ARBITRATION DECISION NO.:
611

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

EMPLOYER:
Department of Public Safety - Division of State Highway Patrol

DATE OF ARBITRATION:
April 30, 1996

DATE OF DECISION:
July 22, 1996

GRIEVANT:
Craig Shivers

OCB GRIEVANCE NO.:
15-03-(95-07-26)-0074-01-07

ARBITRATOR:
David M. Pincus

FOR THE UNION:
Mike Muenchen, Advocate

FOR THE EMPLOYER:
Richard G. Corbin, Advocate
Heather Reese, Second Chair

KEY WORDS:
Removal
Just Cause
Sick Leave
Medical Verification
Work Rules

ARTICLES:
Article 24 - Discipline
§ 24.01 - Standard
§ 24.02 - Progressive Discipline

FACTS:

The grievant was employed as a Portable Load Limit Inspector with the State Highway Patrol when, on May 6, 1995, he was involved in an accident on Interstate 71. The grievant did not have insurance on the car he was driving and was cited for failing to maintain an assured clear distance, which resulted in a ninety (90) day suspension of his driving privileges. This suspension was effective from May 15, 1995 to August 15, 1995. On May 8, the grievant's supervisor received information concerning the grievant's accident and insurance difficulties. He checked the grievant's LEADS driving record and found that his driving privileges

had been suspended indefinitely. The supervisor also discovered that the grievant was under a Financial Responsibility Act suspension from May 15, 1995 to May 15, 2000 for failing to have adequate automobile insurance.

Because of the difficulties faced by the grievant, he was temporarily assigned to work on an 11:00 p.m. - 7:00 a.m. shift at the northbound platform scale on Interstate 71. This assignment did not include any driving responsibilities and did not result in any loss of pay. He was scheduled to report to this assignment on June 12, 1995. On June 12, however, the grievant called off sick because he was experiencing cardiac related problems and claimed that he had a scheduled doctor's appointment the next day. The grievant later submitted a Medical Appraisal Job Capacity form, which stated that he should discontinue working effective June 12 and not to return to work until July 24, 1995. The Employer granted the grievant's sick leave request but required additional clarification of the cause of his alleged health problems.

On June 24, the grievant's supervisor discovered that the grievant had been seen working at an auto parts store in Wilmington, Ohio. Management interviewed the store manager, who confirmed that the grievant had indeed been working in the store since May 30, 1995. In fact, on his job application the grievant indicated that he would be available to work as needed after 4:00 p.m. on any given day.

On June 28, the grievant contacted his supervisor to discuss a stress test that he had taken on June 26. Although the test appeared fairly normal, the grievant also saw a psychologist, who purportedly indicated that his cardiac problems might be emotionally based. During this conversation, the grievant's supervisor also asked how the grievant was getting back and forth to work. The grievant explained that his son was providing him with transportation. Later that same day, the supervisor presented the grievant with a citation for violating ORC 4507.02 (B) (1), which includes driving under FRA suspension. Finally, on July 7 the grievant was ordered to return to work effective Monday, July 10. The order also indicated that "absent verified mitigating circumstances, failure to report will subject you to disciplinary action." The grievant never returned to work, nor did he allegedly provide any mitigating circumstances for his failure to return to work.

A disciplinary meeting was held on July 20; and, at the meeting, the grievant submitted another Medical Appraisal Job Capacity form, which indicated that he was under psychological evaluation and should discontinue working indefinitely. Despite this appraisal, however, the grievant was advised that he was being removed for Violating Public Safety Work Rule Section (A) (6).

