CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration Between:	*	
THE STATE OF OHIO Ohio Adjutant General's Department	*	Arbitrator's File #VI JD 1-88 Grievance Number G87-2358
-and-	*	
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION AFSCME, AFL-CIO Local 11	*	Decision Issued August 17, 1988

APPEARANCES

FOR THE STATE

Michael Duco	Labor Relations Specialist
Neil J. Moore	Labor Relations Officer
Michael E. Duffey	Base Civil Engineer
Tracy A. Moore	Building Maintenance Superintendent

FOR OCSEA

Lois A. Haynes	Union Advocate
Linda Fiely	Associate General Counsel
Timothy P. Tabol	Grievant
Douglas K. Mayerhofer	Witness

ISSUE: Article 24 -- Removal for fraud and AWOLs.

Jonathan Dworkin, Arbitrator
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THE GRIEVANCE; ISSUES AND
RELEVANT CONTRACTUAL PROVISIONS

The grievance protests the discharge of a civilian employee of the Ohio Adjutant General's Department. Grievant, a Maintenance Repair Worker II, had been employed at the Air National Guard Base, Toledo Express Airport, Swanton, Ohio since 1985. His removal was effective October 9, 1987.

The disciplinary action was premised on allegations of fraud and unauthorized absences in connection with military leave. Apart from his civilian employment, Grievant was a member of the Army National Guard, 112th Engineer Battalion. He was required to participate in two weeks of training each year, and his 1987 annual training was scheduled July 29 through August 15. His orders were to report to Battalion Headquarters in Brookpark, Ohio, and proceed from there to Camp Grayling, Michigan. Four months earlier, on March 10, 1987, Grievant applied for and was granted leave for the training. The leave was in accordance with Article 30, §30.02 of the governing Collective Bargaining Contract which provides:

> Any permanent employee who is or becomes a member of the reserve component of the Armed Forces . . . shall be allowed military leave with pay for up to twenty-two (22) work days or one hundred seventy-six (176) hours per calendar year for federal duty performed which is directed or caused to occur by authority of the Department of Defense (DOD) or its agent.

Grievant took his leave on July 29, as scheduled, but did not begin annual training on that day. He notified his military superior that he was sick and would not be able to make the trip to Grayling. His orders were deleted and he was directed to join his unit on August 1. He was instructed to bring medical documentation to support his claim of illness. He complied with the instruction and fulfilled the balance of his annual training from August 1 through 15. But he did not notify the Employer of his change in status. As a result, he was technically absent from work between July 29 and August 1. He was not legitimately on military leave because he had been excused from the first three days of training. He was not on sick leave or leave-without-pay because he had not requested either allowance. In the Employer's view, he was AWOL.

Another day of AWOL resulted from the fact that Grievant did not return to work when his leave ended. He delayed one day, notifying the Employer that his military assignment had been extended to August 17. According to Grievant, his Sergeant had authorized him to make up the days he had missed by building a map cabinet in his home, and he did not complete the task until approximately 1:00 a.m. on Monday, August 17. When he did report for work on August 18, he handed his Supervisor an "excuse" on an Army form letter which was unsigned. Upon investigating, the Adjutant General's Office determined that the excuse had been typed by Grievant him-

self and was fraudulent. It was further learned that the extra day of military service Grievant allegedly performed was totally inconsistent with Army regulations covering make-up training.

The Department regarded Grievant's AWOLs, in and of themselves, as sufficient to support his discharge. Personnel Rules governing employees and prescribing discipline for infractions had been posted in the workplace since February 16, 1987. Rule 14 prescribed removal as the penalty for three or more AWOLs. In addition, Grievant's alleged manipulation of leave was viewed as fraudulent and as a violation of such severe magnitute as to require that his employment be ended.

