

<p style="text-align: center;">DAVID A. CONCEPCION Arbitrator</p>	<p>Arbitrator's Case No. 06-03-87 CCPOA Case No. LR-5643-85 DPA Arbitration No. 85-06-85</p>
<p style="text-align: center;">'87 SEP 10 A11 :28 IN ARBITRATION PROCEEDINGS PURSUANT TO AGREEMENT BETWEEN THE PARTIES</p>	
<p style="text-align: center;">In the Matter of a Controversy between CALIFORNIA CORRECTIONAL PEACEOFFICERS ASSOCIATION, and STATE OF CALIFORNIA, DEPARTMENT OF CORRECTION Involving the termination of Anderson, Grievant, for job</p>	<p style="text-align: center;">ARBITRATOR'S OPINION AND AWARD Del abandonment.</p>

This Arbitration arises pursuant to Agreement between CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, hereinafter referred to as "Association," and STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS, hereinafter referred to as "Department," under which DAVID A. CONCEPCION was selected to serve as Arbitrator, and under which his Award would be final and binding upon the parties.

Hearing was held in Sacramento, California on June 3, 1987 at which time the parties were afforded the opportunity, of which they availed themselves, for examination and cross-examination of witnesses, for introduction of relevant exhibits, and for argument. Further, the parties agreed to submission of post-hearing briefs which were received in a timely manner.

APPEARANCES:

On behalf of the Association:

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CONTRACT PROVISIONS

Article XVI - Miscellaneous

106. AWOL TERMINATION

Appeals of AWOL terminations for Bargaining Unit 6 employees

will be subject to the grievance procedure starting at the second step. Should the appeal be brought to arbitration, the arbitrator's decision on whether or not the employee was AWOL or whether or not there were extenuating circumstances for the employee's being AWOL is final and binding. Whenever the arbitrator find's that the automatic resignation from State service by an employee under Section 19996.2 is inequitable or unjustified, the Arbitrator may order reinstatement of the employee to State service. This decision is also final and binding. Further, the arbitrator may recommend to the Department of Personnel Administration that an employee so reinstated shall be paid salary and benefits for the period of his/her absence or separation or for any portion thereof that the arbitrator deems appropriate The Department of Personnel Administration's decision regarding back salary and benefits is appealable through the judicial system. All applicable provisions of Government Code Section 19996.2 which are not superseded by this section will apply.

CALIFORNIA GOVERNMENT CODE

19996.2 Absence without leave as automatic resignation; notice; reinstatement; conflict of section with memorandum of understanding

(a) Absence without leave, whether voluntary or involuntary for five consecutive working days in an automatic resignation from state service, as of the last date on which the employee worked.

A permanent or probationary employee may within 90 days of the effective date of such separation, file a written request with the department for reinstatement; provided, that if the appointing power has notified the employee of his or her automatic resignation, any request for reinstatement must be made in writing

and filed within 15 days of the service of notice of separation. Service of notice shall be made as provided in Section 18575 and is complete on mailing. Reinstatement may be granted only if the employee makes a satisfactory explanation to the department as to the cause of his or her absence and his or her failure to obtain leave therefor and the department finds that he or she is ready, able, and willing to resume the discharge the duties of his or her position or, if not, that he or she has obtained the consent of his or her appointing power to a leave of absence to commence upon reinstatement.

An employee so instated shall not be paid salary for the period of his or her absence or separation or for any portion thereof.

(b)If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

ISSUE

Did the Department have a reasonable belief that the Grievant, Del Anderson, was Absent Without Leave for five consecutive workdays through May 3, 1985?

If so, does the Grievant, Del Anderson, have a satisfactory explanation as to the cause of his absence?

If so, is the Grievant, Del Anderson, ready, willing and able to resume the discharge of his duties, or if not, has he obtained the consent of his appointing power to a leave of absence to commence upon reinstatement?

If so, what is the amount of back pay, if any, that the Arbitrator should recommend?

BACKGROUND

The Grievant was hired by the Department on February 11, 1983 as a Correctional Officer and assigned to San Quentin Prison.

