#157

ARBITRATION

BETWEEN

OHIO DEPARTMENT OF YOUTH SERVICES

- AND -

GRV: OCB CASE NO. 35-17-20010510-0011-01-03
(LYNDA MADISON DISCHARGE)

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

APPEARANCES:

For the Department:	Pat Mogan, State Advocate Columbus, Ohio
For the Union:	Victor Dandridge Staff Representative Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Labor Arbitrator

STATEMENT OF THE CASE:

This case, well presented by the parties' advocates, involves the termination of State Employee Lynda Madison, herein the Grievant, a Juvenile Correctional Officer (JCO) with the Ohio Department of Youth Services (DYS), assigned to the Freedom Center, a facility in the Riverview Youth Center complex housing female youth offenders convicted of a felony. The Grievant was terminated pursuant to an Order of Removal dated April 25, 2001, which reads as follows:

"TO: Lynda Madison, JCO
FROM: Christie Stagner, Superintendent
SUBJECT: Order of Removal

It has been determined that you failed to follow proper call-off procedures. It has been found that you failed to return to work after being issued a return to work letter. It has been found that you failed to provide appropriate documentation and also failed to complete the request for leave forms upon returning from your absence. It has been found that you have been absent from work an excessive amount of time. It has finally been determined that you requested bereavement leave for a qualifying family member, when the deceased was not a qualifying family member. This is in violation of B-19, General Work Rules, specifically:

RULE #1 NEGLECT OF DUTY

a. Failure to follow procedures and/or instructions and/or perform the duties/assigned tasks of the position of which the employee holds.

* * *

RULE #4 DISHONESTY

Dishonesty while on duty or engaged in State business, including but

not limited to, deliberately withholding, knowingly giving false or inaccurate information, verbal or written, to a supervisor or appropriate authority, (Highway Patrol, State Auditor, investigators, etc.).

RULE #22 FAILURE TO REPORT FOR DUTY AS SCHEDULED

a. Failure to follow proper call-off procedures for regular scheduled shift and/or accepted overtime. ...

d. Unauthorized absence 3 or more days.

e. Failure to complete the standard Request for Leave form within specified time.

f. Failure to provide documentation of absence when required.

g. Failure to provide physician's verification when required. ...

k. Excessive absenteeism.

RULE #23 JOB ABANDONMENT

Absent three (3) or more consecutive working days without proper notice.

For your action(s) you are being removed from your position of Juvenile Correction Officer, effective April 30, 2001."

The pre-disciplinary notice starts off with the narrative set forth below. Thereafter it lists the Rules allegedly violated, and the subsections within said Rules allegedly violated. These are the same Rules and subsections thereof referred to in the Order of Removal. The pre-disciplinary meeting notice concludes with the date, time, and location of the meeting, and a summary of the Grievant's rights at the meeting. I note that it also states:

"..... This meeting will not be rescheduled. You are expected to attend this meeting as scheduled. Failure to attend this pre-disciplinary meeting will result in a waiver of your rights to a pre-disciplinary meeting. Disciplinary action may be taken up to and including removal. ....."

The matter was rescheduled; the Agency did not regard her failure to attend her pre-disciplinary meeting as a waiver of her right to a pre-disciplinary hearing.

The Grievant grieved her removal as "unjust" and seeks to be reinstated, with back pay, and to otherwise be "made whole."

The parties jointly stipulated to the following:

"1. The grievance is properly before the Arbitrator.
2. The Grievant's date of hire is 12/17/90.
3. The Grievant was removed effective 04/30/01.
4. The Grievant received and signed for DYS Directive B-19 (Work Rules).
5. The Grievant did not attend her pre-disciplinary conference.
6. The State drops the Work Rule #4 (Dishonestly) charge."

The parties also jointly stipulated that the issue in the case is:

"Was the Grievant removed for just cause? If not, what should the remedy be?"

The parties refer to various Articles of their Contract and to various provisions of DYS Directives Nos. 7 and 19.

"The Contract

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in The Ohio Revised Code, Section 4117.08(c), Numbers 1- 9.

* * *

ARTICLE 24 - DISCIPLINE

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. ...

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. One or more oral reprimand(s) ...

B. One or more written reprimand(s)

C. Working suspension;

D. One or more fines in an amount of one (1) to five (5) days, the first fine for an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after

approval from OCB.

E. One or more day(s) suspension(s);

F. 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.

...

* * *

24.04 - Pre-Discipline

...

An employee has the right to a meeting prior to the imposition of a suspension, a fine, leave, reduction, working suspension or termination. ... Absent any extenuating circumstances, failure to appear at the meeting will result in a waiver of the right to a meeting.

...

* * *

ARTICLE 29 - SICK LEAVE

....

29.04 - Sick Leave Policy

I. Purpose

The purpose of this policy is to establish a consistent method of authorizing employee sick leave, defining inappropriate use of sick leave and outlining the discipline and corrective action for inappropriate use. ...

II. Definition

A. Sick Leave: Absence granted per negotiated contract for medical reasons.

B. Unauthorized use of sick leave:

1. Failure to notify supervisor of medical absence;
2. Failure to complete standard sick leave form;
3. Failure to provide physician's verification when required; ....

D. Pattern abuse:

Consistent periods of sick leave usage, for example:

1. ...

* * *

8. Excessive absenteeism;

III. Procedure

A. Physician's verification

At the Agency Head or designee's discretion, in consultation with the Labor Relations Officer, the employee may be required to provide a statement, from a physician, who has examined the employee or the member of the employee's immediate family, for all future illness. The physician's statement shall be signed by the physician or his/her designee. This requirement shall be in effect until such time as the employee has accrued a reasonable sick leave balance. However, if the Agency Head or designee finds mitigating or extenuating circumstances surrounding the employee's use of sick leave, then the physician's verification need not be required.

Should the Agency Head or designee find it necessary to require the employee to provide the physician's verification for future illnesses, the order will be made in writing using the "Physician's Verification" form with a

copy to the employee's personnel file.

Those employees who have been required to provide a physician's verification will be considered for approval only if the physician's verification is provided within three (3) days after returning to work.