The grievance challenges each allegation. According to the Union, Grievant followed the rules of his employment as he reasonably understood them and committed no fraud or deception whatsoever. While on military leave, he became ill and had to be excused from three days' service. If he was supposed to advise the Employer of his temporary disability, he claimed he had no knowledge or instruction concerning the requirement and certainly could not have been expected to comply with regulations which were not communicated. His understanding was that he was on leave and owed notification only to the Army. Regarding the allegedly fraudulent excuse for the extra day's leave on August 17, Grievant staunchly maintains that everything he did -- taking the day off and typing his own excuse -- were expressly authorized by his Army superiors. The

Union urges that Grievant be returned to his job with full restoration of lost wages and benefits.

The Union's position relates primarily to Article 24, §§24.01 24.02 and 24.05 of the Agreement. Section 24.01 sets a critical limitation on the State's authority to discipline members of the Bargaining Unit. It forbids disciplinary action unless founded on just cause:

> **§24.01 - Standard**
>
> Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. . . .

Section 24.02 supplements the just-cause mandate by requiring the State to follow prescribed disciplinary progressions:

> **§24.02 - Progressive Discipline**
>
> The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:
>
> A. Verbal reprimand (with appropriate notation in employee's file)
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> B. Written reprimand;
>
> C. Suspension;
>
> D. Termination.
>
> . . .

Section 24.05 ties the just-cause and progressive-discipline provisions together with its statement that discipline must be "reasonable and commensurate with the offense and shall not be used solely for punishment."

The Agreement also contains a procedural due-process provision requiring the Employer to initiate discipline within a defined time frame. Article 24, §24.02 provides in part:

> 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.

While the Union's principal contention is that Grievant's discharge lacked just cause, a secondary (but no less forceful) argument is that the Agency's action was delayed to the extent that it was out of compliance with the negotiated purpose expressed in §24.02. The Union requests that the Arbitrator fulfill his responsibility under the Section by considering the delay and overturning the discipline for the procedural defect.

The parties began processing the grievance at Step 3 of the four-step grievance procedure. The Agency denied the complaint at each level, remaining firm in its position that the discharge was

justified, supported by just cause, and consistent with all contractual requirements. The Union appealed to arbitration, and a hearing convened in Columbus, Ohio on May 26, 1988. At the outset, the parties stipulated that the appeal was timely and the Arbitrator was authorized to issue a conclusive award on the merits of the dispute. Arbitral jurisdiction is more specifically defined and limited by the following language in Article 25, §25.03 of the Contract:

> Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

TIMELINESS OF DISCIPLINE

Article 24, §24.02 obligates the Employer to discipline without unreasonable delay. The negotiators made the requirement unmistakably clear. Not only did they state in mandatory terms that discipline "shall be initiated as soon as reasonably possible," they underscored their purpose by instructing arbitrators to consider the Employer's timing when deciding grievances over disci-

pline. It is apparent that the parties meant to place the strongest emphasis on this aspect of the Employer's duties; to the point that timeliness of discipline was made an indispensable ingredient of just cause itself.

The language in §24.02 on timeliness does not stand alone. The negotiators returned to the subject and clarified their meaning three Sections later in §24.05. There they set a deadline of forty-five days after the pre-discipline meeting (provided for in §24.04) for an Agency Head to finalize discipline. Section 24.05 states in part:

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

Reading §§24.02 and 24.05 together leads to the conclusion that the forty-five days is an absolute maximum. It supplements, but does not entirely supersede the Employer's responsibility to react to a disciplinary event "as soon as reasonably possible." The maxim, "justice delayed is justice denied" is an integral part of the contractual relationship between these parties.

The Union contends that Management breached its contractual responsibility by postponing Grievant's discipline overly long.

This contention is based on the fact that the disciplinary recommendation was not issued until August 26, 1987; the alleged violations began on July 29, when Grievant failed to report his status change to the Adjutant General, and ended August 18 when he returned to work with the unsigned letter. More than a week elapsed between Grievant's return to work and the proposal to discipline him.