EMPLOYER'S POSITION:

The employer contended that there was just cause to remove the grievant. Much of the employer's decision was based on a determination that he allegedly manipulated the use of sick leave after he decided not to work the midnight shift at the platform scales and that he allegedly engaged in a pattern of deceit. The employer emphasized that the sudden onset of his cardiac condition while his license was suspended, the scheduling of his medical appointments, and his work at the auto parts store while allegedly disabled, all pointed to an intention on the part of the grievant not to work on the third shift. The employer further argued that the grievant's allegations about job-related stress causing his condition were unsupported by the record. Management insisted that the medical documents presented by the Union would have to be supported by testimony from the professionals who authored them; otherwise, the documents could only be taken at face value or, in light of the grievant's actions, they should be ignored completely

UNION'S POSITION:

The Union alleged that the employer did not have just cause to remove the grievant. The Union's contention was that there was no proof the grievant intended to defraud the employer when applying for sick leave. The grievant's intent is a critical facet of any dishonesty allegation, and its importance is emphasized by the employer's work rule on sick leave fraud. The grievant's own testimony and the medical documentation established that the grievant properly applied for sick leave benefits in order to relieve job-related stress and to improve his mental health. Medical verification was provided by a psychologist and psychiatrist, who both determined that the grievant was experiencing diminished coping ability as a result of problems at work. They also determined that the grievant's stress problems were relieved by his employment at the auto parts store. The Union also contended that the opinions of the medical professionals should be given considerable weight and should not be discounted as hearsay simply because

the doctors were not available to testify at the hearing. Physicians' notes are commonly accepted at arbitration, as a practical matter, in recognition of the expense and availability of physicians to testify.

ARBITRATOR'S OPINION:

The Arbitrator held that the employer did have just cause to remove the grievant because he was dishonest in his attempt to procure sick leave benefits and, as such, was in direct violation of the Department of Public Safety Work Rule Section (A) (6). The Arbitrator stated that the grievant's credibility regarding the entire situation was significantly dampened by his continued refusal to be forthright with his employer. Even though a majority of his job duties involved driving responsibilities, he failed to inform his employer of his license suspension. Moreover, he continued to drive his van after being placed on notice concerning this suspension. When asked by his supervisor about how he was getting back and forth to work, the grievant replied that his son was providing him with transportation. This explanation clearly conflicted with the supervisors own observations and eventually resulted in a citation for a violation of ORC 4507.02 (B)(1). Furthermore, the grievant applied for work at the auto parts store shortly after his accident on May 6, but before his hearing on May 15. On his job application, the grievant stated that he would be available for work between the hours of 4:00 and 9:00 p.m. starting on May 15. The Arbitrator's opinion was that the grievant had anticipated some work related problems based on his driving status and had positioned himself accordingly. Finally, on June 12, when the grievant called off on sick leave, he told his supervisor that he was scheduled for a doctor's appointment on June 13. The medical documentation, however, indicates that the appointment did not take place until June 21. Nonetheless, the grievant did work at the auto parts store on June 12 and worked at the store regularly thereafter. In the Arbitrator's opinion, these circumstances indicated that the grievant engaged in a series of deceitful acts hoping to realize the sick leave benefits of his state job while enjoying compensation from his job at the auto parts store.

The Arbitrator did not give credence to the Union's assertions that the grievant's health problems were a result of job-related stress. He held that this claim merely muddled the record and ultimately showed that the entire episode on June 12 was completely contrived. The Arbitrator felt that if stress or anxiety did exist, they were a result of the grievant's own actions and deceit.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

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

IN THE MATTER OF THE
ARBITRATION BETWEEN

OHIO DEPARTMENT OF PUBLIC SAFETY, DIVISION OF STATE HIGHWAY PATROL

-AND-

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

GRIEVANT:
CRAIG SHIVERS
CASE NUMBER:

15-03-950726-0074-01-07

ARBITRATOR'S OPINION AND AWARD

ARBITRATOR:
DAVID M. PINCUS
DATE:
July 22,1996

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APPEARANCES

For the Employer
Robert L. Bahr, Sergeant
Peggy Tucker, Store Manager
Brian Landis, Sergeant
Heather Reese, Second Chair
Richard G. Corbin, Advocate

For the Union
Craig Shivers, Grievant
Louella Jeter, Chief Steward
Art H. Murphy, Portable Load Limit inspector
Mike Muenchen, Advocate

INTRODUCTION

This is a proceeding under Article 25, Sections 25.02 and 25.03 entitled Grievance Steps and Arbitration Procedures of the Agreement between the State of Ohio, Ohio Department of Public Safety, Division of State Highway Patrol, 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 March 1, 1994 - February 28, 1997 (Joint Exhibit 1).