B. Unauthorized use or abuse of sick leave

When unauthorized use, or abuse of sick leave is substantiated, the Agency Head or designee will effect corrective and progressive discipline, keeping in mind any extenuating or mitigating circumstances.

When progressive discipline reaches the first suspension, under this policy, a corrective counseling session will be conducted with the employee. The Agency Head or designee and Labor Relations Officer will jointly explain the serious consequences of continued unauthorized use or abuse of sick leave. The Agency Head or designee shall be available and receptive to a request for an Employee Assistance Program in accordance with Article 9(EAP). If the above does not produce the desired positive change in performance, the Agency Head or designee will proceed with progressive discipline up to and including termination.

* * *

ARTICLE 31 - LEAVES OF ABSENCE

31.01 - Unpaid Leaves

The Employer shall grant unpaid leaves of absence to employees upon requests for the following reasons: ...

C. Extended Illness

For an extended illness up to one (1) year; if an employee has exhausted all other paid leave. The employee shall provide periodic, written verification by a medical doctor showing the diagnosis, prognosis and expected duration of the illness. Prior to requesting an extended illness leave, the employee shall inform the Employer in writing of the nature of the illness and estimated length of time needed for leave, with written verification by a medical doctor. ...

* * *

ARTICLE 34 - SERVICE-CONNECTED INJURY AND ILLNESS

.....

34.02 - Coverage for Worker's Compensation Waiting Period

...

An employee may elect to take leave without pay, without exhausting accrued leave balances, pending determination of a Workers' Compensation claim. ....."

The Union introduced as Union Exhibit No. 1, DYS Directive B-07, Sick Leave. It refers to the provisions therein, which are set forth below, in its post-hearing Closing Statement. Other provisions therein help to understand the instant case better, and those provisions are also set forth below.

"E. SICK LEAVE CONTROL:

....

2. Physician's Verification. At the discretion of the Agency Head (or designee), in consultation with the Labor Relations Officer,

and in accordance with the requirements of the FMLA, the employee may be required, for all subsequent illnesses, to provide a statement written and signed by a physician/designee who has examined the employee. ...

* * *

7. When unauthorized use or abuse of sick leave is substantiated, the Agency Head (or designee) will impose corrective and progressive discipline.

8. When progressive discipline reaches the first fine or suspension, a corrective counseling session is conducted with the employee.

   8.1 The Agency Head (or designee) and Labor Relations Officer (or designee) will jointly explain the serious consequences of continued unauthorized use or abuse of sick leave. .....

9. Pattern of Abuse. If an employee's use of sick leave forms a discernable pattern, the Agency Head (or designee) may reasonably suspect Pattern Abuse. The following consistent periods of sick leave usage (though not a complete list) are examples of pattern abuse: .....

   9.2 Before and/or after weekends. ....

   .....

   9.7 Continually maintaining a zero or near zero leave balance; and

   9.8 Excessive absenteeism.

10. If Pattern of Abuse is suspected, the Agency Head (or designee) notifies the employee in writing of that fact.

    10.1 The "Pattern Abuse" form will be used for this purpose. That form will invite the employee to explain, rebut or

refute the pattern abuse claim.

10.2 If a satisfactory explanation cannot be provided, the Agency Head (or designee) may begin corrective and disciplinary action."

The DYS General Work Rules, Directive B-19, Joint Exhibit No. 4, provide in pertinent part as follows:

"A. Policy Provisions:

1. The unauthorized activities contained herein are not considered as all inclusive, but are intended to be representative examples of activities which warrant immediate corrective action. ....

* * *

3. The penalties reflected on the following grid are meant to be guidelines only. The actual discipline an employee receives may vary depending on the circumstances and the appropriate [Collective Bargaining] Agreement, if applicable. ...

* * *

DYS GENERAL WORK RULES

STANDARDS OF EMPLOYEE CONDUCT

RULE VIOLATIONS AND PENALTIES

Steps in Progressive Discipline [Key]:

(V)	Verbal
(V to 5)	Verbal to 5-day Suspension
(W)	Written
(W to 5)	Written to 5-day Suspension
(W to 10)	Written to 10-day Suspension
(W to R)	Written to Removal
(1 to 5]	1 to 5-day Suspension
(1 to R)	1 day Suspension to Removal

(5 to 10) 5 to 10-day Suspension
(5 to 15) 5 to 15-day Suspension
(5 to R) 5 day to Removal
(10 or 15) 10 or 15-day Suspension
(15 or R) 15-day Suspension or Removal
(xxx) 1 to 5-day Fine

* * *

OFFENSES

RULE		1st	2nd	3rd	4th	5th
1	NEGLECT OF DUTY a.) Failure to follow-up procedures and/or instructions and/or perform the duties/assigned tasks of the position which the employee holds. ...	v to w	w to 5 or xxx	10 or 15	R	
4	DISHONESTY	5 to 15 or xxx	15 to R	R		
22	FAILURE TO REPORT FOR DUTY AS SCHEDULED. a.) Failure to follow proper call-off procedures for regular scheduled shift and/or accepted overtime. ...	v to 5 or xxx	1 to 5 or xxx	10 to 15	R	
	d.) Unauthorized absence 3 or more days.	15 or R	R			
	e.) Failure to complete standard Request for Leave form within specified time.	v to w	1 to 5 or xxx	10 or 15	R	
	f.) Failure to provide documentation of absence when required.	v to w	1 to 5 or xxx	10 or 15	R	
	g.) Failure to provide physician's verification when required.	v to w	1 to 5 or xxx	10 or 15	R	
	k.) Excessive Absenteeism	v to w	1 to 5	10 or 15	R	
23	JOB ABANDONMENT Absent three (3) or more consecutive working days without proper notice.	R				

The Grievant incurred an unenviable record of absenteeism, throughout the entirely

of her employment. Thus, in the first full year of her employment (she was hired as a full-time employee and thus scheduled to work 2080 hours annually) she worked only 62.45% of her scheduled hours; in 1992, only 31.92%; in 1993, only 20.52%; in 1994, only 26.05%; in 1995, only 32.78%; in 1996, only 18.60%; in 1997, only 26.25%; in 1998, only 25.24%; in 1999, only 2.54%; and in 2000, only 36.77.

