

## BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

MILWAUKEE DEPUTY SHERIFFS'  
ASSOCIATION

and

COUNTY OF MILWAUKEE

5-day suspension of  
of Sgt. Frank Ornelas  
issued May 1, 1989

Case 272  
No. 42250  
MA-5629

### Appearances:

Ms. Marna M. Tess-Mattner, Gimbel, Reilly, Guerin & Brown, Attorneys at Law,  
2400 Milwaukee Center, 111 East Kilbourn Avenue, Milwaukee, WI 53202,  
appearing on behalf of the Association and the Grievant, Sgt. Frank Ornelas.

Mr. Robert G. Ott, Corporation Counsel, Milwaukee County, Courthouse Room 303, 901  
North 9th Street, Milwaukee, Wisconsin 53233, appearing on behalf of  
Management.

### ARBITRATION AWARD

The Wisconsin Employment Relations Commission designated the undersigned Arbitrator to hear and determine disputes concerning the above-noted disciplinary suspension arising pursuant to the grievance arbitration provisions of the parties' 1989-1990 collective bargaining agreement.

The parties presented their evidence and arguments to the Arbitrator at a hearing held in Milwaukee, Wisconsin on January 9, 1990. By agreement of the parties, the Arbitrator recorded the hearing on cassette tape for his exclusive use in award preparation. The parties' presented their closing arguments at the hearing, marking the close of the record.

As is discussed in greater detail under FACTUAL BACKGROUND, below, prior to award issuance, the Association requested reopening of the record to submit additional evidence consisting of a transcript of a tape recording of a conversation having a direct bearing on certain of the factual matters in dispute. Over written Management objections to the reopening but after the Management reviewed the tape and confirmed its authenticity and the accuracy and completeness of the transcript the Arbitrator granted the Association's request, received the transcript into evidence, and allowed Management to present any further evidence it had in response. Neither party requested that the matter be remanded to the Sheriff or the Review Board for consideration of the newly-revealed evidence, and neither party presented additional evidence or arguments.

The record was closed as of March 30, 1990.

This arbitration arises out of a Notice of Suspension issued by Sheriff Richard E. Artison on May 1, 1989. It imposed a disciplinary suspension (without pay) on May 11, 12, 15, 16 and 17, 1989 on Deputy Sergeant Frank Ornelas, a member of the non-supervisory law enforcement bargaining unit represented by the Association. The charges contained in the Notice of Suspension are set forth below.

### STIPULATED ISSUES

At the hearing, the parties stipulated to the following issues:

1. Are there grounds to substantiate the imposition of discipline for the charges stated?
2. If discipline was warranted was the amount of discipline warranted in the circumstances?
3. If not, what shall the remedy be?

### PERTINENT PORTIONS OF THE NOTICE OF SUSPENSION

On May 11, 12 and 13, 1988, Sergeant Frank Ornelas absented himself from duty without authorization. Additionally, it was determined that Sergeant Ornelas was less than truthful, provided false information and failed to obey a lawful order of a superior surrounding the incident and investigation of May 11, 12 and 13, 1988.

#### Sheriff's Department Rules and Regulations

1.03.09	(D)	Sergeants
1.05.10	Rule 10	Obedience to Orders
1.05.18	Rule 18	False Information
1.05.18	Rule 30	Absence without Permission
1.05.35	Rule 35	Truthfulness

### PERTINENT PORTIONS OF SHERIFF'S DEPARTMENT RULES AND REGULATIONS

#### 1.03.09 SERGEANTS

(D) A sergeant shall remain on duty until properly relieved.

1.05.10      RULE 10 - OBEDIENCE TO ORDERS

Members of the department shall obey all lawful orders or directives, whether written or oral.

1.05.18      RULE 18 - FALSE INFORMATION

Members of the department shall not make false reports, or enter, or cause to be entered, or amend any department books, records or reports.

COMMENT: This rule shall also apply to making a false oral report.

1.05.18      RULE 30 - ABSENCE WITHOUT PERMISSION

Members of the department shall not absent themselves from duty without proper authorization.

1.05.35      RULE 35 - TRUTHFULNESS

Members are required to relate the truth, whether under oath or otherwise.

FACTUAL BACKGROUND

The Grievant, Sgt. Frank Ornelas, has a start date in the Sheriff's department of March 1, 1973 and a start date as a sergeant of February 20, 1978. He has worked in a wide range of the work units throughout the department.

On Wednesday May 11, Thursday May 12 and Friday May 13, 1988, Grievant was working the 2:30-10:30 PM shift as sergeant in charge of the Parks/Transit unit based at Washington Park. On each of those days, he was absent from duty for one hour between 7:30 and 8:30, and he was absent for an additional one-half hour on the 11th from 10:00-10:30. Grievant recorded those absences on his time sheet for the pay period ending May 14, 1988 as OU, which means overtime-used or the liquidation of accumulated compensatory time. OU is also referred to herein as o/u and CT. It is undisputed that Grievant did not ask for or receive permission from anyone as regards those absences. Rather, he claims that it was his understanding at the time that he had the authority to grant his own requests for periods of paid time off consisting of two hours or less.

The reason for the half-hour absence at end of the shift was that Grievant had a headache.

That absence does not appear to be the subject of the charges at issue here. The reason for each of the three hour-long absences that are in question here was that Grievant, as a member of the local Great Dane Club, had agreed to bring his great dane to the PAC so that the dog could perform a short (3-4 minute) segment each night in the hunt scene of a ballet company's performances of Swan Lake. It is undisputed that Grievant knew about one month in advance of the absences on the 12th and 13th that he would need to be away from work for the periods of time involved in those absences. The need for the May 11th absence arose on short notice, apparently because that was a dress rehearsal whereas the dog's other appearances were associated with previously-scheduled public performances.

