ARBITRATION DECISION NO.:
181

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Rehabilitation
and Correction, Ohio
State Reformatory

DATE OF ARBITRATION:
February 8, 1989

DATE OF DECISION:
May 31, 1989

GRIEVANT:
Michael Wheeler

OCB GRIEVANCE NO.:
27-20-(88-01-28)-0029-01-03
27-20-(88-01-28)-0031-01-03

ARBITRATOR:
David M. Pincus

FOR THE UNION:
Butch Wylie, Advocate

FOR THE EMPLOYER:
Richard Hall, Advocate

KEY WORDS:
Grievance A
- Suspension
- Late Call Off
- Falsified Doctor's Statement

Grievance B
- Suspension
- Unauthorized Absence
- Disparate Treatment

ARTICLES:
Article 5 - Management Rights
Article 24 - Discipline

§24.01-Standard
§24.02-Progressive Discipline
§24.04-Pre-Discipline
Article 25 - Grievance Procedure
§25.03-Arbitration Procedures
§25.04-Arbitration Panel
Article 26 - Holidays
§26.04-Employee's Birthday
Article 29 - Sick Leave
§29.02-Notification

GRIEVANCE A:

FACTS:

Grievant was employed as a Corrections Officer 2 for the Ohio State Reformatory, a maximum security prison. Grievant was scheduled to work at 5:50 a.m. and was required to notify the institution an hour in advance if he was going to be absent. Grievant did not report to work for three days. Grievant allegedly never called off before the scheduled 4:50 call off time. Grievant claims his father called off in time on the third day. When grievant returned to work he submitted a physician's excuse for sick leave for the first two days and requested birthday leave for the third day. The birthday leave was not timely and was denied. A supervisor contacted the grievant's physician and in a notarized affidavit the physician stated that the grievant's excuse had been altered. The grievant was suspended for ten days for improper call offs and falsifying a document.

EMPLOYER'S POSITION:

There is just cause for the ten day suspension. Grievant knew the consequences of his invalid call offs and unexcused absences. He clearly violated employee rules. Grievant also falsified a physician's excuse. Grievant could have obtained compensation based on that excuse which would have constituted fraud and attempted theft. Any claims of disparate treatment must be dismissed since the only other employee that falsified a physician's excuse was removed.

UNION'S POSITION:

Grievant did call in late for two days, but the employer and the arbitrator must consider several mitigating factors. Grievant was on medication for a previous auto accident that caused drowsiness. Grievant's father did notify the institution in time on the third day. Grievant did not falsify the physician's excuse. The excuse was submitted by the grievant on his own initiative and the altered date would not in any case benefit the grievant. The Union believes that the excuse was altered by a third party, perhaps the supervisor. The only possible infraction that grievant could be charged with is late call offs. Grievant should receive at most a one day suspension not the ten day suspension the employer imposed. There is also evidence of disparate treatment.

ARBITRATOR'S OPINION:

It is the opinion of the arbitrator that the grievant did falsify his physician's excuse. The Union failed to prove that anyone else falsified the excuse. The Union's arguments that the falsification

would not result in fraud is immaterial. Grievant's motivation is not an issue; the falsification is a direct violation of an employee work rule. A falsification violation jeopardizes the relationship between an employer and an employee and has several penalties, including removal, for the first offense. The Union provided no proof of disparate treatment. The grievant's suspension can not be compared with other employees with tardiness infractions since the grievant never showed up for work and had the added violation of falsification. The only other employee that was found to falsify a document was removed. Even if grievant was under medication that caused drowsiness, grievant should have had a contingency plan for call offs. The Union also did not offer proof that grievant's father had notified the institution of his son's absence. The absences were unexcused and the doctor's excuse was falsified by grievant. The employer had just cause for the ten day suspension.

AWARD:

The grievance, (27-20-88-01-28-0029-01-03), is denied and dismissed.

GRIEVANCE B:

FACTS:

Approximately two months after the first ten day suspension the grievant failed to report to work due to car trouble. Grievant phoned the institution at 5:50. Grievant never reported to work and justified his absence by stating he had to have to car towed to a local car dealer and then received a call from a physician about his father's future surgery. Grievant could provide no documentation of these events. The car dealer who allegedly towed grievant's car denied any such activity. Once again employer imposed a ten day suspension.

EMPLOYER'S POSITION:

The grievant originally called up and would not report to work because of car trouble, this should be the reason that grievant attempts to justify his absence. Later attempts to introduce evidence that grievants absence was somehow based on his own impaired physical condition should not be allowed. Grievant did not submit this evidence before the second disciplinary meeting although he clearly had possession of it at that time. Grievant is not credible and modified several portions of his original account. A dealer to whom grievant had claimed his car was towed denied ever seeing grievant's car. Employer had just cause to suspend the grievant for ten days.

UNION'S POSITION:

Grievant did not lie, but was confused about the events of the day because of the stress of hearing of his father's illness. Although grievant did not attend work, he had good reason to visit his father in the hospital. The second ten day suspension is excessive for this type of violation. The second ten day suspension is also improper because the employer did not follow the steps of progressive discipline.

ARBITRATOR'S OPINION:

First the physician's excuse that grievant tried to submit at arbitration will not be allowed as evidence. Arbitration proceedings must have the essential facts revealed in the early stages of the process. Grievant held back information. Secondly it was the grievant's own actions that placed him in the position of having the two suspensions run consecutively. Even though the grievant is not credible, the penalty imposed by employer is excessive. Other unauthorized absence

violations were not as severely punished. The most severe penalty, considering the employee's record of previous discipline, that should be imposed is a seven day suspension.

AWARD:

The grievance, (27-20-88-01-28-0031-01-03), is sustained is part and denied in part. The ten day suspension is modified to seven days and the employer must compensate grievant for the three days difference.

TEXT OF THE OPINION:

STATE OF OHIO AND OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE
ARBITRATION BETWEEN

**THE STATE OF OHIO,
DEPARTMENT OF REHABILITATION
AND CORRECTION,
OHIO STATE REFORMATORY**

-and-

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

GRIEVANCE:
Michael Wheeler
(Two 10-Day Suspensions)

CASE NUMBERS:
27-20-88-29-01-03
27-20-88-31-01-03

ARBITRATOR'S OPINION AND AWARD

Arbitrator:
David M. Pincus

Date:
May 30, 1989

APPEARANCES

For the Employer
John Morrison, Major
Ben Rachel, Captain
Don LeClair, Captain
Ted Durkee,
Labor Relations Specialist
Richard Hall, Advocate

For the Union
Michael Wheeler, Grievant
Joyce Wheeler, Witness
Robert Wheeler, Witness
Dennis Cowell, Corrections Officer
Becky Jones, Corrections Officer
Butch Wylie, Advocate
Linda Fiely,
Associate General Counsel

INTRODUCTION

This is a proceeding under Article 25, Section 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Department of Rehabilitation and Correction, Ohio State Reformatory, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on February 8, 1989 at the Office of Collective Bargaining, Columbus, Ohio. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would submit briefs.

STIPULATED ISSUES[1]

Was the Grievant disciplined for just cause and if not what shall the remedy be?