On July 13, 1984, while on duty, the Grievant fell and sustained injury to his head, neck, shoulder, left side and left wrist. The Grievant received initial treatment at Neumiller Hospital, located on the Prison grounds. The Grievant was referred to Marin General Hospital for further treatment. However, before the Grievant's departure to Marin General Hospital he was told by the Watch Commander that he was on "Will Call" status. The latter status is one in which the employee is expected to inform the Prison when he or she knows his or her return to work date. Accordingly, an Employee Absence Request form was completed for the Grievant which indicated that the Grievant was on "Will Call" status. The latter form was placed in the

Grievant's personnel file. The Grievant was treated at Marin General Hospital and then released.

In December 1984 the Personnel Lieutenant, Lieutenant Hall, who was responsible for the tracking and movement of correction officers at the Prison, sought to determine the Grievant's status at that time. Lieutenant Hall went to the Personnel Section of the Business Office where he learned that the office staff were holding several pay checks not picked up by the Grievant and that the staff had not been able to make contact with the Grievant. Lieutenant Hall also checked the Grievant's personnel file where he noted the Employee Absence Request regarding the accident of July 13, 1984 as well as various other papers pertaining to that accident. In particular, Lieutenant Hall reviewed the Doctor's First Report of Occupational Injury and illness in which the Doctor estimated that the Grievant would be able to return to his usual work on July 21, 1984.

Lieutenant Hall attempted to contact the Grievant by telephone over the next several months. On Three occasions Lieutenant Hall talked with a female; however, at no time would she disclose her name even though she was requested to do so. Nevertheless, Lieutenant Hall, after identifying himself, left the message that it was imperative that the Grievant immediately contact Him. All that Lieutenant Hall learned was that the Grievant was in the eastern United States serving in the military. Given the latter information, Lieutenant Hall checked with the Personnel Section and he learned that there was no record of the Grievant being on military leave. Consequently, on or about April 8, 1985 Lieutenant Hall sought to contact the Grievant by mail but the letter was returned for lack of a proper address. Lieutenant hall continued to attempt to contact the Grievant by telephone, then, beginning on April 29, 1985, Lieutenant Hall telephoned the Grievant's residence on five consecutive days. The log of the latter telephone calls is as follows:

April 29, 1985; 6:10 A.M.:

An unidentified female answered. She claimed that she didn't know where Officer Anderson was and had not heard from him in over one month. I advised the individual that this was the first of five attempts to contact Officer Anderson.

April 30, 1985; 6:50 A.M.:

An unidentified female answered and merely stated that Officer Anderson was not there. She was advised that this was the second of five attempts.

May 1, 1985; 7:10 A.M.

No answer.

May 2, 1985; 8:40 A.M.

No answer.

May 3, 1985,; 9:05 A.M. :

An unidentified female answered and stated that Officer Anderson was not at home.

On May 6, 1985 Lieutenant Hall wrote to Lieutenant C.R. White, the Employee Relations Officer explaining the situation and requesting action be taken regarding the matter. The text of the latter letter is as follows:

"This is to advise you that Correctional Officer D.J. Anderson has been absent from his duties since July, 1984. Officer Anderson left work in July due to what he claimed was a job related injury. (See attachment #1). To date no compensation claim has been filed by officer Anderson, nor has he made any attempt to maintain contact with San Quentin. Approximately three months ago I began making telephone calls to inquire as to the status of Officer Anderson. Using the only telephone number provided I contacted an unidentified female. This individual first stated that Anderson was on active military duty "back East". During subsequent telephone calls to the listed number I was advised on at least two occasions that Anderson had left earlier that day and no one seemed to know when he would be returning. After approximately ten (10) separate attempts over a period of three months to make contact I knew little more than what I had previously known as to the whereabouts of the Officer.

On April 8, 1985 a registered letter was sent express mail to Officer Anderson at his address of record. (See attachment #2). The latter was returned as undeliverable. Commencing April 29, 1985 I began making daily telephone calls to the telephone number provided by Anderson. I placed these calls for five (5) consecutive days and advised an unidentified female that the result of each attempt to contact the officer would be documented and may be used as grounds for administrative action. (See attachment #3). At no time was I able to reach Officer Anderson.