The eight days between Grievant's return to work and the recommendation that he be disciplined did not violate the principles expressed in §§24.02 and 24.05, especially in light of the fact that the Employer investigated in the interim to confirm (or refute) its suspicions. The day that Grievant reported to his job with the questionable "excuse" from the Army, his Supervisor referred the matter to the Time & Attendance Monitor. Meanwhile, a Captain who was second in command at the Air National Guard Base made repeated telephone calls to the 112th Engineer Battalion for verification. He followed up with written requests, and the Battalion's responses (many of which were received after the disciplinary proposal) added to the Agency's growing certainty that Grievant was guilty of serious misconduct.

It is inconceivable that the Union would view the contractual language on timing as calling for knee-jerk disciplinary responses to mere suspicions. Summary discipline, without thorough investigation and sober consideration, would violate just cause in many, if not all circumstances. It is noted, however, that the Union's

challenge to timeliness refers only peripherally to the contractual requirements. Its primary focus is the Adjutant General's own Personnel Policy, posted February 16, 1987, which establishes a three-day time limit for most discipline. Paragraph 8 of the Regulations provides:

> 8. ADMINISTRATION:
>
> a. Timeliness: Normally, the maximum time lapse between the act of commission and the initiation of formal disciplinary should not exceed 3 work days. Exceptions to this policy may be granted by the Adjutant General for unusual circumstances.

The evidence does not indicate whether or not the Adjutant General granted an exception to time requirements in this case. Clearly there was reason for an exception. If Grievant was guilty of misconduct, his violations were not overt. It was not as if he had been openly dishonest or his unauthorized absences were matters of record. Assuming he violated employment responsibilities, the violations were hidden by a seemingly proper leave request and an allegedly falsified Army document. The Employer obviously needed time to unravel the facts and determine whether or not discipline was justified.

The Arbitrator concludes that the delay was minimal; it did not prejudice Grievant's rights nor did it contravene the Contract. Accordingly, the Union's request that the discipline be overturned on procedural grounds is denied.

ADDITIONAL FACTS AND CONTENTIONS

On first examination, Grievant's explanation of the discrepancy between the dates of his military leave and the dates of his military service seems plausible. He stated that he became ill on July 29 and was temporarily unable to report for duty. He recognized that he had an obligation to notify the National Guard, but was unaware of a concomitant duty to the Employer. In his mind, he was on leave; he had no work schedule. He believed that the only work responsibilities he owed during his leave were to the United States Army, not to the State of Ohio. Although the Army deleted his original orders, Grievant maintains he was not informed of the deletion. His orders were amended by an internal memorandum; he was not provided a copy.

The 112th Engineer Battalion ended its semiannual training on Sunday, August 16. The unit held a final drill and was dismissed at 4:00 p.m. Grievant stayed later for cleanup. He needed extra service to make up the time he had missed. Cleaning the area covered some of the time owed and he arranged with his Sergeant to complete the rest of his obligation at home. Grievant had a home carpentry workshop, and the unit needed a map cabinet. The Employee offered to conclude his training by building the cabinet; the Sergeant agreed. Grievant finished the project at one o'clock on the morning of August 17. He had worked eighteen or nineteen hours

between Sunday and Monday morning, and was exhausted. Prior to his scheduled starting time, his wife telephoned the Employer to report him off. The reason she gave (with Grievant's apparent approval) was that his military service had been extended one day.

