 - Theft (in or out of employment)
>
> Rule 24 - Falsifying, altering, or removing any official document arising out of employment with DR&C
>
> Rule 35 - Intentional misue (sic) of state or federal funds

The Employer duly held a pre-disciplinary hearing on January 20, 1993 at which time a number of people testified including the Grievant, his girlfriend, the Lieutenant from the Grievant's National Guard unit and two of the girlfriend's co-workers.

In the course of the hearing the Grievant's girlfriend was asked if she had gone on vacation to Pigeon Forge, Tennessee, to which she responded that she had. She was also asked if the Grievant had accompanied her on the trip, which she denied, telling the Hearing Officer that someone else had gone with her instead of the Grievant. Neither the Hearing Officer nor the Employer ever asked who that person was and the Grievant's girlfriend never volunteered the individual's name. Likewise, the Grievant never volunteered the name of the person then or at any of the early steps of the grievance procedure although he knew who she was since it was his sister who ultimately testified at the arbitration hearing that it was she who had accompanied the Grievant's girlfriend to Tennessee. The girlfriend's co-workers testified that because the Grievant discussed the condition of the hotel that his girlfriend had stayed at, they believed that he had accompanied her to Tennessee although neither the Grievant nor is girlfriend ever specifically so stated to them, nor did they ever specifically ask the Grievant if he went with her.

When those same women and a third co-worker testified in the course of the arbitration hearing, however, they, for the first time, declared that the Grievant's girlfriend had stated that he had gone to a dinner theater in Pigeon Forge, Tennessee with her, the girlfriend describing the Grievant's behavior that night. This was the first time that these women had ever publicly indicated that the Grievant's girlfriend had made those statements. For his part, the Grievant repeated his story that he worked for the Guard throughout the two-week period in question, cleaning stoves and other cooking equipment at the direction and behest of his immediate supervisor at the Guard, a Sergeant from whom the Union obtained an unsworn statement which indicated that the Grievant had cleaned equipment throughout the two-week period in question. The Sergeant, however, did not testify during the course of the pre-disciplinary hearing nor at arbitration, neither party calling the Sergeant to testify.

At the conclusion of the pre-disciplinary hearing, the Hearing Officer found, by a preponderance of the evidence, that the Employer had just cause to discipline the Grievant. Specifically, she concluded:

> I am convinced C/O Steve McGraw did initiate and/or orchestrate an unauthorized work excusal be produced to deceive the institution into believing he was on properly authorized drill with the Ohio Army National Guard for the dates October 26, 1992 through November 6, 1992. This fraudulent work excusal constitutes a forgery as is purports to be the act of another though actually unauthorized. Further, this act solicited improper compensation other than allowed by law.
>
> I am convinced C/O McGraw did perform some work with the knowledge of his guard's unit superior officer, Sgt. Robert Dials; however, I believe this was a mere ploy attempting to legitimize this leave.
>
> I am convinced C/O McGraw did accompany Nurse Colegrove to Pigeon Forge, Tennessee for vacation as originally planned. When he discovered he may have to cancel this plan because of insufficient vacation hours, he conveniently arranged to be on military leave to ensure he would be able to take this vacation as originally scheduled by both employees.
>
> I find he falsified an official DR&C leave form claiming military leave. I find him absent without proper authorization from 10:50 am October 26, 1992 through 7:00 pm November 6, 1992. These cumulative actions constitute a violation of Ohio Revised Code 124.34 for dishonesty and neglect of duty.
>
> I do not find cause for discipline on Rule 35 - as military leave is a legitimate payroll expenditure from state funds. Further, C/O McGraw is in no position of authority to expend funds from any state account.

In large part, the Hearing Officer's conclusion was based on her belief that the Grievant's girlfriend was less than credible when she testified that the Grievant did not accompany her. That conclusion, in turn, was based on an incident which had occurred after November 6, 1992 when the girlfriend

was discovered making unauthorized copies of incident reports concerning the Grievant. Since his girlfriend was willing to go that far to help him in that incident, the Hearing Officer reasoned that the girlfriend would be willing to lie for the Grievant.