Richard Hall
Employer Advocate

Butch Wyely (sic)
Union Advocate

(Joint Exhibits 13 and 26)

JOINT FACT STIPULATION LIST IN THE CASE OF
OHIO DEPARTMENT OF REHABILITATION AND CORRECTION
VS
MICHAEL WHEELER, GRIEVANT, AFSCME/OCSEA

GRIEVANCE #27-20-88-029-01-03

1. Grievant did not report to work as scheduled on November 14, 15, or 16, 1987.
2. Grievant submitted a Doctor's excuse (J7) to Capatin (sic) Leclair (sic) on November 17, 1987.
3. Grievant was scheduled for a pre-disciplinary hearing on December 7, 1987 but he called off sick on that date.
4. Grievant was rescheduled for pre-disciplinary hearing on December 12, 1987 but he called off with car trouble on that date.
5. The grievance is properly before the arbitrator.
6. The grievant had received the Standards of Employee Conduct (Departmental Work Rules) prior to November 14, 1987.
7. The arbitrator must rule on this grievance (27-20-88-029-01-03) first and distinctly from grievance #27-20-88-031-01-03.

JOINTLY SUBMITTED TO THE-RECORD:

RICHARD HALL
EMPLOYER'S ADVOCATE

BUTCH WYLIE
UNION'S ADVOCATE

(Joint Exhibit 28)

JOINT FACT STIPULATION LIST IN THE CASE OF
OHIO DEPARTMENT OF REHABILITATION AND CORRECTION
VS
MICHAEL WHEELER, GRIEVANT, AFSCME/OCSEA
GRIEVANCE #27-20-88-031-01-03

1. Documents jointly submitted in grievance #27-20-88-029-01-03 shall be considered as jointly submitted in grievance #2720-88-031-01-03.
2. The grievant, who was scheduled to work on December 12, 1987 called off at 5:50 AM, his scheduled starting time, to notify the institution that he would not be in to work because of car trouble.
3. All due process rights with regard to discipline were enjoyed by the grievant.
4. The grievance is properly before the arbitrator.
5. The grievant had received the Standards of Employee Conduct (Departmental Work Rules) prior to December 12, 1987.
6. The first pre-disciplinary hearing, commenced on December 22, 1987 was continued to December 28, 1987 at the grievant's request.

JOINTLY SUBMITTED TO THE RECORD

RICHARD HALL
EMPLOYER'S ADVOCATE

BUTCH WYLIE

UNION'S ADVOCATE

(Joint Exhibit 14)

PERTINENT CONTRACT PROVISIONS

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 ORC Section 4117.08 (A) numbers 1-9."

(Joint Exhibit 27, Pg. 7)

ARTICLE 24 - DISCIPLINE

Section 24.01 - Standard

"Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse."

Section 24.02 - Progressive Discipline

"The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. Verbal reprimand (with appropriate notation in employee's file)
B. Written reprimand;
C. Suspension;
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process."

. . .

Section 24.04 - Pre-Discipline

"An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the

reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges."

. . .

(Joint Exhibit 27, Pgs. 34-37)

Section 24.05 - Imposition of Discipline

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

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

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

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

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

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

(Joint Exhibit 27, Pgs. 34-37)

ARTICLE 26 - HOLIDAYS

. . .

Section 26.04 - Employee's Birthday

"The employee shall be permitted to observe his/her birthday. Should the employee's birthday fall on a holiday or a day when the employee is normally in non-work status or if the employee is unable to take the birthday because of operational needs of the Employer or wishes to take another day, the employee shall be credited with a personal leave day.

ARTICLE 29 - SICK LEAVE

. . .

Section 29.02 - Notification

"When an employee is sick and unable to report for work, he/she will notify his/her immediate supervisor or designee no later than one half (1/2) hour after starting time, unless circumstances

preclude this notification. The Employer may request that a physician's statement be submitted within a reasonable period of time. In institutional agencies or in agencies where staffing requires advance notice, the call must be made at least ninety (90) minutes prior to the start of the shift or in accordance with current practice, whichever period is less.

If sick leave continues past the first day, the employee will notify his/her supervisor or designee every day unless prior notification was given of the number of days off.

. . .

(Joint Exhibit 27, Pgs. 47-48)

CASE HISTORY

Michael Wheeler, the Grievant, has been employed as a Corrections Officer 2 since January 9, 1984. The Ohio State Reformatory, the Employer, is a maximum security prison which houses approximately 2400 inmates; even though the facility was originally designed to house 1200 inmates.

On or about August 28, 1987, the Grievant and his family were involved in a car accident in Mansfield, Ohio. The Grievant suffered a neck injury diagnosed as whiplash which necessitated medical treatment. The injury, moreover, resulted in three to four weeks of lost time as a consequence of the disability. The Grievant also alleged that the disability engendered a series of painful maladies which needed to be periodically medicated (Union Exhibit 1).

On November 14, 1987 the Grievant was scheduled to report to work at 5:50 a.m. He, and other employees, were also aware of an existing call off policy which requires officers to call off one hour prior to report time (Joint Exhibit 21). Thus, on the date in question, the Grievant was obliged to call off by 4:50 a.m., otherwise a policy violation might arise.

The Grievant did not report to work on November 14, 1987. A call was received by the institution at 5:03 a.m. The Grievant allegedly notified the facility that he was unable to report because be was going to the Cleveland Clinic for physical therapy (Joint Exhibit 6).

On November 15, 1987, the Grievant, again, called off after 5:00 a.m. He justified his absence by explaining that he was under a doctor's care (Joint Exhibit 6).

On November 16, 1987, the Grievant did not report to work as scheduled. Although there is some dispute concerning whether the Grievant and/or his father initiated a valid call off, the Employer's records (Employer Exhibit 3) indicated that he failed to notify the institution of his absence. As a consequence, he was docked with a no call no show occurrence (Joint Exhibit 6).

The Grievant eventually returned to work on November 17, 1987. It appears that the Grievant submitted a number of request for leave forms to cover the above dates. He, moreover, submitted medical documentation (Joint Exhibit 7) which served to verify his difficulties on November 14, 1987 and November 15, 1987. The Grievant provided this information in order to secure approved sick leave. With respect to the absence on November 16, 1987, the Grievant attempted to gain approval by taking birthday leave for this absence. The Employer eventually denied the birthday leave request because it was not submitted and approved in a timely fashion.

Other issues dealing with the propriety of the physician's statement (Joint Exhibit 7) arose shortly after the initial submission. Captain LeClair noted that November 17, 1987 was specified as the release date but that the statement (Joint Exhibit 7) appeared to have been altered. LeClair communicated his misgivings to Major Morrison. He, in turn, investigated the matter by contacting the physician who had authorized the release. The physician, via a notarized affidavit (Employer Exhibit 2), purportedly substantiated that the document had somehow been altered.

A Pre-Disciplinary Conference was held December 13, 1987. Richard Hall, the Hearing Officer, determined that there was just cause for discipline based upon the evidence and testimony

dealing with each of the alleged violations (Joint Exhibit 10). Hall's recommendation resulted in the issuance of the following suspension order on December 14, 1987:

. . .

Pursuant to the authority granted in the Collective Bargaining Agreement between the State of Ohio and the Ohio State Reformatory this letter is to advise you that you are to be SUSPENDED ten (10) days from the position of Correction Officer effective: January 10, 11, 12, 15, 16, 17, 18, 19, 22 and 23, 1988

You are to be SUSPENDED for the following infractions:

There does exist substantial evidence that on November 14, 1987 you violated Rule 6-C of the Standards of Employee Conduct when you were three minutes late in calling off and violated Rule 1-A by failing to notify the institution of your absence, and on November 16, 1987 you were absent from work without authorization. Rule 21 was violated when you submitted an altered physician's statement to cover your absence on November 16. It is also noted that on August 30, 1987 you received a verbal reprimand and on November 10, 1987 a written reprimand for absenteeism problems. On May 26, 1987 you were suspended three days for sleeping on duty.