The explanation seemed reasonable, but the Adjutant General had cause to suspect that it was untrue. Grievant's story that he fulfilled some of his military training at home and out of uniform was incredible; it was totally inconsistent with Army policy. National Guard Regulation 350-1, promulgated by the Department of the Army on November 30, 1983, sets training guidelines. It specifies that substitute training must be similar to what was missed, it must enhance relevant skills, and it must be performed in uniform. Sections 2-7 and 2-10 of Regulation 350-1 clearly establish these prerequisites, and the requirement that a uniform be worn appears in both Sections:

> 2-7. Equivalent training
>
> When an individual misses his/her regularly scheduled period of instruction or duty whenever it is normally scheduled due to unforeseen emergency situations of a personal nature, the training may be made up with pay in accordance with the following guidance:
>
> . . .
>
> b. ET will be of a similar nature and quality to that which was missed. ET will be appropriate to and enhance the ability of the individual to accomplish the duties of the position to which assigned.
>
> c. ET must be performed in uniform within 60 calendar days after the missed period of instruction.

. . .

2-10. Uniform to be worn at assemblies

Individuals will not be credited with attendance at an IDT assembly, unless they are present throughout the assembly in the prescribed uniform . . . [Emphasis added]

The Employer, itself a National Guard unit, was thoroughly familiar with the Regulations and found it inconceivable that Grievant was given an equivalent-training assignment which was so contrary to governing standards.

When Grievant's wife telephoned to report the absence, she was told that written documentation would be required. Grievant complied with the requirement, but the document he submitted did nothing to assuage suspicion -- in fact, it fueled the Employer's doubts. The letter was a three-paragraph form with spaces to be filled in by a company clerk. The first two paragraphs set forth a general request for leave of absence and a brief statement of rights and obligations under the Military Selective Service Act of 1987. The third paragraph was designed to notify employers of the dates scheduled for training and provide any other relevant information. Paragraph three of the letter Grievant submitted read as follows:

3. UNIT TRAINING ASSEMBLYS HAVE BEEN SCHEDULED FOR: 17 AUG 87

EXTENSION OF ANNUAL TRAINING DUE TO LATE TIME OF ARRIVAL. ANY QUESTIONS CONTACT MSG EADER AT THE ABOVE ADDRESS.

There was a space at the bottom of the form for the Commanding Officer's signature. Grievant's document was unsigned.

The belief that Grievant had pursued a scheme to defraud the State out of paid military leave became firmer when the Commanding Officer of the 112th Battalion first responded in writing to the Department's inquiries. The Employer had asked for verification of the unsigned document extending Grievant's service through August 17. The response was accusing. It stated in part:

> 1 September 1987
>
> MEMORANDUM FOR: 180th Civil Engineering, Toledo Express Airport, Swanton Ohio 43558-5008
>
> SUBJECT: Attendance Verification on [Grievant]
>
> 1. Reference your letter of 25 August 1987 concerning [Grievant] of this unit, and his attendance at unit training.
>
> 2. [Grievant] has taken advantage of the "system" when he generated documents supporting the fictitious training date of 17 August 1987. This unit has contacted his section sergeant (MSG Eader) to verify that he was not authorized to perform any additional training (any additional training would have had to be approved by this office).

The Army's letter created a sound case against Grievant. It pointed to an act of deliberate fraud. However, the 112th Battalion pursued its investigation further and discovered that Grievant's

story was true; his Sergeant had authorized him to build the map cabinet as part of his training assignment. On September 7, 1987, the State received a second letter from the Army correcting the first:

> MEMORANDUM FOR: 180th Civil Engineering Squadron, Toledo Express Airport, Swanton, Ohio 43558-5008
>
> SUBJECT: Attendance Verification on [Grievant]
>
> . . .
>
> b. [Grievant] had been given permission, by his section sergeant, to perform additional training on 17 August 1987. That training was never authorized by this commander and never brought to the attention of the First Sergeant. Additionally, [Grievant] obtained a copy of this unit's training attendance letters from the unit clerk. With the unit clerk busy, [Grievant] took that letter and filled it out himself and failed to obtain authentication from this headquarters. Subsequently, [Grievant] did not perform duties at this armory, in proper uniform on 17 August 1987.