The Grievant's formal active discipline record reflects that she was last formally disciplined in 1995. Thus, on September 20, 1995, she received a one (1) day disciplinary suspension for violating Rule #10 - Carelessness, i.e., failure to maintain control over tools, keys, and other equipment, and Rule #26(E), now Rule 22(f); i.e., failure to provide documentation of absence when required. On June 22, 1995, the Grievant received a verbal reprimand for violating the "Sick Leave Policy." Prior to that, on March 23, 1995, she received a written reprimand for failure to submit leave forms and excessive absenteeism. Finally, it is noted that on June 21, 1993, she received a written reprimand for violating the Agency's call-off procedure.

The record shows that the Grievant was off work from December 14, 2000, until December 25, 2000. On December 25th, the Grievant reported to work and worked but briefly. Her immediate Supervisor at the time, Tamara Morrissette testified at the hearing herein conformance with a written statement of said circumstances she prepared for higher Management on January 18, 2001, which reads as follows:

> "On 12-25-00 at approximately 10:30 p.m. [the Grievant] came to me and stated that she had a family emergency and had to leave immediately. I authorized her to leave and advised her that she was required to provide documentation verifying the emergency. She acknowledged and stated she

would provide documentation. To date, I have not received any documentation from [the Grievant] in regards to this emergency on 12/25/00."

On November 30, 2000, Operations Manager Thompson put the Grievant on "Physician Verification." His memo to her stated:

"Effective immediately and until otherwise notified, you must provide a statement from a physician each time you are absent from work and are requesting sick leave for your absence. The physician's statement must be provided within three days after returning to work and must be signed by the physician or his/her designee.

In order to return to work, the physician's statement must indicate that you are capable of performing the essential functions of your position. Failure to provide a physician's statement may lead to disciplinary action up to and including removal.

If you have any questions, contact Mark Tackett, Labor Relations Officer. ..."

Then, on January 4, 2001, DYS Superintendent Stagner mailed to the Grievant's Post Office box the following letter:

"Dear Ms. Madison:
It has come to my attention that you have not reported to work since 12/25/2000. You are hereby ordered to report to work on your regular shift the day following receipt of this notice. You are to report to the Operations Office.

Your failure to report to work as ordered will place you in an 'absent without leave' status and will be considered job abandonment. You will then be subject to disciplinary action up to and including removal."

The record contains a series of faxes to the Agency from the Grievant's personal physician, William W. Nucklos, M.D., with Executive Medical Inc., Columbus, Ohio. The first one, Joint Exhibit No. 5A is typical. It reads as follows:

"Date: December 22, 2000
Name: Lynda Madison

The above captioned patient has been off work/school from 12/14/00 to present. He/she may return to work/school on 12/25/00. Please feel free to contact this office if you have any questions concerning this patient.

Comments: (No Entry)
Sincerely,
William W. Nucklos, M.D., P.M.&R."

The signature that appears over the doctor's printed name and title appears to be a stamp of the doctor's signature. Subsequent faxes, in the "Comment" section reflect: "Pending bi-weekly medical evaluations." These faxes (with an occasional lapse of a few days) cover the period from 12/14/00 to 6/4/01, and in effect indicate that the Grievant remained under Dr. Nucklos' care during this period. It is also noted that some twelve (12) faxes were sent by Dr. Nucklos to cover this 12/14/00 to 6/4/01 time frame, and each successive fax extended the projected return-to-work date. It is clear that the Grievant saw

these faxes as embodying a request for sick leave; as being in compliance with her "physician's verification" requirement; and as in effect notice to the Agency of her sick leave status.

The Grievant testified that she called in every day "until the paper work caught up," a reference to Dr. Nucklos' faxes to the Agency I presume. She also testified that she saw Dr. Nucklos on a weekly basis.

Although sent certified mail, there was no signed receipt for the Agency's "report-to-work" letter of January 4, 2001, and the Grievant testified she never got it and saw it for the first time at a mediation session following the filing of the instant grievance.

The thrust of the Grievant's testimony is that she was ill with the flue and rotator problems during the 12/14/00 to 8/28/01 time frame. This 8/28/01 ending date is the "return-to-work" date Dr. Nucklos indicated on a Worker's Compensation claim the Grievant filed on May 21, 2001. In this claim, the Grievant seeks Worker's Compensation benefits for the period 12/14/00 to 5/21/01. On this claim she lists her date of injury as 12/12/96. In this regard, the Grievant testified that on December 14, 1996, while in unarmed self-defense training being conducted by the Agency at work, she received an injury to her rotator, for which she received Worker's Compensation. In 1999, the Grievant was deemed "medically improved" and BWC determined that what she needed was "surgery" and that in any event Worker's Compensation would no longer be paid to her, and would not even potentially be resumed, until she had surgery. The Grievant explained that her son had died in surgery from too much anesthetic. The inescapable inference, of course, is that she was therefore afraid to have surgery, albeit she did not

directly so testify.

Other matters of note include the uncontradicted testimony of Agency Labor Relations Officer Tackett to the effect that: from and after 12/14/00 the Grievant had no paid leave to take; could not take unpaid FMLA leave because in all of the ten years the Grievant worked for the Agency, she never worked enough hours to qualify for FMLA leave; and the Grievant, from and after 12/14/00, never requested and applied for leave without pay.

It is also noted that the record reflects that on 2/6/01, the Grievant filed an Accident and Disability Claim form with the private insurance carrier, American Family Life Assurance Company of Columbus (AFLAC) for disability due to illness; i.e., the flu, from 12/14/00 to 2/19/01, a claim verified by Dr. Nucklos.

Finally, it appears that the Grievant was on Worker's Compensation and/or disability status for most of her scheduled hours following her December, 1996 work place injury.