Pursuant to the AFSCME/OCSEA contract, Article 25.07, you may choose to grieve this disciplinary action. You must file a grievance through your Union representative within fourteen (14) calendar days of notification of this action.

. . .

(Joint Exhibit 12)

On January 27, 1988 the Grievant filed a grievance which contested the previously mentioned ten day suspension (Joint Exhibit 14). The grievance was advanced to the third step of the grievance procedure where it was denied on March 11, 1988. The third step response placed a great deal of emphasis on the alleged altering of the physician's statement (Joint Exhibit 7) in support of the ten-day suspension.

The Parties were unable to resolve the above grievance. No objection being raised by the Parties as to arbitrability, either on procedural or substantive grounds, the matter is before the Arbitrator for a final and binding decision.

On December 12, 1987 the Grievant was scheduled to report for work at 5:50 a.m. He failed to report to work as scheduled because he allegedly experienced car trouble en route to the facility. The Grievant did, however, phone the institution at approximately 5:50 a.m. and notified appropriate personnel about his dilemma (Joint Exhibit 4). Shortly thereafter, the Grievant's aunt allegedly arrived at his house and informed him that his father had become critically ill and that it was necessary for him to go to the Cleveland Clinic. The Grievant departed to Cleveland and informed his wife that she should deal with the stranded vehicle.

Upon returning to work, the Grievant's supervisor asked him to provide verification concerning his car problem on December 12, 1987. The Grievant failed to provide the necessary documentation within a reasonable period of time. As a consequence, the supervisor initiated a request for a pre-disciplinary meeting dealing with a charge of being absent without authorization.

On December 22, 1987 the above mentioned meeting was held (Joint Exhibit 3). The Grievant purportedly provided several justifications concerning his absence. First, the Grievant allegedly maintained that his car broke down on the way to work, that the car was towed to a local car dealer, and that the car was still at the dealership. He, moreover, noted that he could document the particulars if he was given the opportunity. Second, the Grievant also stated that he had received a

call from a physician at the Cleveland Clinic who notified him that his father was going in for emergency surgery. Again, the Grievant emphasized that if given the opportunity he could document the particulars dealing with his Cleveland visit. The Employer complied with the Grievant's requests by granting him a six day continuance to obtain additional documentation. It should also be noted that directly after the meeting LeClair contacted the car dealer to verify the Grievant's version of the events. A car dealer representative purportedly told LeClair that the Grievant's vehicle had not been towed or repaired at his facility.

On December 28, 1987, the previously mentioned pre-disciplinary meeting was continued per the Parties' agreement. The Grievant, however, failed to provide the additional documentation alluded to at the previous meeting. He did, however, remark that his aunt had contacted him the morning of December 12, 1987 and told him about his father's pending emergency surgery.

Based upon the above information, the Employer suspended the Grievant for ten days on January 4, 1988. The suspension order contained the following pertinent particulars:

. . .

Pursuant to the authority granted in the Collective Bargaining Agreement between the State of Ohio and the Ohio State Reformatory this letter is to advise you that you are to be SUSPENDED ten (10) days from the position of Correction Officer effective: January 26, 29, 30, 31, February 1, 2, 5, 6, 7 and 8, 1988.

You are to be SUSPENDED for the following infractions:

There does exist substantial evidence that on December 12, 1987 you violated Rule 1-A, 6-C & #3 of the Standards of Employee Conduct when you notified the institution at 5:50 a.m. (your scheduled reporting time) that you would not be in to work due to car trouble and your expected date of return to work would be December 13, 1987. It is also noted that on August 30, 1987 you received a verbal reprimand and on November 10, 1987 a written reprimand for absenteeism problems. On May 26, 1987 you were suspended three days for sleeping on duty. It is further noted that in January 1988 you received a ten (10) day suspension for unauthorized absence and submitting an altered doctor's statement.

Pursuant to the AFSCME/OCSEA contract, Article 25.07, you may choose to grieve this disciplinary action. You must file a grievance through your Union representative within fourteen (14) calendar days of notification of this action.

. . .

(Joint Exhibit 7)

On January 28, 1988, a grievance (Joint Exhibit 9) was filed contesting the above suspension. A Step 3 grievance meeting was held on March 8, 1988 in an attempt to resolve the dispute. The matter, however, was not settled because the Employer felt that the Grievant's absence was unauthorized, excessive, and violated the call-off procedure.

The Parties were unable to resolve the above grievance. No objection being raised by the Parties as to arbitrability, either on procedural or substantive grounds, the matter is before the Arbitrator for a final and binding decision.

THE MERITS OF THE CASE
(Grievance No: 27-20-88-29-01-03)

In accordance with the Parties' stipulation, this Arbitrator will initially and independently deal

with the merits of the first ten day suspension (#27-20-88-29-01-03). Once an evaluation of this grievance has been accomplished, and an opinion and Award rendered, then, and only then, will an evaluation of the second ten day suspension be undertaken.

The Position of the Employer

It is the position of the Employer that it had just cause to levy a ten day suspension for the activities engaged in by the Grievant on November 14, 15, and 16, 1987. The Employer emphasized that the violations in question were independently supported and as a group justified the previously mentioned suspension.

The Employer charged that the Grievant was adequately forewarned of the possible consequences attached to the policies and work rules which he violated. Also, the Union's failure to dispute the legitimacy of the work rules and their associated penalties further bolstered the legitimacy of the Employer's actions.

The November 14, 1987 incident was viewed as a violation of two specific work rules. By failing to call of in a timely manner, the Grievant violated policy P101.00. This impropriety resulted in a direct violation of work rule 6(C) of the Standards of Employee Conduct (Joint Exhibit 17) because of the Grievant's failure to follow administrative regulations and/or written policies or procedures.

The Employer also viewed the Grievant's call off justification as questionable which resulted in an additional violation of Rule 1(A) (Joint Exhibit 17). This Rule deals with unauthorized absence (Joint Exhibit 12). Varying versions provided by the Grievant indicated that his justification was highly suspect. The call off form (Joint Exhibit 6) clearly indicated that the Grievant was going to the Cleveland Clinic for physical therapy. Yet, the Grievant ultimately testified that he actually intended on going to his chiropractor. This justification was also viewed as highly suspect based upon the Grievant's testimony. He noted that his chiropractor, Dr. Wilging, typically closed his office on Saturdays unless a patient contacted him on the previous Friday. Thus, the Grievant had to know, at the time of his call off, that the chiropractor's office was closed on Saturday, November 14, 1987. The potential mitigating influence of the medication (Union Exhibit 1) taken by the Grievant was also considered to be contrived. If the Grievant was in constant pain since the medication was issued on October 16, 1987, he should have consumed the ten darvocet capsules prior to the November 14, 1987 incident.

Similar arguments dealing with the November 15, 1987 absence were provided by the Employer. When the Grievant called off on this date he maintained that he was under a doctor's care (Joint Exhibit 6). Yet, the Grievant testified that he had not seen the doctor as of the date of his call off. In addition, if he was indeed continuously under a doctor's care throughout this entire episode, then the Grievant should have used the same excuse for the November 14, 1987 and November 16, 1987 incidents. The Employer, moreover, questioned the Grievant's medication justification with respect to this particular incident.