In the arbitration, Management has not questioned the accuracy of Grievant's reporting as to the length of the absences involved or the propriety of Grievant's conduct during the course of the absences. Management has only cited Grievant for a failing on the three dates in question, contrary to an oral order, to obtain permission from supervision for the hour-long absences and for repeated denials that he had told his immediate supervisor, Lt. Peter Lango on May 16, 1988 that he had obtained permission for the absences from the Night Commander.

Lango testified in support of Management's position. He stated that he was put in command of units including the Parks/Transit unit on or about March 1, 1988. This was Lango's first supervisory assignment since his recent promotion to Lieutenant. Shortly after taking command, Lango states, he called the four sergeants under his command to a meeting to set the ground rules under which he would operate. During the course of that meeting, Lango states, he told the sergeants that they were to request his permission in writing for all of the off time they wanted to take except that emergency requests could be handled by a telephone call to Lango if he was on duty or by a telephone call to the Night Commander in Lango's absence. Lango states that he told the sergeants that he wanted to know at all times who he had on the street and whether he needed to alert the Night Commander of a possible need to reassign a sergeant from another unit to cover for an absent sergeant. After that meeting, Lango states, three of the four sergeants requested approval of their off time as Lango had directed, but Grievant did not request Lango's approval for periods less than eight hours in duration.

Lango testified that he had occasion to address Grievant's use of short amounts of CT time when he issued him the following "gym memo" on March 9, 1988:

**SUBJECT: USE OF MILWAUKEE COUNTY SHERIFF'S GYM**

I have reviewed with Director Estrada your use of the Milwaukee County Sheriff's Gym during working hours after our discussion the other night.

It has been decided that use of the gym during duty hours, even though compensatory time is used, is inappropriate and causes a

morale problem among your subordinates.

Therefore, use of the gym facilities by you or any other Park/Transit personnel is strictly forbidden during duty hours. Gym facilities are available for your use before and after your regularly scheduled shift hours, and on your off days.

Lango states that another Lieutenant told him that Grievant had been at the PAC while his dog performed with the ballet on Saturday, May 14, 1988. Lango then learned that the ballet had scheduled performances on two previous days, as well, so he checked Grievant's time sheet for the pay period ending May 14 and found that Grievant was showing the abovenoted amounts of OU time on each of the three days preceding May 14. (Grievant was off duty on the weekend of May 14 and 15.) Lango stated that, without checking anything else, Lango called Grievant in and asked why he had taken the time off in question without permission. Lango testified that Grievant replied that Grievant had obtained permission from the Night Commander. Lango then directed Grievant to write an incident report on the matter.

Lango states that he then checked with Lieutenants Zenz and McFarland who served as Night Commander and learned that McFarland had been the Night Commander on duty on each of those three nights and that McFarland did not know that Grievant had been absent on any of the three nights and had not given Grievant permission to be absent on any of the three occasions.

Lango wrote his own report on the matter to Director Donald E. Rieck on May 17, 1988, as follows:

Subject: Sgt. Frank Ornelas

On May 16, 1988, at 9:00 a.m., I was reviewing the payroll sheet of Sgt. Frank Ornelas when I noticed that he had utilized o/u hours on 5/11, 5/12 and 5/13. This time was used without my prior knowledge or approval.

On 5/13 Ornelas also submitted an o/t card for 1 hour. The following o/u hours were used, .5 [1.5?] hours on 5/11, 1 hour on 5/12 and one hour on 5/13. The total hours worked on 5/13 totaled 8. On at least 3 prior occasions Ornelas was ordered to get my approval for all his time off and to do so in writing. This order was given to all Sergeants working in DEU, MOU and Park/Transit.

Also on 5/16/88 I contacted Lt. Jeffrey Zens (2nd shift Night Commander) to check if he had approved the emergency use of o/u time for Ornelas. Zens indicated he was off those days and

had not approved any o/u for Ornelas. Zens stated that Lt. McFarland was working as Night Commander on 5/11, 5/12 and 5/13.

Also on 5/16, 88 I spoke with Lt. William Woger who stated he observed Ornelas at the Milwaukee Ballet on 5/14/88 where Ornelas was using his dog in the show. Woger stated the show was also presented on 5/12 and 5/13.

At about 3:00 p.m., on 5/16, I spoke with Ornelas about his use of o/u time without my prior knowledge or approval. He stated that the Night Commander had approved the o/u time.

Ornelas also stated that he "thought" my order for approval of off time was for "whole" days only and not partial days. Ornelas also stated that I was "harrassing" him. I explained to him that I just wanted to know when he was working.

I also asked Ornelas if he had taken his dog to the Convention Center for a show. Ornelas stated, "yes I did, but it's none of your business." I indicated that if it's during his work hours that I should know where he is.

On 5/13 Ornelas used 1 hour of o/u time and also requested 1 hour of overtime. I denied the overtime request and allowed the 8 hours he worked as straight time only. Ornelas stated that he would file a grievance against me for the overtime denial. Ornelas was then instructed to file a report regarding his use of o/u time on 5/11, 5/12 and 5/13.

At 4:00 p.m., on 5/16/88, I contacted and spoke with Lt. Willie McFarland in Room 310 of the Safety Building. McFarland stated that he was the Night Commander on 5/11, 5/12 and 5/13 from 4 PM to Midnight. McFarland stated that he did not approve o/u time for Ornelas on 5/11, 5/12 or 5/13 and did not authorize his absence from duty for any reason. McFarland stated he will file a report stating same.

Ornelas for the third time in the last two months has violated my order to have off time approved in writing prior to use.