THE AGENCY'S POSITION:

The Agency takes the position that the evidence of record supports a finding that the Grievant violated all of the Rules her Removal Order references (except of course Rule #4, Dishonesty, which has been withdrawn), but it is the Grievant's AWOL, Job Abandonment, and Excessive Absenteeism which especially constitute just cause for her termination. The Grievant received and signed for the Work Rules and received discipline for absenteeism. The Grievant therefore, had clear formal notice that absenteeism was a disciplinable offense. The Agency asserts that the evidence shows that the Grievant was

AWOL for the period 12/14/00 to 04/30/01, the date she was terminated. Except for 45 minutes on Christmas Day, 2000, the Grievant was never at work during this period. Nor was she on any approved leave, because she had no leave balances. The Agency notes that while she completed on 5-21-01 an application for workers' compensation temporary/total disability wage benefits for part of period of absence, there is no evidence that she was awarded any compensation - a fact she confirmed on cross examination. Work Rule #22(d) defines AWOL as "Unauthorized absence (AWOL) 3 or more days," and carries a range of discipline from a 15 day suspension to removal for first offense. Given a range of potential disciplinary measures for a work rule violation, Management is obliged to consider mitigating and aggravating circumstances surrounding the events that constitute the violation when determining what level of discipline to impose. In the instant case, with respect to the AWOL charge, there was no legitimate mitigation to consider. The Grievant has zero leave balances after 10 years of employment. This fact exists through no fault of Management. And, asserts the Agency, there are "aggravating" circumstances properly considered. Thus, the Agency notes that in addition to the inordinate length of 4 ½ months of the AWOL period and the non-existence of any leave balances, disability, or workers' compensation awards, to protect the Grievant during this period, there is the Grievant's overall attendance record of less than 30% of total time available over the course of her ten (10) years of employment.

As for the Union's reliance on Joint Exhibit No. 5, a series of faxes from Executive Medical, Inc., such is misplaced, asserts the Agency. This is so because they do not indicate that the Grievant had been seen by anyone in the doctor's office and most are not

signed by the physician or her designee, contrary to the requisites of Article 29, Section 29.04IIIA, and therefore, they do not constitute valid physician's verification.

In any event, argues the Agency, even if all of the Joint Exhibit No. 5 faxes constituted "legitimate" valid physician verification, such would not serve to nullify the AWOL charge. The fact that one has no leave balances cannot be altered by any excuse; Rule #22(d) addresses absences without leave, not unexcused absences without leave. The Grievant, asserts the Agency, simply did not avail herself of her contractual right under Contract Article 31C - unpaid leave for extended illness. The Grievant had exhausted all of her paid leave. She did not request leave under 31C. She did not inform the employer in advance of the nature of her illness and estimated length of time needed for leave with written verification by a medical doctor. She did not provide periodic, written verification by a medical doctor. She did not provide periodic, written verification by a medical doctor showing the diagnosis, prognosis, and expected duration of the illness. Why would a prudent employee in the Grievant's predicament not seek the protection of Article 31C? The Grievant either had no such qualifying condition, or she was not concerned enough about her job to make the effort to seek an unpaid leave of absence - the one contractual provision that could ameliorate her argument for no just cause. Accordingly, Management had just cause to impose the penalty of removal for AWOL.

As for the Agency's Job Abandonment allegation, the Agency notes that Rule #23 defines "job abandonment" as "absent three (3) or more consecutive working days without proper notice," and the level of discipline for a first time violation is removal. This definition and penalty is standard throughout the agencies of the State of Ohio, and it's

application has been routinely upheld in arbitration. It is clear the Grievant did miss three or more consecutive working days. The Grievant did not provide Management with proper notice of her absences. This combination of circumstances constitutes classic job abandonment. A return to work letter (Joint Exhibit #8) ordered the Grievant to "... report to work on your regular shift the day follow(ing) the receipt of this notice ....," and advised her that her failure to comply would place here in an AWOL status and would be considered job abandonment. It further advised her that noncompliance would subject her to disciplinary action up to, and including, removal. This letter was sent to the Grievant's address of record (an unrebutted fact) on January 4, 2001. This letter was sent by certified and by regular mail, but the Grievant claims not to have received either delivery, and in fact did not sign the certified mail receipt. Using the commonly accepted mailbox rule, the Grievant should have received either or both of these documents by January 7, 2001. Under the terms of the return to work letter, the Grievant was obliged to report to work on her regular shift that occurred on January 8, 2001, or on the next regularly scheduled shift, if January 8th was one of her regularly scheduled days off (good day). In fact, the Grievant did not return to work on January 8th, or any other day. She was not seen again in the workplace, and she was consequently removed from employment on April 30, 2001 without having ever again set foot on DYS property as a working employee. The Union is again relying on Joint Exhibit #5, maintaining that these documents from Executive Medical, Inc. provided Management with proper notice of the Grievant's absences. These documents are accurately characterized as repetitive statements of facts already known to Management - namely that the Grievant was not at work on any of the several time periods

mentioned in the documents. None of these documents contain any information to advise Management as to a diagnosis or prognosis of any illness or injury, but this is not all that surprising considering that they contain no indication that the Grievant was ever in the offices of Executive Medical, Inc., let alone be examined by anyone while there. It is important to note that the Grievant gave absolutely no advance notice that she would be off work for any specified period of time. In fact, the Grievant's Supervisor, Tamara Morrissette, testified that she personally advised the Grievant that she would be required to document the reason(s) for leaving work on December 25, 2000, due to an alleged family emergency. The Grievant produced no such documentation until late January when she requested bereavement leave and submitted an obituary for someone she claimed was her step-father. This, of course, is not proof of the 12/25 family emergency; the deceased did not die until sometime after 12/25. Even then, the obituary refers to the Grievant as a pastor and a loving care giver, not as a step-daughter. This example serves to illustrate the Grievant's cavalier attitude toward attendance and reporting policies and procedures. This attitude contributed to the Grievant's troubles which led to her inevitable termination, with just cause, for job abandonment as well as for being AWOL.