The arbitration hearing was held on April 30, 1996 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 they would submit briefs. The Union's advocate asked for additional time dealing with his submission. This request was granted by the Arbitrator, with the Employer's awareness and concurrence.

STIPULATED ISSUE

Did the Employee have just cause to terminate the Grievant? If not, what shall the remedy be?

STIPULATED FACTS

The termination was not based on a charge of failing to fill out a 104G form (application for off duty employment).

The grievance is properly before the Arbitrator.

PERTINENT CONTRACT PROVISIONS

ARTICLE 24 - DISCIPLINE

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. 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. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

24.02 - Progressive Discipline

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

Disciplinary action shall include:

A. One or more oral reprimand(s) (with appropriate notation in employee's file);

B. one or more oral reprimands(s);

C. a fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;

D. one or more day(s) suspension(s);

E. 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 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.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

(Joint Exhibit 1, Pgs. 68-69)

CASE HISTORY

Craig Shivers, the Grievant, was employed as a Portable Load Limit Inspector with the State Highway Patrol on May 6, 1990. The facts surrounding the dispute are, for the most part, not in dispute.

The triggering event took place on Saturday, May 6, 1995, when the Grievant was involved in a crash on Interstate 71 near Mason, Ohio. The Grievant did not have insurance on the car he was driving, and was cited for failing to maintain an assured clear distance.

Subsequently, the Grievant was found guilty as charged, which resulted in a mandatory ninety (90) day suspension of his driving privileges effective May 15, 1995 to August 15, 1995. A noncompliance notice sent to the Bureau of Motor Vehicles resulted in the drivers license suspension.

The Grievant's supervisor, Sergeant Robert L. Bahr, testified he received information concerning the Grievant's accident and insurance difficulties on Monday, May 8, 1995. He discussed the upcoming appearance date set for May 17, 1986, and admitted he did not have insurance on the car.

On June 5, 1995, Sergeant Bahr checked the Grievant's LEADS driving record and determined his driving privileges had been suspended indefinitely. Also, the Grievant was placed under an FRA suspension

from May 15, 1995 until May 15, 2000. After reviewing this information, Sergeant Bahr contacted the Grievant and ordered him to park the scale van he was driving. Both the van and the Grievant were eventually relayed back to district headquarters. Upon his return, the Grievant acknowledged he was told of the suspension the day of the hearing; he assumed his attorney was going to take care of the suspension.

Because of the difficulties faced by the Grievant, he was temporally reassigned to work on 11:00 p.m. - 7:00 a.m. shift at the northbound platform scale on IS 71. This assignment did not include any driving responsibilities and did not result in any loss of pay. He was scheduled to report on June 12, 1995.

On June 12, 1995, the Grievant called off on sick leave and stated he had medical problems which precluded completion of his work assignment. He maintained that he hadexperienced cardiac related difficulties; an appointment with his doctor was scheduled for June 13, 1995. It should be noted the Grievant did submit a Medical Appraisal Job Capacity form (Employer Exhibit 2) dated June 21, 1995. The form indicated the Grievant should discontinue working effective June 12, 1995 to an estimated return date of July 24, 1995. The physician's remarks portion of the form included the following statement:

***

Off work for medical workup. If nothing found might be able to return sooner than the above date.

***

The Employer granted the Grievant's sick leave request but was asked to provide additional documentation.

During a conversation on June 24, 1995 between Sergeant Bahr and a retired Trooper, the Grievant's sick leave status arose as a topic of conversation. The Trooper noted he had purchased an auto repair manual on June 12, 1995 at the Auto Works store in Wilmington. He remarked the Grievant was working at the store, and had waited on him.