Ornelas also has lied to me about having approval of the

Night Shift Commander for use of the o/u time. By not obtaining my or the Night Shift Commander's approval Ornelas was absent from duty. I also question his use of just one hour of o/u time on 5/12 and 5/13. It is practically, physically impossible to change clothes, pick up his dog, appear at the show and return to duty all in one hours time. He is either lying on his time sheet or conducting personal business on department time.

I am requesting this matter be referred to Internal Affairs for investigation.

Lango could not recall whether he had received Grievant's incident report before or after writing his May 17 report.

Grievant's incident report was not dated in the space provided for a date at the signature line, although it identified May 16 as the date of the incident in the second identifying information box near the top of the form. Grievant's report read, in pertinent part, as follows:

Monday, May 16, 1988 I was directed to write this report by Lt. Peter Lango regarding why I took 1.5 hrs of OU on Wednesday May 11, 1988, 1.0 hr of OU on Thursday May 12, and 1 hr on Friday May 13r 1988 without asking him.

I am a Sergeant in charge of unit with no minimum staffing requirement. I have in the past given deputies days and fractions of days off. I have also given myself time off.

Since March 1, 1988, Lt. Peter Lango has been the Lieutenant in Charge of the M.O.U Bureau. Lt. Lango told me verbally that he was creating a policy that made it necessary for me to ask him for every personal, holiday or compensatory day off. Since I have been having difficulty getting the Lieutenant to put things in writing his policy was vague in that he did not mention minimal time off. I would think that that would be at my discretion as it always has been.

In any event I took minimal time off on each of the three days and I notified the dispatcher. If I would have taken more significant time off I would have notified the night commander. If I would have wanted a whole day off I would have asked Lt. Lango.

Grievant testified in support of his and the Association's position. He stated that under



Lango's predecessor, he had been responsible for dealing independently not only with his subordinates' but also with at least some of his own time off requests. Grievant admitted that no supervisory officer had ever told him that he had the authority to take time off without a supervisory officer's approval but that his time sheets were routinely signed by Lango's predecessor and by other supervisory officers even though they contained time off that Grievant had taken without permission of any command staff officer. The Association submitted several of Grievant's time sheets signed by various command staff officers containing short amounts of OU time off which Grievant states he had taken off without permission from anyone other than himself. Grievant stated that he had been informed about the self-approval arrangement in effect under Lango's predecessor by another sergeant. Grievant further stated that he thought the department's governing documents specifying duties and procedures in the Transit/Parks unit made him the Lieutenant's "designee" for approving time off requests in the Lieutenant's absence as regards all of those in his unit, including himself, especially because there was no minimum staffing level established for his unit and because he was not ordinarily replaced by another sergeant when absent.

Grievant testified that Lango's statement at the sergeants meeting was that they must tell Lango if they intended to take personal days, holidays or other off days. He stated that because Lango made no reference to periods of time less than a full "day," and because Lango did not put the new policy in writing, he understood Lango to intend that the previously existing arrangements would remain in effect as regards time off requests for less than a full day. Grievant's testimony on that point in questioning by Management Counsel was as follows:

Q: . . . [so] it's your position that if you were going to take off an 8 hour block you had to tell somebody ahead of time, but if you were going to take off less time than that during your shift you could authorize it yourself at that point in time, is that correct?

A: That's right.

Q: Was there any limit on that, and by that I mean if you wanted to take off 7.5 hours on your shift was it your position that you didn't have to tell anybody?

A: No, I'd ask somebody to take off if I was going to take any significant time off, or else I'd mention it to the Night Commander or something.

Q: What's "significant" to you?

A: Half a day or more.

Q: Okay, so three hours would have been all right to authorize on your own.

A: Depending on the circumstances. I generally never took off 3 hours without notifying somebody, but an hour or two hours near the end of your shift if nothing was happening wouldn't seem like it would require me and hasn't in the past required me to let anyone know, especially the Lieutenant who worked days and I worked the second shift.

Q: Are we at 3 hours now or are we down to 2 hours on the notification.

A: Well, I'd say 2 hours.

Q: Okay, 2 hours or less is all right but anything over you felt you should have got [sic] notification.

A: Like I say, it would depend upon the circumstances. I'm not going to say that I made my own absolute rule about when I'm going to tell anybody about taking time off.

Q: You made a decision that if it was one hour or less, you weren't going to tell anybody, correct.

A: Mainly because I never did in the past.

Q: And you were going to continue that process in the future, isn't that correct?

A: Until I knew of a rule that changed that.

Regarding the May 16 conversation with Lango, Grievant denied telling Lango that he had obtained the permission of the Night Commander for the absences in question. He did acknowledge making reference to the Night Commander during the conversation, but asserted that what he had said in that regard was to ask Lango how he expected Grievant to contact Lango about off time requests since it was the Night Commander rather than Lango who was on duty during Grievant's shift.

Grievant also testified that he had told his subordinates where he would be if needed during the absences in question and that they could call him on the radio if problems arose in his absence.

Grievant admitted that he had not included a reference to that effect on his incident report or in any prior discussions of the incident, explaining that no one had ever asked him whether he had done so.

Grievant admitted that he had refused to answer Internal Affairs' questions as to what he had been doing during the absences in question on the grounds that he had taken OU time off making that Grievant's personal time and hence not a proper subject, in his view, for a departmental inquiry. When Grievant was questioned by Management Counsel at the arbitration hearing about the March 16 "gym memo," Grievant went out of his way to comment both that Lango had issued that memo after being in charge of Grievant's unit for just a few days and that Grievant considered the order inappropriate because it presumed to tell him "what I could do on my own off time." While admitting that he stopped going to the gym during his scheduled work hours, Grievant went on to state that "What I did was I just disregarded the order." Upon further questioning by Management Counsel, Grievant made it clear that while his conduct following receipt of the order could be viewed as complying with it, he preferred to consider himself as having ignored or "disregarded" it.