In any event, argues the Agency, the Grievant clearly has been excessively absent throughout her ten (10) years of employment with DYS. The testimony and other evidence, namely Management Exhibit #1, establish beyond any question that the Grievant had been excessively absent throughout her ten years of employment. The Union's argument that Management was lax in enforcing the absence policy, at least with respect to this Grievant, is well taken. To suffer the Grievant to be chronically absent more than

75% of the time over a ten year period, and to have issued only a written reprimand for absenteeism since 1995 is inexplicable. More than likely this Grievant should have been terminated long ago. These facts notwithstanding, there is much precedent in arbitral history to support the removal of a chronically absent employee, regardless of other considerations. Thus, as the Elkouris observe in their treatise, How Arbitration Works, *(5th Ed., 1997) at page 796:* "[Management] may feel impelled to terminate employees whose genuinely poor health conditions require excessive absences. The right to terminate employees for excessive absences, even when they are due to illness, is generally recognized by arbitrators." Generally speaking, arbitrators have held that illnesses, injuries, and other forces beyond the control of the employee serve to mitigate discipline for "reasonable" periods of absence. However, employees who have demonstrated an inability to maintain an acceptable attendance record over a long period to time are subject to termination. The Department of Youth Services or any other employer must be allowed to terminate any employee who has compiled an attendance record of less than half the scheduled work days. This Grievant has been to work only 28% of the time; that is 1/4 of the time; that is one out of every 4 days - over a ten year period! The Grievant's extremely excessive absenteeism, combined with her indisputable record of AWOL, and the fact that she abandoned her job, provide Management with just cause to remove her three different ways.

Anticipating a Union argument to the effect that just cause for the Grievant's discharge is negated because the Agency has dropped its "dishonesty" charge against the Grievant, the Agency urges an analogy to a Court of law wherein a Defendant who is

charged only with murder, after having been arraigned on potential charges of murder, possession of a firearm, and resisting arrest. Murder is a capital offense for which the Defendant will be subject to the penalty for a capital offense if found guilty, even though the lesser felony or misdemeanor charges are dropped prior to the trial, or if the Defendant is found not guilty for those charges. AWOL for 3 or more days and job abandonment in the DYS work rules are analogous to capital crimes in the criminal code. They carry the ultimate penalty of termination if they are proved, even for a first offense. The fact that a lesser charge was dropped, or that several lesser charges are not proved does not insulate the Grievant from the penalty for the "capital offense." The Union's argument would enjoy a degree of validity and would serve to mitigate discipline but for the fact that the Agency has clearly established just cause for two charges carrying removal for a first offense. This would be true even if the State had established just cause for only one of those charges. Similarly, a just cause determination of either Work Rule #22(d) or #23 will render moot the Union's argument that the Grievant had never received a counseling, per DYS policy, prior to having been disciplined for absenteeism. In any event, this argument is an attempt by the Union to persuade the Arbitrator to disregard and dismiss the mountain of evidence establishing just cause for the Grievant's removal based on a relatively insignificant and trivial technicality. How is the Grievant harmed? How would any such meeting have prevented the Grievant from earning and burning all discretionary leave time? How would such a meeting have prevented the Grievant from being AWOL from work, incommunicado, for 4 ½ months? It would not have prevented any of these things, of course. No, the policy relied upon by the Union exists to help prevent employees with

casual attendance problems from sliding down the slippery slope to further discipline. It was not meant to be, and cannot be allowed to be, a shield against discipline for chronic absenteeism, especially one with such a horrendous attendance record as the Grievant. Finally, the State notes that the Grievance #35-18-20001199-0178-01-03, filed by Elisha Earnest regarding his removal from his position as a JCO at Circleville Youth Center, in addition to being irrelevant to the facts of this case, was resolved by bench decision under the rules of expedited arbitration as specified in Contract Article 25.09, pp. 73-74. As such, this decision is not precedent setting (See Article/Section 29.05F), and the State respectfully requests that the Arbitrator not consider any aspect of this decision.

In summary, the Agency has proven by clear and convincing evidence that the Grievant violated Work Rules #22(d) and #23, which carry an automatic removal as discipline for a first offense. She also violated Work Rule #22(g), (sic) and the circumstances of that violation (an apparent reference to excessive absenteeism) remove it from progressive discipline considerations. If the Arbitrator finds that the Grievant did violate all or any of these Work Rules, he must deny this Grievance in it's entirety.

THE UNION'S POSITION:

The Union takes the position that the position that the Agency failed to satisfy the "just cause" standard for removal of the Grievant and thus improperly removed her from her JCO position.

The Union contends that the Agency removed the Grievant based on the sum of the several Rule violations set forth in the Order of Removal. However, points out the

Union, the charge of a violation of Rule #4 - Dishonesty, set forth in the Order of Removal, was dropped by the Agency prior to arbitration; yet the discipline, discharge, was never reduced.

Additionally, the Union points to the provision in Article 34.02 to the effect that "[a]n employee may elect to take leave without pay, without exhausting accrued leave balances, pending determination of a Workers Compensation Claim." And here, asserts the Union, the Grievant applied for Workers Compensation covering the time period for which she has been disciplined (Joint Exhibit No. 12). The Union asks rhetorically, how can the Employer charge the Grievant with AWOL, when the Collective Bargaining Agreement clearly indicates that an employee may elect to take a leave without pay; ergo, leave is not required to be used by the employee?