After reviewing the Hearing Officer's findings, the Employer recommended the Grievant's removal. The Union timely protested that decision asking that the Grievant be reinstated with full back pay. The matter subsequently proceeded through the various steps of the grievance procedure until it reached arbitration. Until that time, neither party had offered anything new concerning the incidents which led to the Grievant's dismissal. At arbitration, however, both parties presented a wealth of new information, including that the equipment the Grievant allegedly cleaned had passed an Army inspection three days before October 26, 1993, that it was the Grievant's sister who accompanied the Grievant's girlfriend to Tennessee, that the Grievant had been seen cleaning the equipment by an aunt who was visiting his house and that the equipment was kept in a locked area at the Guard unit which could only be accessed by keys provided by the Grievant's supervisor, the Sergeant who did not testify. Further, the Union called an individual who testified that he had helped the Grievant move the kitchen equipment to and from the Guard headquarters, taking it from the Guard on a Monday and returning it on a Friday. He could not remember, however, which Friday, October 30th or November 6th. Finally, as indicated earlier, three of the Employer's witnesses testified for the first time that the Grievant's girlfriend specifically stated that they had attended a dinner theater in Pigeon Forge, Tennessee on one of the days that the Grievant was supposed to have been working for the guard.

It was upon these facts that this matter rose to arbitration and award.

II. POSITION OF THE EMPLOYER

While the Union would characterize this case as one involving a harmless misunderstanding, it is anything but. Nor has Management blown it out of proportion as the Union seems to insist. Instead, the Grievant's actions must be seen for what they really were, a calculated attempt to defraud both the State of Ohio and the United States government so that he could accompany his girlfriend on a vacation. There is no question that the Grievant always intended to accompany his

girlfriend when she went on vacation to Tennessee in early November, 1992. The two of them not only discussed their plans openly, but the Grievant had requested the days off and would have taken the time if Management had not discovered that he did not have adequate vacation time on the books. Not one to see his plans thwarted, the Grievant hatched a plot of machiavellian proportions which was only discovered by a fluke when Management tried to contact him about a bid he had submitted.

Were it not for that phone call, the Employer would have never known of the Grievant's attempted use of the National Guard as a mechanism to get around the Employer's denial of his vacation request. Once Management began checking, it became clear exactly what the Grievant had done. Until that time, no one at the Southern Ohio Correctional Facility had any reason to question the authenticity of the Grievant's situation. That was because upon being told that he could not take off the two days he wanted so that he could accompany his girlfriend on her vacation, the Grievant went to his Guard unit and fraudulently obtained papers which led Management to believe that he would be fulfilling his two-week active duty requirement between October 26 and November 6, 1992. What Management did not know when it accepted the Grievant's papers was that he was never authorized nor required to fulfill his two-week active duty obligation during the period in question. Instead, the Grievant took a blank work excuse form and either signed his commanding officer's name to it or had somebody else sign the commanding officer's name and submitted that to the Employer knowing full well that the document he submitted did not authorize him to be off work.

While it is true that the Grievant apparently did some work for the Guard over the two-week period in question, it is equally clear that it was a minor amount and certainly did not cover the full two-week period. Had there been that much work, it would have spoiled the Grievant's plan to accompany his girlfriend on vacation to Tennessee, a vacation which she took. There is no question about that. Nor can there be any question about the Grievant having accompanied her as both of them discussed the trip with three of the girlfriend's co-workers at the Correctional Facility. None of those individuals had any reason to lie or to fabricate their testimony which was consistent and

complimentary. In the face of that evidence, the Union elicited stories from the Grievant's girlfriend and his sister who supposedly accompanied his girlfriend on her trip to Tennessee. There were obvious problems with their stories, not the least of which is that they were not consistent. Considering that the Grievant's girlfriend and sister spent just a short time in Tennessee, one would expect that they would have no trouble recounting the same events, but they did.

Coupled with the obvious discrepancies in their testimony is the fact that neither the Grievant nor the Union ever divulged at the pre-disciplinary hearing or at any of the prior the steps of the grievance procedure that it was his sister who supposedly accompanied his girlfriend to Tennessee. Considering the seriousness of the charges against the Grievant, it is utterly incomprehensible that that information would not have been divulged sooner. The fact that it was not indicates that the testimony of those two women was fabricated in a desperate attempt to avoid the Grievant's termination.

