Pursuant to Section 252(c)(4) of Title 41 United States Code and Part 37 of the Federal Acquisition Regulation by and between the Panama Canal Commission, hereinafter referred to as the "Commission," and the Undersigned (contract No. CRA-94542-GB29) and the Decision and Order of the Federal Labor Relations Authority (43 FLRA No. 120), the Undersigned was appointed as the Hearing Examiner to hear and decide the Appeals of Ricardo De Leon, Isidro Tesis, Alirio Sanchez, Luis A. Dominguez, Roberto West and Luis A. Collins hereinafter referred to as the "Appellants," from the Adverse Actions of the Commission Removing them from its employ.

Hearings were held in the Commission's office on the following dates:

Ricardo De Leon August 16, 1993
Isidro Tesis August 18, 1993
Alirio Sanchez August 24, 1993
Luis A. Dominguez August 24, 1993
Roberto West August 26, 1993
Luis A. Collins August 26, 1993

On the date of each of their respective hearings and except for Appellant Roberto West, the Appellants involved appeared with their representatives, Appellant West's representatives also appeared. The Commission was duly represented. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.
Appearances (Representatives of the parties)

For the Appellants:

Orlando Diaz, Esq.
National Maritime Union

Azael Samaniego
NMU District Steward

For the Commission:

Office of General Counsel
By: Jay Sieleman, Esq.

Angela Rodriguez
Employee Relations Specialist

Each Appellant was dismissed from the Commission's employ because of a positive test showing use of an illegal drug.

Material to these cases are Chapter 792, Employee Health Counselling and Assistance Program; Executive Order No. 12563 of September 15, 1986 issued by President Reagan and Chapter 751 Disciplinary Actions. These three documents, in their entirety, are attached hereto and made a part hereof respectively as Attachments A, B and C.

Certain provisions of each warrant highlighting as follows:

Chapter 792 Employee Health Counselling and Assistance Program.

Sub-Chapter 1-2a.

Agency Policy:

a. The Panama Canal Commission recognizes alcoholism, drug abuse, smoking and stress as treatable health problems. The Commission is concerned when the illnesses impair the efficiency and safe performance of employee's assigned duties, reduce employee dependability, or reflect discredit on the agency. The effects of alcohol or drug abuse on job performance include absenteeism, faulty decision
making, and increased accidents. The Employee Health Counselling and Assistance Program provides an employee who has any of these problems with evaluation, counselling and/or treatment by health and counselling professionals. The goals of the Program are to assist employees in overcoming health problems in general, and to improve the job performance, satisfaction, conduct and attendance of employees whose efficiency has been diminished by these health problems.

Sub-Chapter 3-1
Purpose of the Program:

The Employee Assistance Program provides a source of help in confronting, dealing with and resolving a variety of problems including alcohol abuse, use of illegal drugs, stress management, marital and family problems.

Sub-Chapter 3-4
Rehabilitation Program Completion:

An employee who actively participates in the program for alcohol and/or drug-related reasons, maintains sobriety and fulfills the agreement for treatment made with the attending staff is considered to have successfully completed the program. In some cases, a period longer than 12 months is required in the program for an employee to receive maximum benefit. In any case, if the employee has authorized the disclosure of information by signing a consent
form, in accordance with Section 5-2 of this Chapter, a memorandum will be sent to the supervisor noting the completion (and re-enrollment for continuing treatment, if applicable) of the Program.

Sub-Chapter 3-6

Re-Enrollment:

An employee who successfully completes the rehabilitation program and at a later date suffers a recurrence of alcohol or drug-related problems may be re-enrolled. Re-entry into the rehabilitation program may be provisional for employees previously terminated from the program for noncooperation or for declining the services offered. Decisions on eligibility for re-enrollment are made by the rehabilitation team (an Occupational Health Division physician, the Supervisory Occupational Health Nurse, the Employee Counselling Coordinator, and counselors). Factors taken into consideration for re-enrollment include the employee's job performance, the employee's motivation for treatment, the supervisor's recommendation, and the length of time since the employee was last enrolled in the Program.

Sub-Chapter 3-7 a, b, c

Relationship to Disciplinary Action:

a. Purpose. Employees whose use of alcohol or drugs interferes with the performance of their duties should be offered a reasonable opportunity for rehabilitation before decisions to take adverse or
disciplinary actions are effected. If the employee refuses to seek counselling, adverse or disciplinary action should be taken as warranted on the basis of unsatisfactory job performance, conduct, and/or attendance. In the case of illegal drug use, an employee may be removed from Federal service upon the first confirmed finding if the employee refuses to enroll in rehabilitation counselling or upon a second confirmed finding of illegal drug use.

b. Safe harbor. An employee who voluntarily admits his drug use prior to being identified through other means, completes a rehabilitation treatment program under the Commission's EAP, and thereafter refrains from drug use, will be safe from discipline for reasons of illegal drug use.

c. Postponement of disciplinary action. (1) If a disciplinary or adverse action has been or is in the process of being proposed for work deficiencies (unsatisfactory job performance, conduct, or attendance) or other factors related to alcohol or drug abuse or illegal activity, upon recommendation of the Occupational Health Division physician, employees entering the program for the first time or re-enrolling after successfully completing the program at an earlier date, may be granted a postponement of pending action for deficiencies related to alcohol or drug abuse which occurred prior to entering the Program. Any such postponement must be requested by
the employee. The purpose of a postponement is to allow the employee to demonstrate job performance, conduct, and attendance free of alcohol or drug intake; it should not be considered to be a time of freedom from job expectations or conduct, or a shield from disciplinary action due to subsequent offenses. If the employee fails to cooperate with the rehabilitation program, job performance, conduct or attendance requirements, any pending disciplinary/adverse action may be effected and action concerning the new problems may be initiated.

Executive Order No. 12563

By the authority vested in me as President by the Constitution and laws of the United States of America, including Section 3301(2) of Title 5 of the United States Code, Section 7301 of Title 5 of the United States Code, Section 29033-1 of Title 42 of the United States Code, deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the Federal service, and in order to establish standards and procedures to ensure fairness in achieving a drug-free Federal work place and to protect the privacy of Federal employees, it is hereby ordered as follows:

Section 1. Drug-Free Work Place:
(a) Federal employees are required to refrain from the use of illegal drugs.
(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for Federal employment.

Section 2. Agency Responsibilities:

(a) The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public.

(b) Each agency plan shall include:

(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

(2) Employee Assistance Programs emphasizing high level direction, education, counselling, referral to rehabilitation, and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

(4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and
(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.

Section 3. Drug Testing Programs.

(a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.

(b) The head of each Executive agency shall establish a program for voluntary employee drug testing.

(c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:

(1) When there is a reasonable suspicion that any employee uses illegal drugs;

(2) In an examination authorized by the agency regarding an accident or unsafe practice; or
(3) As part of or as a follow-up to counselling or rehabilitation for illegal drug use through an Employee Assistance Program.

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use. The agency shall conduct their drug testing programs in accordance with these guidelines once promulgated.

Section 5. Personnel Actions.

(a) Agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counselling, and referral for treatment or rehabilitation as appropriate.

(b) Agencies shall initiate action to discipline any employee who is found to use illegal drugs, provided that such action is not required for an employee who:

(1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to Section 3(b) of this Order, prior to being identified through other means;

(2) Obtains counselling or rehabilitation through an Employee Assistance Program; and

(3) Thereafter refrains from using illegal drugs.
(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion of rehabilitation through an Employee Assistance Program. However, as part of a rehabilitation or counselling program, the head of an Executive agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

(d) Agencies shall initiate action to remove from the service any employee who is found to use illegal drugs and:

1. Refuses to obtain counselling or rehabilitation through an Employee Assistance Program; or
2. Does not thereafter refrain from using illegal drugs.

Chapter 751 Disciplinary Actions

Appendix A-1-d(in part):

Disciplinary or adverse actions demand the exercise of responsible judgement so that an employee will not be penalized out of proportion to the character of the offense...

The Appellants do not challenge the consistency of the Counselling and Assistance Program with the Executive Order. It is obvious to me, and I so hold, that the Counselling and Assistance Program is a precise and therefore correct implementation of the Executive Order.
The principal challenge by all or virtually all of the Appellants is to the procedure of Removing an employee who is initially enrolled in the Counselling Program because of a positive drug test, if that employee tests positive again during twelve months in the Program or within the twelve months of the period of abeyance granted by the Personnel Director.

Most of these cases involve employees who tested positive for use of illegal drugs; whose Removal was held in abeyance by the Commission because they then entered the Counselling Program, and who by the terms of that abeyance would suffer implementation of their Removals if they failed to remain drug free for twelve months in the Program and for twelve months from the beginning date of the abeyance. The pertinent parts of a typical abeyance letter from the Commission's Personnel Director reads:

[You have been] notified of a proposal to remove you from the service of the Panama Canal Commission for unauthorized use of illegal drugs...

...it is my decision...that you be removed from the service. However, based on your expressed desire to rehabilitate, your enrollment in the Panama Canal Commission Employee Health Counselling and Assistance Program...and your eligibility for postponement of the adverse action, I have decided to hold the implementation of my decision in abeyance for a period not to exceed one year from the date you receive this letter, subject to the following conditions:

1. **You must participate in the agency's Employee Health Counselling and Assistance**
Program for a period of twelve months, and you must successfully complete the program.

2. ...

3. ...

4. ...

5. ...any violation of conditions during the one year period, however, will be grounds for implementing the decision to remove you without delay.

6. ...

7. ...even a single incident of...a verified positive drug test result...may be sufficient cause for implementing the Removal (emphasis added).

By his signature, each affected Appellant accepted this and other conditions.

The Appellants' challenge is to the reasonableness of the foregoing condition. They asserted that a "relapse" during either of the twelve month periods is to be expected in the course of treatment and that it is unfair and unreasonable to dismiss an employee for that single relapse. Or, in short, that that rigid condition is not consistent with Sections 1-2, 3-4, 3-6 and 3-7 of the program nor Chapter 751.