As noted in the introductory paragraphs of this Award, following the close of the hearing, the Grievant and Association requested a reopening of the hearing to receive additional evidence consisting of a transcript of a tape recording Grievant had made of the May 16, 1988 conversation between himself and Lango that was the subject of conflicting testimony during the course of the arbitration hearing. It is undisputed that Grievant made that recording without Lango's knowledge and did not reveal its existence to Management until after the close of the arbitration hearing.

Despite Management objections that, among other things, post-hearing submissions should be limited to newly-discovered evidence, the Arbitrator received the transcript once it was stipulated by Management (following Management's comparison of the transcript with the tape recording itself) that the transcript was accurate and the tape was authentic. The Arbitrator stated his rationale for reopening the record for receipt of the transcript as follows in a March 30, 1990 letter:

While acknowledging the validity of the County's concern that reopening for other than newly-discovered evidence could create an unwieldy arbitration hearing process, . . . I prefer . . . avoiding the possibility that my award could be vacated if I were to refuse to reopen for this potentially probative evidence in the face of the unqualified language of Agreement Sec. 5.02(2)(c). ["Any time prior to the filing of the Arbitrator's award with the Department of Labor Relations and the Association, either party may petition the Arbitrator to reopen the record for the purpose of presenting additional evidence."]. . . . [I]n balancing considerations of orderliness of hearing with completeness/accuracy of factual

record/findings, the comparative importance of the latter in this case was heightened by the fact that my findings were being awaited by the State Department of Justice as regards a possible criminal investigation.

The Arbitrator's latter reference was to a State Department of Justice request that the Arbitrator retain the tapes of the January 9, 1990 arbitration hearing in connection with a possible criminal investigation that could be undertaken at some point after the Department of Justice reviews the Arbitrator's Award in this case.

The abovenoted transcript of the May 16, 1988, conversation between Lango and Grievant is attached to this award. The underlining on that document is apparently Grievant's and is to be disregarded. The handwritten corrections on the document are Grievant's but they are appropriate to conform the transcript to the tape and are considered part of the transcript in evidence.

The record evidence also establishes that Lango and Grievant had exchanged heated words concerning the propriety of Grievant's handling of a crime scene, sometime within the 12 months preceding May of 1988. Lango, then a sergeant in the Detective Bureau, privately but loudly criticized Grievant for having pursued the perpetrator rather than keeping the witnesses at the crime scene, and Grievant loudly disagreed. The argument was ended by a Lieutenant who told both to stop arguing, which both did.

The record evidence also establishes that on April 27, 1988, Lango had reviewed with Grievant the semi-annual evaluation of Grievant that Lango had prepared. In that evaluation, Lango had given Grievant a final rating in the "below average" range. Grievant had never before been rated below average. When Grievant complained that Lango had not observed Grievant for a sufficient portion of the semi-annual rating period to be the appropriate rating supervisor, it was decided (by whom it is not clear) that a substitute evaluation should be prepared by Lango's predecessor. In that substitute evaluation, Grievant was rated in the "above average" range. The substitute evaluation document shows a "Bureau Review" date of May 16, 1988, and that it was reviewed by Grievant on May 23, 1988 and with him by the Bureau Director on May 25, 1988. The record does not indicate when, if ever, Lango learned of the results of the reevaluation.

The record evidence also establishes that on May 5, 1988, an order issued transferring Grievant from Parks/Transit to the Airport, where he would no longer be under Lango's supervision, however that order by its terms took effect on May 29, 1988.

There was testimony from two of the other sergeants who attended the sergeants meeting shortly after Lango took over in March of 1988. Sgt. David Czysz was called as a Management witness. He testified that his understanding from what Lango had said at the meeting was that the sergeants were to notify Lango of any intent to take time off regardless of the amount of time involved. On cross-examination, Czysz admitted that he may not have been present for the whole

meeting and that Lango remained his immediate supervisor at the time of the arbitration hearing.

Lt. Joseph Delaney was called as an Association witness. He had been another of the sergeants attending that meeting. He testified that during that meeting Lango covered various topics concerning how things were going to be handled during Lango's term as the Lieutenant with responsibility for the four sergeants' units. Delaney recalls that, regarding off-time, Lango told the sergeants that all requests for personal days, overtime used days and holidays were to go through Lango so he could control who was on the street at all times. Delaney understood that if a sergeant wanted OU time or personal time or a holiday he would need to communicate about it with Lango. However, Delaney testified that he thought Lango was referring only to full days off, and that he did not recall that Lango's remarks referred to all off time of any length.

On cross-examination, Delaney stated that Lango did not mention timeoff in less than full day increments one way or the other. Nevertheless, Delaney admitted that he would have notified Lango or his clerk of his intentions before taking off any amount of time off during his shift, based on the nature of his particular assignments and on his prior experiences in other work units when he had failed to do so. However, he again asserted that in his opinion Lango had not established any standard or expectation to that effect as regards periods of less than a full day during his meeting with the sergeants. Delaney admitted that he knows of no other division of the Sheriff's department where a sergeant can authorize his own time off without communicating that fact to the supervisor. Delaney further stated that, while every supervisor has a different style of management, and while there is no departmental requirement that all policy directives affecting subordinates be put into writing, as a Lieutenant he has a written policy in place requiring the sergeants working for him to get his approval before taking any time off during their scheduled hours. He stated that he considers putting such policies in writing for his subordinates important as a means of avoiding misunderstandings.

The Internal Affairs investigation in this case got underway when Director Rieck approved Lango's March 17 request to that effect the following day. That investigation dealt not only with this complaint but with others filed by Grievant and by Lango against one another.

