ARBITRATION DECISION NO.:
137

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

EMPLOYER:
Ohio Department of Transportation

DATE OF ARBITRATION:
May 19, 1988

DATE OF DECISION:
July 20, 1988

GRIEVANT:
Margaret Burmeister

OCB GRIEVANCE NO.:
G-86-2361

ARBITRATOR:
Hyman Cohen

FOR THE UNION:
Lois Haynes

FOR THE EMPLOYER:
Rodney Sampson

KEY WORDS:
Just Cause - Removal (24.01)
Insubordination
Unauthorized absence more than 3 days
Unpaid Leave (31.01)

ARTICLES:
Article 24 – Discipline
§24.01 - Standard

Article 31 – Leaves of Absence
§31.01 – Unpaid Leaves

FACTS:

Grievant was a Highway Worker 2 for the Department of Transportation. She told her Supervisor that she needed unpaid leave for ninety days due to family problems. Her son was to be discharged from a rehab center and she wanted to take care of him. She requested leave to start

the next day. The Supervisor took the Grievant to the District Office so she could talk to Personnel. Grievant was told by Personnel that she should not do anything until notified by Personnel. The Supervisor told
Grievant that she should call in if she did not come to work to avoid being AWOL as opposed to UA. Grievant cleaned out her locker and did not return to work even though she was not told her leave was approved. Grievant was removed for unauthorized absence for more than three days.

EMPLOYER'S POSITION:

Grievant was aware of the problem well in advance of the date on which she requested it. The section that describes unpaid leave states that the employee is to give two weeks advance request for the leave. The directives violated by Grievant were posted in the employees breakroom. Grievant had been UA in the past and was familiar with the procedures. Grievant expressed her lack of concern for proper procedures in colorful language directed to the Supervisor. All efforts were made to accommodate the Grievant within established guidelines. Both the Supervisor and Personnel instructed Grievant not to do anything until notified by Personnel. Grievant's explicit contempt for following this advice amounted to insubordination. Coupled with the unauthorized absence for more than three days, there was sufficient just cause for removal.

UNION'S POSITION:

The Grievant believed from statements made by Personnel and her Supervisor that leave would be granted. She did not believe that she was doing anything that would jeapordize her job. The predisciplinary notice was vague. It stated that possible action was suspension/removal. This was ambiguous. The .employer was at least sloppy and probably negligent in their handling of the Grievant's leave request. The employer did not have just cause for removal.

ARBITRATOR’S OPINION:

Grievant was aware of the need for leave two weeks before she filed the request. She should have complied with the two week provision. The Supervisor and Personnel attempted to process the leave request and to assist Grievant in her time of need. The Employer was not required to grant the leave requested. It is discretionary and not mandatory in cases for family responsibilities. Conflicting statements by the Grievant and harsh statements to the Supervisor indicate the great stress Grievant was experiencing. Grievant was aware of leave procedures and cannot use ignorance of proper procedures as an excuse for failing to follow them. Grievant left without permission to take leave. Testimony by the Supervisor and Personnel was credible and indicate that no permission was given. The employer did not exercise its discretion so it could not have been abused. Personnel was not negligent in handling the request. A two-day delay is not negligent, sloppy, or improper. Grievant should have waited for a decision on the leave request. The predisciplinary notice's use of "suspension/removal" is permissable. Section 24.04 requires the notice to list the "possible form of discipline". The discipline to be imposed may not be certain until after the conference. The Grievant violated work rules and deserved discipline. But a string of family problems caused Grievant's maternal instincts and obligations to prevail over her obligations to the employer. This should have been considered as a mitigating circumstance.

AWARD:

Reinstatement, but without backpay to underscore the serious nature of Grievant's behavior.

TEXT OF THE OPINION: * * *

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration
-**between**-

STATE OF OHIO, DEPARTMENT OF TRANSPORTATION

-**and**-

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

ARBITRATOR'S OPINION
Grievant: Margaret Burmeister

FOR THE STATE: **RODNEY D. SAMPSON**
Arbitration Advocate
Ohio Department of Administrative Services
Office of Collective Bargaining
65 E. State Street
16th Floor
Columbus, Ohio 43215

FOR THE UNION: **LOIS HAYNES,**
Staff Representative
Ohio Civil Service Employees Association
77 N. Miller Road, Suite 204
Fairlawn, Ohio 44313

DATE OF THE HEARING: **May 19, 1988**

PLACE OF THE HEARING: **Ohio Department of Administrative Services**
Office of Collective Bargaining
65 E. State Street, 16th Floor
Columbus, Ohio

ARBITRATOR: **Hyman Cohen, Esq.**
Impartial Arbitrator
Office and P.O. Address
2565 Charney Road
University Heights, Ohio 44118

* * *

The hearing was held on May 19, 1988 at the State of Ohio, Office of Collective Bargaining, 65 E. State Street, Columbus, Ohio, before **HYMAN COHEN**, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:15 a.m. and was concluded at 4:50 p.m.