I do not agree. The Presidential Executive Order, to which the Commission is bound, mandates that consequence. Moreover, I do not consider it arbitrary or unreasonable, in the war on drugs in the work
place, and for employees in the safety sensitive jobs involved in these cases, for the Commission which has given the employee an opportunity at rehabilitation through a professional rehabilitation program and a chance to keep his job when otherwise there is cause for his dismissal, to require that employee to remain drug free for a twelve month period. Though stringent and stern, the condition is consistent with a meaningful rehabilitation program and clearly, in my judgement, a reasonable condition for continued employment under the circumstances. It meets the requirement of Sub-Chapter 3-7 that employees "be offered a reasonable opportunity for rehabilitation before decisions to take adverse or disciplinary action are effected." So the argument of unreasonableness in that regard is rejected in all the cases in which it was raised.

The same is true for an employee who has any other "relapse" and drops out of the program within the twelve month period, or is terminated from the Program for poor attendance or other failures to follow the Program's disciplines.

Additionally, it should be pointed out that enrollment in or re-enrollment in the Program is not an automatic sanctuary from discipline. It is a "safe harbor" only as defined in 3-7b of the Program. And re-enrollment is not guaranteed. Section 3-6 makes clear, with the word "may," that re-enrollment is discretionary with the Commission and conditioned on the factors set forth in the last sentence thereof.

Therefore, contentions in these proceedings that an employee is immune from discipline if he enrolls in the Program \textit{after} his illegal drug use has been discovered or should be re-enrolled in the Program \textit{after} successfully completing twelve months if he thereafter tests positive again, are not supported by the conditions of the Program and therefore are rejected where asserted in these cases.
These and other issues, contentions and factual distinctions, if any, will be dealt with in the discussions and Decisions of each case.

RICARDO DE LEON

On December 13, 1991, Appellant De Leon, a line handler at the Locks was notified by the Commission of a "proposal to remove (him) from (its service) for sleeping on the job, wasting time on the job, and repeated instances of unauthorized absences from duty and failure to follow written leave instructions/procedures...."

On January 27, 1992 the Commission's Personnel Director upheld the proposal of Removal, but, because of Appellant's enrollment in the Employee Health Counselling and Assistance Program held the implementation of the decision in abeyance, subject to the express conditions of the "abeyance" letter of that date.

The Appellant admitted that he had an alcohol problem upon entry into the Assistance Program.

Less than one year later on October 2, 1992, the Appellant tested positive for use of an illegal drug. This was in violation of a specified condition of the "abeyance." Condition #4 of the Personnel Director's letter of January 27, 1992 provides in pertinent part:

Any violation of the conditions during the one-year period...will be grounds for implementing the decision to remove you without delay....

Even a single incident of a verified positive test result...may be sufficient cause for implementing the removal.
Considering this express violation of the conditions of the abeyance and the Appellant's record otherwise, including prior progressive discipline and continued unauthorized absences during the abeyance period, the Commission had cause to impose the penalty it expressly warned the Appellant would be imposed for those violations, namely Removal from the service.

I have previously held that the procedure of an abeyance of implementation of a Removal under the stated conditions with which an employee must comply, constitutes the reasonable chance at rehabilitation contemplated by the Assistance Program, the Executive Order and the Disciplinary Actions.

The Removal of Ricardo De Leon was for just cause and is upheld.

ISIDRO TESIS

On April 20, 1992 Appellant Tesis, a Line Handler was notified by the Commission's Personnel Director of "a proposal to remove (him) from the services...for (1) refusal to carry out a proper order from an official of the Occupational Health Division as directed, i.e. undergo drug testings, and (2) excessive and repeated unauthorized absences from duty and failure to follow written leave procedures/instructions..."

Appellant admitted the use of cocaine and requested an opportunity for rehabilitation.

The Personnel Director upheld the foregoing second charge and Appellant's Removal from the service, but held the Removal in abeyance because of Appellant's re-enrollment in the Assistance Program on March 2, 1992. The Personnel Director's letter of April 20, 1992 set forth the
specific conditions the Appellant would have to comply with during the
abeyance period of one year, including the condition that he remain drug
free.

On August 6, 1992 five months after entering the Assistance
Program under the "abeyance" conditions, the Appellant tested positive for
use of an illegal drug, thereby violating an express condition of the
abeyance arrangement. Under that circumstance, and considering the
Appellants prior unsatisfactory discipline record, for which he was
previously progressively discipline, the Commission had the right to
implement the penalty that it warned the Appellant would be imposed for
a violation of the abeyance conditions, namely the penalty of Removal.

My ruling holding the Commission's actions and the conditions of
the abeyance period to be reasonable, obtain to this case.

The Appellant's moving plea for leniency and for another chance,
with particular reference to the drastic impact on his family, especially
his children, that would result from the loss of his job, are matters not
within the authority of the Examiner to consider. The Examiner's role is
to determine if the offense has been committed, and if so, whether the
penalty is legally proper. Mitigating considerations in the face of an
Appellant's guilt, and where Removal from the service is a legally proper
penalty for that offense, are for the Commission to consider, not the
Examiner.

The Commission had just cause to Remove Isidro Tesis from its
employ. His Removal is upheld.
On January 3, 1992 the Appellant, a Drill Rig Operator was notified by the Acting Personnel Director of the "proposal to remove (him)...for unauthorized use of illegal drugs.

The allegation of that drug use is not denied by Appellant in this proceeding.

On January 28, 1991 the Personnel Director wrote the Appellant upholding the charge, but held the Appellant's Removal in abeyance "for a period not to exceed one year from the date you receive this letter" because Appellant had enrolled in the Assistance Program.

As in other similar cases, the "abeyance" was conditioned on certain specific and enumerated requirements. Among them (#4) states in pertinent part:

"Any violation of the conditions during the one year period...will be grounds for implementing the decision to remove you without delay."

"Even a single incident of...a verified positive drug test result...may be sufficient cause for implementing the removal."

By his signature on that letter, the Appellant acknowledged and accepted the conditions.

As of December 17, 1992, less than one year after receipt of the abeyance letter, the Appellant tested positive for use of an illegal drug, thereby violating a condition of the "abeyance" and his continued employment.

As I have rejected the argument that the foregoing condition is unreasonable and have held instead that it is a proper condition for both rehabilitation and continued employment, especially for those in safety
sensitive jobs, which includes this "Appellant," I find that with this violation the Commission had the right to implement the penalty it warned the Appellant would be imposed for the violation.

The Removal of Alirio Sanchez was for just cause and is upheld.

LUIS A. DOMINGUEZ

On July 22, 1991 the Appellant, a Line Handler was notified by the Personnel Director of "a proposal to remove (him) from the service...for: (1) Unauthorized use of illegal drugs; and (2) Reporting for duty under the influence of an intoxicant and refusal to carry out a proper order...as directed, i.e. undergo alcohol/drug testing.

The Appellant did not deny or contest these charges.

By letter of August 22, 1991, the Personnel Director upheld the charges, but held in abeyance the Appellant's Removal from the service because of Appellant's enrollment in the Counselling and Assistance Program.

That letter contained the usual specific conditions. Among them is the requirement that the Appellant remain drug free for a one year period (from the date the letter is received) as well as the requirement that he successfully complete the Counselling and Assistance Program for a period of twelve months.

The Appellant tested positive for drug use from a specimen collected on December 16, 1991, four months after his Removal was held in abeyance. This violated the foregoing express condition of his continued employment and made him subject to immediate dismissal.

My prior rulings upholding the reasonableness of the foregoing condition, within the meaning of the Counselling and Assistance Program,
within the meaning of the Executive Order and Chapter 751 (Disciplinary Actions), obtain to this case as well. Again I note, as in the prior cases, that the Appellant occupied a safety sensitive job.

Accordingly, the Commission had just cause for the Removal of Luis A. Dominguez. The Removal is upheld.

ROBERTO WEST

The Appellant failed to appear at the hearing on August 26, 1993 though he received due notice.

I directed that the hearing go forward in his absence.

The Appellant was Removed for "unauthorized use of illegal drugs."

By letter dated August 28, 1989 the Appellant was notified of a proposal to "remove (him) from the service...for unauthorized use of illegal drugs." He entered the Commission's Counselling and Assistance Program on June 22, 1989, and his Removal was held in abeyance for one year from the date he received the Personnel Director's abeyance letter of October 10, 1989.

The abeyance was subject to the usual conditions, including the requirement that Appellant remain drug free for that one year period.

Appellant's urine sample collected September 20, 1990, less than one year after the October 10, 1989 abeyance letter, was positive for use of an illegal drug.

Appellant thus violated an express condition of the abeyance which he acknowledged and accepted. The Commission is therefore justified in implementing the penalty which it warned the Appellant would be imposed for that violation, namely the penalty of Removal.
My prior rulings holding that the foregoing procedures and conditions meet the test of reasonableness under Chapters 792 and 791 and the Executive Order, obtain to this case as well.

Accordingly, the Removal of Roberto West was for just cause and is upheld.

LUIS A. COLLINS

By letter dated July 23, 1990, the Appellant was notified by the Personnel Director of the proposal to "Remove (him) from the service... for unauthorized use of illegal drugs."

As the Appellant entered the Counselling and Assistance Program, the Personnel Director by letter dated August 13, 1990, held the Removal in abeyance for the usual twelve month period, subject to the regular conditions including that the Appellant remain drug free for the one year period. The Appellant acknowledged and accepted those conditions of the abeyance.

On November 30, 1990, the Appellant was terminated from the Program because "he did not comply with the treatment plan." The Appellant was Removed from the service effective January 5, 1991.

In the course of the hearing, the Commission established by direct testimony that the Appellant's failure to comply with the treatment plan included a positive test for use of an illegal drug from a specimen collected on March 23, 1990.

As the positive test for use of an illegal drug occurred less than one year after the Personnel Director's abeyance letter of August 13, 1990, the Appellant violated one of the conditions of the abeyance. This
violation justified the imposition of the penalty which the Appellant was warned would be imposed for such a violation, namely the penalty of Removal.

Again, as I have stated before, the foregoing procedure and conditions meet the test of reasonableness under Chapters 792, 751 and the Executive Order.

Accordingly, the Removal of Luis A. Collins was for cause and is upheld.