Considering the nature of the Grievant's offense, termination was the only penalty which Management could impose. While the Union would downplay the nature of the Grievant's actions, it is clear that he engaged in a pattern of fraud and theft, which if it had not been discovered would have resulted in the Employer paying him for two weeks when he had no legitimate reason to be off work and would not have been permitted to be off work had Management realized the exact nature of the situation at the Grievant's Guard unit. When the Army realized what the Grievant had done, it refused to pay him because he had no reason to be there and, therefore, no right to be paid. Likewise, the Grievant had no right to be off work and certainly no right to receive his pay while he was off work. When he did, through the fraudulent scheme he concocted, he stole from the State and gave the Employer just cause to discharge him. It was a fitting punishment and the only one Management could have imposed given the circumstances of the case and the Grievant's actions.

III. POSITION OF THE UNION

Management had no reason to discipline the Grievant and certainly no justification whatsoever to discharge him. Up to November, 1992 he had been employed at the Southern Ohio Correctional Facility for eight years and had a completely unblemished record. Then, in November,

because of a series of mistakes over which the Grievant had no control, hearsay, calumny and spitefulness, Management began the process which ended in the Grievant's dismissal. In doing so, it initially charged him with five separate offenses including dishonesty, being absent without proper authorization, theft, falsifying documents, and the intentional misuse of state or federal funds. Management pressed all five at the pre-disciplinary hearing only to see the fifth, the intentional misuse of state or federal funds, dropped at the conclusion of the hearing. There was no evidence to support it. There is no evidence to support the other charges, either, and they too, therefore, should be thrown out.

Certainly there is nothing in the record to support Management's claim that the Grievant was in Tennessee with his girlfriend. The best that the Employer was able to muster up until the time of the hearing was the suppositions of three women who, apparently after discussing the matter among themselves, came to believe that the Grievant had been in Tennessee because he knew something about the trip. If the Grievant hadn't had some relationship with his girlfriend, then their musings might have some merit. But the Grievant was involved with her and because he was it was natural that they would share their experiences with each other. It is from that commonplace exchange and from that alone that he knew something of the events which took place in Tennessee. Management, though, would ignore the obvious and instead declare such little bits of knowledge to be proof of the Grievant's alleged guilt.

All that the Grievant is guilty of, though, is following the policies at the Southern Ohio Correctional Facility and that of his Guard unit. He had to complete two weeks of active duty and sought the paperwork from the Army to do so. He was given the paperwork which was signed with what the Grievant believed was the appropriate officer's signature. There was nothing to lead him to believe that there was anything wrong with the signature. Nor is there any proof for Management's claim that the Grievant signed the form himself. The evidence, in fact, indicates just the opposite, that the officer's name was routinely signed on the form both before and after the events of November, 1992. Yet, again Management would ignore the obvious, choosing to believe that the Grievant was somehow responsible for something over which he had absolutely no control.

It should have been clear to Management that when the Grievant submitted the form which his supervisors accepted, he was simply following the practice which was in effect at the time. There was obviously nothing wrong with the paperwork because the Grievant's leave was approved by his supervisors at the Correctional Facility. If there had been anything wrong with the paperwork, they would not have done so. Again, though, Management is trying to say at this point that the Grievant knowingly submitted forged documents. Nothing could be further from the truth. It is these kinds of allegations, however, which form the basis of Management's decision to terminate the Grievant. The allegations exist in a vacuum, though, totally divorced from the facts of the case which unequivocally establish that the Grievant spent two weeks working for the United States Army during which time he cleaned equipment. Management claims he didn't do it, but all the evidence points to just the opposite conclusion.

The Employer could have subpoenaed the Grievant's Sergeant who, once and for all, could have established its claim that the Grievant didn't do any work, but for some reason the Employer chose not to take that step. Instead, it made a series of wildly unsupported allegations, allegations which became ever more bizarre as time went on. Thus, in the course of the arbitral hearing, three of Management's witnesses indicated for the first time that the Grievant had explicitly stated that he had been in Tennessee on vacation with his girlfriend. Those allegations had never been made before that date. Since they are the only proof that the Grievant actually committed the offense Management has charged him with, both logic and common sense dictate that they would have been brought forward at the earliest possible time. Yet again, they were never heard until the last possible moment. The timing of those allegations is indicative of the desperation Management felt going into the hearing. It realized that there was simply no justification for the Grievant's dismissal. Since there wasn't, he is entitled to be reinstated with no losses whatsoever.

IV. OPINION

As the individual who conducted the Grievant's pre-disciplinary hearing so aptly noted, this case is first and foremost about credibility or, as Management's representative so impolitely but succinctly declared in his closing argument, "Someone is lying." The question, obviously, is who?