On May 6, 1985 I received a telephone call from a female identifying herself as Anderson's mother. this person advised me that Officer Anderson has been on military

duty at Fort Gordon, Georgia. The caller went on to state that the Officer will be completing his military duty status and is expected to be in California Friday, May 10, 1985. Based on the information provided during my initial attempts to contact the employee, approximately three months ago, I can only deduce that Officer Anderson has been on short term military leave since that time.

Upon review of the supervisory and personnel files of Officer Anderson I find that there has been no request for military leave submitted. S.P.B. Rule 19771, Chapter 11, Article 2 states in party that the employee must submit a copy of military orders for approval of the appointing power when anticipating leave of absence for active military duty.

It is evident that Officer Anderson has vacated his responsibility and obligation to the Department of Correction while pursuing his military career. Officer Anderson has further misled the Department into believing that this extended absence was a direct result of job related injuries. If officer Anderson has been on military duty without specific approval, this would constitute absence without authorization and is to be considered resignation without fault. Under the circumstances I must request that you process this action."

A Notice of Absence Without Leave (AWOL) regarding the Grievant was prepared on May 6, 1985 and it was signed by the Warden on May 8, 1985. On May 13, 1985, after nothing further had been heard from or about the Grievant, the AWOL Notice was mailed. The Grievant acknowledged receipt of the AWOL Notice on May 16, 1985. The text of the AWOL Notice was as follows:

"YOU ARE HEREBY NOTIFIED that under the provisions of Government Code Section 19996.2 you have been separated from your position of Correctional Officer for being absent without leave (AWOL) for five (5) consecutive working days from April 29, 1985, through May 3, 1985. Your separation is effective April 29, 1985.

YOU ARE FURTHER NOTIFIED that within ten (10) working days of the service of this notice of separation, you may grieve this action in accordance with the Unit 6 Memorandum of Understanding. Should you fail to grieve this matter within the time specified, your separation will be final."

The Grievant, in response to the AWOL Notice contacted the Employee Relation Office where he talked with a secretary and he contacted Correctional Officer D.W. Fredericks who was President of the Association. Association President Fredericks, according to the Grievant, advised the Grievant that the Grievant had to respond within ten days. The Grievant did respond and a hearing was set for May 24, 1985. The outcome of the hearing was expressed in a letter from the Warden to the Grievant dated the date of the hearing but not mailed until June 11, 1985.

The text of the letter was as follows:

"Per your request on this date, an appeal hearing was held regarding your separation from the position of Correctional officer, for being absent without leave (AWOL) for five consecutive work days from April 29, 1985, through May 3, 1985.

Those present were Correctional Officer D.J. Anderson, CCPOA Representative Correctional Officer D.W. Fredericks, C.R. White ERO and Dan Vasquez, Warden..

I have decided after careful consideration to sustain your termination. You have introduced no new substantiation which would have modified the action against you."

The Grievant challenged the Warden's decision and the matter proceeded to the Arbitration.

POSITION OF DEPARTMENT

The Department did have a reasonable belief that the Grievant was Absent Without Leave for five consecutive workdays through May 3, 1985. The Grievant maintained no contact with the Prison during his ten months absence. The Grievant failed to turn in any absence forms despite the training to do so. The Grievant never provided a return to work date to his employer pursuant to the "Will Call" requirement that he do so. The Grievant never responded to the numerous telephone messages left at his residence over a six month period. Moreover, when Lieutenant Hall initially called the Grievant's residence and left a message he was told that the Grievant was back East in the military. There were no military orders on file and the Grievant had no permission for military leave. Further, on the second call to the Grievant's residence, Lieutenant Hall was told he had just missed the Grievant. The Grievant made no attempt, while at his residence, to respond to Lieutenant Hall's initial message. Finally, Lieutenant Hall, on May 6, 1985 was told, by the Grievant's mother, that the Grievant would return from military duty on May 10, 1985, yet, the Grievant never responded on or after that date until he received written notice of his separation on May 16, 1983. ,thus, for the reasons stated, the Department had sound basis for its belief that the Grievant had abandoned his job.