Then too, argues the Union, although the Agency has charged the Grievant with excessive absenteeism, it has failed to follow its own Sick Leave Directive. Thus, the Union notes that said Directive provides at No. 7 that substantiated unauthorized use or abuse of sick leave warrants corrective and progressive discipline; and at No. 8, Paragraph 8.1, provides that when the first fine or suspension is imposed, that the Agency head (or designee) and the Labor Relations Officer will jointly explain the serious consequences of continued unauthorized use of sick leave. Yet none of these corrective progressive disciplinary measures were taken by the Employer in this case, indeed the Grievant was last disciplined in 1995, and consequently the Grievant was not properly and currently warned that she'd be disciplined. *Ohio Veterans Home [Lyvonne Moore Grievance] (Rivera, 1991) Case No. 33-00-190-08-06)-0267-01-05.* Return to work letters sent to the Grievant were no

substitute for progressive discipline; as Arbitrator Hymen Cohen observed in Ohio Department of Aging *[Denise Stewart Grievance] Case No. 03-00-(88-09-28)-0013-01-03,* return-to-work letters make the employee aware of the Employer's dissatisfaction, but do not meet progressive discipline requirements. Indeed, argues the Union, by failing to discipline the Grievant for prior attendance rule infractions, in particular prior job abandonment infractions, the Employer has given the Grievant "negative notice," as those terms were used by Arbitrator David M. Pincus in Bureau of Workers' Compensation *[Hervey Williams Grievance] (1991) Case No. 34-04-(91-02-04)-0019-01-09,* that is, the Employer has indicated to the Grievant that it will not enforce its job abandonment rule. As Arbitrator Pincus put it:

> *"'Written rules covering certain types of conduct may not be enforceable if an Employer has knowingly let certain violations go unpunished. By condoning such conduct, misconduct may be viewed or perceived to be acceptable,' citing U.S. Springs & Bumper, 5 LA 109 (Prasow, 1946); Misco Precision Casting Co., 40 LA 87 (Dworkin, 1962); and Armco Steel Corp., 52 LA 101 (Duff, 1969)."*

Another contention of the Union is that the Agency confused things by issuing a direct order to the Grievant to not return to work from any illness or injury without receiving clearance from her physician (Joint Exhibit No. 7), yet the Agency received faxed documentation from the Grievant's physician indicating that the Grievant was under his care. (Joint Exhibit No. 5). Therefore, asserts the Union, the Grievant was not able to return to work. Indeed, argues the Union, her return to work may have resulted in a charge of insubordination. In its opening statement, the Union characterized these

circumstances thusly: clearly, the Agency placed the Grievant in an impossible predicament by giving the Grievant two (2) separate and conflicting orders, and then disciplined the Grievant for following only one of the orders.

In sum, argues the Union, the Grievant's removal order was punitive and not corrective; the Agency was lax and did not follow its own progressive discipline policy; the Agency's laxity deprived the Grievant of fair warning of her removal to which she was entitled under the applicable just cause standard; the Agency gave conflicting and contradictory orders to the Grievant concerning her return to work; and her discipline, her removal order, was based on the sum of four Rule violations, but one such basis has been withdrawn, yet the Agency declines to diminish the penalty of removal.

Based on the foregoing, the Union urges that the Grievance be sustained and that the Grievant be returned to her JCO position and be "made whole," i.e., that it be directed by the Arbitrator that the Grievant receive all lost wages, including roll call pay, and leave balance accrual from August 1, 2001, the date of her physician's release for her to return to work, to the present.

DISCUSSION & OPINION:

Given the multiplicity of the charges against the Grievant; the complexity of the provisions of the Agency Directives Nos. B7 and 19 invoked by the parties; the relative complexities of the governing Contract provisions; the number of different dates of importance; and the number of arbitral principles applicable here, I am unable to agree with the Agency's characterization in its Opening Statement that the matter at hand "is not

complicated."

First addressed are the arbitral principles determined by the undersigned to be applicable, which principles constitute the analytic framework for arriving at the resolution reached here. In this regard, as will be seen, I have quoted other arbitrators' reported decisions for other parties. These arbitrators are quoted because, in my view, they have expressed in a clear and concise manner some of the principles applicable here. The point to be made, therefore, is that these other cases and arbitrators are cited, not because the undersigned views them as any sort of "precedent" here, but rather because of their clear, succinct, and sound reasoning. As Arbitrator Henry L. Sisk put it in *Atlantic Richfield Co., 69 LA 484, 487 (1977):*

> "A general rule in arbitration is that prior awards between different parties under different labor agreements and decided by different arbitrators have ... no precedent value. The term "precedent value" is used in a legal sense and means that prior awards are not binding in subsequent [non-party] arbitrations. Yet this does not mean that prior awards have little or not merit. On the contrary, good reasoning in one case more often than not constitutes good reasoning in another case provided the factual situation and the language of the agreement are similar and comparable in nature."

One arbitral notion and principle applicable here was well put by Arbitrator John M. Gradwohl in *Iowa Power and Light Co., 76 LA 482, at 487,* wherein Arbitrator Gradwohl observed:

> "Relying on ... three stated grounds, the Company suspended [the Grievant]

for fifteen days. ... Since the Company relied on all three stated grounds in imposing the fifteen day suspension, the suspension should be reduced in view of the determination herein that one of them was not proper. The Company did, in fact, take all three allegations into account in fixing the discipline at a fifteen day suspension."

But there is a caveat or exception to the principle espoused by Arbitrator Gradwohl. Thus, in Lamar Construction Co., *98 LA 500 (1992),* Arbitrator Richard L. Kanner cogently observed:

"I am in agreement with the Union that where there are two minor charges underlying discipline and one fails by lack of proof or withdrawal by the Employer, the amount of discipline is thereby affected. It is only in cases where the several charges are so egregious that each one could arguably sustain the discipline that such proposition is not valid. (Emphasis supplied.)"

Another applicable arbitral principle is that alluded to by the Union's references to decisions by Panel Arbitrators Rivera, Cohen and Pincus. As Arbitrator Pincus put it:

"Written rules covering certain types of conduct may not be enforceable if an Employer has knowingly let certain violations go unpunished. By condoning such conduct, misconduct may be viewed or perceived to be acceptable, citing *inter alia, Misco Precision Casting Co., 40 LA 87 (Dworkin, 1962).*"

As arbitrator Harry Dworkin put it at page 90 in the *Misco* case, cited by Pincus:

"In such instances the employees may logically be lead to belief that the rule has either been disregarded or relaxed to the point that its violation would

not be the subject for discipline.

> This principle is particularly applicable to a rule which prohibits conduct which is not inherently objectionable, such as innocent card playing, as compared to other types of conduct which are universally regarded as prohibited even in the absence of a rule."