The Employer steadfastly insists that it is the Grievant and his witnesses, his sister and his girlfriend who are dissembling. The Union, just as strenuously, defends the Grievant, maintaining that it is Management's witnesses who have fabricated their testimony either out of a desire to strike out at the Grievant and his girlfriend or to cover mistakes which they made. It is from this morass of conflicting claims and allegations that the Arbitrator must discern the truth.

In attempting to resolve such disputes it is tempting to begin at the places where the various stories diverge. As tempting as it may be to do so, it is always better to start at the points the parties agree upon and work outward, trying to resolve disputed factual situations from what is accepted as true. It is especially appropriate to do so in this case where there are so many factual questions and their resolution is complicated by the "last minute" addition of so much information to the story.

What is a given is that the Grievant had every intention of accompanying his girlfriend to Tennessee and would have done so without any problem if he had had adequate vacation leave available at the time he put in his request. He only had eleven hours, though, so the request was turned down. However, he did have almost thirty hours of other time available, but the use of that time was discretionary with the Employer. Whether or not Management would have permitted the Grievant to use some or all of that time is pure supposition as the Grievant never asked to use any of what was available to him. Instead, on October 20, 1992 he obtained a statement from his Guard unit declaring that he would be on duty with the Guard from October 26 through November 6, 1992.

The statement was signed with the name of an individual whom the form identified as the commanding officer of the Grievant's Guard unit. Although the individual whose name appears on the form testified that he did not sign it and that the Sergeant who gave it to the Grievant also denied signing it, there is no evidence that the Grievant forged the officer's signature. Rather, the evidence supports just the opposite conclusion, that the Grievant had absolutely nothing whatsoever to do with signing the officer's name to the form he submitted to the Employer. That conclusion follows from the similar forms the Union entered into evidence covering the period from mid 1992 through early January, 1993. All of those forms were identical to the one the Grievant obtained and all bore the forged signature of the same officer. An examination of three of the forms, two of which were

submitted by the Grievant and the third by another SOCF employee, reveals that the forms, including the officer's name, are photocopies. Since there is nothing to suggest that the Grievant signed any of those other forms or the original from which the others were copies, it is reasonable to conclude that the officer's name had been signed by someone at the Guard unit other than the Grievant and that he was simply handed one of those forms by the Sergeant when he requested to take his two weeks of active duty. There is no question about the latter point since the Sergeant testified as such. Just as importantly, the Sergeant also stated that he filled in the dates before he handed the form to the Grievant.

There is also no question that the Grievant's work excuse was identical to the type the Employer had received in such instances in the past. Had it not been, Management would have denied the Grievant's leave request out of hand. That conclusion is true in spite of the Lieutenant's testimony that the form was simply a device which the Guard had developed as a courtesy to local employers to notify them when their workers would be on drill weekends and that actual notification that the Grievant was on two weeks active duty would have been the orders he received from the Guard. Since those were not submitted to the Corrections Facility, the Lieutenant reasoned that both Management and the Grievant should have known that the Grievant was not on active duty and could not have been on active duty during the two weeks in question. The officer's testimony notwithstanding, the fact that the SOCF staff accepted the Grievant's paperwork without question indicates that Management had long recognized identical forms as sufficient evidence that members of the SOCF staff would be away on active duty during the times specified on those forms. It has to be borne in mind, however, that just because Management accepted the form the Grievant submitted as evidence that he would be on active duty does not mean that the Grievant did not know that he was not authorized to be off work and, therefore, was actively engaged in a plot to obtain paid leave as the Employer alleges.

It is also clear that the Grievant performed some work for the Guard over the two weeks in question and that he did so with the consent of his immediate supervisor. That conclusion follows from the fact that the Grievant was able to remove the kitchen equipment from the locked area

where it was stored at the unit. In order to gain access to the equipment he needed the Sergeant's keys which he could only obtain with the Sergeant's consent. That conclusion is buttressed by the statement the Sergeant provided in which he declared that the Grievant cleaned equipment over the two week period. Unfortunately the Sergeant did not testify at either the pre-disciplinary hearing or at arbitration with the result that there are a host of questions left unanswered about the Grievant's activities over the two weeks in question, including how much work he performed, how long it took him to perform the work, the exact nature of the work and, most importantly, why the work had to be performed at all given that the unit had undergone an inspection on October 23, 1992 which found only minor deficiencies with the kitchen equipment the Grievant took out to clean.