The Undersigned, duly designated as the Hearing Examiner, and having duly heard the proofs and allegations of the Appellants and the Commission, renders the following DECISIONS:

The Removals of Ricardo De Leon, Isidro Tesis, Alirio Sanchez, Luis A. Dominiguez, Roberto West and Luis A. Collins were for just cause. Their Removals are upheld.

_Eric J. Schmertz,
Hearing Examiner_

DATED: September 15, 1993

STATE OF NEW YORK )
COUNTY OF NEW YORK )

I, Eric J. Schmertz do hereby affirm upon my Oath as Hearing Examiner that I am the individual described in and who executed this instrument, which is my DECISION.
Pursuant to Section 252(c)(4) of Title 41 United States Code and Part 37 of the Federal Acquisition Regulation by and between the Panama Canal Commission, hereinafter referred to as the "Commission," and the Undersigned (contract No. CRA -94542- GB29) and the Decision and Order of the Federal Labor Relations Authority (43 FLRA No. 120), the Undersigned was appointed as the Hearing Examiner to hear and decide the Appeal of Jaime Bolanos, hereinafter referred to as the "Appellant," from the Adverse Action of the Commission Removing him from its employ.

A hearing was held on August 18, 1993 in the offices of the Commission at which time the Appellant, his representatives and representatives of the Commission appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Appearances (Representatives of the parties)

For the Appellant:
Orlando Diaz, Esq.
National Maritime Union
Azael Samaniego
NMU District Steward

For the Commission:
Office of General Counsel
By: Jay Sielman, Esq.
David McConaughey
Equipment Maintenance
General Foreman
By letter dated August 10, 1992 from the Commission's Personnel Director, the Appellant was notified of a proposal "to Remove (him) from the Commission's service for "repeated instances of unauthorized absences from duty and failure to follow written leave instructions/procedures..." That letter not only sets forth the specifics of the charges but also reviews the prior progressive discipline imposed on the Appellant. That letter is attached hereto and made a part hereof as Attachment A.

The Appellant does not deny the charges. His defense is that he has an alcohol problem; that he has been trying to overcome it through voluntary enrollment in the Commission's Employee Counselling and Assistance Program; and that he should be given an additional chance to rehabilitate himself in that program, including in-patient detoxification treatment at a psychiatric hospital.

The record shows that the Appellant was in the Assistance Program for one year, but did not complete it successfully. I must conclude that his failure to complete the Program successfully signifies, along with his record of excessive absenteeism and the other specified rule violations, an inability or unwillingness to pursue a rehabilitation program diligently and meaningfully.

The Commission does not and is not required to guarantee successful treatment, nor is the Commission obligated to re-enroll him in the Program or supplement it with psychiatric care when his record demonstrates, as it does, poor job performance and poor motivation for treatment. He has had a reasonable opportunity at rehabilitation within the requirements and meaning of Chapters 792, 751 and the Executive Order, and has failed at rehabilitation.
Moreover, that he may have been in the Assistance Program while he accumulated his poor attendance record and committed the other rule violations does not provide him with a sanctuary from discipline for that continuing and accumulated record. Sections 3-7b and c of Chapter 792 made that abundantly clear.

Accordingly, the Appellant's poor record, his prior discipline, and the charges admitted and therefore sustained in this proceeding, justify his Removal.

The Undersigned, duly designated as the Hearing Examiner and having duly heard the proofs and allegations of the Appellant and the Commission, renders the following DECISION:

The Commission had just cause to Remove Jaime A. Bolanos from the service. His Removal is upheld.

Eric J. Schmertz,
Hearing Examiner

DATED: September 15, 1993

STATE OF NEW YORK )
COUNTY OF NEW YORK )

I Eric J. Schmertz do hereby affirm upon my Oath as Hearing Examiner that I am the individual described in and who executed this instrument, which is my DECISION.
Pursuant to Section 252(c)(4) of Title 41 United States Code and Part 37 of the Federal Acquisition Regulation by and between the Panama Canal Commission, hereinafter referred to as the "Commission," and the Undersigned (contract No. CRA -94542- GB29) and the Decision and Order of the Federal Labor Relations Authority (43 FLRA No. 120), the Undersigned was appointed as the Hearing Examiner to hear and decide the Appeal of Jaime Bolanos, hereinafter referred to as the "Appellant," from the Adverse Action of the Commission Removing him from its employ.

A hearing was held on August 18, 1993 in the offices of the Commission at which time the Appellant, his representatives and representatives of the Commission appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Appearances (Representatives of the parties)

For the Appellant:
Orlando Diaz, Esq.
National Maritime Union
Azael Samaniego
NMU District Steward

For the Commission:
Office of General Counsel
By: Jay Sielman, Esq.
David McConaughey
Equipment Maintenance
General Foreman
By letter dated August 10, 1992 from the Commission's Personnel Director, the Appellant was notified of a proposal "to Remove (him) from the Commission's service for "repeated instances of unauthorized absences from duty and failure to follow written leave instructions/procedures..." That letter not only sets forth the specifics of the charges but also reviews the prior progressive discipline imposed on the Appellant. That letter is attached hereto and made a part hereof as Attachment A.

The Appellant does not deny the charges. His defense is that he has an alcohol problem; that he has been trying to overcome it through voluntary enrollment in the Commission's Employee Counselling and Assistance Program; and that he should be given an additional chance to rehabilitate himself in that program, including in-patient detoxification treatment at a psychiatric hospital.

The record shows that the Appellant was in the Assistance Program for one year, but did not complete it successfully. I must conclude that his failure to complete the Program successfully signifies, along with his record of excessive absenteeism and the other specified rule violations, an inability or unwillingness to pursue a rehabilitation program diligently and meaningfully.

The Commission does not and is not required to guarantee successful treatment, nor is the Commission obligated to re-enroll him in the Program or supplement it with psychiatric care when his record demonstrates, as it does, poor job performance and poor motivation for treatment. He has had a reasonable opportunity at rehabilitation within the requirements and meaning of Chapters 792, 751 and the Executive Order, and has failed at rehabilitation.
Moreover, that he may have been in the Assistance Program while he accumulated his poor attendance record and committed the other rule violations does not provide him with a sanctuary from discipline for that continuing and accumulated record. Sections 3-7b and c of Chapter 792 made that abundantly clear.

Accordingly, the Appellant's poor record, his prior discipline, and the charges admitted and therefore sustained in this proceeding, justify his Removal.

The Undersigned, duly designated as the Hearing Examiner and having duly heard the proofs and allegations of the Appellant and the Commission, renders the following DECISION:

The Commission had just cause to Remove Jaime A. Bolanos from the service. His Removal is upheld.

Eric J. Schmertz,
Hearing Examiner

DATED: September 15, 1993

STATE OF NEW YORK )
ss.: COUNTY OF NEW YORK )

I Eric J. Schmertz do hereby affirm upon my Oath as Hearing Examiner that I am the individual described in and who executed this instrument, which is my DECISION.
Pursuant to Section 252(c)(4) of Title 41 United States Code and Part 37 of the Federal Acquisition Regulation by and between the Panama Canal Commission, hereinafter referred to as the "Commission," and the Undersigned (contract No. CRA -94542- GB29) and the Decision and Order of the Federal Labor Relations Authority (43 FLRA NO. 120), the Undersigned was appointed as the Hearing Examiner to hear and decide the Appeal of Hector Montes, hereinafter referred to as the "Appellant," from the Commission's Adverse Action of Removing him from its employ.

A hearing was held on August 25, 1993 at the offices of the Commission at which time the Appellant, his representatives and representatives of the Commission appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Appearances (Representatives of the parties)

For the Appellant:

Orlando Diaz, Esq.
National Maritime Union

Ozael Samaniego
NMU District Steward

For the Commission:

Office of General Counsel
By: Clea B. Efthimiadis, Esq.

Adolfo Ceballos,
Chief, Warehousing Branch, Logistical Support Division
The Appellant is charged with the theft of two bottles of liquid Lux soap on December 12, 1991 from the Commission's stock at its oil house. He was dismissed by the Commission for this offense effective April 24, 1992 after completion of the Commission's internal disciplinary procedures.

The Appellant does not deny that he removed the bottles of Lux soap from the Commission's supplies and acknowledged he planned to take them home. This admission, in the course of the Commission's investigation, after the bottles were found in the Appellant's bag during a search by a security guard, was made after the Appellant gave two other versions of what happened. Those two other versions need not be recited herein because at the hearing the Appellant reiterated the admission, but offered an explanation in either defense or mitigation. He explained that the Commission supplied bottled Lux to the employees to wash their meal utensils. And that instead of taking working time from his duties in the office to wash those utensils, he decided to wash them at home and took the liquid soap for that purpose.

The explanation is neither acceptable nor believable. To comply with his plan, the soap would have to be used at his home only for the meal utensils used at work, and nothing else. That is implausible and improbably in the extreme. Moreover, if that was the plan, the removal of two, large sized bottles would be an excessive quantity. Under any circumstance, the attempted removal of the soap was unauthorized, improper and can only be construed as a theft for the Appellant's personal use. Accordingly the charges are sustained.

The real question in this case is whether the penalty of dismissal is too severe. The Appellant argues that he had no "felonious
intent;" that the Commission failed to exercise judgement in fashioning the penalty of dismissal for items of such small value when the Commission's Schedule of Offenses and Penalties expressly authorizes, for a first offense of theft, a minimum penalty of five (5) days suspension and removal (dismissal) as the maximum penalty for a first offense.

It is well-settled that theft of an employer's property is ground for summary dismissal, regardless of the offending employee's prior work record. Here, the Appellant is a warehouse employee who has ready access to the Commission's supplies. In the face of the quantity of theft which the Commission was experiencing, I have no quarrel with a rule that mandates dismissal for theft or attempted theft. And under that circumstance, I would not substitute my judgement for that of the Commission in implementing such a policy.

But that has not been the Commission's uniform policy nor its uniform penalty. The schedule of offenses provides for penalties less than discharge for theft, if, as here, it is a first offense. I do not interpret that schedule as confining the Commission to only either a five (5) day suspension or removal. By implication and by the express provisions of Appendix A Section A-1-2 of Chapter 751 Disciplinary Action, penalties of suspensions in excess of five (5) days are contemplated and allowed, as well.