The Grievant does not have a satisfactory explanation as to the cause of his absence. The Grievant's explanation has included inconsistent statements as well as contradiction of facts; and, his explanation, in and of itself, is unsatisfactory.

POSITION OF ASSOCIATION

The Department did not have a reasonable belief that the Grievant was Absent Without Leave for five consecutive workdays through May 3, 1985. The Grievant made personal trips to the Prison several times in 1984. The Grievant sought to return to work in September 1984 and, in addition, the Grievant in response to telephone messages, went to the prison, in October 1984 as well as December 1984. The Grievant was on duty with the Army from October 3, 1984 to March 23, 1985. The Department knew the Grievant was in the military. The Department did not have cause to believe the Grievant had abandoned his ~job and its efforts to contact the Grievant to establish the facts was insufficient. After the April 8, 1985 letter was returned, Lieutenant Hall made no effort to ascertain the Grievant's correct mailing address although he called the Grievant's residence every day from April 29, 1985 through May 3, 1985.

The Grievant did have a satisfactory explanation as to the cause of his absence. The Grievant attended a military school based on the good fait belief that he could do so while on industrial disability leave.

Thus, for the reasons stated, the Grievant's automatic separation from State service was improper and it should be set aside. Further, the Grievant should be reinstated to his former position with back pay and benefits.

DISCUSSION

The Grievant testified that at the beginning of being off work he called in to the Watch Sergeant several times until the Watch Sergeant told him that he didn't have to call in anymore because he was on "Will Call" status. The Grievant's assertion that he called the Watch Sergeant is uncorroborated and it is unclear why he would call the Watch Sergeant after he was told by the Watch Commander, on the day of the accident before being taken to Marin General Hospital, that he was on "Will Call" status. The latter is particularly true in light of the Grievant's testimony that he understood his obligation while in "Will Call" status. In any event, there is no claim by the Grievant that he understood the alleged instruction from the Watch Sergeant, that he did not have to call in anymore, as granting relief from his obligation to inform appropriate authorities at the Prison when he was given a return to work date. The Grievant noted that in addition to the telephone calls he also made several trips to the Prison to pick up and sign for his pay checks.

The Grievant testified that he came under the care of a private physician, a Dr. Orr, in July 1984. According to the Grievant, Dr. Orr diagnosed the Grievant's condition as ... more muscles and inflamed muscles and hot spots."Dr. Orr's course of care involved the prescription of certain medicines and referral to a therapist. The therapist gave the Grievant a regime of specific exercises to follow regularly with the proviso that he should stop any exercise which caused him pain. The foregoing noted, the Grievant testified that on September 24, 1984 he returned to Dr. Orr and pleaded with Dr. Orr to let him try to return to work. Supposedly Dr. Orr acquiesced to the Grievant's plea and authorized the Grievant's return to work on a light duty basis. The Grievant testified that on the same day, September 24 1984, he went to the Personnel Lieutenant's Office at the Prison and reported to Sergeant Michael J. Campbell of that Office. Supposedly Sergeant Campbell referred the Grievant to the Prison' Medical Officer for review. According to the Grievant, the Medical officer, upon determining the prescription drugs being taken by the Grievant, refused to allow him to return to work and referred him back to Dr. Orr. The Grievant claims he informed Sergeant Campbell of the Medical Officer's decision and left. The record shows that a review of the Grievant's medical records by Lieutenant White revealed no return to work slip. Further, Sergeant Campbell's testimony is that he spoke to the Grievant only one time and that occasion was other than September 24, 1984. In other words, Sergeant Campbell denies the events described by the Grievant. In addition, one other feature which needs to be considered, in regard to the September 24, 1984 episode is that the Grievant was required to take a physical examination in conjunction with his going into the Army. The Grievant testified that he passed the entrance physical but that the Army also required that he provide a release from his personal physician. The Grievant testified that he provided the Army with the release he supposedly obtained on September 24, 1984 from Dr..Orr. The latter testimony does not reconcile with the Grievant's claim that he gave the Dr. Orr return to work slip to the Prison's Medical Officer.