The Employer was unconvinced. Despite the Army's retraction of its original allegations, the Department held firm to the conviction that Grievant had committed several offenses, each of which justified his removal. By not advising Supervision of his illness and the deletion of his military orders, it is charged that he fraudulently obtained paid military leave to which he was not entitled. He sought a third day of military leave on August 17 and

attempted to support that claim with a fictitious excuse he himself generated.

The State places no credence on Grievant's assertion that he was unaware of a responsibility to keep the Employer advised of the change in his leave status. That excuse might have been compelling were it not for the fact that the Employee was disciplined for an almost identical violation less than two years previously. He had suffered an injury while on military leave and obtained two weeks off. When the two weeks ended, he did not report for work nor did he contact Supervision. On November 12, 1985, he was issued a stern reprimand which stated in part:

> You informed us that you were injured on Sunday, 20 Oct 85, and would be incapacitated and on military leave for 2 weeks. This was substantiated by letter from Cpt. Michael A. Ferguson, dated 23 Oct 85. We have not heard from you since 22 Oct. 85, and your military leave ran out on 5 Nov 85, 2 days after you should have reported back to us on your work/leave status.
>
> First, since you failed initially to contact your supervisor on Monday, 21 Oct 85 about being off all day, and second, since you have not kept us informed on your work/leave status, I have placed you on leave without pay, beginning 4 Nov 85. This is not the first time you have failed to keep your supervisor informed.
>
> I reiterate, it is up to you to keep your supervisor informed and for you to provide us with the required information/documentation. Continued failure to follow these requirements will lead to disciplinary action and/or termination. You are solely responsible for your actions, both here at work and with your civilian responsibilities (ie. Banking, Debts, Apartment Rental, Legal Matters, Etc.).

The Department concludes that Grievant's fraud justified his removal. Moreover, it contends that the second charge against him -- successive AWOLs -- stands as independent justification for the penalty. When the Employer discovered that Grievant was not entitled to military leave on July 29, 30, and 31, it regarded the days as unreported and, therefore, unauthorized absences. Three days of AWOL were charged. Grievant's request for an extension of military leave on August 17 was denied, and that absence became his fourth AWOL. According to the published Regulations of the Adjutant General, removal is the penalty for three or more AWOLs. The State urges the Arbitrator to find that Grievant committed both offenses but, if only one of them stands, it alone requires that the grievance be denied.

* * *

The Union's position rests primarily on Grievant's testimony. The Employee insists he is innocent of fraud. At worst, his failure to notify Supervision of his illness was an excusable oversight. Grievant maintains that he was not aware of a reporting obligation to the Employer; he believed that he had been released from his employment and was responsible only to the military during his leave. In this regard, the Union vigorously objected to Management's submission of the 1985 reprimand. It was more than twelve

months old and the Employee had received no discipline in the interim. According to Article 24, §24.06, it should have been removed entirely from Grievant's personnel file. The provision relied upon by the Union states in pertinent part:

> **§24.06 - Prior Disciplinary Actions**
>
> All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.
>
> . . .
>
> This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

In the Union's judgment, the AWOL charges were manufactured to support what was clearly a specious disciplinary decision. Grievant was not AWOL July 29 through 31 -- he was not scheduled for work. The Union maintains that he could not have been AWOL on August 17 because his Sergeant had extended his military service.

In its opening statement, the Union demanded the following broad range of remedies for the Employer's alleged breach:

> [T]he remedy sought is that the Grievant be reinstated with no loss of wages or seniority, restoration of sick leave and vacation accrual for the time that the Grievant has been off, payment of medical bills for the time the Grievant has been

off, and payment of lost overtime opportunities. Alternatively, if wrong doing is found to have occurred by the arbitrator, the Union stresses removal is too harsh under the circumstances of this case and requests modification of the penalty.