The final issue the parties agree on is that the Grievant's girlfriend did go to Pigeon Forge, Tennessee as planned and that someone accompanied her on the trip. Who it was and, more specifically, if it was the Grievant, however, are two of the issues which need to be resolved. Before attempting to do so, though, it is necessary to first establish the requisite burden of proof which the parties must meet and exactly what each party is required to prove.

The hearing officer at the Grievant's pre-disciplinary hearing used the least onerous standard, a preponderance of the evidence, to judge the Employer's case. Translated into mathematical terms, the standard required Management to prove by only 50.1 percent that the Grievant committed the alleged infractions. While that quantum of proof may be appropriate in a pre-disciplinary hearing or in a contract action, it is too lenient a burden to impose upon the Employer in discharge and discipline cases. Instead, this Arbitrator and the vast majority of those who have considered the matter have concluded that while it would be inappropriate to require the Employer to meet the proof beyond a reasonable doubt standard required of the State in criminal cases, Management should nonetheless have to meet a far more stringent burden than a mere preponderance of the evidence. That standard of proof is clear and convincing evidence which is often described as lying at the mid point between the two extremes. It is not necessary, however, to assign a numerical value to that standard. It is enough to recognize that the rule requires that the Employer present

significantly more proof than a mere preponderance of the evidence while not demanding that it be able to prove its case by proof beyond a reasonable doubt.

Although logic would dictate that the Grievant should shoulder the same burden as the Employer in seeking to establish his alibi, that has never been the case. Instead, in both the criminal justice system and at arbitration an individual alleging an affirmative defense need only prove that defense by a preponderance of the evidence. The different burden may be a reflection of how much an individual has to lose if the employer (or the State in a criminal case) can establish the truth of the allegations against him. However or why ever the different burdens came to be, it is those two, clear and convincing evidence for the Employer and a preponderance of the evidence for the Grievant which control the outcome of this matter.

Unfortunately, determining the burden each party must meet does not readily resolve the outstanding issues in this case. The problem is that in presenting their respective positions both parties left unanswered as many questions as they answered. In part, that situation is a function of the last minute allegations both parties made in the course of their presentations. On the Employer's side those included that the kitchen equipment the Grievant alleges he cleaned so assiduously over the two weeks in question passed an inspection just three days before the Grievant removed it from the Guard unit to clean. That information paled in comparison, though, to the allegations of the three women who worked with the Grievant's girlfriend who stated for the first time in the course of the arbitration hearing that the Grievant's girlfriend declared that she and the Grievant had gone to a dinner theater in Pigeon Forge. Up to the point that they made those statements, the Employer had absolutely no hard evidence to place the Grievant in Tennessee between October 26 and November 6, 1992. The best that it was able to offer was the conclusion the girlfriend's coworkers came to, that the Grievant had accompanied her to Tennessee because he spoke to them about the condition of the motel. As the Union points out, given the relationship between the Grievant and his girlfriend it is not surprising that he would know something about her trip to Tennessee. Rather, it would have been surprising if she had failed to discuss it with him. Were the co-workers suppositions the sole evidence the Employer had to prove that the Grievant had gone to Tennessee,

then while it may have been able to sustain its burden at the pre-disciplinary hearing of proving by a preponderance of the evidence that the Grievant accompanied his girlfriend to Tennessee, the undersigned would have to conclude that it failed to meet the more stringent burden of proving by clear and convincing evidence that the Grievant was in Tennessee on any of the days in question.

If, however, the Grievant and/or his girlfriend explicitly declared, as the girlfriend's co-workers testified, that he was out of the State on vacation with her, then the Employer would have met its burden of establishing that aspect of its case. Considering how important the statements are, it is astounding that they apparently were never made until arbitration. While one of the co-workers testified that she gave the information to the Ohio State Highway Patrol when she was interviewed, it is clear that she never imparted that information to the hearing officer at the pre-disciplinary hearing and that Management's representative had never before heard those allegations. The failure to mention those allegations at any time before arbitration requires that they be given little credibility. As a result, all that the Employer is left with to establish that the Grievant went to Tennessee is the supposition of the three co-workers that he must have gone along on the trip because he knew something about the condition of the hotel. Again, though, given the relationship between the Grievant and his girlfriend it is not the least bit surprising that he would have heard about the hotel from his girlfriend or that he would have made some statements about it in passing.