* * *

On October 22, 1987, Warren J. Smith, Director, **DEPARTMENT OF TRANSPORTATION**, **STATE OF OHIO**, the "**State**", sent a letter to Margaret Burmeister, informing her that she was "removed from employment as a Highway Worker 2, designed to the Lucas County Garage, effective October 30, 1987. * *" He further stated:

> "* *After reviewing the recommendation of the impartial administrator and others, it has been determined that just cause exists for this action.
>
> The charges you have been found in violation of include:
>
> Directive A-301 2b --insubordination "Willful disobedience of a direct order by a supervisor"
>
> Directive A-301 16b--Unauthorized Absence (more than 3 consecutive days)
>
> Directive A-301 34--Violation of 124.34 of the 0hio Revised Code."

On November 9, 1987 the instant grievance was filed, wherein it was stated that the Grievant was dismissed after requesting a leave of absence which "she was told was approved". Since the grievance was not satisfactorily resolved at the various steps of the

Grievance Procedure contained in the Agreement between the State and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION**, **Local 11, AFSCME** the "**Union**", the grievance was carried to

arbitration.

FACTUAL DISCUSSION

The Grievant was hired by the State as a Highway Worker 2. She had been assigned to the Lucas County' Garage, Toledo, Ohio, for approximately fourteen (14) months before her termination on October 30, 1967. Among her duties as a Highway Worker II were the following: driving a truck, mowing grass, light maintenance, picking up litter, and attendance at safety and training seminars.

The State's Case:

John H. Earl is the Superintendent of the Lucas County Garage. He indicated that on September 1, 1987, the Grievant told him that she was having some family problems and needed 3 to 6 months. off. As he had done in the past, he said that he told her that if it is "UA", he would have to contact Pamela Shanks, in Personnel at the District Office located in Bowing Green. Earl explained that where an employee requests leave after having depleted their personal leave, vacation time, sick leave, personal time and "comp. time", the **2**

employee receives an unauthorized absence", or "UA". If the employee wishes to receive an "AA" or authorized absence, the employee is required to apply to Personnel at the District Office. The "UA'* is changed to "AA", for example, if the employee submits verification from a "Court or a doctor". Since the Grievant had depleted the various categories of leave which She is entitled to receive, Earl called Shanks and made an appointment for the Grievant to meet with her on the following morning, September 2.

On September 2, Earl who was scheduled to attend a meeting at the District Office, drove the Grievant to the District Office. During the one-half hour trip to Bowling Green, Earl said that the Grievant related to him that she had problems with "insurance" which caused her to request leave. It appears that the Insurance Company would not "pay" for her son's treatment for chemically dependence "at the Insurance at the Tennyson Center in excess of two (2) weeks. Earl had been aware that the Grievant's son, who was about 17 years old had spent some time at a center for drug and alcohol rehabilitation. He said that the Grievant told him that her "Son had a drinking problem". During the ride to Bowling Green, Earl said that he told her that an EAP [Employee Assistance Program) had-been established by the parties. He also advised her that a few blocks from "Our home", his brother was a counselor to a rehabilitation center for alcoholics. He

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suggested that he might help her rind provided her with his telephone number.

When they arrived at the District Office, Earl accompanied the Grievant to the Personnel Department after which he went to his meeting. At the conclusion of his meeting he met the Grievant and asked her how she "made out". According to Earl she told him that she "did not know

anything yet". He told her that he would meet her at his car and he went to talk to Shanks alone about the Grievant's situation. Earl testified that Shanks "did not know anything" and had to contact Mr. German or Mr. Peyton who were her supervisors. He related to the Grievant what Shanks had told him and he returned to Toledo where both of them went to work.

Later in the day Earl called Shanks to ask if she had heard anything yet. He called because the Grievant had not get heard anything from Shanks. In any event, Shanks told Earl that she did not know whether the leave was going to be approved until she talks to Peyton or German. Earl called the Grievant into his office at about

3:30 to 4:00 p.m. and told her what Shanks had told him. According to Earl the Grievant said, "I do not give a good damn, I don't give a fuck and that is all there is to it." Earl replied by stating, "if you are not coming in, you better call in. It is better to be UA rather than AWOL

by not calling in". He added that he told the Grievant, that "either she comes into work or calls". He added that he told her that "taking a UA rather than AWOL is the lesser of two (2) evils". He explained that after three (3) days of AWOL an employee can be removed which is why UA is better than AWOL. He added that with "UA there could be discipline consisting of a reprimand or some days off'.