The record also contains examples of cases of theft of Commission property or "conspiracies to commit theft" of Commission's property where the penalties were suspensions.

The Commission in this case has not made any substantive distinctions among those cases, nor any distinction between them and the instant case.
No Commission witness testified as to why other theft or "conspiracy to commit theft" cases resulted in only suspensions, and why the instant case was so more serious as to justify dismissal. Hence, on the well-settled industrial relations principle that punishment must be evenhanded for employees similarly situated, I shall reduce the Appellant's removal to a suspension.

The length of the suspension shall be for the period of time that he has been removed. I make it that long because he was an employee of short tenure (three (3) years) and because he was not straight forward or forthcoming in the investigation by the Commission, or at the hearing. Before me, he persisted in his effort to justify his action and to escape punishment for what was clearly wrong, by his contrived explanation.

I also make his suspension of that length as notice to him and all other employees that a first offense of theft is not limited to a five (5) day suspension, but may well be more severe, including discharge.

And finally, employees should be on notice that the Commission need not tolerate theft, and that for the future, provided the Commission shows the Hearing Examiner legitimate mitigating distinctions in prior cases of theft in which the penalty was suspension; the offense of theft will carry with it a presumptive penalty of dismissal.
The Undersigned, duly designated as the Hearing Examiner in the above matter and having duly heard the proof and allegation of the Appellant and the Commission, renders the following DECISION:

The Removal of Hector Montes is reduced to a suspension for the period of time his has been out. He shall be reinstated, but without back pay. The period of time between his Removal and his reinstatement shall be deemed a disciplinary suspension for the charges sustained herein.

Eric J. Schmertz,
Hearing Examinee

DATED: September 15, 1993

I Eric J. Schmertz do hereby affirm upon my Oath as Hearing Examiner that I am the individual described in and who executed this instrument, which is my DECISION.
Pursuant to Section 252(c)(4) of Title 41 United States Code and Part 37 of the Federal Acquisition Regulation by and between the Panama Canal Commission, hereinafter referred to as the "Commission," and the Undersigned (contract No. CRA-94542-GB29) and the Decision and Order of the Federal Labor Relations Authority (43 FLRA No. 120), the Undersigned was appointed as the Hearing Examiner to hear and decide the Appeal of Friedell Baker, hereinafter referred to as the "Appellant," from the Commission's Adverse Action of Removing him from its employ.

A hearing was held on August 17, 1993 at the offices of the Commission at which time the Appellant, his representatives and representatives of the Commission appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The witnesses were duly sworn. The hearing was recorded.

Appearances (Representatives of the parties)

For the Appellant:

Arthur S. Davis
Alvin McFarlane
(International Organization of Masters, Mates and Pilots)

For the Commission:

Office of General Counsel
By: Clea B. Efthimiadis, Esq.

Adofo Ceballos
(Chief, Warehousing Branch, Logistical Support Division)
The Appellant's dismissal was based on the charge against him that on October 16, 1989 he committed the theft of four coils of rope belonging to the Commission.

This is a dismissal case. In such cases it is universally well-settled that the burden is on the employer, here the Commission, to prove the charge by a quantum of evidence that is clear and convincing. And, if so proved, that the penalty of dismissal was appropriate.

The Commission has not met that initial burden of proof.

The principal direct evidence against the Appellant adduced at the hearing is the testimony of Ismael Rivera, a maintenance worker. Indeed, Adolfo Aballos, Chief of the Warehousing Branch, acknowledged that until Rivera came forward and reported what he saw, he did not think the Commission had a provable case. Rivera testified that he saw the Appellant drive a fork lift truck carrying coils of rope to the rear of van parked on the warehouse floor, elevate the lift to the level of the van's rear loading area, get off the lift truck and push the coils of rope into the van (the rear doors were open).

Rivera stated that he was seated at the desk in the carpenter's shop; that from that location he first saw the van driven to the particular location by another employee (Jorge Loaiza); and that after the Appellant put the coils of rope in the van, Loaiza, who had gone into the office, returned to the van closed its doors, and drove it away.

Rivera's testimony contains one fatal frailty which nullifies its conclusive value. With the Appellant and representatives of both sides, I visited the site of the incident, and positioned myself at the precise location in the carpenter's shop where Rivera said he sat. The events were simulated. A van was placed in the position testified to by Rivera. A fork lift track was driven the route described by Rivera, and
the alleged activity at the rear of the van, replicating the alleged placing of the coils of rope into the van, was demonstrated.

From the location at which Rivera said he saw the events, and at which I positioned myself, it was impossible to see rope on a fork lift truck being "pushed" into the van. The rear of the van was opposite Rivera's location. The most that Rivera could have seen was the approach of the fork lift to the van, the legs of the Appellant after he got off the van, and some movement of those legs in proximity to the rear loading area of the van. I can understand how he thought the movement involved pushing the coils of rope into the van, but he could not see any such action directly.

I am not prepared to conclude that the circumstantial evidence of this event leads to the one conclusion that the Appellant put the coils in the van. The hearing record indicates that the Appellant was engaged in moving coils of rope from location to location that day in the warehouse. That he transported the rope on a fork lift that day is not inconsistent with that work. That he apparently removed rope from his fork lift at a location near or at the rear of the van is also not inconsistent with that assignment, particularly, if, as he testified, his job was to place the coils of rope at new locations in order to clear an area in the warehouse for some other activity. It has not been shown, clearly and convincingly, that the activity at or near the rear of the van was not merely the repositioning of the rope rather than its theft.

Moreover, the Commission has not shown in the hearing that rope was missing from inventory, though apparently inventories were taken. The evidence on that important fact is most inconclusive and hence indeterminative. The pre-hearing file (joint Exhibit #1) indicates that an inventory was taken shortly after report of the event and that same
coils of rope were missing. But, the Commission presented no testimony on that point at the hearing. Indeed, the direct testimony at the hearing was to the contrary. Though several witnesses testified that they heard or even took part in an inventory, those witnesses could not testify definitely about the results. But Supply Clerk Randolph Blake testified that he remembered the inventory taken shortly after the incident and that he heard Supervisor Navas tell managerial employee Foster that "all ropes were accounted for" and that Foster replied "if complete, what's the problem."

I recognize the hearsay nature of this latter testimony. But it was not rebutted by the Commission and no evidence was offered by the Commission at the hearing that that inventory showed missing rope. I do not consider a much later inventory, which apparently showed more than four coils of rope missing, to have any proximate or probative connection to the charge in this case.

The Commission also relies heavily on its claim that during its investigation, the Appellant denied moving coils of rope that day. And that from that falsification, the Commission logically and properly concluded that because Rivera and Supervisor Coco saw him carrying rope on the fork lift truck, the Appellant's denial was an attempt to divert attention from his theft. But during the testimony on this point by the Commission witness, Jorge Quiros, who was at that meeting, and upon questioning by the Examiner, it became clear that what the Appellant was denying at that investigative meeting was not that he was transporting rope that day but that he did not put any of it into the van. So, I find no false denials at that investigative point.

Certainly there are circumstantial matters in this record which create suspicion. That the alleged theft took place during the Appellants
lunch period when, ordinarily he does not work through lunch (and the same for Loaiza); that there were rumors that the rope was delivered by the van to one of the employee's wives located at some pier; and that the van was positioned by Loaiza at a location convenient to being loaded by a fork lift, raise legitimate doubts about the Appellant's innocence. But suspicions, doubts and rumors do not add up to clear and convincing evidence, especially in a dismissal case.

The Commission has established that for a period of time, including the time of this incident, it had been suffering large scale thefts of merchandize and material from the warehouse. I hasten to observe that the Commission has an absolute right, indeed a duty to take vigorous corrective and preventative steps to guard against and stop theft of its property. Obviously, that legitimate objective is behind the charges in this case, and I am fully satisfied that those charges were made in good faith and upon an honest belief that a theft had been committed. But again, in an adjudicatory forum such as this Appeal, good faith and honest beliefs must be supported by acceptable evidence that meets the clear and convincing standard.

Let me be clear. I do not conclude unequivocally that the Appellant did not commit a theft. Rather, as is my authority, I conclude that the Commission's burden of proving that charge by the requisite clear and convincing standard has not been met.
On that basis, the Undersigned, duly designated as the Hearing Examiner, and having duly heard the proofs and allegations of the Appellant and the Commission in the above-named matter, renders the following DECISION:

The Commission did not show by clear and convincing evidence that it had just cause to dismiss Friedell Baker. He shall be reinstated with full back pay, seniority and benefits.

Eric J. Schmertz,
Hearing Examiner

DATED: September 15, 1993
STATE OF NEW YORK ) ss.:
COUNTY OF NEW YORK )

I Eric J. Schmertz do hereby affirm upon my Oath as Hearing Examiner that I am the individual described in and who executed this instrument, which is my DECISION.
Pursuant to Section 252(c)(4) of Title 41 United States Code and Part 37 of the Federal Acquisition Regulation by and between the Panama Canal Commission, hereinafter referred to as the "Commission," and the Undersigned (contract No. CRA -94542- GB29) and the Decision and Order of the Federal Labor Relations Authority (43 FLRA No. 120), the Undersigned was appointed as the Hearing Examiner to hear and decide the Appeal of Friedell Baker, hereinafter referred to as the "Appellant," from the Commission's Adverse Action of Removing him from its employ.

A hearing was held on August 17, 1993 at the offices of the Commission at which time the Appellant, his representatives and representatives of the Commission appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The witnesses were duly sworn. The hearing was recorded.

Appearances (Representatives of the parties)

For the Appellant:

Arthur S. Davis
Alvin McFarlane
(International Organization of Masters, Mates and Pilots)

For the Commission:

Office of General Counsel
By: Clea B. Efthimiadis, Esq.

Adofo Ceballos
(Chief, Warehousing Branch, Logistical Support Division)
The Appellant's dismissal was based on the charge against him that on October 16, 1989 he committed the theft of four coils of rope belonging to the Commission.

This is a dismissal case. In such cases it is universally well-settled that the burden is on the employer, here the Commission, to prove the charge by a quantum of evidence that is clear and convincing. And, if so proved, that the penalty of dismissal was appropriate.

The Commission has not met that initial burden of proof.