Regarding the Grievant's next alleged contact with the Prison, the Grievant testified that in either early October or mid October, when he went to the Prison to get his pay check, he stopped in at the Personnel Lieutenant's office where he talked with Sergeant Campbell. The Grievant testified that he discussed with Sergeant Campbell the possibility of attending school while on Industrial Injury Leave, including schools offered by the military. According to the Grievant, Sergeant Campbell told him "You can do whatever you want to do. You're off. You're on IDL. as well as stating "It's up to your doctor what you can do."The Grievant's testimony in one instance is that he was not asking for permission for military leave but that

he was only seeking information about what he would " ... have to do to go to the military." In another instance, the Grievant claims he was seeking permission to go to the military but that permission was not granted. There is nothing in the Grievant's testimony that indicates that Sergeant Campbell explained what the Grievant should do to go to the military. The latter is odd since that was a specific part of the alleged purpose of the Grievant's visit. For example, the Grievant claims that he was never told by Sergeant Campbell that in order to get military leave he had to provide the Prison with a copy of his orders or anything else before he left. Nevertheless, the latter allowed, the Grievant did know that he needed permission and had he sought that permission as he claims, it would be unusual if he were not told that he had to provide a copy of his orders two weeks in advance of taking such a leave.

Sergeant Campbell had a vague recollection of talking with the Grievant two to three years before the hearing in this Arbitration. Two years back would be June 1985, a time after the Grievant had completed military duty. Three years back would be June 1984, a time well in advance of the Grievant's departure in October 1984. The Grievant testified that he signed up for the Army's course in Avionics "Around January or February of '84..." Thus, the Grievant knew he was committed to a course of action and he could have spoken to Sergeant Campbell at any time after making that commitment. In any event, Sergeant Campbell did talk with the Grievant at some point before the Grievant left for duty. As to the meeting, whenever it occurred, Sergeant Campbell recalled that the Grievant briefly appeared at the door of the Personnel Lieutenant's office. According to Sergeant Campbell the Grievant said ... something like he may be leaving or he would be going some place at the time." Sergeant Campbell also remembered "...that the conversation had something to do with military leave." Sergeant Campbell did not specifically remember what he told the Grievant at the time, but Sergeant Campbell did testify that in cases where correctional officers do ask about military leave, his response is to let them know that they do have to provide a copy of their military orders to the Prison. Further, it was noted that military leave was a topic covered during all new employee orientation sessions and that it is also a subject covered in the instructions for completing a State of California Form 634 entitled "Absence and Additional Time Worked Report." The Grievant testified that he had no memory of the matters covered in his orientation.

According to the Grievant his last contact with the Prison was in December 1984. The Grievant testified that his mother left him a handwritten message in December which stated "Del, Lt. Hall at San Quentin called - ext. 2427. Please call - EMERGENCY!! Needs to know if you are still going to work. Your sick leave is up and they need to know something from you. P.S. Edwina called." The Grievant's testimony on direct examination is that he tried to get a hold of Lieutenant Hall and was unable to reach him but that he did reach Sergeant Hall at 3:30 in the afternoon on December 27, 1984. The Grievant testified that he specifically told Sergeant Campbell that he, the Grievant was in the Army and that Sergeant Campbell made no reply. Moreover, the Grievant asserts that during this alleged conversation Sergeant Campbell never told him anything about filling out any paper or that the Grievant needed to provide a copy of his orders to the Prison. The foregoing testimony makes it appear that the Grievant was engaged in a telephone conversation with Sergeant Campbell; however, on cross-examination, the Grievant testified that he got the message at 3:30 in the early morning of December 27, 1984 and that he then went to the Prison in person where he spoke with Sergeant Campbell. In regard to the latter conversation, the Grievant testified that "It was discussed what was the emergency and what was going on." Specifically, Sergeant Campbell supposedly said, "We didn't know where you'd been." In response, the Grievant

testified that he said, "I've been off sick. I've been off injured." The Grievant testified that the conversation ended with his words and that he picked up his pay checks and left. The Grievant's testimony on cross-examination does not include the fact of his being in the Army and the explanation for his absence is that he was off with an injury. As noted before Sergeant Campbell testified that he spoke with the Grievant on only one occasion and that occasion was not December 27, 1984.