Earl acknowledged that during the morning of September 2 he indicated to the Grievant that he saw no problem with regard to her leave being approved "because we followed the rules and regulations". He indicated that he knew that the Grievant needed time off. He said that he would not have taken the Grievant to Bowling Green if she did not need the time off. Earl further acknowledged that he was hoping that her leave would be approved. Earl testified that the Grievant never told him that she was not coming in on September 3. Moreover, she never said to him that she needed leave beginning on September 3.

On September 3 the Grievant did not call the Garage. In fact, Earl added, there was no further contact with the Grievant after September 2. He called the Personnel Department in Bowling Green to ask whether the Grievant had contacted them. Earl said that he checked every day for fourteen (14) days with the Personnel Department. Earl said that the Grievant knew that more than one (1)

day was needed to get approval of her request for leave. He testified that he had the paper work prepared on September 3 and ready for the Grievant to work during that day but she was absent. On September 3 he went to the locker room and he stated that the locker which the Grievant shared with Barbara Wilson and Mary Ann Brossia did not have any of the Grievant's personal belongings. He was told by Wilson and Brossia that the Grievant had cleaned out the locker on September 2.

Pamela Shanks, Personnel Officer 3, handles the leave papers for German who is the Deputy

Director of the Department of Transportation. In German's absence, Peyton decides whether or not to approve requests for leave. She indicated that she takes the information from the employees, the reasons for the leave, the type of leave and she relays the information to Peyton, an Administrative
Assistant, who makes the decision whether to approve the application for leave. Shanks testified that when she met the Grievant in her office the Grievant said that she needed time off to be with her son. The Grievant told her that her son had problems with alcohol and family counselling was necessary. Shanks further testified that the Grievant told her that she had to make sure that her son went to school every day. As a result the Grievant had to be home. The Grievant further stated that her husband worked the swing

shift and in effect could not be at home with their son. Shanks then proceeded to tell her that she would have to file the appropriate leave papers and she told the Grievant that she would have to submit the information to Peyton. The Grievant completed the papers and submitted them to Shanks. Upon reviewing the documents, Shanks expressed surprise because the Grievant requested ninety (90) days of leave to begin the following day on September 3, 1987. As a result, Shanks told the Grievant that it usually takes more time for the leave to be approved. In fact, she added that approval takes a couple of weeks since Peyton submits his recommendation to Columbus. She added that Peyton may have some questions concerning the information that Shanks communicates to him. In any event, Shanks told the Grievant that Peyton makes the decision and she said, "don't do anything until I get back to you". Shanks added "* *don't leave tomorrow, don't do anything until I get back to you". The Grievant said, "Okay". Shanks acknowledged that she could have told the Grievant that she would get back to her by the end of the day.

Peyton, according to Shanks, did not return to the office on September 2. Shanks went "somewhere to a garage later on during the day and she went on vacation September 3 and September 4". Before leaving the office Shanks said that she wrote a note to Peyton attached it to the request for leave form, and left the papers on his

desk.

Shanks returned to work on Tuesday, "September 6 or 9". She met with Peyton who told her that the Grievant" took, off on September 3 and that "she told off Earl and that she was leaving". Shanks went on to say that she told Peyton that she advised the Grievant not to do anything until she heard from her. Shanks said that Peyton wanted to find out what was going on and wanted to know why the Grievant took off the way she did. Shanks conveyed to Peyton the reasons why the Grievant wanted leave. She talked about the Grievant's need to be home to take care of her son. After calling the Grievant at her home for one (1) week "off and on", she finally reached the Grievant and talked to her.

Shanks testified that the Grievant never said to her on September 2 that her leave constituted

an emergency. Moreover, she described the Grievant as "agreeable" after she said "don't do anything until you hear from me". Shanks could not recall whether she told the Grievant that her leave would be approved; moreover, she did not recall telling the Grievant that she would be in trouble if she left without approval of tier request for leave.

Barbara Wilson has been a Highway Worker 2 for three (3) years

and is employed in the Lucas County Garage. She also serves as a substitute time keeper, the position which she occupied on September 2. Wilson testified that when she spoke to the Grievant on September 2 after the Grievant had returned from Bowling Green, she told her that she had "resigned as of today". Wilson replied "you are kidding". She went on to state, that she "couldn't believe it". She was "shocked" by the Grievant's statement. She then asked the Grievant to go to lunch with her. During lunch the Grievant said that she should know by Friday [September 4] whether her leave had been approved. Wilson acknowledged that there was some confusion between her earlier comment about resigning and what the Grievant said during lunch. During lunch according to Wilson, the Grievant disclosed that her son's problems were causing her to leave. Wilson added that she was familiar with her son's problems.