The principal direct evidence against the Appellant adduced at the hearing is the testimony of Ismael Rivera, a maintenance worker. Indeed, Adolfo Aballos, Chief of the Warehousing Branch, acknowledged that until Rivera came forward and reported what he saw, he did not think the Commission had a provable case. Rivera testified that he saw the Appellant drive a fork lift truck carrying coils of rope to the rear of van parked on the warehouse floor, elevate the lift to the level of the van's rear loading area, get off the lift truck and push the coils of rope into the van (the rear doors were open).

Rivera stated that he was seated at the desk in the carpenter's shop; that from that location he first saw the van driven to the particular location by another employee (Jorge Loaiza); and that after the Appellant put the coils of rope in the van, Loaiza, who had gone into the office, returned to the van closed its doors, and drove it away.

Rivera's testimony contains one fatal frailty which nullifies its conclusive value. With the Appellant and representatives of both sides, I visited the site of the incident, and positioned myself at the precise location in the carpenter's shop where Rivera said he sat. The events were simulated. A van was placed in the position testified to by Rivera. A fork lift truck was driven the route described by Rivera, and
the alleged activity at the rear of the van, replicating the alleged placing of the coils of rope into the van, was demonstrated.

From the location at which Rivera said he saw the events, and at which I positioned myself, it was impossible to see rope on a fork lift truck being "pushed" into the van. The rear of the van was opposite Rivera's location. The most that Rivera could have seen was the approach of the fork lift to the van, the legs of the Appellant after he got off the van, and some movement of those legs in proximity to the rear loading area of the van. I can understand how he thought the movement involved pushing the coils of rope into the van, but he could not see any such action directly.

I am not prepared to conclude that the circumstantial evidence of this event leads to the one conclusion that the Appellant put the coils in the van. The hearing record indicates that the Appellant was engaged in moving coils of rope from location to location that day in the warehouse. That he transported the rope on a fork lift that day is not inconsistent with that work. That he apparently removed rope from his fork lift at a location near or at the rear of the van is also not inconsistent with that assignment, particularly, if, as he testified, his job was to place the coils of rope at new locations in order to clear an area in the warehouse for some other activity. It has not been shown, clearly and convincingly, that the activity at or near the rear of the van was not merely the repositioning of the rope rather than its theft.

Moreover, the Commission has not shown in the hearing that rope was missing from inventory, though apparently inventories were taken. The evidence on that important fact is most inconclusive and hence indeterminative. The pre-hearing file (joint Exhibit #1) indicates that an inventory was taken shortly after report of the event and that same
coils of rope were missing. But, the Commission presented no testimony on that point at the hearing. Indeed, the direct testimony at the hearing was to the contrary. Though several witnesses testified that they heard or even took part in an inventory, those witnesses could not testify definitely about the results. But Supply Clerk Randolph Blake testified that he remembered the inventory taken shortly after the incident and that he heard Supervisor Navas tell managerial employee Foster that "all ropes were accounted for" and that Foster replied "if complete, what's the problem."

I recognize the hearsay nature of this latter testimony. But it was not rebutted by the Commission and no evidence was offered by the Commission at the hearing that that inventory showed missing rope. I do not consider a much later inventory, which apparently showed more than four coils of rope missing, to have any proximate or probative connection to the charge in this case.

The Commission also relies heavily on its claim that during its investigation, the Appellant denied moving coils of rope that day. And that from that falsification, the Commission logically and properly concluded that because Rivera and Supervisor Coco saw him carrying rope on the fork lift truck, the Appellant's denial was an attempt to divert attention from his theft. But during the testimony on this point by the Commission witness, Jorge Quiros, who was at that meeting, and upon questioning by the Examiner, it became clear that what the Appellant was denying at that investigative meeting was not that he was transporting rope that day but that he did not put any of it into the van. So, I find no false denials at that investigative point.

Certainly there are circumstantial matters in this record which create suspicion. That the alleged theft took place during the Appellants
lunch period when, ordinarily he does not work through lunch (and the same for Loaiza); that there were rumors that the rope was delivered by the van to one of the employee's wives located at some pier; and that the van was positioned by Loaiza at a location convenient to being loaded by a forklift, raise legitimate doubts about the Appellant's innocence. But suspicions, doubts and rumors do not add up to clear and convincing evidence, especially in a dismissal case.

The Commission has established that for a period of time, including the time of this incident, it had been suffering large scale thefts of merchandize and material from the warehouse. I hasten to observe that the Commission has an absolute right, indeed a duty to take vigorous corrective and preventative steps to guard against and stop theft of its property. Obviously, that legitimate objective is behind the charges in this case, and I am fully satisfied that those charges were made in good faith and upon an honest belief that a theft had been committed. But again, in an adjudicatory forum such as this Appeal, good faith and honest beliefs must be supported by acceptable evidence that meets the clear and convincing standard.

Let me be clear. I do not conclude unequivocally that the Appellant did not commit a theft. Rather, as is my authority, I conclude that the Commission's burden of proving that charge by the requisite clear and convincing standard has not been met.
On that basis, the Undersigned, duly designated as the Hearing Examiner, and having duly heard the proofs and allegations of the Appellant and the Commission in the above-named matter, renders the following DECISION:

The Commission did not show by clear and convincing evidence that it had just cause to dismiss Friedell Baker. He shall be reinstated with full back pay, seniority and benefits.

Eric J. Schmertz,
Hearing Examiner

DATED: September 15, 1993

STATE OF NEW YORK )
ss.:          
COUNTY OF NEW YORK )

I Eric J. Schmertz do hereby affirm upon my Oath as Hearing Examiner that I am the individual described in and who executed this instrument, which is my DECISION.
Pursuant to Section 252(c)(4) of Title 41 United States Code and Part 37 of the Federal Acquisition Regulation by and between the Panama Canal Commission, hereinafter referred to as the "Commission," and the Undersigned (contract No. CRA-94542-GB29) and the Decision and Order of the Federal Labor Relations Authority (43 FLRA No. 120), the Undersigned was appointed as the Hearing Examiner to hear and decide the Appeal of Hector Montes, hereinafter referred to as the "Appellant," from the Commission's Adverse Action of Removing him from its employ.

A hearing was held on August 25, 1993 at the offices of the Commission at which time the Appellant, his representatives and representatives of the Commission appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Appearances (Representatives of the parties)

For the Appellant:

Orlando Diaz, Esq.
National Maritime Union

Ozael Samaniego
NMU District Steward

For the Commission:

Office of General Counsel
By: Clea B. Efthimiadis, Esq.

Adolfo Ceballos,
Chief, Warehousing Branch, Logistical Support Division
The Appellant is charged with the theft of two bottles of liquid Lux soap on December 12, 1991 from the Commission's stock at its oil house. He was dismissed by the Commission for this offense effective April 24, 1992 after completion of the Commission's internal disciplinary procedures.

The Appellant does not deny that he removed the bottles of Lux soap from the Commission's supplies and acknowledged he planned to take them home. This admission, in the course of the Commission's investigation, after the bottles were found in the Appellant's bag during a search by a security guard, was made after the Appellant gave two other versions of what happened. Those two other versions need not be recited herein because at the hearing the Appellant reiterated the admission, but offered an explanation in either defense or mitigation. He explained that the Commission supplied bottled Lux to the employees to wash their meal utensils. And that instead of taking working time from his duties in the office to wash those utensils, he decided to wash them at home and took the liquid soap for that purpose.

The explanation is neither acceptable nor believable. To comply with his plan, the soap would have to be used at his home only for the meal utensils used at work, and nothing else. That is implausible and improbably in the extreme. Moreover, if that was the plan, the removal of two, large sized bottles would be an excessive quantity. Under any circumstance, the attempted removal of the soap was unauthorized, improper and can only be construed as a theft for the Appellant's personal use. Accordingly the charges are sustained.

The real question in this case is whether the penalty of dismissal is too severe. The Appellant argues that he had no "felonious
intent;" that the Commission failed to exercise judgement in fashioning the penalty of dismissal for items of such small value when the Commission's Schedule of Offenses and Penalties expressly authorizes, for a first offense of theft, a minimum penalty of five (5) days suspension and removal (dismissal) as the maximum penalty for a first offense.

It is well-settled that theft of an employer's property is ground for summary dismissal, regardless of the offending employee's prior work record. Here, the Appellant is a warehouse employee who has ready access to the Commission's supplies. In the face of the quantity of theft which the Commission was experiencing, I have no quarrel with a rule that mandates dismissal for theft or attempted theft. And under that circumstance, I would not substitute my judgement for that of the Commission in implementing such a policy.

But that has not been the Commission's uniform policy nor its uniform penalty. The schedule of offenses provides for penalties less than discharge for theft, if, as here, it is a first offense. I do not interpret that schedule as confining the Commission to only either a five (5) day suspension or removal. By implication and by the express provisions of Appendix A Section A-1-2 of Chapter 751 Disciplinary Action, penalties of suspensions in excess of five (5) days are contemplated and allowed, as well.

The record also contains examples of cases of theft of Commission property or "conspiracies to commit theft" of Commission's property where the penalties were suspensions.

The Commission in this case has not made any substantive distinctions among those cases, nor any distinction between them and the instant case.
No Commission witness testified as to why other theft or "conspiracy to commit theft" cases resulted in only suspensions, and why the instant case was so more serious as to justify dismissal. Hence, on the well-settled industrial relations principle that punishment must be evenhanded for employees similarly situated, I shall reduce the Appellant's removal to a suspension.

The length of the suspension shall be for the period of time that he has been removed. I make it that long because he was an employee of short tenure (three (3) years) and because he was not straight forward or forthcoming in the investigation by the Commission, or at the hearing. Before me, he persisted in his effort to justify his action and to escape punishment for what was clearly wrong, by his contrived explanation.

I also make his suspension of that length as notice to him and all other employees that a first offense of theft is not limited to a five (5) day suspension, but may well be more severe, including discharge.

And finally, employees should be on notice that the Commission need not tolerate theft, and that for the future, provided the Commission shows the Hearing Examiner legitimate mitigating distinctions in prior cases of theft in which the penalty was suspension; the offense of theft will carry with it a presumptive penalty of dismissal.
The Undersigned, duly designated as the Hearing Examiner in the above matter and having duly heard the proof and allegation of the Appellant and the Commission, renders the following DECISION:

The Removal of Hector Montes is reduced to a suspension for the period of time his has been out. He shall be reinstated, but without back pay. The period of time between his Removal and his reinstatement shall be deemed a disciplinary suspension for the charges sustained herein.