If the testimony of Management's witnesses was shocking because it had never been heard before, so too was that which the Union elicited from the Grievant's sister and an aunt who confirmed the Grievant's alibi. What makes their testimony so stunning is that in spite of the fact that the Grievant knew as early as the end of January, 1993 he was in serious trouble and by March that he had lost his job, neither he nor the Union divulged until just before arbitration that it was his sister who had allegedly accompanied his girlfriend to Tennessee or that he had a witness who was prepared to testify that she saw him cleaning equipment for the Army throughout the two weeks in question. Since the Grievant's family had to know what he was facing, their silence prior to arbitration is perplexing. In the end, though, it is not the Grievant's responsibility to prove that he did not go to Tennessee, but the Employer's to prove that he did. Because the Employer can only

show that three of his co- workers believed he went, their belief, absent any confirming evidence, is insufficient to lead the undersigned to conclude by clear and convincing evidence that the Grievant accompanied his girlfriend to Tennessee.

Having said that, though, does not end this matter. The Grievant was not charged with going to Tennessee, but rather with four separate offenses which exist independently of whether or not he ever left the State. Management assumed that the Grievant went to Tennessee with his girlfriend in an attempt to provide a motive for his behavior. Regardless of why the Grievant may have done what Management alleges, the important question is whether or not he actually committed the acts with which he is charged. If he did, then regardless of the motive Management ascribed to the Grievant, it would have just cause to discipline him. On the other hand, if the Grievant did not commit any of the alleged offenses, then regardless of what Management believed may have motivated the Grievant's actions it would have had no justification whatsoever to discipline him.

In the end, the question comes down to whether or not the Grievant had reason to believe that he was on two weeks active military duty between October 26 and November 6, 1992. There is no question that the Grievant went to the Guard unit and obtained a document from a Sergeant which informed Management that the Grievant would be on active duty for two weeks. There is also no doubt that the officer's name was forged to the document. However, there is a question of what occurred when the Grievant first came to the Guard unit on October 20, 1992. Specifically, the Sergeant claimed that in response to the Grievant's request he took a blank work excuse form, typed in the Grievant's name and the dates he would be off work and then gave it to the Grievant with the admonition to have it signed by the Lieutenant. The Grievant and his witness assert that the form bore the officer's signature when he received it from the Sergeant.

The undersigned finds the Sergeant's testimony not compelling for two reasons. First, the Sergeant initially falsified the report of his involvement in this matter, denying that he had anything to do with the form the Grievant received when he, in fact, had typed the Grievant's name and the dates the Grievant would be off on the form. Second, the Employer continued to receive similar forms from the Guard unit all bearing forged signatures of the same officer, signatures which are so

identical that they could only have been photocopied. [Laying three of the signatures on top of each other and holding them up to the light reveals no discrepancy between them.] The two points together lead the undersigned to conclude that the Grievant and his witness were truthful when they testified that the forms had been pre-signed by someone at the Guard unit who routinely forged the officer's name to the document. Even the officer whose name appears on the form admitted that at one point the practice in the unit had been for a clerk to routinely sign his name to such forms which were then completed and passed out on an as needed basis. And while he also testified that he stopped the practice some time before October, 1992, it seems evident from the documents the Union submitted that the practice did not stop, but continued on into early 1993 or at least that he was not able to destroy all of the copies bearing the forged signatures.

It is equally clear that in spite of the Grievant's failure to submit a copy of the actual orders from his unit placing him on active duty during the two weeks in question, Management found the Grievant's work excuse sufficient and believed that he would be on active duty from October 26, 1992 through November 6, 1992. Were it not so then the Employer would have never accepted the form and granted the Grievant two weeks military leave in the first place. The fact that it did indicates that Management had routinely received such forms in the past and that they had been used to justify two weeks military leave in other cases prior to this time.

Ultimately, the resolution of this matter comes down to whether or not the Grievant knew when he submitted the form that he had no right to be off work because he was not authorized to be off by the military. As with other aspects of this case, the answer to that question is not readily apparent from the evidence submitted by the parties. What is particularly confusing were the statements by the Lieutenant who testified that the Grievant should have known that the statement he received from the Sergeant was not adequate to place him on military duty. That conclusion was based upon his belief that because the Grievant had been in the Guard for so long (eleven years) he should have known that the excuse he obtained from the Sergeant did not mean he was on active duty because he had no orders. That testimony is at odds with the statements the Lieutenant made in his January 4, 1993 letter to the Employer in which he declared that the Grievant seemed sincere

about his belief that he was authorized to be on active duty during the two weeks in question and that the clerk who gave the Grievant the form had been counseled. Those statements seem to exonerate the Grievant, making him appear to be a victim of bureaucracy. But then the Lieutenant went on, casting doubt on that view by declaring that he was uneasy because the Grievant had not asked to be paid for the period of time, which he felt was unusual.