<u>The Union's Case:</u>

The Grievant explained her reasons for requesting three (3) months leave without pay. She indicated that her son had been "very ill" and in a treatment center. Because he was chemically dependent, she was advised when her son left "Tennyson Center" that there should be family counseling. Moreover, in late August she was informed that her son had been expelled from school and was unable

to attend any public school. In addition, her son had been arrested in August for being drunk and disorderly. Since she make's less money than her husband, the Grievant decided to request personal leave. By doing so, she realized it would be a financial burden for the family but still hold the family together. She decided to request personal leave for ninety (90) days to see how things would turn out. She went on to say that she felt that she had to be home every day because her son needed her to be there every day. She added, that her son would have parties and things would be stolen from her home.

The Grievant explained her "problem" with the insurance company. She indicated that the insurance policy will not cover her son's stay at the treatment center for longer than two (2) weeks. As a result, her son was released after two (2) weeks at the treatment center and she wished to be home with him.

The Grievant indicated that on September 1 she requested ninety (90) days leave from Earl

who said that he would call Shanks and make an appointment. She related to Earl the problems that she had with her son. She indicated that he knew about the Grievant's son's treatment at the Tennyson Center for chemically dependent persons. The Grievant stated that she told Earl that her leave was an emergency leave and must be effective immediately so she could take

care of her son. During the drive to Bowling Green on September 2, the Grievant testified that she discussed with Earl her son's chemical dependence and her need to remain at home. The Grievant confirmed that Earl suggested that his brother might be of some assistance and provided her with his name and telephone number. The Grievant indicated that at the District. Office she "chatted" with Shanks about her son and the reasons for her request for personal leave. She filled out some personnel papers and signed some insurance documents. The Grievant testified that Shanks told her that she would get back to her later that day, "one way or the other". During the trip back to Toledo the Grievant told Earl that she had filled out papers for leave which was to be effective the next day.

The Grievant confirmed that she went to lunch with Wilson on September 2. According to the Grievant she told Wilson that she went to Bowling Green to fill out papers. Her son and his illness were discussed during lunch in addition to her need for personal leave. The Grievant denied that she told Wilson that she going to quit.

The Grievant testified that received one (1) call from Shanks within one (1) week after she had met with her on September 2. According to the Grievant Shanks asked her "what's going on?" The Grievant testified that in her discussion with Shanks she denied she

yelled and screamed at Earl.

The Grievant said that on September 2, she asked Earl for keys to the back room. She had no other discussion or conversation with Earl during the day and she left at "quitting time" which was 4:00 p.m. The Grievant also denied that Earl told her to report to work the following day.

James R. Henley, Union Steward. went to the Grievant's home on December 12, 1987 to assist her in filling out the grievance form and a "Grievance Prep Sheet". He described the conditions at the Grievant's home as "chaotic". He indicated that the Grievant felt that she was losing her family. She was not in control of herself. Her son "was on the run" and she could not control him. He described her condition as "being in total stress and outraged".

Henley testified that almost everyone at the garage knew of the Grievant's problems. Moreover, the Grievant felt that she was an unsafe worker because she was under stress. She communicated her anxieties to Henley almost one (1) month before she requested leave.

Henley said that the Grievant talked to Earl about one (1) month Prior to September 2 and told

him that she was a hazard on the road **12**

with the college kids who were employed during the summer. The Grievant said that she could not relate to them. Henley said that he talked about the Grievant's stress to Earl around August 2. In addition, he talked to Earl sometime during the second to third week in September concerning the Grievant's problems. Henley testified that when the Grievance Prep Sheet was filled out on December 12, the Grievant told him that she "felt" the leave had been approved.

Earl indicated "UA" on the Grievant's request for leave form well into September. Finally, after not hearing from the Grievant, Earl requested a pre-discipline meeting concerning her violations of Department policy and rules. The meeting was held on October 2, 1987. The State terminated the Grievant effective October 30, 1967.

DISCUSSION

The issue to be resolved in this arbitration was jointly stipulated by the parties to be as follows:

> "Did the Department of Transportation discharge Ms. Margaret Burmeister for just cause in accordance with Article 24 of the Contract? If not, what shall the remedy be?

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FINDINGS

On September 1, 1987 the Grievant indicated to Earl that she wished to take an extended leave because of "family problems" involving her son who was “chemically dependent". Although Earl had no authority to approve the request for leave, he arranged to schedule an appointment for her to meet with Shanks of the Personnel Department in the District Office located in Bowling Green on the following day, September 2, 1987.

During the morning of September 2, Earl drove the Grievant to the District Office to meet with Shanks. During the one-half hour drive, the Grievant discussed her son's problems with Earl. It should be noted that the Grievant's family problems were familiar to Earl and the employees at the Lucas County Garage.