Eric J. Schmertz,
Hearing Examiner

DATED: September 15, 1993
STATE OF NEW YORK )
COUNTY OF NEW YORK )

I Eric J. Schmertz do hereby affirm upon my Oath as Hearing Examiner that I am the individual described in and who executed this instrument, which is my DECISION.
PANAMA CANAL COMMISSION
ADVERSE ACTION APPEALS

In the Matter of the Appeal

of

LUIS E. ARAUJO

DECISION OF

HEARING EXAMINER

Pursuant to Section 252(c)(4) of Title 41 United States Code and Part 37 of the Federal Acquisition Regulation by and between the Panama Canal Commission, hereinafter referred to as the "Commission," and the Undersigned (contract No. CRA -94542- GB29) and the Decision and Order of the Federal Labor Relations Authority (43 FLRA No. 120), the Undersigned was appointed as the Hearing Examiner to hear and decide the Appeal of Luis Araujo, hereinafter referred to as the "Appellant," from the Commission's Adverse Action of Removing him from its employ.

A hearing was held on August 18, 1993 at the offices of the Commission. Representatives of the Appellant and the Commission appeared. The Appellant did not appear though he received due notice of the hearing.

I directed that the hearing proceed in his absence. The Commission and the Appellant's representatives were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Appearances: (Representatives of the parties)

For the Appellant:

Orlando Diaz, Esq.
National Maritime Union

Azail Samaniego
NMU District Steward
For the Commission:

Offices of General Counsel
By: Glenn Heisler, Esq.

Alexandra Wong
Supervisory Administrative Services
Assistant, Gatum Locks, Locks Division

The Appellant was Removed on September 15, 1992 because of a record of absenteeism, tardiness and failure to follow instructions. The charges are not denied or refuted, and hence are sustained.

The letter dated July 27, 1992 from George A. Mercier, the Commission's Personal Director to the Appellant, notifying him of his proposed Removal sets forth the Appellant's record of poor attendance and his failure to follow instructions regarding absences and leave instructions. It also sets forth his prior disciplinary record of reprimands and suspensions for those offenses. That letter, the receipt of which the Appellant acknowledged with his signature thereon, is attached hereto and made a part hereof as Attachment A.

It is universally well-settled that chronic absenteeism, tardiness and failure to follow instructions are grounds for dismissal whether or not the cause of those offenses is the employee's fault or beyond his fault or control. Here the Appellant was a Boatman in the Locks Division, a job that needed to be filled daily and which, if vacant because of absences or tardiness, directly impeded the efficient operation of the Canal's locks. The Commission is entitled to require regular and punctual attendance from its employees, especially those in such essential operating jobs.

The Appellant failed to meet that duty over an extended period of time, and I have no choice but to conclude that his poor attendance record together with the other related offenses had become a chronic.
Also, a record of these types of offenses warrants dismissal after the application of progressive discipline. The Commission has met that requirement. A series of reprimands and suspensions were previously imposed on the Appellant. He was given every reasonable opportunity to improve his record, but failed to do so. There is no doubt that he was put on notice adequately that his record was unsatisfactory and that unless improved to a satisfactory level, he would be dismissed.

His Removal was the proper culmination of his continued poor record, and is upheld.

The Undersigned duly designated as the Hearing Examiner, and having duly heard the proofs and allegations presented in the above matter, renders the following Decision:

The Removal of Luis E. Araujo was for just cause and is upheld.

Eric J. Schmertz,
Hearing Examiner

DATED: September 15, 1993
STATE OF NEW YORK )
COUNTY OF NEW YORK ) ss.: I

I Eric J. Schmertz do hereby affirm upon my Oath as Hearing Examiner that I am the individual described in and who executed this instrument, which is my DECISION.
Pursuant to Section 252(c)(4) of Title 41 United States Code and Part 37 of the Federal Acquisition Regulation by and between the Panama Canal Commission, hereinafter referred to as the "Commission," and the Undersigned (contract No. CRA -94542- GB29) and the Decision and Order of the Federal Labor Relations Authority (43 FLRA No. 120), the Undersigned was appointed as the Hearing Examiner to hear and decide the Appeal of Luis Coco, hereinafter referred to as the "Appellant," from the Commission's Adverse Action of Removing him from its employ.

A hearing was held on August 23, 1993 at which time the Appellant, his representatives and representatives of the Commission appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Appearances (Representatives of the parties)

For the Appellant:

Arthur S. Davis

Alvin McFarlane
Alternate District Steward,
International Organization of Masters, Mates and Pilots

For the Commission:

Office of General Counsel
By: Jay Sieleman, Esq.

Yolanda Valdes
Employee Relations Specialist
Personnel Operations Division
The Appellant was Removed effective September 4, 1990 for refusing to follow an order to undergo a drug test and for a second offense of sleeping on the job.

Based on what the Commission asserts was "reasonable suspicion," the Appellant was ordered to take a drug test on April 24, 1990, and refused to do so.

Sub-Chapter 4(3) of the Employee Health and Counselling and Assistance Program reads in pertinent part:

Reasonable suspicion. When there is a reasonable suspicion that an employee uses illegal drugs, a request for testing supported by written documentation should be sent to the Drug Program Coordinator (PRDX) by the branch chief or higher...

The Commission's Schedule of Disciplinary Offenses and Penalties reads in pertinent part:

12(b)...willful refusal to carry out any proper order from a supervisor.

Maximum penalty: Removal.

The Appellant did not deny at the hearing that he refused to take an ordered drug test. Indeed, in his testimony and in answers to questions on cross-examination and from the Examiner he admitted that he refused because he thought it was harassment by supervisor Quires. And by refusing he thought he could bring the harassment to the attention of superior officers of the Commission.

He expressly stated that he knew that the consequence of refusing the drug test was his dismissal and that he "risked his job" by doing so.
Assuming the Appellant's reasons for refusing the drug test had merit, his response was nonetheless insubordination in a well-recognized form. He should know, and I believe he did know that the universally well-settled rule in such situations is that the employee is to comply with the order, and if he thinks it is improper (or here, harassment) he should grieve under the grievance and arbitration provisions of the applicable collective bargaining agreement. This remedy was available to the Appellant but he did not use it. Had he, the issue of harassment could have been addressed and presented to higher officials of the Commission, as the Appellant wished. He not only failed in his purpose, but knowingly and purposefully committed an act of insubordination for which dismissal is a proper penalty.

I am satisfied by the record, that the Commission had reasonable grounds and a "reasonable suspicion" to refer the Appellant for a drug test. The Commission introduced official records showing the Appellant's pattern of absences, tardiness, claimed illness, sleeping on the job, work performance, and physical demeanor, which cumulatively present a prima facie case of "reasonable suspicion." Considering the safety sensitive nature of the Commission's mission, the Presidential Executive Order with which the Commission as an agency of the executive branch of government must comply and which demands a drug free work place, the presumption must be in support of an ordered drug test based on the kind of prima facie evidence of reasonable suspicion present in this case.

In fact, though the Appellant claims that the use of the "reasonable suspicion" evidence is also an example of supervision's harassment, he does not deny the factual accuracy of the record of absenteeism, illness, tardiness, or his reported physical symptoms that may reasonably result from drug use.
In short, I find no probative rebuttal in the record to the Commission's official documentation of its "reasonable suspicion" as the basis for ordering the drug test, and I find the Appellant's refusal to comply with the order to take the test to be insubordination. Considering the nature of the Commission's work, the Presidential Executive Order to which it is bound, and the Commissions published schedule of Disciplinary Actions, I find that the Appellant's Removal was for cause and was proper.

My Decision regarding the drug test makes a recitation of and a formal decision on the charge of sleeping on the job, unnecessary.

The Undersigned, duly designated as the Hearing Examiner, and having duly heard the proofs and allegations of the Appellant and the Commission, makes the following DECISION:

The Removal of Luis Coco for insubordination was for just cause and is upheld.

Eric J. Schmertz,
Hearing Examiner

DATED: September 15, 1993

STATE OF NEW YORK )
COUNTY OF NEW YORK ) ss.:

I Eric J. Schmertz do hereby affirm upon my Oath as Hearing Examiner that I am the individual described in and who executed this instrument, which is my DECISION.
Pursuant to Section 252(c)(4) of Title 41 United States Code and Part 37 of the Federal Acquisition Regulation by and between the Panama Canal Commission, hereinafter referred to as the "Commission," and the Undersigned (contract No. CRA -94542- GB29) and the Decision and Order of the Federal Labor Relations Authority (43 FLRA No. 120), the Undersigned was appointed as the Hearing Examiner to hear and decide the Appeal of Jose Perinan, hereinafter referred to as the "Appellant," from the Commission's Adverse Action of Suspending him for thirty (30) days.

A hearing was held on August 16, 1993 in the offices of the Commission at which time the Appellant, his representatives, and representatives of the Commission appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Appearances (Representatives of the parties)

For the Appellant:

Arthur S. Davis
Alvin McFarland
Alternate District Steward
International Organization of Master, Mates, and Pilots
For the Commission:

Office of General Counsel
By: Clea B. Efthimiadis, Esq.

Rodrigo Teran
Acting Superintendent, Northern District,
Motor Transportation Division

The Appellant was suspended for thirty (30) days from May 24, 1992 through June 22, 1992 "for willful use of a government motor vehicle for other than official purposes."

The undisputed facts show that on February 12, 1992 the Appellant, a driver, went off his assigned route about 1/2 a mile with the Commission vehicle he was driving to go to the carpenter shop to pick up a picture frame for his personal use. His work assignment that day with the official vehicle was on a route to and from the Motor Transportation Division and Gatun. To go to the carpenter shop is unquestionably a diversion from that assignment, and to do so to pick up an item for personal use is unquestionably a violation of the Commissions regulations and applicable statutes concerning the use of government motor vehicles.