The Association contends that it should be believed that the Grievant contacted the Prison on December 27, 1984 and that he talked to Sergeant Campbell. Moreover, the Association contends that since Sergeant Campbell knew that Lieutenant Hall was seeking to determine the Grievant's status, Sergeant Campbell was obligated to inform Lieutenant Hall about the December 27, 1984 meeting. And, the Association contends that Sergeant Campbell's failure to do so was prejudicial to the Grievant in that it could have precluded the notion that the Grievant had abandoned his job. The foregoing considered, the Grievant can not be believed for the very reason he thinks he should be believed. That is, the Grievant concedes Sergeant Campbell explained the "emergency" and it would be incredible indeed if Sergeant Campbell never reported such a meeting. It is also noted, that the Grievant claims that he went to the Prison on December 20th or 21st to see Lieutenant Hall and that Lieutenant Hall was not in at the time. The Grievant makes the latter assertion even though he contends he never got "any" message from his mother until December 27, 1984. Moreover, the Grievant claims that he was seen by several people known to him at the Prison when he made his alleged December visits, yet his testimony is uncorroborated.

As noted, the Grievant testified that he never heard anything further about his employment at the Prison until he returned from the Army. The Grievant testified that the class was over on March 15, 1985 and that he was released from active duty on March 23, 1985. The Grievant gives various times for his return home. The Grievant testified that he took 7 to 10 days to get home. The Grievant testified that he got home in late March 1985, that he got home in April 1985 and that he got home in May 1985. If the Grievant got home in late March or April he would have been present when Lieutenant Hall made his five daily calls from April 29 through May 3, 1985. Yet, the Grievant cannot account for why his mother would not have informed him of Lieutenant Hall's telephone calls. Moreover, it must be remembered that Lieutenant Hall testified that the woman (presumably the Grievant's mother) he talked to on April 29, 1985 told him she had not heard from the Grievant for approximately a month. The Grievant never called his mother as a witness on his behalf.

The evidence considered, it is clear that the Grievant left the area after entering the Army and that the Grievant did so without coordinating with or obtaining permission from

officials at the Prison. The only information known to the Personnel Lieutenant was that the Grievant had gone into the military and that he was somewhere in the East. The latter facts, even without the subsequent efforts to contact the Grievant, were sufficient to count the five

consecutive days necessary to constructively establish the Grievant's intent to abandon his job. Therefore, for the foregoing reason it is decided that the Department did have a reasonable belief that the Grievant

was Absent Without Leave for five consecutive workdays through May 3, 1985.

The Grievant testified that he lived with his mother on Lofus Place in Vallejo and that it was the place of his permanent residence since June 1984. There is no testimony that any person other than his mother lived with the Grievant in Vallejo. Thus, it is reasonable to conclude that the person who answered the telephone, particularly those calls made early in the morning was the Grievant's mother.

The Grievant's explanation is that he was in the Army and that he thought it was alright to do so. The element lacking in the Grievant's explanation is that of acknowledge permission by the Prison. The fact that the Grievant acted on his own volition makes his explanation unsatisfactory. Therefore, for the latter reason as well as the reasons contained in the foregoing, it is decided that the Grievant does not have a satisfactory explanation as to the cause of his absence.

AWARD

The Department did have a reasonable belief that the Grievant, Del Anderson, was Absent Without Leave for five consecutive workdays through May 3, 1985.

The Grievant, Del Anderson, did not have a satisfactory explanation as to the cause of his absence.

Dated: 9/9/87 Signed by David A. Concepcion

DAVID A. CONCEPCION

Arbitrator

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