At her meeting with Shanks the Grievant requested three (3) months leave so that she could be at home. She expressed to Shanks the nature of her son's problems which included the following: her son needed her at home; he had no school to go to inasmuch as he had been expelled from the last public school that he had attended; he had been treated at a center for chemically dependent persons for two (2) **14**

weeks and he had been released; the insurance company would not extend its coverage for the son's treatment at the center for longer than two (2) weeks; her son had been arrested for being "drunk" and for disorderly conduct; and that her family life, in effect, was “coming apart". At her meeting with Shanks, the Grievant signed documents pertaining to her request for leave and "insurance forms".

Shanks' testimony was highly credible and trustworthy. When she noticed on the leave application form that the Grievant wanted to begin her leave beginning the following day, on September 3, she "was surprised". She then indicated to the Grievant that the processing of leave "takes more time" and that Peyton "makes the decision". I am persuaded that Shanks then told the Grievant "don't do anything until I get back to you". She also told the Grievant "don't leave tomorrow--don't do anything until I get back to you". The record also warrants the conclusion that Shanks told the Grievant that she would get back to her "by the end of the day" or as the Grievant testified that she "would get back to me one way or another".

After the Grievant's meeting concluded with Shanks, Earl met the Grievant. Since she did not know "anything yet" about her request for leave, Earl talked to Shanks while the Grievant went to his automobile. Shanks told Earl that she "did not know anything yet" and

that she had to get hold of "German or Peyton". Earl passed on this information to the Grievant.

Earl drove the Grievant to the Lucas County Garage. Upon returning to the garage, contrary to the Grievant's denial that she told Wilson that she quit, the evidence supports Wilson's testimony that the Grievant told her that she "had resigned today". Since Wilson was shocked" by the Grievant's comment, she suggested that they have lunch. Wilson had been familiar with the Grievant's “personal problems" with her son. At lunch, the Grievant discussed those “problems" with Wilson which were "causing her to leave". At the meeting, the Grievant told Wilson that she should know by Friday [September 2, fell on a Wednesday], whether her leave had been approved". I should add that Wilson's testimony was highly credible and trustworthy. Her statements to Wilson about resigning and then waiting for her leave to be approved, leads me to infer that the Grievant was under great stress and was confused due to her “personal problems".

This conclusion is buttressed by the Grievant's outburst at Earl between 3:30 and 4:00 p.m. which occurred after Earl asked the Grievant if she had heard anything from Personnel. Since Personnel had not contacted her Earl called Shanks who told him that "no one has

been here" and that she did not know whether the leave would be approved until she talks to

Peyton or German. When Earl told the Grievant what Shanks told him, she said, I do not give a god damn, and "I do not give a fuck and that is all there is to it". Earl then stated that if she "was not reporting to work on the following day, she should call in because it is better to be UA rather than AWOL for not calling in". He added that calling in is "the lesser of two (2) evils".

I cannot conclude that the only time that the Grievant talked to Earl when they returned from Bowling Green was to request a key to the "back room". As with the other instances where a conflict of testimony existed between Earl and the Grievant, I am inclined to believe Earl. As a witness Earl demonstrated that he made an effort to be a friend of the Grievant. On September 2, he drove her to and from Bowling Green, while she was on the clock. Earl suggested that his brother, a counselor at a rehabilitation center for alcoholics could help her. He suggested that she might try the EAR He was not obligated to drive the Grievant to Bowling Green, but he did so, as he indicated because "she was a good employee--she tried hard to do a good job and made an effort to be a good employee". He added that "being a friend and a supervisor [he] owed it to her since [he] knew that she was having problems". Earl accompanied the Grievant to

Shanks' office and took a sincere interest in inquiring about her request for leave. When the Grievant had not heard anything from Shanks during the afternoon of September 2, he took it upon himself again to call Shanks and inquire about the status of her request for leave.

Despite the Grievant's hostile outburst on September 2, Earl checked every day with Personnel to find out whether she had called. He talked to other employees in the Garage and asked whether they had heard from her. His concern for the Grievant's job continued even after he discovered that she had aparently removed her personal belongings from her locker. In fact, he "carried" the Grievant as "UA" or "unauthorized absence" rather than "AWOL" to give the Grievant "time" to receive a decision from Bowling Green. Earl's concern is consistent with his advice to the Grievant on September 2 to call in rather than be AWOL as "the lesser of two (2) evils"; and that if she was not coming in, [she] better call in".

As a supervisor, Earl demonstrated extraordinary concern for the Grievant and unusual patience and restraint in dealing with the her. Indeed, Earl said that he was "hopeful" that she would return because of "the way" she left work on September 2, 1987. Earl's concern for the Grievant is to be contrasted with the Grievant's motive for denying the language which she used on September 2,

before leaving work. Accordingly, the record supports the testimony of Earl.