On June 27, 1995, Sergeant Bahr called the Auto Works store and determined the Grievant was scheduled for work at 7:30 p.m. At approximately 4:09 p.m. Sergeant Bahr observed the Grievant driving into the parking lot in front of the store. He later determined the car was owned by the Grievant's son. Later that day, Sergeant Bahr returned to the Auto Works store and interviewed Peggy Tucker, the Store Manager. Information obtained during the course of the discussion disclosed the Grievant had filled out an application for employment on May 9, 1995; and actually began work on May 30, 1995. The Grievant also informed the auto shop that he worked for the State Highway Patrol, and was available as needed any day after 4:00 p.m. Further discussion disclosed the Grievant performed duties such as moving cases of oil and other boxes, stocking shelves, sweeping, mopping and waiting on customers.

On June 28, 1995, the Grievant called Sergeant Bahr and discussed a stress test he had on June 26, 1995. He explained the tests looked fairly normal and that he had also seen a psychologist. The psychologist purportedly indicated his problem might be emotionally based. Sergeant Bahr also asked him how he was getting back and forth from work since his license had been suspended. The Grievant explained his son was providing him with transportation.

Later that day, Sergeant Bahr served the Grievant with a citation for a violation of ORC 4507.02(B1),which includes driving under FRA suspension. The Grievant became extremely upset when presented with the citation.

On July 7, 1995, the Grievant was ordered to return to work effective Monday, June 10, 1995 (Union Exhibit 5). The document also indicated "absent verified mitigating circumstances, failure to report will subject you to disciplinary action." It should be noted the Grievant never returned to work, nor did he allegedly provide any mitigating circumstances to justify his absence.

A disciplinary meeting was held on July 20, 1995. At the hearing, the Grievant submitted another medical Appraisal Job Capacity form (Employer Exhibit 4) authored by Christine Henry, MD she stated in the physician's remarks:

***

Mr. Shivers was taken off work on 6/12/95 through 6/28/95 for a medical workup which proved negative. He is under Dr. Berman's direction for psychological evaluation (see his letter enclosed). Please contact him

for his recommendation regarding work status.

***

The form, moreover, designates that the Grievant should discontinue working indefinitely, and that his estimated date of return was unknown. The letter (Union Exhibit 3) referred to in Dr.Henry's form (Employer Exhibit 4) was also offered by the Union during the pre-disciplinary hearing. It was sent by Dene S. Berman, Ph.D to Dr. Henry on June 29, 1995. It contained the following relevant particulars:

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Re: Craig Shivers

Dear Dr. Henry,

I saw your patient, Craig Shivers, for an initial interview on June 27, 1995. This 45 year old divorced father of two presented with numerous stress-related symptoms, including the death of three people who were close to him, earlier this year**********.[1] We began to discuss the discrepancy between his current lifestyle and one that would bring him more satisfaction, as well as peace. It is my hope by working with him I will be able to help him with the psychological symptoms he is having. Of course, this does not preclude the possibility that his chest pains from a few weeks ago are related to a physical cause.

Please do not hesitate contacting me if you have any questions, concerns, or additional information you would like to provide.

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On July 20, 1995, the Grievant was advised that he was being removed for disciplinary reasons. The removal notice (Joint Exhibit 3) contained the following charges in support of the removal:

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The removal is the result of your violation of the Department of Public Safety Work Rule Section (A)(6), Neglect of Duty, and Dishonesty, to wit: On June 12, 1995 you reported off on sick leave claiming you were unable to work pending a "medical work up." It was later learned you were working for a second employer during your absence. You have not returned to work in spite of being advised to do so.