Following an Internal Affairs investigation, a Complaint Review Board was convened regarding the instant case on March 13, 1989. It deliberated regarding Internal Affairs' Findings of Fact relative to sustained charges of department Rules/Regulations violations. The Review Board ultimately sustained Internal Affairs' findings that Grievant had violated the rules listed under PERTINENT PORTIONS OF THE NOTICE OF SUSPENSION, above, and recommended a suspension of 5 days, which the Sheriff ultimately adopted. The Review Board's stated rationale reads, in pertinent part, as follows:

The conduct identified in [additional charges concerning attention to duty, insubordination and reporting to duty] is covered more appropriately in the rules violations which have been sustained.

The following narrative includes some of the reasoning behind the Review Board's decision:

Contrary to Sgt. Ornelas' stated opinion, he does not have the authority to leave work prior to the completion of his shift without supervisory approval. In this particular case, that fact was reinforced by verbal orders from his unit commander, Lt. Peter Lango. On several previous occasions, Lt. Lango addressed the issue of time off with his subordinates in general, and with Sgt. Ornelas in particular.

An important supporting document is the memo dated March 9th, 1988 which addresses gym use. Lt. Lango stated he spoke with Sgt. Ornelas prior to drafting this memo. The crux of the conversation was the practice of using CT in the middle of a duty shift. Lt. Lango states he informed Sgt. Ornelas that this practice was having a negative effect on the troops. He advised Sgt. Ornelas to end that practice.

When asked if he had ever been spoken to concerning the time off in the middle of a shift, Sgt. Ornelas initially denied any such conversations. However after being prompted, Sgt. Ornelas did recall such a conversation in the context of the gym. He continued to deny that the broader issue of partial time off was discussed.

It is the opinion of the Review Board that Sgt. Ornelas was advised to discontinue the practice of using CT in the middle of a shift.

Therefore, Sgt. Ornelas was not properly relieved, making him absent without permission. This is the result of his disobedience to previously established verbal orders.

Sgt. Ornelas denied having told Lt. Lango he had obtained the approval of the Night Commander on the days he utilized CT in the middle of his shift. However, the facts presented before the Review Board indicate otherwise.

Lt. Lango stated quite firmly that Sgt. Ornelas initially informed him that the Night Commander had approved his time off. This is supported by the fact that he immediately attempted to verify that information with the Night Commander. A report was filed by Lt.

McFarland on Monday, May 16, 1988. Lt. McFarland states he was unaware that Sgt. Ornelas had taken any time off from duty. Lt. McFarland was the only Lieutenant working during the time in question.

It is the opinion of the Review Board that Sgt. Ornelas did state to Lt. Lango that the Night Commander had approved his time off.

Sgt. Ornelas therefore made a false oral report to Lt. Lango. He has since been untruthful about that incident.

Captain Richard Cox, who chaired the Review Board in Grievant's case, testified that the Review Board based its penalty recommendation on the seriousness of the offenses and on the fact that Grievant had previously been suspended for a similar or related offense. Specifically, Cox stated, Grievant was suspended previously for leaving the jail before the relieving sergeant had reported for work. The Review Board in that case had recommended a written reprimand, but the Sheriff imposed a 2-day suspension, and re-imposed that penalty when an arbitrator remanded the case on account of the Sheriff's failure to explain why he had imposed a different penalty than the Review Board had imposed.

Finally, Capt. Cox testified that he followed a practice of putting his policy directives affecting his subordinates in writing.

#### POSITION OF MANAGEMENT

At the arbitration hearing, Management argued as follows in support of its general contention that the evidence supports the charges and the discipline imposed in all respects.

Grievant was absent from duty without permission. Grievant did not consider Lt. Lango's oral directive to get approval for off time to be necessary or appropriate, so he deliberately disregarded it except for full day increments. Sgt. Czysz unequivocally corroborated Lango's assertion that Lango's oral directive at the meeting of sergeants conveyed the message that he wanted them to get permission from him before taking any days off, without mentioning any threshold amount. That was a clear enough directive to cover all time off increments including those of less than a full day. Grievant's contention to the contrary is not credible on its face and in light of questions about his credibility that arise from the fact that he never before asserted as he has here that he told his subordinates where he could be reached while he was gone during the absences in question. Moreover, the Association's corroborating witness, Lt. Delaney equivocated regarding what had been said at the sergeants' meeting.

This was not an isolated situation that came up at the last minute. Rather it was multiple instances of which Grievant had lead time in which to obtain permission. As shown by the gym

memo in March, this was not the first time Lango had communicated with Grievant about taking compensatory time off during his shift.

When Lango questioned Grievant about the incidents, Grievant asserted that he had obtained permission from the Night Commander. Grievant's credibility is doubtful for reasons noted above. In any event, it is undisputed that Lango checked with the Night Commanders, and that they replied that they had not given Grievant permission and had not known he was away from duty during the periods of time in question. Lango would have had no reason to do so had Grievant not claimed to have obtained Night Commander permission.

The Internal Affairs investigation was handled as promptly as possible given the overburdened workload situation there. Indeed, Grievant made the investigation more difficult and time consuming by filing multiple related complaints.

Grievant has demonstrated a pattern of conduct in which he has failed to recognize that he is subordinate to his superiors and obligated to follow their directives and policies even if he considers it inappropriate or inconvenient for him to do so. Grievant had previously received and served a 2-day suspension for having improperly relieved himself of duty before he was supposed to have done so. This incident therefore represented a repetition of that misconduct, aggravated by Grievant's untruthfulness, and made particularly troublesome by the fact that Grievant is a sergeant with long service. The 5-day suspension was appropriately a heavier penalty than he had previously received, which is consistent with principles of progressive discipline, and that penalty was warranted in the circumstances. The Review Board considered the evidence carefully and impartially, and the Arbitrator ought not overturn their decision and recommended penalty lightly.