The Grievant did eventually seek to be paid, but when he did so is not clear. His request was turned down by the military, though, on the basis that there were no orders authorizing him to be on training and, therefore, he could not be paid for the two week period in question even though he undoubtedly did some work for the Army during that period. How much work he did and how long it took him to complete the work, though, are questions which can never be of the three factors definitively answered because of the three factors, the passage of time which blurred the witnesses memories, the failure of the Section Sergeant to testify and the results of the unit inspection which occurred just three days before the Grievant removed the equipment for cleaning and which showed the equipment to be in good shape.

Management assumes that the Grievant's absence was a scheme he concocted in order to accompany his girlfriend to Tennessee on her vacation. According to Management, in order to make the scheme work the Grievant had to appear to be doing something for the military which explains why he may have actually spent some time cleaning equipment as he testified he did. It is just as likely, though, that the Grievant needed additional money as he indicated and decided to spend two weeks working for the Army so that he could collect from both the government and the Employer for the same period of time. In either case, the Grievant's plan required the cooperation of at least two other people, his Section Sergeant who controlled access to the cooking equipment and the Sergeant from whom the Grievant obtained the work excuse form which he turned over to Management. Unfortunately, the former individual didn't testify and the latter's testimony was corrupted by his failure to initially disclose that he had typed the Grievant's name and the dates he would be off work on the form he gave the Grievant, a form the undersigned has concluded carried

the Lieutenant's forged signature when it was turned over to the Grievant even though the Sergeant denied that it did.

In the end, the undersigned must conclude that the Grievant should have known that he was not on active duty between October 26 and November 6, 1992. What leads to that conclusion is that the Grievant had not received any orders authorizing him to be on active duty. Further, he never testified that he asked for any such paperwork. It may be possible that he felt that once he obtained the work excuse from the Sergeant, the Sergeant would take the steps necessary to have the orders issued for the Grievant to be on active duty. If that is what the Grievant had in mind, he never testified to it. Instead, his testimony indicates that he went to the Guard unit, told the Sergeant that he needed to be on active duty for two weeks, obtained the work excuse, submitted it to Management and then performed some work for the Guard over the period of time. If, as the Grievant indicated, he took this step because he needed extra money, then the Lieutenant's observation that the Grievant failed by January 4, 1993 to seek payment for the two weeks he was allegedly on active duty severely undercuts his reason for working for the Guard. Again, there may be a logical explanation for the Grievant's apparent lack of concern about getting paid, but if there was, he failed to voice it.

In addition, the Grievant never explained how he believed he could simply walk into the Guard unit and put himself on active duty. Taking his testimony at face value that, though, is exactly what he did. As he recounts the sequence of events, he had a conversation with his Section Sergeant in which he offered to clean some cooking equipment if he could get the time. The Grievant didn't indicate when the conversation took place, but it had to have been sometime prior to October 20, 1992 as that was the day the Grievant handed in the work excuse he received from the Guard. The Grievant indicated that he went to his Sergeant, who is one of the full time Army personnel assigned to the unit, and requested a slip so that he could notify his Employer that he would be off work for two weeks commencing October 26, 1992. If the form had not been signed and the Grievant had been told, as the Sergeant testified he did, that he had to obtain the commanding officer's authorization to be off for two weeks, then it would be clear that the Grievant

knew that he had no right to be off work because he never received proper authorization. However, the evidence indicates that the form bore the Lieutenant's signature at the time it was handed to the Grievant which means that the Grievant never spoke to anyone beyond the two Sergeants about going on active duty for two weeks. It is difficult to imagine that the Grievant, an eleven year veteran of the Service, could have reasonably believed that either Sergeant individually or both together could have authorized him to go on two weeks active duty. This is especially so if the work excuse had the Lieutenant's signature photocopied on it.