***

On July 26, 1995, a grievance was filed contesting the Grievant's removal. The parties were unable to settle the disputed matter in subsequent portions of the grievance procedure.Neither party raised substantive nor procedural arbitrability issues. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employers' Position

It is the opinion of the Employer it had just cause to remove the Grievant. Clearly, his actions and attitude documented his neglect of duty and dishonesty. He was performing more strenuous duties for a secondary employer while claiming inability to perform his state job, and receiving sick leave benefits. Much of the Employer's decision to remove is based on a determination that the Grievant decided to manipulate the use of sick leave after he decided he did not want to work the midnight shift at the platform scales. He engaged in a pattern of deceit which clearly discredited his view of the situation. The surprising onset of his cardiac condition while his license was suspended, the scheduling of medical appointments, his work at Auto Works while allegedly disabled , all point to intentional subterfuge. Rather then telling the truth, the Grievant continued to cover his tracks by providing a series of deceitful and dishonest responses hoping to manipulate

the sick leave process.

The Union's attempt to reinforce the Grievant's allegations by forwarding a job-related stress hypothesis was thought to be unsupported by the record. Neither the state job nor his supervisors' actions generated the alleged stress. Any stress that existed was self-induced and caused by certain life-related pressures, failure to comply with driver's license laws and his deceitful dealing with his employer.

The Employer strongly objected to the Union's submission of several medical documents at the arbitration hearing. These documents (Union Exhibit 4) concerned a fax transmittal toAnita Patel, NM from Dene Berman, Ph.D on July 19, 1995 concerning Berman's assessment of the Grievant's condition and stress-related problems. A follow-up fax was sent by Patel to Berman indicting agreement with her proposed treatment plan. Patel also forwarded a disability certificate.

The Employer maintained it placed the Union on notice that these medical documents would be in dispute if offered as submissions. Any medical documents would have to be supported by testimony provided by these professionals so that cross examination would be available if necessary. Otherwise, the documents should be given face value only, or ignored in light of the Grievant's contrary behavior. These documents are extremely self-serving in terms of the Grievant's alleged inability to perform his state job.

The Union's Position

The Union opined that the Employer did not have just cause to remove the Grievant. Several theories were proposed in support of his conclusion.

The Employer failed to prove that the Grievant intended to defraud the Employer when applying for sick leave. The Grievant's intent is a critical facet of any dishonestly allegation. In fact, this essential proposition is specified in the Employer's Work Rule dealing with sick leave fraud (Joint Exhibit 4). The Grievant's testimony and supporting medical documentation established the Grievant properly applied for sick leave benefits. He did so to relieve job-related stress and to improve his overall mental health. Medical verification was provided by an attending psychologist and psychiatrist. They determined the Grievant was experiencing diminished coping ability as a result of the Grievant's problems occurring at work. They also determined that stress problems were relieved by his employment at Auto Works (Union Exhibit 4).

A comparison of job related responsibilities in the state job as opposed to those required at Auto Works clearly supported the opinions of the medical professionals. The Grievant's supervisors are obliged as a consequence of their positions to conduct criminal investigations such as those dealing with driving while under a suspended license. Obviously, the auto parts store would never be inclined to undertake a criminal investigation. The loss of a drivers license had greater impact on the Grievant's state employment as opposed to his outside employment. His predicament could have resulted in imposed discipline considering the Portable Load Limit Inspector's driver's license requirement. The temporary assignment to the load limit platform required the Grievant to work alone for a considerable period of time at a remote area. Clearly, these circumstances placed the Grievant in potential jeopardy while undergoing cardiac evaluation. The Grievant testified his physician recommended against such isolation. Auto Works, on the other hand, had a store policy which prohibited working alone. Finally, another critical distinction involved the working hour requirements. The auto parts clerk position required half-time employment, while the state position required a full-time commitment.

The Employer unfairly applied the work rule, (Joint Exhibit 4) dealing with physician's verification and the standard contained in Article 29.04 III A. Neither guideline requires a specific diagnosis. The Grievant relied on the standards as specified, while the Employer's requirement for additional clarification was unnecessary and unfounded.

The medical professionals opinions and determinations should be given considerable weight. All three individuals confirmed that the Grievant's employment with the state impacted his mental health and should, therefore, be discontinued for an indefinite period of time.