The Employer emphasized that the Grievant's most egregious activity dealt with the circumstances surrounding the November 16, 1987 incident. Again, a number of work rule violations were proposed by the Employer.

The Employer maintained that the Grievant did not report to work as scheduled. This violation resulted in a determination that the Grievant had violated Work Rule 1(A) dealing with being absent without authorization (Joint Exhibit 17) and Work Rule 6(C) which requires timely notification (Joint Exhibit 17). The Employer strongly asserted that evidence and testimony supported this disciplinary determination.

Major Morrison testified that an examination of the call off records for November 16, 1987

(Employer Exhibit 3) controverted the Grievant's assertion that his father had called the Grievant off at approximately 5:00 a.m. The records, more specifically, indicated that no call offs were received 4:36 a.m. through 6:22 a.m. Thus, Becky Jones, the Records Clerk, could not have received a call from the Grievant's father on or about 5:00 a.m. because the records failed to support the occurrence of this transaction.

Jones' testimony purportedly supported the above conclusion. She testified that she did, in fact, remember receiving a call from the Grievant's father, but that she was unsure about the date of the call. This testimony was corroborated by a prior statement (Joint Exhibit 9) authored by Jones during the investigation of this incident. She, moreover, noted that if the call off record (Employer Exhibit 3) was accurate, she could not have taken the call off on November 16, 1987. Her recollection of the call off initiated by the Grievant's father implied that it dealt with the Grievant's sickly condition or that he had to go to the hospital. Thus, her testimony contradicted the Grievant's migraine headache and neck problem justifications; and also raised considerable doubt that Jones and the Grievant were talking about the same call off incident.

Contradictions and inconsistencies in the Grievant's testimony also raised a number of credibility concerns. First, the Grievant's original debilitating conditions seemed to vanish and were replaced by the migraine condition on November 16, 1987. Second, the Grievant maintained that he asked his father to call him off with a migraine headache and instructed him in terms of the necessary procedure. The Grievant, moreover, felt that these instructions were necessary because his father had never called him off before November 16, 1987 or after this incident.

These assertions allegedly conflicted with his father's recollections. His father, more specifically, noted that be asked his son whether he wanted to be called off. He, moreover, alleged that he called his son off for a neck injury rather than a migraine headache. With respect to the number of prior call offs, the Grievant's father acknowledged that he had called his son off several times prior to November 16, 1987.

The Employer claimed that the severity of the administered penalty was a function of the Grievant's submission of an altered physician's statement (Joint Exhibit 7). This activity violated Work Rule 21 (Joint Exhibit 17) which prohibits the alteration of any document arising out of employment. The Employer corroborated the falsification hypothesis by submitting a sworn affidavit (Employer Exhibit 2) signed by the physician who authored the original doctor's excuse. The physician maintained that the physician's verification statement (Joint Exhibit 7) that he issued on November 16, 1987 "did <u>not</u> contain the handwritten notation of 'November 17, 1988.'" And that he, moreover, claimed "I did <u>not</u> write that Michael Wheeler was disabled and is now being released to return to work as of November 17, 1988."

There was no doubt in the Employer's mind that the Grievant falsified the document. Captain LeClair testified that the document that the Grievant presented was altered which raised his suspicion. The Employer, moreover, claimed that the Grievant was the only individual with an opportunity to alter the document.

The falsification attempt was viewed as quite onerous because the Grievant's submission could have potentially resulted in a compensable outcome. Thus, the Employer perceived that the Grievant was attempting to obtain money under false pretenses; which was viewed as fraud and attempted theft.

The Grievant's physician verification arguments were also viewed as an attempt to divert attention from the falsification issue. The Employer, more specifically, claimed that he had prior knowledge of this requirement, as evidenced by a written order to the Grievant to provide such verification (Employer Exhibit 4). Shortly after the issuance of this order on April 30, 1987, the Grievant had a request for leave request disapproved because he failed to provide a physician's verification (Employer Exhibit 5). The Grievant, moreover, had submitted a number of physician's

verifications (Employer Exhibits 6, 7, and 8) which clearly evidenced his knowledge concerning the requirement.

The Employer maintained that the Grievant's lack of awareness of his sick leave balance was also a mere pretext. The Grievant, more specifically, should have known that he was approaching a low or negative balance situation. A leave request dated July 15, 1987 (Employer Exhibit 6) indicated that the Grievant had five hours of sick leave remaining. Thus, he should have known his balance was in jeopardy far in advance of the November, 1987 incidents.

The Grievant's birthday leave request was also viewed quite skeptically by the Employer. Captain LeClair stated that the leave request was denied because the Grievant submitted this request after the fact, that is, a few days after the submission of the physician's medical verification (Joint Exhibit 2). He, more specifically, maintained that the request was denied because the Employer was not provided with prior notification.

The disparate treatment issue raised by the Union was considered as unpersuasive by the Employer. Only one of the submitted cases dealt with the same principle charge for which the Grievant was disciplined. This individual was also charged with submitting an altered excuse; and this activity resulted in the employee's ultimate dismissal. Thus, the present ten day suspension was viewed as a lenient penalty rather than an example of disparate treatment.

Position of the Union

It is the position of the Union that the Employer did not have just cause to suspend the Grievant for ten days. A number of evidentiary and procedural concerns were raised in support of this premise.

The Union admitted that the Grievant failed to call off in a timely fashion on November 14, 1987, but viewed this as a deminimus infraction. Thus, the Union emphasized that this infraction clearly did not justify a ten day suspension. The Union, more specifically, alleged that this infraction did not adversely jeopardize the Employer's interests in having timely employee call offs.

The discipline administered was also viewed as excessive in light of Section 29.02 requirements. This provision required the Employer to consider mitigating circumstances when assessing the November 14, 1987 incident. Substantial mitigating circumstances did in fact exist which were overlooked by the Employer. A document (Union Exhibit 1) introduced at the hearing clearly established that the Grievant was placed on a variety of medication protocols as a consequence of his car accident. The Grievant and his wife, moreover, stated that the medication elicited a drowsy state which often caused the Grievant a great deal of difficulty awakening in the morning.

A notice dispute dealing with the Employer's requirement that the Grievant provide a doctor's verification for his absences was also discussed by the Union. The Grievant strongly asserted that he did not receive the memorandum dated April 30, 1987. The requests for sick leave offered by the Employer as examples of the Grievant's compliance were not totally supportive of the Employer's premise. Some of these examples, more specifically, were submitted after the incidents in dispute. The Grievant, moreover, testified that he often submitted medical verification on his own without being prodded by the Employer.

The November 14, 1987 incident was also thought to be defective as a consequence of Section 24.01 and Section 24.05 requirements. By citing the Grievant with Work Rule 1(A) and Work Rule 6(C) (Joint Exhibit 17) the Employer "stacked" and inappropriately assigned the specified charges. One late call off of a three minute duration does not constitute habitual absenteeism, pattern abuse, tardiness, and early departure as specified in Work Rule 1(A) (Joint Exhibit 17), and clarified in a document (Joint Exhibit 22) defining unauthorized absences. The call

off incident, moreover, should have been dealt with in a corrective rather than a harsh manner. The Union claimed that the infraction was closely akin to a tardiness infraction and should have been dealt with in a similar manner. Based upon the Grievant's prior disciplinary record (Joint Exhibit 13) he should have received a one day suspension if all the charges were substantiated.