In registering its objections to reopening the hearing for consideration of the transcript of the May 16, 1988 conversation, Management also pointed out that Grievant had recorded the conversation without Lango's knowledge and that Grievant had not revealed the existence of the recording to Management until well after the close of the arbitration hearing.

#### POSITION OF THE ASSOCIATION AND GRIEVANT

At the hearing, the Association and Grievant presented the following arguments.

What we have here is the result of a personality clash that got out of hand. Grievant was and is a long-service sergeant. At the time this situation arose, Lango was a newly-promoted Lieutenant. The two of them had a history of interpersonal conflict. Because Lango and Grievant worked different shifts, Lango was generally not on duty when Grievant was performing his duties. According to governing Department documents, sergeants' duties include, among others, the following duties under the Lieutenant's direction: developing and maintaining work schedules to insure that adequate staffing levels are maintained, assigning personnel to appropriate areas to insure proper distribution of available manpower, supervising and directing all personnel assigned



to the Transit/Parks Security Units; reviewing and approving all overtime requests and overtime cards submitted and inspecting for accuracy and completeness all time distribution sheets forwarded by deputies in Transit/Parks Security units.

Under Lango's predecessor, Grievant exercised a great deal of discretion and authority. That had included Grievant approving his own taking of paid time off during what were otherwise his regular working hours. Lango admitted that did not know and did not ask what the old practices had been before he met with the sergeants and directed that they obtain Lango's permission for "days off." The testimony of those present at that meeting shows that by using the term "day" and by not making any specific reference to increments of less than a day, Lango caused some of those present (Grievant included) to understand his order to apply only to situations in which they took full-day increments. Relying on that reasonable interpretation of what Lango had said, Grievant began obtaining Lango's written permission for full-day increments and continued to authorize his own paid time off for minimal increments such as those in question here. Indeed, the payroll records in evidence indicate that Lango's predecessor, Lango and other supervisors had approved time sheets showing similar periods of OU that Grievant had taken off on his own authority.

Nevertheless, another Lieutenant mentioned to Lango that he had seen Grievant at the PAC on May 16, and Lango reviewed the payroll for the pay period ending May 14, 1988. In doing so, Lango jumped to the conclusion that Grievant had defied what Lango thought (incorrectly) had been a clearly communicated requirement that the sergeants get Lango's permission for any and all such time off, regardless of its length. Apparently angered by what he thought was Grievant deliberate disregard of his order, and perhaps because he and Grievant had previously clashed on other matters, Lango overreacted. In the process he misunderstood Grievant to say that he had obtained the Night Commander's permission for the absences in question. What Grievant in fact had said was that he would have gotten the Night Commander's permission if the absences had involved longer periods of time, just as Grievant had asserted in his incident report in the matter. It would have been foolish for Grievant to try to falsely claim that he had permission from the Night Commander, since that is a fact that Lango could be expected to easily verify. Even more significantly, Grievant's contemporaneous incident report written at Lango's direction makes no claim of permission from the Night Commander and is consistent with Grievant version of the events in question in all respects. Lango's propensity to jump to conclusions about what the facts were is also reflected in his erroneous assumption that Grievant had changed clothes before and after travelling to the PAC on the dates in question.

For those reasons, there are no grounds to substantiate the imposition of discipline for any of the charges stated. If the Arbitrator concludes otherwise, the amount discipline imposed was not warranted in the circumstances for several reasons.

Grievant is a 17-year employe with a record of community service and commendations for his work, and with only one prior disciplinary action. He did nothing that he knew was wrong

and there is no indication that he consciously considers himself to be above or independent of command staff. He was acting pursuant to what he believed was his authority under departmental documents setting forth his duties. He made no attempt to hide anything that he did, except that he was unwilling to answer questions about what he did on his off time. The department has no rule requiring department personnel to tell their commanding officers what they are doing when they are not on duty. The facts reveal that there were misunderstandings and a clash of personalities. Grievant should not be made the fall guy for errors in judgment on the part of Lango. Grievant should not be punished for failing to understand what his newly-promoted Lieutenant intended but did not clearly state or put in writing. Rather, the benefit of the doubt should go to the subordinate who thought he was following orders as they had been given him. Finally, it should be noted that the initial disciplinary incident in Grievant's long years of service had been one in which it had been recommended that he receive a written reprimand only for that first offense, but that the Sheriff ultimately chose instead to impose the 2-day suspension penalty. For those reasons, a 5-day suspension is excessive in the circumstances.

## DISCUSSION

The charges focus on two basic elements of alleged wrongdoing on Grievant's part: his failure, contrary to Lango's oral order, to obtain a superior officer's permission to be absent during his scheduled working hours on the three dates in question, and his repeated denials that he told Lt. Lango on May 16, 1988, that he had obtained such permission from the Night Commander.

### Charges of Untruthfulness and False Statements

Taking the second of those areas first, the evidence--both as presented at the arbitration hearing, and then considering the May 16, 1988 conversation transcript as well--does not support Management's contention that Grievant told Lt. Lango that he had obtained the Night Commander's permission to be absent on the dates in question.

The fact that Lango immediately proceeded to check with the Night Commanders shows at most that Lango had understood Grievant to say that he had the Night Commander's permission. If Lango had misunderstood Grievant in that regard, however, the charges of untruthfulness and false statements would be groundless.