The Employer would have the Arbitrator discount their evidence as hearsay. A questionable notion when one considers physicians' statements as the standard method ofverifying illness as specified in Article 29.04. Also, physicians' notes are commonly accepted at arbitration as a practical matter in recognition of the expense and availability of physician's to testify. The Employer's reasoning seems especially perplexing

since no additional clarification was sought, nor any third party medical review arranged prior to the imposition of discipline.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony presented at the hearing, a complete review of the record including pertinent contract provision, it is this Arbitrator's opinion that the Employer had just cause to remove the Grievant. The Grievant was dishonest in his attempt to procure sick leave benefits. As such, he was in direct violation of the Department of Public Safety Work Rule Section (A)(6). Circumstances described in subsequent portions of this Opinion and Award indicate intentional deceit was involved in the procurement of sick leave justifying removal. These circumstances raised sufficient concern which properly engendered additional clarity and supporting documentation requirements.

The Grievant's credibility regarding the entire situation was significantly dampened by his continued refusal to be forthright with his Employer. The Employer had to initiate its own investigation regarding the Grievant's license suspension. Even though a critical aspect of his work requirements involved driving responsibilities, he continued to drive his van after being placed on notice concerning suspension. His justification regarding efforts engaged in by his attorney do not mitigate his actions. Even if efforts were being initiated to change his driving status by vacating the plea, he was still driving under a suspended license during the interim. As such, from his appearance in court on May 15, 1995 to June 5, 1995 when Sergeant Bahr accessed his LEADS driving record and ordered him to return to headquarters, the Grievant placed himself and his Employer in jeopardy. If he got into an accident while driving with asuspended license, tremendous insurance liabilities might have resulted. His explanation appears even more spurious when one considers the documents the Grievant had in his possession. The Grievant's attorney had sent a letter dated June 1, 1995. This letter explained that by the time he appeared for the hearing on the motion to vacate the plea it was too late. The court had immediately submitted the Notice of Suspension to the BMV on May 15, 1995. Also, the BMV further clarified the Grievant's driving status by advising him in a letter dated May 31, 1995 that his driving privileges had been suspended. His explanation, in my view, that these documents had been received but had remained unopened, seems self-serving and incredulous.

Not only was the Grievant driving for the Employer while his license was suspended, he continued to do so while working at Auto Works. Sergeant Bahr's observation on June 27, 1995 regarding the Grievant's driving to work was unrebutted. Similarly, his telephone conversation with the Grievant on June 27, 1995 disclosed the Grievant's willingness to stretch the truth when confronted with an unpleasant situation. Sergeant Bahr asked him how he was getting back and forth from work. The Grievant replied "my boys been taking me - that's about the only way I get around." This explanation clearly conflicted with Sergeant Bahr's earlier observations which eventually resulted in a citation for a violation of ORC 4507.02 (B 1), which involves driving while under FRA suspension.

The parties stipulated the Grievant was not charged with failing to fill out a HP-104G application. And yet, his inaction raises certain suspicions regarding his truthfulness. This application, more specifically, deals with off-duty work and is contained in Policy 9-505.05 (Union Exhibit 2). The policy indicates that divisional personnel shall not engage in any outside employment unless a HP-104G (application for off-duty work) has been submitted and approved.The Grievant never completed this application prior to working at Auto Works while attempting to procure sick leave status.

A series of timing-related circumstances also reinforce the dishonest tendencies engaged in by the Grievant. Shortly after his accident on May 6, 1995 and prior to his hearing on May 15, 1995, the Grievant applied for work at Auto Works. He applied on May 9, 1995, and his application indicated he was available on May 15, 1995 to begin work. He actually began work on May 30, 1995, and his work schedule indicated he worked from 4:00 p.m. to 9:00 p.m. most weekdays with a more extensive work day on Saturdays.