The allegations surrounding the November 16, 1987 incident were similarly challenged by the Union. Two major concerns were discussed: the call off violation and the falsification of a doctor's excuse.

The Union maintained that the Employer failed to sustain its burden that the Grievant's father failed to call him off properly. The Union asserted that the father's testimony was highly credible and should be believed by the Arbitrator. The Grievant's father stated that he advised his son that he was too weak to report and that he would call him off sick. Since the Grievant did not have a phone, his father returned to his own home to make the call.

The call did, in fact, take place based upon the testimony provided by Jones. She claimed that she only received one prior call from the Grievant's father during the course of her employment at the facility. The Grievant's father confirmed Jones' testimony when he noted that he had only called once or twice before the present incident. Jones' credibility regarding this matter was thought to be quite critical by the Union. Jones, more specifically, had no reason to lie for the Grievant because she did not know him prior to the incident.

In a like fashion, the Union asserted that the Employer failed to substantiate that the Grievant failed to submit a fraudulent physician's statement. For a number of reasons, the Union alleged that the Employer failed to establish the elements of fraud necessary to support the claim.

First, when the Grievant returned to work he submitted a doctor's statement (Joint Exhibit 7) for November 14, 1987 and November 15, 1987. He also submitted a request for leave form which indicated he was taking "birthday leave" for November 16, 1987. The "birthday leave," moreover, did not require a doctor's excuse.

Second, the Grievant would not have realized any monetary gain by placing a return to work date on the excuse.

Third, the Grievant's testimony credibly supported his claim that he did not alter the doctor's statement (Joint Exhibit 7). The Grievant claimed that neither he nor the doctor filled in the 17th of November as the return to work date. Similarly, a declaration by the physician regarding November 16, 1987 would have been superfluous because the Grievant intended on submitting a "birthday leave" request for November 16, 1987 in order to save his sick leave. Since a "birthday leave" request does not require a doctor's excuse, the Employer's desire to link the "birthday leave" request with a doctor's excuse requirement was viewed as irrelevant.

Even if all of the previous charges are deemed to be substantiated by the Arbitrator, the Union argued that the Grievant has been disciplined more harshly than other employees that were similarly situated. These other employees received less harsh discipline and/or were provided with additional corrective opportunities prior to the imposition of a ten day suspension.

THE ARBITRATOR'S OPINION AND AWARD
(Grievance No: 27-20-88-29-01-03)

Since the Employer asserted that the falsification offense, that is, the violation of Rule 21 (Joint Exhibit 17) on November 16, 1987, served as the primary justification for the ten day suspension, this incident will be reviewed initially to determine the propriety of the charge and the penalty. Once this review is completed, an analysis of the November 14, 1987 incident will be undertaken in an attempt to evaluate its propriety.

From the evidence and testimony introduced at the hearing it is this Arbitrator's opinion that the

Grievant violated Rule 21 (Joint Exhibit 17). In other words, the Grievant did in fact willfully falsify the doctor's verification document (Joint Exhibit 7). The argument raised by the Union in terms of the fraud definition, and the elements which must exist when one attempts to substantiate such a claim are immaterial to the present matter. Unlike the decision submitted by the Union[2] which seemed to deal with a specific fraud allegation, the present matter deals with a work rule violation which anticipates willful falsification of an official document. Whether the Grievant falsified the document to achieve illicit gain, or whether he did not have to falsify the document because he could have received a legitimate "birthday leave," are viewed as irrelevant by this Arbitrator. Circumstantial and direct evidence clearly indicate that falsification did, indeed, take place.

A composite set of circumstances led this Arbitrator to the above conclusion. First, the sworn affidavit (Employer Exhibit 2) was given some weight by the Arbitrator. Typically, where medical fact is at the very heart of the issue, such as the case where the parties are litigating whether an employee is permanently disabled, medical evidence is normally admissible. There is no guarantee, however, that it will be credited to the extent that it would otherwise be if the physician were present at the hearing.[3] Greater weight, however, may be placed on affidavits of the sort presently discussed where the issue is whether an employee has a valid excuse for missing work relies on the doctor's excuse as the proof of illness.[4] The affidavit (Employer Exhibit 2) clearly establishes that the physician did not write that the Grievant was released to return to work as of November 17, 1988. The Grievant's motivation, again, is viewed as irrelevant. His falsification might not have been necessarily warranted to credential a valid excuse. In this instance, by overstating the point, the Grievant's excess led to the present violation.

Second, an evaluation of the excuse (Joint Exhibit 7) and the contents contained therein, raise certain obvious tampering suspicions. A naive reviewer, evaluating this document, could readily discern that some falsification had transpired. The November 17, 1987 insert, more specifically, in terms of writing style, obviously evidences an intentional attempt to falsify the excuse (Joint Exhibit 7).

Third, the Union failed to provide any plausible explanation in terms of an alternate perpetrator of the falsification attempt. Some trivial unsubstantiated testimony regarding LeClaire's potential involvement was proposed, but it failed to reach an appropriate level of suspicion. In other words, the Union failed to establish that LeClair possessed a sufficient level of personal animus toward the Grievant to warrant the claim that he, somehow, falsified the document.

In this Arbitrator's opinion, the falsification charge independently supports the ten day suspension. Work Rule 21 (Joint Exhibit 17) provides a range of possible penalties up to and including a removal option for an initial offense. Such violations are viewed as extremely onerous because they jeopardize the cement of any employee/employer relationship. This relationship can only thrive and prosper if it is based on trust. The use of physician excuses is typically a highly sensitive enterprise and is often subject to abuse. When an employee violates an employer's trust and the trust of his physician by falsifying an excuse it jeopardizes the validity of the entire excuse verification process. A process which needs to be rigidly enforced to protect the interests of fellow employees who are legitimately absent for medical reasons.

The disparate treatment argument raised by the Union does not seem relevant in terms of the verification charge. Only one of the examples provided by the Parties dealt with a verification issue. This individual, however, was removed, rather than suspended, for engaging in a similar activity.

Although this Arbitrator determined that the suspension was clearly justified based upon the falsification charge, the other violations need to be discussed in anticipation of progressive discipline ramifications upon the second ten day suspension. Thus, each of the incidents and the

respective work rule violations will be discussed to develop some threshold perspective.

The Union freely admitted that the Grievant called off late on November 14, 1987 and viewed his action as deminimus. This Arbitrator does not view this instance as deminimus and questions the Union's assertion that it constitutes a mere three minute violation. The reporting policy indicates that critical employees must call off one hour prior to the beginning of the shift. The Grievant's shift commenced at 5:50 a.m. which required the Grievant to call off by 4:50 a.m. Thus, if the Grievant called in by 5:03 a.m. he violated the policy by a full thirteen minutes. Although this incident does not warrant a ten day suspension, it deserves some form of penalty because it involves a specific work rule violation, separate and distinct from the falsification charge.

The Union's attempt to clothe this infraction as a tardiness occurrence seems totally unwarranted. The specific violation did not deal with a traditional tardiness occurrence. Tardiness takes place when an employee arrives at work at a time which exceeds the required reporting time. On November 14, 1987 the Grievant did not report to work and he failed to call off within the appropriate time frame.

This Arbitrator, however, does not deem the Work Rule 6(C) charge as justified. Charging an employee with a specific infraction dealing with an unauthorized absence, and then charging the same employee with a violation of failing to follow administrative regulations and/or written policies smacks of pyramiding. If such a policy was deemed appropriate by this Arbitrator, anytime an employee violated a work rule, the Employer could view this infraction as a distinct insubordinate act. Such a policy is unacceptable because the same incident does not necessarily involve two misconducts for which two separate penalties are appropriate. Other fact situations might justify such a distinction when distinct and independent charges arise out of the same set of circumstances.