Turning to Shanks' testimony, she indicated that she could have told her that she would get back to her by the end of the day on September 2. That fact she did not do so, does not constitute an implied authorization for the Grievant to take an extended leave. Nor does the failure of Shanks to call the Grievant before 4:00 p.m. on September 2 constitute a reasonable basis for the Grievant

to believe that her leave was authorized. Shanks' statement about getting back to the Grievant is consistent with her testimony that she told the Grievant not to do anything until she gets back to her; and her statement that she was not to "leave tomorrow".

It cannot be claimed that the Grievant was unaware of the procedure concerning her request for extended leave in light of the fact that she had already depleted the other categories of leave. From August 16, 1985 through October 10, 1986, the Grievant received a "UA" on four (4) different occasions. On two (2) of these occasions, the "UA" was changed to an "AA". The Grievant was reminded by Earl of the procedure on September 1 when she requested the three (3) to six (6) months leave. He proceeded to advise her, "as in the past", that with a UA he would have to contact the Personnel Department. **19**

Indeed, by traveling to Bowling Green to see Shanks, the Grievant must have been aware of the procedure. Moreover, after losing control of herself during the afternoon of September 2, Earl again advised the Grievant that she "better call in" and take a UA because it is "better than * *AWOL for not calling in".

The evidence is compelling that the Grievant did not have approval from the appropriate officials to go on an extended leave; furthermore, there was no reasonable basis upon which she determined that she had approval for such leave. Support for this conclusion is also derived from the "Grievance Prep Sheet", a joint exhibit, which was prepared by Henley on December 12, 1987. As part of the "grievance background", in his own handwriting, Henley indicates that the Grievant requested an answer from Shanks "by 4:00 p.m." on September 2, to her request for leave. He goes on to state that "when 4:00 come around, Margaret [the Grievant] still didn't have an answer. Starting the next day, Margaret took off". Thus, in preparing the "Grievance Prep Sheet", Henley acknowledged that since the Grievant did not have an answer from Shanks by 4:00 p.m., starting the next day, she took, off". Furthermore, in taking off, the Grievant was defiant, in failing to comply with the instructions of Shanks and Earl both of whom told her not to take off.

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DIRECTIVE No. A-301

Directive No. A-301, dated June 1, 1987, which is issued by the State contains "Department of Transportation Disciplinary Guidelines". It is undisputed that the "Disciplinary Guidelines" were posted "in the employees' break room". There is nothing in the record to indicate that the Grievant was unaware of Directive No. A-301 and the "Disciplinary Guidelines". Guideline 2 b provides for the discipline of "suspension" for a first offense of "Willful disobedience of a direct order by a superior" under the category of "Insubordination". On September 2, 1987 Earl told the Grievant "to be in [on September 31 or * * to call." He repeated that if she was not coming in, she "better call". The Grievant failed to call and also failed to report for work on September 3. Shanks told the Grievant that she was not to do anything until she [Shanks] gets back to her. She added that the

Grievant was not to leave on September 3. The Grievant defiantly refused to follow direct orders of Earl and Shanks. Accordingly, the Grievant committed the offense of insubordination by her absence from work, beginning September 3, "without calling in”.

Guideline 16 b calls for "removal' for the offense of unauthorized absence for 3 days or more". The evidence warrants the conclusion that the Grievant violated Guideline 16 b.

ARTICLE 31— §31.01

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Article 31, Section 31.01 of the Agreement in relevant part, provides as follows:

> "The Employer may grant unpaid leaves of absence to employees upon request for 6 period not to exceed one (1) year. Appropriate reasons for such leaves <u>may</u> include, but are not limited to** family responsibilities **”. [Emphasis added).

The Union contends that Section 31.01 "strongly suggests" that the State "cannot be arbitrary or capricious in denying leave" for "family responsibilities". Furthermore, the State "should have a legitimate business reason to turn down a legitimate leave request".

Section 31.01 confers discretion upon the State to "grant unpaid leaves of absence to employees upon request for a period not to exceed one (1) year". The parties underscored their intent by stating that [T]he Employer may grant unpaid leaves of absence * *". Moreover, the paragraph in Section 31.01 providing for such discretion in granting unpaid leaves of absence is preceded by three (3) categories of unpaid leaves of absence, which the parties indicated

that the State is required to grant to employees. The three (3) categories are preceded by the phrase: "[T]he Employer <u>shall</u> grant unpaid leaves of absence for the following reasons". By utilizing the word "shall" the three (3) categories of leave are mandatory which is to be contrasted with the discretionary language used for unpaid leave for "family responsibilities".