As the Grievant was not authorized to be on active duty, he had no right to be off work. However, the undersigned is not convinced that Management had just cause to discharge the Grievant as a result of what he did. While it is true that he was not officially authorized to be on active duty, he was nonetheless acting under color of authority during the period in question. That conclusion follows from the fact that the Sergeant who gave the Grievant the work excuse form typed not only his name on the pre-signed form, but also the dates the Grievant intended to be off work. Therefore, while the Grievant should have know that he had to have orders to be on active duty for two weeks, he did receive some authorization from an individual who could have easily said "no" to him by simply failing to give him the form or not typing in the dates until he provided copies of orders. The Sergeant did neither, however. Instead, he did exactly what the Grievant requested, provided him with a statement that he would be on active duty for two weeks.

The second reason the discharge penalty is not justified in this case is that the crux of the Employer's position is that the Grievant deliberately entered upon a scheme in order to accompany his girlfriend to Tennessee. As indicated above, though, the Employer failed to prove that the Grievant accompanied her on the trip. The undersigned is cognizant of how difficult the Employer's burden is where the evidence of what took place lies with the Grievant. On the other hand, the testimony elicited from the Lieutenant leads the undersigned to conclude that while the Grievant may not have gone to Tennessee and instead worked on the kitchen equipment there was insufficient work to take up two full weeks.

Whether the Grievant went to Tennessee or worked for the Guard is not the issue, though. The issue is whether or not the Grievant knowingly submitted false documents as the Employer alleges. The work excuse itself was not false nor does the evidence establish that the Grievant falsified it in any way. The best that could be said is that the Grievant obtained it with the Sergeant's connivance as part of a plot to take advantage of either the Army, the Employer or both. That the Army did not pay the Grievant for the work he performed doesn't do anything to resolve the issue of the Grievant's motive since the government's decision was based solely on the fact that the Grievant was never officially ordered to active duty. As a result, the government had no way to recognize any of the work he may have performed for the Guard.

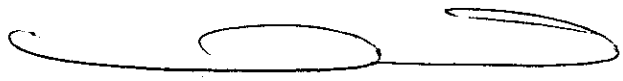
Again, though, the Grievant was only able to obtain the work excuse with the assistance of the Sergeant he contacted at the unit. Except for the Sergeant's obvious embarrassment at having gotten caught providing the Grievant with a pre-signed work excuse form and filling out the dates on the form, there is nothing to suggest that the he and the Grievant were friendly enough for him to have risked censure or some worse penalty by engaging in a scheme to permit the Grievant to defraud the Employer, as Management insists.

Under the circumstances, it is impossible to put the full blame on the Grievant who, although he should have known that he needed orders to be off work, can reasonably argue that he was misled by the Sergeant's action. The question thus becomes what penalty should apply in the circumstances. The undersigned believes that given all the circumstances of this case the discharge should be converted to a ninety day suspension. The Union also asks that the Grievant be reinstated with no loss of pay or other benefits. The Grievant, however, went out on medical leave sometime in mid November and remained in that status until he was terminated in March, 1993. Unless the Grievant establish a point in time when he was physically capable of returning to work, he is not

entitled to back pay. If he can, then the Employer is directed to pay him back pay to that date less any sums the Grievant earned from any other sources.

V. DECISION

For the foregoing reasons, the grievance is sustained in part and denied in part. The discharge is converted to a ninety day suspension. The Employer is directed to reinstate the Grievant and pay him back pay from the point the Grievant would have returned to work from medical leave less any sums he earned from any other source.



LAWRENCE R. LOEB, Arbitrator

December 21 1993
Date

MEMORANDUM

TO: File

FROM: Brian Walton BDW

DATE: May 19, 1994

RE: Steve McGraw Arbitration Decision clarification meeting

On Thursday, May 19, 1994 I was present at a meeting at which John Porter and Don Sargent of OCSEA and Joe Shaver of the Department of Rehab. & Correction met with Arbitrator Lawrence Loeb to clarify the arbitration decision regarding the removal of Steve McGraw.

The grievance was granted in the decision but the Grievant thought that he should have received compensation for the overtime hours that he would have gotten had he not be removed.

After explaining the situation, Joe Shaver offered to give the Grievant 36 hours of comp. time added to whatever balance the Grievant has. This number represented 4 hours of overtime a month for time that the Grievant would have received for being on the "Disturbance Control Team". The number was totaled for 6 months at the time and half rate.

The Union Staff Representative, Don Sargent, said he would take this offer to the Grievant. If the Grievant did not accept this offer, John Porter said the parties would refer to the Arbitrator for his ruling on the situation.