The Union's mitigation arguments as they relate to Section 29.02 requirements were not sufficiently articulated nor supported. The Union attempted to equate the phrase "unless circumstances preclude this notification" with an absolute requirement that the Employer must consider mitigating circumstances in investigating an employee's improper call off. Although the rule of reason requires the consideration of mitigating circumstances, the Union failed to provide evidence and testimony to support this interpretation. Also, if the Grievant was able to call off at 5:03 a.m., surely he should have had some contingency plan in effect to ensure compliance with the policy. The notice argument does not justify the Grievant's actions. Documents introduced at the hearing clearly established that the Grievant for a considerable period of time submitted doctor verification statements. In my judgment, such compliance was for the most part a function of a written order issued on April 30, 1987 (Employer Exhibit 4).

The sole remaining issue requiring a determination concerns the November 16, 1987 call off incident. In this Arbitrator's judgment, the Grievant, again, violated Work Rule 1(A) (Joint Exhibit 17). From the evidence and testimony introduced at the hearing a proper and valid call off by the Grievant's father did not take place and the Grievant did not report to work as scheduled.

The Union's reliance on Jones' testimony to refute the charge did not sufficiently rebut the Employer's allegations. Although she remembered taking a previous phone call from the Grievant's father she was unsure of the date. This uncertainty was initially documented in a statement (Joint Exhibit 9) taken during the course of the investigation process, and reinforced by her testimony at the hearing. The information contained in the call off log (Employer Exhibit 3) clearly supports the Employer's claim that the call off did not take place as suggested by the Grievant and his father. Jones' description of the process used to document call off incidents, with particular emphasis on the sequence numbers used and the information provided to the caller, was viewed as highly credible and pertinent by this Arbitrator. If this Arbitrator agreed with the Union's version, he would have to conclude that the entire call off procedure broke down on November 16,

1987. This Arbitrator is unwilling, based on the evidence provided, to reach such a conclusion. The Grievant's father stated that he had called off the Grievant on several prior occasions, and thus, he should have been aware of the procedure. The Grievant, moreover, testified that he told his father to establish the identity of the person receiving the call on November 16, 1987. Yet, the father could neither substantiate the identity of the person receiving the call nor the sequence number attached to the call off slip. Presentation of such a critical piece of information could have possibly swayed the ruling in the Union's favor.

AWARD
(Grievance No: 27-20-88-29-01-03)

The grievance is denied and dismissed. The Employer legitimately suspended the Grievant for ten days. This penalty was justifiably based upon the falsification charge which took place on November 16, 1987 which resulted in a violation of Rule 21 (Joint Exhibit 17). The Grievant, moreover, was properly charged with two separate violations of Rule 1(A) (Joint Exhibit 17) which took place on November 14, 1987 and November 16, 1987.

THE MERITS OF THE CASE
(Grievance No: 27-20-88-31-01-03)

The Position of the Employer

In the Employer's opinion it had just cause to suspend the Grievant for violating Work Rules 1(A), 6(C), and 3 (Joint Exhibit 17).

The Employer raised a threshold issue dealing with the weight that should be given to a doctor's excuse (Union Exhibit 1) submitted to substantiate the December 12, 1987 absence. The Employer contended that the Arbitrator should limit his analysis to the information available to the Employer at the time that it imposed the disciplinary penalty. If the Arbitrator considered the doctor's excuse, it would place the Employer in an adverse position in terms of its due process responsibilities, and prevent the Employer from initiating proper progressive discipline principles.

Even if the Arbitrator considered the document after its emergence one year beyond the original incident, the Employer still considered the document as defective in terms of barring the administered discipline. The Employer asserted that the statement was available to the Grievant at the time of the second disciplinary meeting held on December 28, 1987. This premise was based upon testimony provided by the Grievant's father. He noted that the Grievant obtained the document between December 12, 1987 and December 23, 1987. Clearly, the Grievant had this document at his disposal by December 28, 1987.

The Grievant's assertion that the physician's statement (Union Exhibit 1) introduced at the hearing reflected his second attempt to submit such a document was also contested by the Employer. If he, in fact, had this document on December 12, 1987, and he provided a copy to his supervisor and the Union President, then some evidence of its existence should have been readily apparent. By failing to substantiate this claim, the Employer felt that this allegation was totally misleading and trumped up.

The Employer also emphasized that the doctor's excuse justification was totally irrelevant because he originally called off as being unable to report for work as a consequence of his car trouble. Thus, car trouble was the justification that the Grievant had to validate in terms of his reason for his failure to report to work and failure to call off in a timely fashion.

Several potential inconsistencies regarding the December 12, 1987 incident were also raised

by the Employer. First, the Employer emphasized that statements made by the Grievant at the December 22, 1987 meeting were not substantiated during subsequent portions of the grievance procedure. He allegedly noted that he had car trouble, that he had the car towed to Grahm Chevrolet, that the car was still at the dealership, and that he had received a call from a doctor at the Cleveland Clinic regarding his father's upcoming surgery. At the December 28, 1987 meeting, the Grievant modified his explanations. That is, he failed to provide documentation to document the car trouble, refused to divulge where or when his car had been repaired, and stated his aunt informed him about his father's pending surgery rather than a physician at the Cleveland Clinic. Second, the status of the car the morning of December 12, 1987 was also contested. If the car was disabled, then the Grievant's wife should have experienced much greater difficulty when she eventually started the car. Third, if the Grievant anticipated that his vehicle would be towed under his wife's supervision, then he should have had some discussion with his wife upon his return on December 12, 1987. At a minimum, he should have been able to honestly relay the condition and location of his vehicle at the time of the various pre-disciplinary meetings. Last, the previously specified allegations were viewed as a pretext. The Grievant, more specifically, attempted to take advantage of his father's unfortunate situation, and used this circumstance to justify his absence.

The Employer also questioned the relative weight that this Arbitrator should give to after-the-fact information provided by the Grievant and his wife. The Employer, more specifically, was referring to testimony dealing with the status of the car. Similar information was not provided in either of the pre-disciplinary meetings or the Step 3 grievance hearing. Thus, the Employer had no way of integrating this information if indeed it was accurate, and in turn, it should not be given any weight at this late date.

The Employer argued that the suspension was not defective as a consequence of notice and progressive discipline concerns. The Grievant, more specifically, did not need to know the outcome of the prior ten day suspension to anticipate the consequences associated with his most recent behavior. Notice was allegedly provided via a number of related sources. First, the Grievant received a notice on December 4, 1987 (Joint Exhibit 5) for a forthcoming pre-disciplinary meeting dealing with allegations of altering of a physician's statement and unauthorized absence. Second, the Grievant was placed on official notice when he received the work rules (Joint Exhibit 17) associated with the various charges. Third, the Grievant's prior discipline record (Joint Exhibit 8) also placed him on notice of the potential consequences associated with his misconduct. Over a three month period, the Grievant received corrective counseling, a verbal reprimand, and a written reprimand for similar misconduct.