I would agree that in exercising its discretion the State is prohibited from arbitrary or capricious action. Turning to the facts of the instant case, the Grievant's son was released from the treatment center on August 16. Thus, on that date, she was aware that her son would be living at home. The Grievant failed to disclose why the leave was required to begin on September 3 when she first requested leave on September 1, 1987. She indicated that during the lost week in August, she decided that she wanted to take personal leave. However, no explaination was offered by the

Grievant as to why leave was required to begin on September 3 when she knew as early as August 16 of her son's release from the treatment center. Her son was required to make 6 court appearance for being "drunk and disorderly" during the first week of September. However, the court appearance, in and of itself does not constitute a sufficient reason why it was imperative that she take leave on September 31.

Shanks referred to an employee handbook entitled "Working for Ohio" which was distributed to all employees in the District in late 1986 or early 1967. The handbook, which covers leave of absence without pay provides that such leave is granted at the "sole discretion of the State" for a "period not to exceed six months * *". To apply for leave, the Section in the handbook indicates that "and employee must submit "an authorized leave form at least two weeks in advance, stating the reason for the request". The Grievant failed to comply with the advance notice requirement without explaining why such advance notice should not apply to her.

However, what is more to the point is that the Grievant failed to comply with a procedure that is so basic it is entrenched in any organizational scheme. I have already established that by failing to receive an answer from Shanks of her request for extended leave on September 2, and as Henley's Grievance Prep Sheet indicated "starting the next day Margaret [the Grievant] took off". Receiving an answer, even of approval and not receiving an answer from Bowling Green, which occurred in this case, are poles apart. Clearly, there is approval in the former instance; but in the latter, there is none. The Grievant cannot remove the basic prerogative of management by assuming that tier leave would be approved. Neither Earl, nor Shanks indicated to tier that she should take her leave beginning on

September 3. Indeed, they stated the very opposite. Under Section 31.01, whether the Grievant's request for unpaid leave is granted, depends upon the exercise of a discretionary decision by the State. The exercise of such discretion cannot be short-circuited by the Grievant making the decision on her own. To sanction such action by an employee would lead to chaos. To sustain the grievance in this case would mean that any employee for a real or perceived need, does not have to wait for decisions by supervisors--they can make such decisions on their own. Rather than belabor the point any further, it is true that the State is prohibited from exercising a discretion which is considered to be arbitrary or capricious. The point to emphasize is that a discretion must be first exercised before it is considered arbitrary or capricious. In this case, the Grievant did not wait f or the State to exercise
discretion under Section 31.01.

The Union contends that the State's processing of the Grievant's request for leave form was at best, "sloppy" and at its worst, “negligent". I disagree. The Grievant failed to explain why she could not wait until Friday, September 4, as she indicated to Wilson, for the State's decision on her request for leave. Indeed, she could not wait until the following day, September 3. As I have already established, the Grievant failed to indicate why she did not submit her request for leave earlier than

September 2. The employee handbook on "Working
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for Ohio" provides for at least two (2) weeks of advance notice for a six (6) month leave. In light of the circumstances of this case, I cannot conclude that the State was "sloppy" or "negligent" in processing the Grievant's request for leave. Whatever delay in processing the Grievant's request for leave is outweighed by the Grievant "taking off" because she failed to receive approval by the State before 4:00 p.m. on September 2.

ARTICLE 31 SECTION 31.02

The Union seeks support for its position from Section 31.02 of the Agreement, which provides that "[T]he request for leave shall be submitted as soon as the need for such a leave is known". Assuming that the Grievant complied with these terms of Section 31.02, she was terminated for taking leave without obtaining approval from the appropriate official of the State, although she was instructed that such approval was necessary; she was not terminated for failing to submit her "request for leave * * as soon as the need is known". However, it should be noted that there is evidence in the record to warrant the conclusion that the need for such leave was known to the Grievant before September I or 2, 1987.

ARTICLE 31 SECTION 31.03

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The Union also refers to Section 31.03 of the Agreement which provides that "[A]uthorization for leave shall be promptly furnished to the employee in writing * *." Based upon the extended leave requested, I cannot conclude that the failure of the State to provide "[A]uthorization for or denial of a leave of absence" by 4:00 p.m. on September 2 violates the terms of Section 31.03. Consistent with the employee handbook "Working for Ohio", Shanks said that approval usually takes a couple of weeks". She added that Peyton may have some questions on the information that she furnishes to him. Furthermore, Peyton contacts the Columbus office on the request. Shanks stated that she never received a request for extended leave to begin on the following day. In any event, the Grievant failed to give the State the opportunity to "promptly" furnish authorization or denial of her request for leave.

ARTICLE 24-SECTION 24.04

Article 24, Section 24.04 of the Agreement provides for a pre-discipline meeting. The Section, in relevant part, provides:

> “**An employee has a right to a meeting
> before the imposition of a suspension or
> termination. Prior to

> the meeting the employee rind his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline * *."