Then too, there is the arbitral principle that, so long as "the facts" for which the discipline was based, in themselves constitute an offense, the Employer should not be required to prove the exact charge that the Grievant is charged with. This principle was well put long ago by the oft quoted Whitley P. McCoy in his decision in *Esso Standard Oil Co., 19 LA 495, 498 (1952).* In that case, the Grievant was given a two week disciplinary lay off for sleeping on the job. Arbitrator McCoy cogently observed as follows:

> "The [Union] argues that since the Company made no contention that the penalty was imposed for any other reason than being asleep, the [Arbitration] Board has no right to justify the penalty unless it finds that he was asleep. I cannot agree with that contention. The penalty was imposed as a result of the facts. ... Giving a name to those facts is not important. There was a time when the criminal law was so technical that on a given set of facts a conviction of larceny would be set aside on the ground that those facts constituted embezzlement, and vice versa. Arbitration should not be tied up with such technicalities. [Grievant] did certain things - leaned back in his swivel chair, put his feet on the desk, closed his eyes, relaxed his muscles, leaned his head back against the wall, and assumed the position and appearance of sleeping. Those facts constitute an offense, and I do not think that the [Arbitration] Board is bound to set a penalty aside merely because

the facts fail to prove conclusively that [the Grievant] was asleep.."

I also find that Arbitrator Benjamin M. Shieber's decision in *Kimberly-Clark Corp., 62 LA 1119 (1974),* articulates some cogent arbitral principles applicable here. Arbitrator Shieber observed at pages 1121 through 1123, in pertinent part as follows:

> "Numerous arbitration decisions hold that excessive absenteeism due to illness or accident may be just cause for discharge even though the absenteeism does not involve any misconduct on the part of the employee. ... It is clear that the discharge in these cases is not based on any misconduct on the part of the employee. Instead, in these cases, the discharge of the employee is based on the claim that the interests of the employer and of the other employees in efficiency and economy of operations requires that an employee with an excessive absenteeism rate which will probably continue in the future be discharged.
>
> Thus, in order to sustain the discharge of an employee for excessive absences due to illness or injury, absent any misconduct by the employee, an employer must prove that two elements are present. First, it must prove that the employee has a high rate of absences from work. Second, it must prove that the employee will probably be unable to return to work as a dependable employee in the future. ...
>
> Where an employee is discharged because of absenteeism caused by job-related injuries, the equities weigh heavily in favor of the employee. In such a case, the employer bears a heavy burden of proof that each of the elements needed to sustain the discharge is present. This burden can only be met by clear and convincing evidence; i.e., by proof that it is highly

probable that each element needed to sustain discharge is present."

Also noted is Arbitrator Sisk's observation and finding in *Atlantic Richfield Co., supra, at pages 490 and 491,* to the effect that:

> "[O]ne wonders whether or not absenteeism due to illness is a voluntary act that can be controlled by the individual. There can be no doubt that the basic cause of or [the Grievant's] absenteeism was illness. Referring to the dual purpose of progressive discipline as set forth by Arbitrator Shister,[1] one questions whether or not successive warnings would have been helpful.
>
> * * *
>
> The undersigned does not believe that absenteeism due to sickness falls within the purview of normal disciplinary offenses such as violation of posted plant rules for which progressive discipline may be used. The reason is that one cannot order a person to 'get well' and expect results. Punishment for illness is not a logical procedure."

Applying the foregoing arbitral principles to the facts and circumstances of the instant case, for the reasons which follow, it must be found that the Agency had just cause to terminate the Grievant's employ, and thus, the grievance must be denied.

First applied is the general rule of the *Iowa Power* case, and its caveat or exception as articulated in the *Lamar Construction* case. Thus, it will be recalled that the Union seeks

---

[1] Arbitrator Sisk had previously noted that: "[t]he Union ... cites *Bell Aircraft Corp, 17 LA 230 (1951)* in which Arbitrator Shister defines ... progressive discipline and its dual purpose, namely "the discouragement of repeated offenses ... and the protection of the right of the Company to sever completely its relationship with any employee who by his total behavior shows himself to be completely irresponsible."

to bring the instant case within the parameters of the general rule, asserting that the Agency, in citing several rule violations as the basis for the Grievant's discharge, thereby indicated that it was relying on "the sum" of each of them, that is, their cumulative weight, to justify its termination of the Grievant. This perspective and argument would be persuasive if each of the charges involved were only minor matters. But here, as the Agency points out, the charges involve a mix of minor and major alleged Rule violations. That some alleged violations are relatively minor, and others major, is made readily apparent by the disciplinary grid. Some alleged offenses would not support termination until a fourth progressive discipline step on the grid, but other (AWOL) and Job Abandonment, would support discretionary termination or termination, respectively, for a first offense. These latter charged offenses are therefore clearly "egregious" and major with the consequences that the instant case is clearly within the caveat or exception articulated in the *Lamar Construction* case. Thus, even if some of the "minor" infractions are not established, or if a major infraction is withdrawn, as long as one or another of the "major" infractions is established, the *Iowa Power* rationale cannot and does not obtain.

In the instant case the Grievant's absenteeism is extraordinary: it is exceptionally high; it is sustained; and it is consistently poor to very, very poor throughout her decade of employment. Management's failure to discipline her concerning this absenteeism is also extraordinary. The Agency's advocate is to be commended for his candor and willingness to grasp the reality of the Agency's inaction and laxness, by characterizing such laxness as "inexplicable." Nonetheless, and, again, as the Agency's advocate points out, a particular fact present here, namely, the exhaustion by the Grievant of all her paid leave from and