The Employer also questioned the progressive discipline charge alleged by the Union. The Employer, more specifically, claimed that it did not have to complete the imposition of discipline relating to one rule infraction prior to the imposition of a second, if in fact the second infraction takes place. The Employer, moreover, maintained that the negotiated disciplinary process and the time frames negotiated by the Parties do not often lend themselves to the speedy imposition of discipline. Actions engaged in by the Grievant also caused the overlapping time periods related to the two ten day suspensions. The Grievant, more specifically, caused a delay in the meeting schedules by calling off on December 7, 1987 and December 12, 1987 (Joint Exhibit 5). Intentional or non-intentional avoidance engaged in by the Grievant should not artificially extend a contractually agreed to disciplinary hearing.

The Employer contended that the second ten day suspension was commensurate with the offense and was progressive and not excessive. The warden of the facility administered the second suspension on December 28, 1987 (Joint Exhibit 6) with an awareness that he recommended the initial suspension on December 14, 1987 (Joint Exhibit 11). Since the first and second suspension involved related types of absenteeism offenses, the Employer did not impose

a suspension which exceeded the previous ten day suspension. Thus, the Employer alleged that it considered the overlapping time period issue by not administering a penalty which exceeded the initial ten day suspension. At the same time, however, the Employer felt that it sent a clear signal to the grievant that this type of behavior would no longer be tolerated.

The penalty was also deemed appropriate because the second offense not only encompassed an absenteeism offense but also involved dishonesty. Dishonesty allegedly took place during the previous stages of the grievance procedure when the Grievant refused to admit that he failed to report to work and lied about it when he offered varying and conflicting justifications. Intentional subversion by the Grievant of the disciplinary process was also alluded to by the Employer. The Grievant, more specifically, engaged in deliberate delaying tactics in an attempt to avoid the discipline which he justly deserved.

With respect to the disparate treatment claims, the Employer asserted that the Union failed to meet its burden of proof responsibilities. The Employer, more specifically, failed to provide one example where another employer had engaged in dishonesty activities similar to those dealing with the first ten day suspension.

The Position of the Union

It is the position of the Union that the Employer did not have just cause to suspend the Grievant for ten days. This theory was based on evidentiary concerns and several procedural defects perpetrated by the Employer.

The Union emphasized that the Grievant indeed experienced car trouble on December 12, 1987, that he subsequently traveled to Cleveland because of his father's delicate condition, and that when he returned the problem had been somehow solved. Upon his return, moreover, the stress surrounding his father's perilous condition seemed to be his primary concern. As a consequence, the condition of the vehicle and what had transpired during the course of the day were not discussed by the Grievant and his wife. The Grievant stated that he assumed that certain things had happened but that he did not verify his perceptions.

These above circumstances led the Union to certain inferences concerning the Grievant's credibility. His father's condition on December 12, 1987 caused an enormous amount of stress which engendered a confused and distraught state. The Grievant, moreover, legitimately felt defensive and had reason to believe that the Employer was “out to get him." A pre-disciplinary conference was held on December 13, 1987 which dealt with the first ten day suspension. The timing of this meeting and his father's medical maladies reasonably led to his defensive posture.

The Union adamantly emphasized that the Grievant submitted two doctor's excuses in compliance with the Employer's verification requirements. Submission of the first excuse purportedly took place shortly after his return to work from the Cleveland Clinic. The document, moreover, was given to the shift supervisor during line up. Since the document was lost by the Employer, the Grievant requested an additional physician's statement (Union Exhibit 1) on or about December 23, 1987. The Grievant, however, did not formally present this documentation to the Employer during the various stages of the grievance procedure.

For a number of reasons, the Union argued that progressive discipline principles were violated by the Employer which jeopardized its just cause theory in violation of Section 24.01. Specific violations of Section 24.02 and Section 24.05 were also raised by the Union.

The Union claimed that the charges contained in the suspension order (Joint Exhibit 7), that is, violations relating to Work Rules 1(A), 6(C), and 3 amounted to stacking charges against the Grievant. By specifying these charges in such a manner, it exaggerated the seriousness of the contested charges which, in turn, justified a harsher sentencing decision. The Union, moreover,

maintained that the 6(C) charge was totally unwarranted because the present matter does not deal with an insubordination issue. Since the remaining charges are closely akin to the circumstances surrounding the alleged violations, if the Arbitrator ruled in the Employer's favor then an application of the disciplinary grid (Joint Exhibit 17) would warrant a lesser penalty.

The Union maintained that the Employer improperly relied on the prior suspension order when it imposed progressive discipline on December 29, 1987. This impropriety arose because at the time that the second suspension order was issued the first ten day suspension order was not a matter of record. The prior suspension, more specifically, was not approved by Director Seiter until January 4, 1988, and was not received by the Grievant until on or about January 7, 1988.

It was also alleged that the second ten day suspension was not imposed in the spirit of corrective discipline. Rather, it was imposed in an arbitrary fashion because the Grievant was not given the opportunity to benefit from corrective discipline in accordance with Section 24.05. The Union questioned the propriety of the Employer's discipline promulgation process. It asserted that the December 12, 1987 meeting should have been dealt with in a more expeditious manner because it preceded all the necessary disciplinary steps dealing with the first ten day suspension. The Union attempted to substantiate this claim by noting that the pre-disciplinary hearing dealing with the first ten day suspension took place on December 13, 1987. In addition, both ten day suspension orders were dated January 4, 1988, while the Grievant received notice of the first ten day suspension on or about January 7, 1988, and eventually received the second ten day suspension on or about January 13, 1988.

The Union asserted that even if all of the charges are substantiated, the grievant was disciplined more harshly than other similarly situated employees. Several examples were offered by the Union which established that these employees received less harsh discipline and/or were given the benefit of more progressive steps prior to the imposition of a ten day suspension.

An additional argument dealing with the penalty modification issue was tendered by the Union. If the Arbitrator adjusts the prior discipline (i.e., the first ten day suspension) then the second ten day suspension should be modified because the Employer relied on the prior suspension to justify the severity of the penalty attached to the second incident.

THE ARBITRATOR'S OPINION AND AWARD
(Grievance No: 27-20-88-31-01-03)

From the evidence and testimony introduced at the hearing it is this Arbitrator's opinion that the Employer had just cause to discipline the Grievant but the ten day suspension was too severe.

Clearly, the Grievant's call off on December 12, 1987, regardless of the justification, violated the Employer's call off requirement. Thus, his absence occurred without proper notification.

The Grievant's absence, moreover, constitutes a violation of Rule 1(A) because his absence was unauthorized. This Arbitrator has a great deal of difficulty accepting the Grievant's version regarding his car troubles and medical verification justifications. His testimony and the rationale for his actions seem quite unrealistic which raised considerable concerns about the Grievant's credibility. A few examples should amply substantiate this premise. While discussing the car difficulty issue on December 27, 1987 the Grievant stated that his car was towed to Grahm Chevrolet, that the car was at the dealer, and that he could provide documentation to substantiate these various points. Even after a continuance was granted the Grievant became more evasive and failed to provide substantive documentation. These allegations were corroborated by several Employer witnesses and a sworn affidavit (Employer Exhibit 4) authored by Michael Miller, the Union's President. The Grievant finally modified his version of the events and explained his wife's involvement after the third step of the grievance procedure. No plausible explanation was

presented to justify these frequent reversals and addendums to the fact situation. The Union attempted to justify the Grievant's actions by focusing on stress, distraughtness, and Employer intimidation. These rationales fall short of the mark and would require a tremendous reach on the Arbitrator's part.