There is no question that the Appellant knew of the regulation against the use of a Commission vehicle for this purpose. He acknowledged so at the hearing. The regulation is posted on a sticker in each vehicle, and drivers are regularly reminded of it in periodic safety meetings with supervision. It is in written form in the M.T.D. Driver's Regulations.

In admitting the charge, the Appellant cites his 26 years of service, his dedication to the Commission, and his truthfulness, and seeks leniency from the Hearing Examiner.
The Hearing Examiner's authority is limited to decide if the offense charged was committed, and if so, whether the penalty is proper. Mitigating circumstances, such as those advanced by the Appellant are for consideration by the Commission prior and at the time it is decided to prefer charges. If the offense has been committed and the charges sustained, the Examiner has no authority to substitute his judgement for that of the Commission on the penalty imposed, if that penalty is properly related to the offense. In short, leniency or a less severe penalty than one that is proper, is for the Commission to consider, not for the Examiner. Especially so here, where by statute a thirty (30) day suspension is mandated for willful use of a government vehicle for personal purposes (31 USC 1349).

There has been no showing that a thirty (30) day suspension has not been the penalty in all similar cases of wrongful use of a Commission vehicle. Hence, by practice and statute it is the proper and required penalty in this case.
The Undersigned, duly designated as the Hearing Examiner and having duly heard the proofs and allegations of the Appellant and the Commission, renders the following DECISION:

The thirty (30) day suspension of Jose Perinan for willful use of a Commission vehicle for a personal purpose is upheld.

Eric J. Schmertz,
Hearing Examiner

DATED: September 15, 1993

STATE OF NEW YORK )
ss.:               COUNTY OF NEW YORK )

I Eric J. Schmertz do hereby affirm upon my Oath as Hearing Examiner that I am the individual described in and who executed this instrument, which is my DECISION.
Pursuant to Section 252(c)(4) of Title 41 United States Code and Part 37 of the Federal Acquisition Regulation by and between the Panama Canal Commission, hereinafter referred to as the "Commission," and the Undersigned (contract No. CRA -94542- GB29) and the Decision and Order of the Federal Labor Relations Authority (43 FLRA No. 120), the Undersigned was appointed as the Hearing Examiner to hear and decide the Appeal of Cornelio Rivas, hereinafter referred to as the "Appellant," from the Adverse Action of the Commission Removing him from its employ.

A hearing was held on August 19, 1993 in the offices of the Commission at which time the Appellant, his representatives and representatives of the Commission appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Appearances (Representatives of the parties)

For the Appellant:
Orlando Diaz, Esq.
National Maritime Union
Azael Samaniego
NMU District Steward

For the Commission:
Office of General Counsel
By: Glenn Heisler, Esq.

Catherine Cedeno
Supervisory Administrative Services Assistant
By letter dated August 20, 1992 the Commission's Personnel Director notified the Appellant, a Line Handler of the proposal "to remove (him)…from the service for "repeated acts of misconduct." That letter, which sets forth the specifics of the charges as well as the progressive discipline previously imposed on the Appellant, is attached hereto and made a part hereof as Attachment A.

The Appellant does not deny the allegations. He explains that he tested positive for alcohol on April 30, 1992 because his step-son had died and he drank following the funeral.

The Appellant asserts that with his re-enrollment in the Counselling and Assistance Program on June 16, 1992, his Removal for prior offenses (the April 30th positive test for alcohol and the offenses referred to in sub-paragraphs b, c, d, e, and f of the letter of charges) should have been held in abeyance for the usual one-year period during his participation and treatment in the Assistance Program.

Section 3-6 Re-enrollment of Chapter 792, Employee Health Counselling and Assistance Program reads:

3-6 Re-enrollment

An employee who successfully completes the rehabilitation program and at a later date suffers a recurrence of alcohol or drug-related problems may be re-enrolled. Re-entry into the rehabilitation program may be provisional for employees previously terminated from the program for noncooperation or for declining the services offered. Decisions on eligibility for re-enrollment are made by the rehabilitation team (an Occupational Health Division physician, the Supervisory Occupational Health Nurse, the Employee
Counselling Coordinator, and counselors). Factors taken into consideration for re-enrollment include the employee's job performance, the employee's motivation for treatment, the supervisor's recommendation, and the length of time since the employee was last enrolled in the program.

Section 3-7c of the Program states in pertinent part: "...employees entering the Program for the first time or re-enrolling after successfully completing the Program at an earlier date may be granted a postponement of pending action for deficiencies related to alcohol or drug use which occurred prior to entering the program" (first emphasis added).

The record is not clear as to whether the prior offenses set forth in sub-paragraphs b, c, d, e, and f of the aforesaid letter are "deficiencies related to alcohol or drug use."

Only if so, would he be eligible under Section 3-7c for a postponement of disciplinary action for those offenses by his re-enrollment in the Program.

However, his last offense of May 5, 1992 before the positive alcohol test of May 28, 1992 was punished with a ten-day suspension. He was also punished for the earlier offenses. So, but for the subsequent positive alcohol test, he would not have been dismissed. It was the positive alcohol test that triggered his Removal.

Two facts impel me to conclude that with his re-enrollment he should have been accorded an additional postponement and period of abeyance, the offenses referred to in sub-paragraphs b, c, d, e and f notwithstanding.
To be re-enrolled, the rehabilitation team must have determined that the Appellant's job performance and motivation for treatment were, at least, adequate. And that determination was made well subsequent to the offenses referred to in sub-paragraphs b, c, d, e and f. In short, the rehabilitation team apparently did not consider those offenses to be disqualifying in terms of his job performance.

More important is the application of the express provisions of Section 3-7c. It provides that with re-enrollment the employee "may be granted a postponement of pending action for deficiencies related to alcohol which occurred prior to entering the program" (emphasis added).

The Appellant's positive test for alcohol abuse of May 28, 1992 was a "deficiency related to alcohol" which occurred prior to his re-entry into the program in June 1992. If under that language discipline related to that use of alcohol is postponed, the event that triggered the Appellant's Removal would not have had a triggering effect.

Put another way, if the effect of re-enrollment is to hold in abeyance a Removal founded on the last event in a series of misconducts, the Removal action is per force suspended too.

I conclude that with the Appellant's re-enrollment, that consequence follows, and that his Removal was therefore premature.

I recognize that the "postponement of pending action for deficiencies related to alcohol..." is also discretionary with the Commission. Section 3-7c states that such a postponement may be granted.

But, under the circumstances of this case, where the Appellant once successfully completed the Assistance Program; when he was re-enrolled in that Program after an apparent affirmative evaluation of his job performance and motivation for treatment; and where he would not have been dismissed but for a single incident of alcohol abuse prior to his
permitted re-entry into the Program, the proper exercise of the Commission's discretion should have been to accord him the postponement.

I am not persuaded, however, that the Appellant is entitled to reinstatement with back pay. A postponement of his Removal does not mean to me that he is totally immune from any discipline for the positive alcohol test of May 28th. I think that act of misconduct warrants a disciplinary suspension for the period of time he has been out.

The Undersigned, duly designated as the Hearing Examiner and having duly heard the proofs and allegations of the Appellant and the Commission, renders the following DECISION:

The Removal of Cornelio Rivas is reduced to a disciplinary suspension for the period of time he has been out. He shall be reinstated but without back pay or other monetary benefits he would have earned during that period.

Eric J. Schmertz,
Hearing Examiner

DATED: September 15, 1993

STATE OF NEW YORK )
COUNTY OF NEW YORK )

I Eric J. Schmertz do hereby affirm upon my Oath as Hearing Examiner that I am the individual described in and who executed this instrument, which is my DECISION.
PANAMA CANAL COMMISSION
ADVERSE ACTION APPEALS

In the Matter of the Appeals

of

RICARDO DE LEON, ISIDRO TESIS,
ALIRIO SANCHEZ, LUIS A. DOMINGUEZ,
ROBERTO WEST, LUIS A. COLLINS

DECISION OF
HEARING EXAMINER

Pursuant to Section 252(c)(4) of Title 41 United States Code and Part 37 of the Federal Acquisition Regulation by and between the Panama Canal Commission, hereinafter referred to as the "Commission," and the Undersigned (contract No. CRA-94542-GB29) and the Decision and Order of the Federal Labor Relations Authority (43 FLRA No. 120), the Undersigned was appointed as the Hearing Examiner to hear and decide the Appeals of Ricardo De Leon, Isidro Tesis, Alirio Sanchez, Luis A. Dominguez, Roberto West and Luis A. Collins hereinafter referred to as the "Appellants," from the Adverse Actions of the Commission Removing them from its employ.

Hearings were held in the Commission's office on the following dates:

Ricardo De Leon August 16, 1993
Isidro Tesis August 18, 1993
Alirio Sanchez August 24, 1993
Luis A. Dominguez August 24, 1993
Roberto West August 26, 1993
Luis A. Collins August 26, 1993

On the date of each of their respective hearings and except for Appellant Roberto West, the Appellants involved appeared with their representatives, Appellant West's representatives also appeared. The Commission was duly represented. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.
Appearances (Representatives of the parties)

For the Appellants:

Orlando Diaz, Esq.
National Maritime Union

Azael Samaniego
NMU District Steward

For the Commission:

Office of General Counsel
By: Jay Sieleman, Esq.

Angela Rodriguez
Employee Relations Specialist

Each Appellant was dismissed from the Commission's employ because of a positive test showing use of an illegal drug.

Material to these cases are Chapter 792, Employee Health Counselling and Assistance Program; Executive Order No. 12563 of September 15, 1986 issued by President Reagan and Chapter 751 Disciplinary Actions. These three documents, in their entirety, are attached hereto and made a part hereof respectively as Attachments A, B and C.

Certain provisions of each warrant highlighting as follows:

Chapter 792 Employee Health Counselling and Assistance Program.

Sub-Chapter 1-2a.

Agency Policy:

a. The Panama Canal Commission recognizes alcoholism, drug abuse, smoking and stress as treatable health problems. The Commission is concerned when the illnesses impair the efficiency and safe performance of employee's assigned duties, reduce employee dependability, or reflect discredit on the agency. The effects of alcohol or drug abuse on job performance include absenteeism, faulty decision
making, and increased accidents. The Employee Health Counselling and Assistance Program provides an employee who has any of these problems with evaluation, counselling and/or treatment by health and counselling professionals. The goals of the Program are to assist employees in overcoming health problems in general, and to improve the job performance, satisfaction, conduct and attendance of employees whose efficiency has been diminished by these health problems.