OPINION

1. The past discipline. When the State offered Grievant's 1985 reprimand into evidence, the Union objected. The Arbitrator overruled the objection and received the submission. On further reflection, the Arbitrator recognizes that he erred. The past reprimand should not have come into evidence; it should not even have existed. Under Article 24, §24.06, the State was required to expunge it from Grievant's record on November 12, 1986. One must assume that the negotiators meant what they said when they created the provision. They could have agreed simply that past discipline could not be used to support more severe discipline after a specified period of time. In such event, the reprimand would have been available to an arbitrator, not as a premise for discipline, but for the limited purpose of refuting Grievant's allegation that he was unaware of his responsibilities. But the negotiators went farther. They stated unambiguously that all records pertaining to reprimands "will cease to have any force and effect and will be removed from an employee's file" after twelve discipline-free

months. Nothing could be clearer. The responsibility imposed on the State to monitor and update files is absolute and unqualified. When the State offered the reprimand into evidence, it did so in violation of §24.06. When the Arbitrator overruled the Union's objection, he ignored §24.06. Neither the State's submission nor the Arbitrator's ruling was contractually proper. The reprimand will be accorded no weight in the decisional process that follows.

2. Grievant was not guilty of fraud. The charge of fraud, with its criminal implications, requires precise definition. The Employer had a responsibility to state clearly what it meant by "fraud" and prove the elements of the charge. During the hearing, the principal witness for the State was asked to define the term. He responded, "Something that is fraudulent is designed to deceive." The Arbitrator finds the definition accurate as far as it goes, but it does not go far enough. It lacks a crucial element. "Fraud" consists of intentional deception designed to mislead, for the purpose of obtaining an illicit gain or advantage [See Black's Law Dictionary (4th ed., 1951)].

It is arguable that Grievant deceived the State by failing to give notice that his leave status had been changed. The Department contends that the deception was designed to achieve illicit gain -- military pay for three days when he did not perform military service. The contention would be persuasive if it were accurate. But the facts demonstrate that Grievant had nothing to gain by the

alleged deception. The training period he was originally assigned, July 29 through August 16, encompassed thirteen paydays -- 104 wage hours. Article 30, §30.02 allows each employee a maximum of 176 paid military leave hours per calendar year. Grievant exhausted ninety-six hours of the allowance by mid-July, 1987. In other words, he was entitled to pay for only eighty hours (ten days). Since his original commitment encompassed thirteen normal workdays, he could not have received wages for three days (twenty-four hours) in any event. In spite of his unreported period of illness, Grievant obtained no more than that to which he was entitled. His failure to report his illness whether deliberate or mistaken, was inconsequential with respect to paid leave.

In addition, the evidence proves that the unsigned letter excusing Grievant for August 17 was not fraudulent. The Employee's unrefuted testimony was that he asked the company clerk for documentation of his extended service before he returned home -- before his wife reported him off and was advised that documentation would be required. The clerk was busy and told Grievant to type it himself. The Employee complied. He obviously made no attempt to deceive the Department because he did not even bother to forge a signature on the letter. He fashioned it precisely as the company clerk told him to and he submitted it without embellishment.

3. Grievant did perform military service on August 16-17. The Department argues that Grievant's extended day of military

service was "unauthorized." It points to Army regulations which state that authorization for equivalent training can be granted only by the Commander and must conform to Army regulations. Grievant's service met neither of these conditions. It was authorized by his Sergeant who was not the Commanding Officer and it was performed in a manner wholly inconsistent with the regulations. The Department concludes, therefore, that Grievant did not perform military service on August 17.

The Arbitrator is admittedly unschooled in rudiments of military regulations and procedures. He finds no reason to disbelieve the Department's allegation that Grievant's cabinet building was technically unauthorized. However, the breach of regulations was not attributable to Grievant. The Employee was wholly innocent -- the irregularity was commited by the Sergeant. Grievant did no more than a soldier is expected to do. He took his orders and his authorization from his Sergeant and relied upon the Sergeant's authority. If the Department's argument and conclusion were adopted, the Arbitrator would effectively place upon the Employee the unwarranted responsibility to second-guess his Sergeant and review regulations before obeying orders. The result would be absurd.