In my opinion, because of the timing, the Grievant prepositioned himself in anticipation of some sort of job action based on his driving status problems. He had to know his position as a Portable Load Limit Inspector might be jeopardized. His fears materialized once Sergeant Bahr discovered the status of his suspension. The Employer's attempt to accommodate the Grievant, however, by assigning him to the

platform scale on IS71 with no loss of pay complicated his situation. The platform scale assignment conflicted with the hours of work requirement at the Auto Works job. He had a decision to make regarding work. In my view, he engaged in a series of deceitful acts hoping to realize the sick leave benefits attached to his state job, while enjoying the compensation outcomes of his temporary position at Auto Works.

On June 12, 1995, the first day of his temporary assignment, the Grievant called off on sick leave because of some cardiac related problems. He told his supervisor he had an appointment with his doctor on June 13, 1995. The record indicates that some appointment took place, but it did not take place on June 13, 1995. Dr. Henry's remarks and dated signature on the Medical Appraisal Job Capacity form (Employer Exhibit 2) indicate she examined him on or aboutJune 21, 1995. The examination took place almost nine days after he allegedly realized momentary symptoms of cardiac problems.

The urgency and seriousness associated with these symptoms appear to be totally contrived. The Grievant testified he never experienced similar incidents since the June 12, 1995 episode. Also, one would think that if these symptoms were as acute as characterized by the Grievant no physician would take nine days to initiate an examination. A subsequent stress test did take place on June 26, 1995, and proved to be negative. The stress test was taken approximately fourteen days after the episode. Symptoms of this sort are normally dealt with by emergency room personnel, but the Grievant never initiated this option. He did, however, work at Auto Works on June 12, 1995, and continued to work there prior to his evaluation, and after he informed Sergeant Bahr of the test results. His work activity during this period of time is quite perplexing considering Dr. Henry's remarks on June 21, 1995 (Employer Exhibit 2). She remarked "off work for medical workup." It appears the Grievant never discontinued work and violated his own doctor's recommendation.

The Union proposed a number of distinctions comparing the Auto Works job as opposed to the Grievant's state position. These distinctions were used to mitigate the Grievant's actions, and to support a decision made by the medical professional. The distinctions raised, however, were found to be unpersuasive and do not support the sick leave request. Just because the state job requires interaction with supervisors who have criminal charges responsibilities does not serve as a critical distinction. If an employee never places himself in harms way by engaging in criminal activities, the interaction of the type complained of would never materialize.

The working alone distinction is also non-sensible. This explanation was never provided by the Grievant as an excuse for not working on June 12, 1996. This hypothesis might havecarried some weight if the stress test taken on June 26, 1995 had proven to be positive. With a negative outcome, the Grievant should have experienced no fear of working alone at the platform scale. This excuse, moreover, was proposed to support two reasons for not working for the state at the platform. It was originally used to support the Grievant's cardiac condition and subsequently used to support a job-related stress theory. The dual justification muddied the record, and led to my conclusion that the entire episode was contrived.

The medical professionals never identified the reasons supporting their distinctions. They never mentioned isolation nor any other pertinent work or job related characteristic which engendered the Grievant's job related stress and anxiety. As such, the various comparisons and theories proposed by the Union are viewed as mere supposition, unsupported by anything in the record.

The record does, however, support the fact the Grievant worked a total of 16 days through June 27, 1995 at Auto Works. A job, based on the store manager's testimony, requiring periods of physical exertion exceeding those realized at the platform scale. Some of this work, moreover, took place prior to the stress test results provided on June 26, 1995.

It is my opinion, the anxiety and job related stress relied upon were not a function of the Grievant's job duties and responsibilities. Rather, actions engaged in by the Grievant caused the Employer to take legitimate action. The Grievant's own actions generated the disputed sanctions, and nothing in the record supports an alternative conclusion. The job and related duties and responsibilities did not generate the stress and anxiety. If stress existed it was self-induced. The Grievant has no one to blame for his present situation. Once he decided to travel thisdeceitful path, he became entangled in the various proposed versions and explanations used to support his actions.

AWARD

The grievance is denied.

July 22, 1996

Dr. David M. Pincus
Arbitrator

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[1] The Xed out portion of this submission was redacted prior to the hearing.