The contents of Grievant's incident report generally and the fact that Grievant did not claim therein to have had Night Commander approval in particular are strong indications that Grievant had not in fact claimed to have had the Night Commander's permission. The fact that Lango was uncertain whether he had even waited to receive and read Grievant's incident report before sending his May 17 memo further increases the likelihood that Lango was proceeding on an honestly-held but mistaken belief that Grievant had claimed to have obtained Night Commander permission.

By Grievant's account as well as Lango's, Grievant had referred to the concept of seeking the Night Commander's approval, making it more likely that Lango could have misunderstood him in that regard. In addition, Lango showed himself to be imprecise regarding other facts associated with the incident, jumping to the conclusion that Grievant was not wearing his uniform when he was at the PAC without having asked Grievant about that, and jumping to the further conclusion that Grievant must therefore have been providing a lower than accurate length of time for his absences on each of the three occasions.

For those reasons, if only on the evidence presented during the January 9 arbitration hearing were considered, the Arbitrator would not find that Management has sustained its burden of proving that Grievant told Lango that he had had the Night Commander's permission.

The transcript evidence firmly supports the same conclusion. At pages 2-3, Grievant asks why he should have to put in a slip and generate paperwork since Lango admits he would not have denied the absences in question. Lango stresses his need to know where his people are. Grievant responds "I think that if I ask you for one hour every time -- you're not responsible anyway. It's the night commander that's responsible." Grievant's reference to the night commander did not constitute an assertion that he had communicated with the Night Commander in any of the three absence situations in question. On the contrary, Grievant had claimed earlier in the conversation (page 1) that he didn't know Lango wanted the sergeants to get approval for every hour.

Later at pages 6-7, Grievant, speaking hypothetically and without reference to the three absences in question, asks whether Lango means that Grievant must track him down or page him to get permission for "an hour here and hour there." Lango replies in the affirmative drawing a parallel between Grievant's situation and Lango's own obligation to get his superior's permission before leaving during his scheduled work hours. Grievant counters by pointing out that, unlike Lango's situation with his immediate supervisor, Lango is not on duty when Grievant is. In that context, Grievant stated, "See, there's a night commander here at that time, you know, and I'd tell the night commander, well, I'd be taking off an hour tonight or something like that." Lango disagreed with the approach Grievant was suggesting and reiterated that Grievant was to get Lango's permission and not the Night Commander's. While the words Grievant used in this instance could easily have been misunderstood, the Arbitrator is satisfied that Grievant was not claiming to have in fact contacted the Night Commander in the three instances in question. Grievant, rather, was talking about what he would prefer to do if permission from a superior officer was in fact going to be required of him for the hypothetical "an hour here, and an hour there" kind of situation.

It should be emphasized that the foregoing conclusion is not based on a finding by the Arbitrator that Lango was not telling the truth as he recalled it during his arbitration hearing testimony. On the contrary, the Arbitrator believes Lango was testifying to the facts as he honestly believed them to be. In other words, it appears clear to the Arbitrator from the record herein that Lango mistakenly understood Grievant from the very beginning to have claimed that he

obtained permission for the absences from the Night Commander. That, in turn, would have prompted him to check with the Night Commanders and to have written the related portions of his May 17 memo to Director Reick. Lango's testimony on the point at the arbitration hearing was similarly based on his honest but mistaken impression about what Grievant had said to him regarding the Night Commander.

The Arbitrator would also emphasize that because Grievant knew the May 16 conversation was being recorded and Lango did not, the benefit of any doubt about what was meant in this conversation must go to Lango. This seems especially important where, as here, Grievant has kept the tape's existence from Management's knowledge throughout an investigation, Review Board proceeding and arbitration hearing on the subject. While the Arbitrator felt compelled to receive the additional evidence for the reasons noted earlier, the Arbitrator does not, by receiving this evidence, wish to be understood as condoning surreptitious recording of workplace conversations or failures to promptly reveal pertinent evidence during the course of an investigation.

Nevertheless, even when taken in the light most favorable to Lango, the transcript evidence supports the conclusions reached above. Accordingly, the evidence does not support Management's charges that Grievant made false or untruthful statements when he denied telling Lango on May 16 that he had the Night Commander's permission for those absences.

#### Charges of Absence without Permission, Absence Without Being Properly Relieved, and Disobeying Orders

At the arbitration hearing, Management's arguments and proof on these elements focused on the sergeants' meeting as the point in time at which Lango directed Grievant and the other sergeants to get a superior officer's permission for any and all time off that they intended to take during their regular schedule of hours. There was no proof regarding the other instances in which Lango was supposed to have discussed his expectations regarding off-time procedures, unlike the information that was apparently put before the Review Board in that regard. The "gym memo" on its face relates only to use of CT time during part of a shift for gym use purposes, not to taking paid time off for part of a shift generally.

It is undisputed that Grievant's absences on the three dates in question were without the permission of anyone but himself. The governing documents to which Grievant has referred do not persuasively establish that a sergeant has the right to approve his own time requests. Neither does the fact that Grievant had been told by another sergeant when he came to the Parks/Transit unit that such was the practice. On the other hand, the fact that for a substantial period of time Grievant had been permitted by Lango's predecessor to approve his own time off for absences of the sort involved herein, places the burden on Management to show that Lango put Grievant on notice that he could no longer rely on Lango's predecessor's approach in that regard.

The Arbitrator is satisfied that Management has met that burden herein. Based on Grievant's testimony concerning the sergeant's meeting,, Lango told his sergeants that they were to get his permission in writing as regards their use of personal days, holidays and OU days, but Lango made no reference one way or the other to periods of time less than a full day. That oral order, which Grievant admits hearing, gave Grievant reason to know that Lango was changing the time off procedures that had previously been in effect. Lango did not limit his order to "full" days, and the language Grievant asserts that Lango used could mean full days or parts of days. For that reason alone, Grievant should have asked during the meeting whether Lango meant full days or less than full day increments, before assuming that Lango's change was limited exclusively to "full day" situations.