4. Grievant did commit three or more AWOLs. It is unnecessary to burden this decision with an analysis of the arguments for and against the AWOL charges. The record convinces the Arbitrator that Grievant knew he had an obligation to notify the Employer when

his military orders were changed. By failing to do so, he effectively placed himself on unauthorized leave. The violation concededly was substantively inconsequential. If Grievant had rescheduled himself for work he would have been entitled to sick leave or leave without pay (he had exhausted his sick-leave allowance) on July 29, 30, and 31; his military leave then would have started on August 1. However, the AWOL charges are technically correct and cannot be disregarded. The Employee's leave authorization automatically became a nullity when he was excused from military service. He knew or should have known that he had been excused despite the fact that he did not receive written confirmation from the Army. The simple fact is that he was entitled to be paid by the Army for every day of training, and he must have been aware that he did not receive pay for the last three days in July. The Arbitrator finds that Grievant's testimony in this regard lacks credibility. The Department's position that his three days away from his job were unauthorized will be adopted.

5. Conclusions: Despite the AWOLs, the removal was not justified. In arguing that the AWOLs justified Grievant's removal, the Adjutant General makes the mistake of mechanically applying unilateral rules as if they were contractual. It is true that Rule 14 of the published Regulations on discipline calls for removal for a first offense of three or more days of AWOL. But unilateral regulations are nothing more than than guidelines -- communications to

the workforce of how Management intends to exercise its disciplinary authority. They do not supplant negotiated rights and protections. Article 24, §24.01 establishes the disciplinary standard which overrides every non-negotiated regulation which the Employer may choose to publish. It states that no employee shall be disciplined "except for just cause." The standard is amplified and further defined in §§24.02 and 24.05 which state that discipline must normally be progressive, reasonable, reasonably corrective, and may not be wholly punitive.

"Just cause" is an amorphous term. Justice is its root, and an arbitrator's chief responsibility in a dispute of this kind is to assure that justice is done. But concepts of justice differ from arbitrator to arbitrator. When the parties negotiated the just-cause precept as the sine qua non of discipline, they explicitly authorized each arbitrator to explore facts, contentions, mitigating circumstances, and ultimately, apply his/her individual view of justice, fairness, ethics, and morality.

The Arbitrator does not have to delve deeply into his own individual sense of justice to find that Grievant's discharge was contrary to just cause. Once the element of fraud is removed from consideration, any sentient human being has to recognize that the discipline is overly harsh and punitive. At its worst, Grievant's misconduct was a technical omission, less serious than most of those for which mild progressive discipline is the penalty prescribed in

the Adjutant General's Regulations. The Arbitrator is forced to conclude that the most severe penalty which could have been imposed under the just-cause precept was a written warning.

The grievance will be sustained in essence. The removal will be modified to a written warning which may be dated August 17, 1988, the date of this award. The Employer will be directed to reinstate Grievant to his job with full seniority and make him whole for lost benefits and straight-time wages.

The make-whole remedy will contemplate the possibility that Grievant earned wages during his period of unemployment. The State will be permitted to deduct such wages from its back-pay obligation. Grievant and the Union will be required to supply the State with any requested documentation of wages earned, including tax returns, pay receipts, and the like.

AWARD

The grievance is essentially sustained.

The removal issued against Grievant is modified to a written reprimand dated August 17, 1988. The Employer is directed to reinstate Grievant to his job with full seniority, and make him whole for benefits and straight-time wages lost as the consequence of the removal.

The make-whole remedy contemplates the possibility that the Employee earned wages during his period of unemployment. The State is authorized to deduct the gross amount of such wages from its back-pay obligation. Grievant and the Union shall, upon request, supply the State with documentary evidence of wages earned, including tax returns, pay receipts, and the like.

Decision Issued:
August 17, 1988

Jonathan Dworkin, Arbitrator