Unfortunately, in my opinion, the Grievant clothed himself excessively in the misery experienced by his father; and as a consequence failed to fulfill his responsibilities to the facility. The Employer provided the Grievant with ample opportunity to provide the relevant documentation. Also, the second pre-disciplinary hearing was held on December 28, 1987. This meeting took place after his father's surgery which should have released some of the pent-up stress. The Grievant's demeanor at the hearing also reduced the veracity of the intimidation theory. In my judgment, this Grievant does not seem to possess a personality that would easily be manipulated and intimidated. He is an outspoken individual that speaks his piece if in fact the situation warrants a response.

The medical verification circumstances closely parallel those discussed in terms of the car trouble scenario. Once again on December 22, 1987 the Grievant noted that he could provide a doctor's verification if the Employer granted him additional time. On December 28, 1987, however, the Grievant maintained that his aunt notified him that his father was having emergency surgery rather than a physician from the Cleveland Clinic. At the arbitration hearing two additional versions were offered. The Grievant alleged that he had initially received an excuse on December 12, 1987. He, moreover, noted that he provided his supervisor and Miller a copy of the document. Mysteriously, however, the Employer lost its copy. This episode seems a bit incredulous because all three individuals would have had to lose the copy of the same document. Otherwise, even if the Employer lost its copy one would think that either the Grievant or his fellow bargaining unit member should have had a copy; if in fact the document ever existed. The second excuse (Union Exhibit 1), again in terms of timing, seems a bit baffling. From the testimony introduced at the hearing the Grievant received this document on or about December 23, 1987. Yet, he failed to introduce the document in support of his case when the hearing continued on December 28, 1987.

There seems to be a particular pattern to the Grievant's behavior; either he never had the appropriate documentation to support his authorization attempts or he was engaged in a perverse attempt to subvert the workings of the grievance procedure process so that he could somehow leverage the process in his favor. Both of the above alternatives weaken the Grievant's case considerably in terms of offering evidence for rebuttal purposes and raise tremendous credibility concerns.

The above analysis readily indicates that the Grievant withheld pertinent evidence during the various stages of the grievance procedure. Such a conclusion raises an interesting due process consideration. Arbitration is merely a method for determining a pre-existing dispute which the Parties have been unable to settle in the prior steps of the grievance procedure. The arbitration hearing, moreover, is not the place for the presentation of new claims, although obviously, a more thorough investigation prior to arbitration often surfaces evidence not theretofore known and additional arguments not theretofore conceived by the Parties. The essential facts supporting the claims of either Party, however, should be revealed in the earlier stages of the grievance procedure, if such facts are known to the Parties.[5] In this particular instance, this Arbitrator is convinced that neither Party was aware of Mrs. Wheeler's involvement nor of the tardy medical verification (Union Exhibit 1). This Arbitrator, however, is convinced that the Grievant was aware of these facts. Whether the Grievant's unwillingness to reveal this information was a consequence of his naivete or an intentional act of subversion is irrelevant in terms of the due process ramifications. Both alternatives subvert the grievance process. With respect to the present

infraction, this Arbitrator must limit the previous analysis to the specific charges levied against the Grievant. He was not charged with dishonesty but that does not mean that this due process infringement will not be factored into the equation when the propriety of the penalty is considered.

The Arbitrator disagrees with the Union's argument that the Employer's mishandling of the two ten day suspensions foreclosed the Grievant from any opportunity to correct his behavior. It was not the Employer's actions that engendered the disciplinary action but the Grievant's activity which necessitated immediate action. Although corrective discipline is an admirable goal, the circumstances surrounding this case forced a procedural overlapping of the disciplinary process. The Employer did not, however, overlap the offenses and the associated consequences. By bifurcating the two incidents the Employer legitimately reduced the possibility of a double jeopardy charge and other related due process violations. Nothing in the record indicates that the Employer engaged in any procedural irregularities. The Grievant's actions or inactions on December 12, 1987 placed him in this perilous situation; he. must, therefore, face the consequences of his derelict behavior.

In terms of the stacking allegation, this Arbitrator concurs with Union's appraisal. As this Arbitrator noted in a previous portion of this Award, Rule 6(C) (Joint Exhibit 17) deals with insubordinate conduct, an infraction which is inapplicable to the present offense. Here we are dealing with a potential Rule 1(A) violation as a consequence of an unauthorized absence. In a like fashion, the Employer failed to substantiate the Rule 3 violation, which concerns excessive absenteeism. It appears that this infraction was added as an afterthought. The record of the hearing is virtually void of any reference to this particular infraction; mere assertions, without appropriate corroborating evidence and testimony cannot justify a penalty assessment.

Although this Arbitrator does not condone the activities engaged in by the Grievant, the degree of discipline administered by the Employer was not reasonably related to the seriousness of the grievant's proven offense. The ten day suspension is overly severe in light of the December 12, 1987 proven violation and the infractions ruled upon in the previous ten day suspension. The Employer indicated that the initial ten day suspension was for the most part a function of the Grievant's falsification activities. Thus, it seems that the loss of ten days' wages is a penalty outside the range of reasonableness for the misconduct in question, that is, an unauthorized absence.[6]

The penalty also seems harsh in light of the manner the Employer has handled other absence-related cases. These factors, however, were weighed against the particulars contained in the previous ten day suspension, the present offense, and other facets of the Grievant's prior work record. Of particular import was the relatively short period of time which transpired between the first set of infractions and the second set of infractions. Even though all of the disciplinary steps regarding the initial matter were not completed prior to the initiation of the disciplinary process dealing with the second infraction, the Grievant was properly aware of the potential consequences associated with absence-related misconduct. The Employee received the Employer's work rules (Joint Exhibit 17), was given a verbal reprimand and a written reprimand (Joint Exhibit 8) for similar absence-related behavior, and was placed on notice concerning an upcoming pre-disciplinary hearing dealing with the consequences of absence-related misconduct. These notice mechanisms, however, failed to modify the Grievant's perspective because in a short intervening period the Grievant continued to compound his record of misconduct. Still, in this Arbitrator's judgment, the Employer was precipitous in moving so drastically to a ten day suspension for a notification violation and a related unauthorized absence. The Arbitrator is, therefore, forced to conclude that the most severe penalty which should have been imposed was a seven day suspension.

AWARD
(Grievance No: 27-20-88-31-01-03)

The grievance is sustained in part and denied in part. The ten day suspension issued against the Grievant is modified to a seven day suspension. The Employer is directed to make the Grievant whole for benefits and straight-time wages lost as a consequence of the ten day suspension. The Grievant should, therefore, receive benefits and straight-time wages for the three day difference anticipated by this Award.

David M. Pincus, Arbitrator
May 31, 1989

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[1] Both ten-day suspensions encompassed the same issue.

[2] The State of Ohio, Ohio Adjutant General's Department and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, Grievance No. G87-2358 (J. Dworkin, 1978).

[3] Report of the West Coast Tripartite Committee, in Problems of Proof in Arbitration, Proceedings of the Nineteenth Annual Meeting, National Academy of Arbitrators (BNA Books, 1967), 107-108.

[4] Id at 277.

[5] Bethlehem Steel Co., 18 Lab. Arb. 366 (1951); Texas Co., 7 Lab. Arb. 735 (1947); Bethlehem Steel Co., 6 Lab. Arb. 617 (1947).

[6] Grand Haven Brass Foundry, 68 LA 41 (Roumell, 1977); Jackson County Medical Care Facility, 65 LA 389 (Roumell, 1975).