The Union contends that the State's notice of a pre-discipline meeting is "grossly deficient" because the notice stated that the possible form of discipline is "suspension/removal". The Union claims that such notice is not "meaningful" because it is not reasonably specific". To be meaningful, the Grievant should have been notified, for example, that she was "facing either a minor or major suspension or termination".

I disagree with the position of the Union. Section 24.04 requires notice of a pre-discipline meeting which includes "the reasons for the contemplated discipline and the "possible" form of discipline". Emphasis added. The word "possible" means "* * something that may or may not occur". *Webster's Ninth New Collegiate Dictionary* Webster-Merriam, Inc., 1966. It is my judgment that the parties used the word "possible" in Section 24.04 because they realized that the discipline to be imposed would become definite, after, rather than before the pre-discipline meeting. I find that the State did not violate the intent and meaning of the phrase "possible form of discipline" contained in Section 24.04. Moreover, **28**

there was no evidence of prejudice to the Grievant as a result of the State using the phrase in question.

REMEDY

Article 24, Section 24.01 in relevant part, provides that: "Disciplinary action shall not be imposed upon an employee except for "just cause". In any judgment, the standard of "just cause" requires
that the punishment be reasonable in light of all of the circumstances". *City of Portland,* 77 LA 820, 826 (Axon, 1981).

The Grievant was first employed by the Ohio Department of Transportation on February 11, 1985. During her fourteen (14) months of employment tit the Lucas County Garage, Earl, described her attendance as "fair to good". However, on August 14, 1987 she received an oral reprimand or "verbal counselling" from Earl for "abuse of sick leave". It should be pointed out that Earl referred to the Grievant as a "good employee who tried hard to do a good job".

The Grievant has had her share of personal misfortunes which have affected her employment

record and caused her to take leave beginning September 3, 1967 without obtaining approval from the State. Before her employment with the State, she underwent serious surgery which required her to be subjected to chemotherapy for a **29**

Period of one (1) year. Four (4) times a year she is required to have a check-up, which consists of a cat scan and "taking medicine". As a result of taking medicine and undergoing the cat scan, she needs time to "recuperate" which causes her to be absent from work for a few days several times a year- Prior to September, 1987, the Grievant was involved in an automobile accident which caused her to be disabled for a period of time. And finally there is her son's difficulties which led to the events in September, 1987. The Grievant's behavior after returning from Bowling Green on September 2, indicates that she was under great stress due to her son's problems. Her son who is chemically dependent, was released from a treatment center after two (2) weeks; he had been arrested on a charge of being "drunk and disorderly"; he had been expelled from the last school that he had attended; her family life was seriously disrupted and she was told at the treatment center that it was imperative that she seek "family counselling".

Her actions on September I and 2, 1987, I believe, stemmed from desperation. On September 1 she requested leave of ninety (90) days from Earl. Since she did not receive an answer from Bowling Green during the afternoon of September 2, she blew up at Earl, apparently emptied her locker, and left work. Her actions were tantamount to an job abandonment of work, especially since she did not **30**

bother to contact Earl or Shanks after September 2, 1987. Earl said that the Grievant was not agitated or troubled during the morning of September 2 but when he told her what Shanks had said to him, she "just blew up". Her inconsistent statements to Wilson about resigning from work and then waiting for a decision until Friday indicate that her behavior was erratic. Her actions were also rash, intemperate and desperate.

The Grievant's obligations to her employer cannot be ignored. The State should be able to expect that its employees have a good attendance record, and comply with its procedures and rules and perform the required work in a satisfactory manner. In the instant case, the Grievant's maternal instincts and obligations prevailed over her obligations to her employer. If a similar predicament occurs in the future, it can be anticipated that her role as a mother will again prevail over her obligations as an employee. However, the Grievant is to be advised that in light of the outcome of this case, discharge for "just cause" will have for greater support.

Without minimizing the gravity of the Grievant's offense, the State failed to prove by clear and convincing evidence that the Grievant was discharged for just cause. Guideline 34 of Directive No. A-301 provides that a Violation of Section 124.34 of the Ohio Revised

Code considers that "[T]he severity of the discipline imposed should reflect the severity of the violation". In light of the circumstances which led the Grievant to take leave without approval, the termination of the Grievant did not reflect "the severity of the violation", by her.

The period that the Grievant has been out of work is to be considered a disciplinary suspension. The Grievant is to be reinstated without back pay.

AWARD

In light of the aforementioned considerations, the State failed to prove by clear and convincing evidence that the Grievant was discharged for "just cause".

The period of time that the Grievant has been out of work is to be considered a disciplinary suspension. The Grievant is to be reinstated without back pay.

Dated: July 20, 1967
Cuyahoga County
Cleveland, Ohio

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