after 12-14-00 to the date of her termination, coupled with her failure to ever apply for leave without pay, serves to shield the Agency from what would otherwise be the consequences of its laxness, as held by Panel Arbitrators Pincus, Cohen and Rivera, heretofore noted. Thus, by virtue of being without any form of leave, not entitled to FMLA unpaid leave, and not so much as applying for discretionary leave without pay, the Grievant, four days after 12/14/01 was, by definition, in a status of unauthorized absence (AWOL) for 3 or more days, in violation therefore of DYS Directive B-19's Rule #22(d), which for a first offense, warranted a 15 day disciplinary lay-off or removal. Given the Grievant's horrendous attendance record, such was clearly an "aggravating circumstance" with respect to her Rule #22(d) attendance related offense, fully justifying Management's exercise of discretion in the direction of the more severe penalty, removal. Likewise, in the absence of any leave, or request for leave without pay, the Grievant, shortly after 12/14/01 was, by definition, in a status of being absent 3 or more consecutive working days without proper notice. The Union's apparent reliance on the Grievant's Doctor's faxes, as in effect a request for sick leave, and notice of sick leave, is misplaced, inasmuch as at all times material the Grievant had no sick leave to be requested. And, as the Agency indicates, said faxes clearly failed to meet the requirements of an Article 31, Section 31.01(c) Extended Illness Leave, or notice of invoking such extended illness leave, namely, the requirements of a: diagnosis; prognosis; expected duration; and a pre-request writing by the Grievant, to the Agency, informing the Agency of the nature of her illness and the estimated length of time she needed to be off work on leave. Similarly, the Union's reliance on Article 34, Section 34.02, to the effect that an employee may elect leave without pay "pending

determination of a Worker's Compensation Claim" is also misplaced. Thus firstly, the Grievant never applied or "elected" to take such a leave without pay. Secondly, this type of leave was intended to protect other accrued paid leave, of which the Grievant had none. And thirdly, and most importantly, the Grievant did not even apply for Worker's Compensation until May 21, 2001, well after her termination. Thus, the provisions of 34.02 of the Contract were simply inapplicable here, and this inapplicability was not cured by the Grievant's post-discharge effort to make her Worker's Compensation claim retroactive to 12-14-00. Furthermore, and significantly, the record fails to show that this BWC claim was ever approved.

In sum, therefore, the Grievant must be found to have been in clear violation of Rule #22(d) of DYS Directive B-19, and of Rule #23 of DYS Directive B-19.

Next addressed is the Agency's contention that the Grievant was in violation of Rule #22(k), "excessive absenteeism" of DYS Directive B-19. This allegation implicitly alleges that the Grievant's "absenteeism" was in large measure absenteeism due to misconduct, and subject, therefore, to amelioration through progressive discipline. But there are two insurmountable problems with this misconduct caused "excessive absenteeism" allegation. One is the "fact" that the Grievant's absenteeism appears to have been grounded principally in illness and an on-the-job Worker's Compensation compensable injury, and not misconduct. Secondly, even if the "fact" of the Grievant's horrendous absenteeism was misconduct-type absenteeism, the Agency's colossal laxness with respect to any discipline for same serve to render unenforceable the Agency's belated attempt to now enforce Rule #22(k). But the "fact" of the Grievant's extraordinary and excessive

absenteeism is undeniable. Equally undeniable is the Agency's extraordinarily broad reservation of managerial prerogatives at Article 5. Thus, the Agency was clearly empowered to terminate the Grievant for just cause even though her absenteeism was due to illness or injury, and not misconduct, if it was "excessive." And since it appears that the bulk of the Grievant's absenteeism over the years has been illness and/or injury caused, it is readily apparent that the first test for termination for excessive absenteeism not involving misconduct, as explained in the *Kimberly-Clark* case *supra* of Arbitrator Shieber, namely, a high and prolonged rate of absenteeism, has clearly and convincingly been established. And, in my judgment, the second *Kimberly-Clark* test, namely, that the Grievant will probably not be able to return to work as a dependable employee in the future, has also clearly and convincingly been established. Thus, the record shows that the Grievant, over a period of some ten years of employment, has on the arithmetical average only been able to report to work some 28.31% of the actual hours called for by her full-time employee schedule. Accordingly, the Grievant historically has worked even fewer hours than a typical part-time employee, even though she was hired to be a full-time employee. There can be no question but that the Grievant's attendance problem adversely impacts the efficiency of the Agency at her assigned work site. Moreover, while due to the personal tragedy involving her son's surgery, one can understand the self-evident fear the Grievant harbors with respect to the apparent need for rotator surgery for herself, it is nonetheless clear that this ongoing fear, outstanding since at least 1999, stands in the way of her ever becoming a dependable employee. The Grievant's most recent claim to the BWC bolsters this conclusion. Then too, there is the fact that from and after 12/14/00 her doctor kept

extending and delaying her projected return-to-work date. Nothing in the record serves to indicate that such extensions and delays would not continue were the employment relationship continued. Finally, there is the circumstance that the nature of the workplace presents greater than normal potential for injury, as the Grievant's 1996 injury bears out. Thus, in my judgment, the aforesaid factors establish by clear and convincing evidence the improbability that the Grievant would be a dependable employee in the future. As the *Kimberly-Clark* and *Atlantic Richfield* cases cited above explain and correctly conclude, these circumstances warrant the conclusion that the Agency has just cause to sever the employment of the Grievant for her illness and injury non-misconduct excessive absenteeism, under the applicable just cause standard. The Arbitrator recognizes of course that its at best less than clear that non-misconduct excessive absenteeism was the "excessive absenteeism" ground relied on by the Agency, but in light of the arbitral principle articulated by Arbitrator McCoy in the *Esso* case, *supra*, it is clear that the Grievant's discharge is nonetheless properly upheld. The relevant and established "facts" were and are that the Grievant was excessively absent, and those "facts," for the reasons noted above, support the Grievant's discharge. As Arbitrator McCoy would put it, "the facts" here, namely "excessive absenteeism due to illness and/or injury," constitute grounds for dismissing the Grievant and "I do not think that [I] am bound to set the (discharge) penalty aside merely because the facts fail to prove conclusively [the Agency's flawed "excessive absenteeism" for misconduct caused absenteeism.]"

In sum, therefore, three solid grounds for upholding the Grievant's discharge and denying the grievance have been made out. Accordingly, the Arbitrator need not, and

does not, further protract this Decision, by addressing the additional grounds for discharge relied on by the Agency, and the Union's defenses thereto.

AWARD:

For the reasons more fully set forth above, the grievance is denied. The Grievant was discharged for just cause.

Dated: April 30, 2002

FRANK A. KEENAN
Arbitrator