Moreover, Lango's stated purpose for the order, as both Lango and Delaney recalled it, was that Lango wanted to know whom he had on the street so that he could he could make any manpower adjustments that needed to be made. Grievant's (and Delaney's) interpretation of what Lango's words meant is inconsistent with Lango's stated purpose for the order since it would deprive Lango of knowledge of sergeants' absences of less than a full day increment and hence prevent Lango from making informed decisions about manpower adjustments that might be needed in light of those absences. Therefore, Grievant's (and Delaney's) interpretation of Lango's order was not a reasonable one in the circumstances.

Of course, Management would not be justified in disciplining an employee simply because he has made a mistake in a good faith attempt to interpret what his supervisor meant by a particular order. In the instant circumstances, however, the Arbitrator is persuaded that Grievant reached his "full" day interpretation in a willful attempt to avoid having to comply with an arrangement he considered inappropriate. The record makes it quite clear that Grievant considered it inappropriate for supervision to require him to obtain permission before taking periods of paid time off of less than 2 hours.

Grievant was also adamant in his testimony that what he did when he took OU off was none of the Department's business. The Arbitrator does not agree with Grievant in that regard. Management has various regulations concerning off-duty conduct that it can legitimately inquire about. Management also has the right to compare what Grievant claims to have done during the time involved against what Grievant has written on his time sheet as a means of determining the accuracy of Grievant's time reporting. These are only two of what may be several areas of legitimate Management inquiry concerning what an employee does on his time off.

Grievant also showed his general propensity to defy Lango's orders in his arbitration hearing testimony indicating that he preferred to think of himself as "disregarding" rather than complying with the "gym memo" and in his testimony indicating that he resented the "gym memo" in part because Lango had issued it after being in charge of Grievant's unit for only a few days.

Finally, the transcript of the May 16 conversation, at various points, confirms: that the

stated purpose of the Lango's order was as Delaney and Lango had described it in their arbitration hearing testimony, to wit, so that Lango could know whom he had on the street at all times (e.g., page 2); that Grievant considered that purpose and Lango's order to be unnecessary and impractical (e.g., page 2) and considered Lango's imposition of that requirement to be "harrassment" (page 7); that Grievant did not like the way Lango was running things generally (e.g., page 3); and that Grievant was eager to pounce on the ambiguity of Lango's use of the term "days" to avoid what Lango had clearly stated was Lango's purpose in making the order (page 6).

For those reasons, the Arbitrator concludes that the evidence, especially including the transcript of the May 16 conversation, supports the charges that Grievant failed to obey a Lango's verbal order concerning time off procedures as stated at the sergeant's meeting and that he was absent without permission (i.e., without proper authorization) on the days in question.

Whether the rule regarding a sergeant needing to be properly relieved of duty fits the Grievant's misconduct involved here is not entirely clear. On the one hand, Grievant's failure to obtain Lango's permission for the absences involved prevented Lango from determining whether there was a need for Grievant to be relieved by someone else in the circumstances. On the other hand, there is no evidence indicating that Lango would have been relieved had he sought and obtained Lango's permission as regards the absences involved. Since the Arbitrator's answers to the STIPULATED ISSUES, above, are not affected by which of those arguable views were to be adopted herein, the Arbitrator will merely conclude that the other two rules (disobeying an order and absent without permission) adequately identify the nature of the Grievant's misconduct involved herein.

In sum, then, with regard to STIPULATED ISSUE 1, the record evidence does not support Management's charges that Grievant made false or untruthful statements when he denied telling Lango on May 16 that he had the Night Commander's permission for the absences in question. However, the record evidence does support Management's charges that Grievant was absent without permission and that Grievant disobeyed Lango's order concerning procedures to be followed by sergeants as regards taking time off for personal leave, holidays and overtime used situations.

Management imposed a 5-day penalty on the basis of the seriousness of the charges and the fact that Grievant had been previously suspended for an incident in which he had left work on his own authority before he was properly relieved. Because the Arbitrator has found no basis in the evidence to support the untruthfulness and false statement charges, it follows that a proportion of the penalty should be reduced. The Arbitrator also finds it appropriate to take into account a degree of fault on Lango's part for giving the time off procedure order giving rise to this case orally rather than in writing. While a written order is not required by department policies and procedures, it should be obvious, as Captain Cox and Lt. Delaney testified at the arbitration hearing, that putting policies of this kind in writing is a highly useful and desirable management

technique. It is not the equivalent of treating subordinates as if they were children, as Lango appears to have believed. Putting policies in writing would, of course, reduce the potential for disputes of this kind to develop.

Considering all of the circumstances, and giving due regard to the fact that Grievant had previously served a 2-day suspension for inappropriately leaving work on his own authority--such that he should have been (but clearly was not in this instance being) extra-cautious thereafter about avoiding conduct of that kind--the Arbitrator finds that reducing the instant suspension to a 3-day suspension is the appropriate remedy.

### DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the STIPULATED ISSUES noted above that:

1. There are grounds to substantiate the imposition of discipline for some but not all of the charges stated, as more specifically noted under DISCUSSION, above.

2. A 5-day suspension was not warranted in the circumstances, but a 3-day suspension would have been.

3. By way of remedy, Management shall make Grievant whole for the loss of pay he suffered as regards the last two of the five days of suspension he served in this matter and shall revise Grievant's record to reflect that he received a 3-day rather than a 5-day suspension in this matter.

Dated at Shorewood, Wisconsin this 27th day of May, 1990.

By Marshall L. Gratz /s/  
Marshall L. Gratz, Arbitrator