Sub-Chapter 3-1
Purpose of the Program:

The Employee Assistance Program provides a source of help in confronting, dealing with and resolving a variety of problems including alcohol abuse, use of illegal drugs, stress management, marital and family problems.

Sub-Chapter 3-4
Rehabilitation Program Completion:

An employee who actively participates in the program for alcohol and/or drug-related reasons, maintains sobriety and fulfills the agreement for treatment made with the attending staff is considered to have successfully completed the program. In some cases, a period longer than 12 months is required in the program for an employee to receive maximum benefit. In any case, if the employee has authorized the disclosure of information by signing a consent
form, in accordance with Section 5-2 of this Chapter, a memorandum will be sent to the supervisor noting the completion (and re-enrollment for continuing treatment, if applicable) of the Program.

Sub-Chapter 3-6
Re-Enrollment:

An employee who successfully completes the rehabilitation program and at a later date suffers a recurrence of alcohol or drug-related problems may be re-enrolled. Re-entry into the rehabilitation program may be provisional for employees previously terminated from the program for noncooperation or for declining the services offered. Decisions on eligibility for re-enrollment are made by the rehabilitation team (an Occupational Health Division physician, the Supervisory Occupational Health Nurse, the Employee Counselling Coordinator, and counselors). Factors taken into consideration for re-enrollment include the employee's job performance, the employee's motivation for treatment, the supervisor's recommendation, and the length of time since the employee was last enrolled in the Program.

Sub-Chapter 3-7 a, b, c
Relationship to Disciplinary Action:

a. Purpose. Employees whose use of alcohol or drugs interferes with the performance of their duties should be offered a reasonable opportunity for rehabilitation before decisions to take adverse or
disciplinary actions are effected. If the employee refuses to seek counselling, adverse or disciplinary action should be taken as warranted on the basis of unsatisfactory job performance, conduct, and/or attendance. In the case of illegal drug use, an employee may be removed from Federal service upon the first confirmed finding if the employee refuses to enroll in rehabilitation counselling or upon a second confirmed finding of illegal drug use.

b. Safe harbor. An employee who voluntarily admits his drug use prior to being identified through other means, completes a rehabilitation treatment program under the Commission's EAP, and thereafter refrains from drug use, will be safe from discipline for reasons of illegal drug use.

c. Postponement of disciplinary action. (1) If a disciplinary or adverse action has been or is in the process of being proposed for work deficiencies (unsatisfactory job performance, conduct, or attendance) or other factors related to alcohol or drug abuse or illegal activity, upon recommendation of the Occupational Health Division physician, employees entering the program for the first time or re-enrolling after successfully completing the program at an earlier date, may be granted a postponement of pending action for deficiencies related to alcohol or drug abuse which occurred prior to entering the Program. Any such postponement must be requested by
The purpose of a postponement is to allow the employee to demonstrate job performance, conduct, and attendance free of alcohol or drug intake; it should not be considered to be a time of freedom from job expectations or conduct, or a shield from disciplinary action due to subsequent offenses. If the employee fails to cooperate with the rehabilitation program, job performance, conduct or attendance requirements, any pending disciplinary/ adverse action may be effected and action concerning the new problems may be initiated.

Executive Order No. 12563

By the authority vested in me as President by the Constitution and laws of the United States of America, including Section 3301(2) of Title 5 of the United States Code, Section 7301 of Title 5 of the United States Code, Section 29033-1 of Title 42 of the United States Code, deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the Federal service, and in order to establish standards and procedures to ensure fairness in achieving a drug-free Federal work place and to protect the privacy of Federal employees, it is hereby ordered as follows:

Section 1. Drug-Free Work Place:

(a) Federal employees are required to refrain from the use of illegal drugs.
(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for Federal employment.

Section 2. Agency Responsibilities:

(a) The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public.

(b) Each agency plan shall include:

(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

(2) Employee Assistance Programs emphasizing high level direction, education, counselling, referral to rehabilitation, and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

(4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and
(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.

Section 3. Drug Testing Programs.

(a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.

(b) The head of each Executive agency shall establish a program for voluntary employee drug testing.

(c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:

(1) When there is a reasonable suspicion that any employee uses illegal drugs;

(2) In an examination authorized by the agency regarding an accident or unsafe practice; or
(3) As part of or as a follow-up to counselling or rehabilitation for illegal drug use through an Employee Assistance Program.

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use. The agency shall conduct their drug testing programs in accordance with these guidelines once promulgated.

Section 5. Personnel Actions.

(a) Agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counselling, and referral for treatment or rehabilitation as appropriate.

(b) Agencies shall initiate action to discipline any employee who is found to use illegal drugs, provided that such action is not required for an employee who:

(1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to Section 3(b) of this Order, prior to being identified through other means;

(2) Obtains counselling or rehabilitation through an Employee Assistance Program; and

(3) Thereafter refrains from using illegal drugs.
(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion of rehabilitation through an Employee Assistance Program. However, as part of a rehabilitation or counselling program, the head of an Executive agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

(d) Agencies shall initiate action to remove from the service any employee who is found to use illegal drugs and:

(1) Refuses to obtain counselling or rehabilitation through an Employee Assistance Program; or

(2) Does not thereafter refrain from using illegal drugs.

Chapter 751 Disciplinary Actions

Appendix A-1-d (in part):

Disciplinary or adverse actions demand the exercise of responsible judgement so that an employee will not be penalized out of proportion to the character of the offense...

The Appellants do not challenge the consistency of the Counselling and Assistance Program with the Executive Order. It is obvious to me, and I so hold, that the Counselling and Assistance Program is a precise and therefore correct implementation of the Executive Order.
The principal challenge by all or virtually all of the Appellants is to the procedure of Removing an employee who is initially enrolled in the Counselling Program because of a positive drug test, if that employee tests positive again during twelve months in the Program or within the twelve months of the period of abeyance granted by the Personnel Director.

Most of these cases involve employees who tested positive for use of illegal drugs; whose Removal was held in abeyance by the Commission because they then entered the Counselling Program, and who by the terms of that abeyance would suffer implementation of their Removals if they failed to remain drug free for twelve months in the Program and for twelve months from the beginning date of the abeyance. The pertinent parts of a typical abeyance letter from the Commission's Personnel Director reads:

[You have been] notified of a proposal to remove you from the service of the Panama Canal Commission for unauthorized use of illegal drugs...

...it is my decision...that you be removed from the service. However, based on your expressed desire to rehabilitate, your enrollment in the Panama Canal Commission Employee Health Counselling and Assistance Program...and your eligibility for postponement of the adverse action, I have decided to hold the implementation of my decision in abeyance for a period not to exceed one year from the date you receive this letter, subject to the following conditions:

1. You must participate in the agency's Employee Health Counselling and Assistance

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Program for a period of twelve months, and you must successfully complete the program.

2. ...

3. ...

4. ...

5. ...any violation of conditions during the one year period, however, will be grounds for implementing the decision to remove you without delay.

6. ...

7. ...even a single incident of...a verified positive drug test result...may be sufficient cause for implementing the Removal (emphasis added).

By his signature, each affected Appellant accepted this and other conditions.

The Appellants' challenge is to the reasonableness of the foregoing condition. They asserted that a "relapse" during either of the twelve month periods is to be expected in the course of treatment and that it is unfair and unreasonable to dismiss an employee for that single relapse. Or, in short, that that rigid condition is not consistent with Sections 1-2, 3-4, 3-6 and 3-7 of the program nor Chapter 751.

I do not agree. The Presidential Executive Order, to which the Commission is bound, mandates that consequence. Moreover, I do not consider it arbitrary or unreasonable, in the war on drugs in the work
place, and for employees in the safety sensitive jobs involved in these cases, for the Commission which has given the employee an opportunity at rehabilitation through a professional rehabilitation program and a chance to keep his job when otherwise there is cause for his dismissal, to require that employee to remain drug free for a twelve month period. Though stringent and stern, the condition is consistent with a meaningful rehabilitation program and clearly, in my judgement, a reasonable condition for continued employment under the circumstances. It meets the requirement of Sub-Chapter 3-7 that employees "be offered a reasonable opportunity for rehabilitation before decisions to take adverse or disciplinary action are effected." So the argument of unreasonableness in that regard is rejected in all the cases in which it was raised.

The same is true for an employee who has any other "relapse" and drops out of the program within the twelve month period, or is terminated from the Program for poor attendance or other failures to follow the Program's disciplines.

Additionally, it should be pointed out that enrollment in or re-enrollment in the Program is not an automatic sanctuary from discipline. It is a "safe harbor" only as defined in 3-7b of the Program. And re-enrollment is not guaranteed. Section 3-6 makes clear, with the word "may," that re-enrollment is discretionary with the Commission and conditioned on the factors set forth in the last sentence thereof.

Therefore, contentions in these proceedings that an employee is immune from discipline if he enrolls in the Program after his illegal drug use has been discovered or should be re-enrolled in the Program after successfully completing twelve months if he thereafter tests positive again, are not supported by the conditions of the Program and therefore are rejected where asserted in these cases.
These and other issues, contentions and factual distinctions, if any, will be dealt with in the discussions and Decisions of each case.

RICARDO DE LEON

On December 13, 1991, Appellant De Leon, a line handler at the Locks was notified by the Commission of a "proposal to remove (him) from (its service) for sleeping on the job, wasting time on the job, and repeated instances of unauthorized absences from duty and failure to follow written leave instructions/procedures...

On January 27, 1992 the Commission's Personnel Director upheld the proposal of Removal, but, because of Appellant's enrollment in the Employee Health Counselling and Assistance Program held the implementation of the decision in abeyance, subject to the express conditions of the "abeyance" letter of that date.

The Appellant admitted that he had an alcohol problem upon entry into the Assistance Program.

Less than one year later on October 2, 1992, the Appellant tested positive for use of an illegal drug. This was in violation of a specified condition of the "abeyance." Condition #4 of the Personnel Director's letter of January 27, 1992 provides in pertinent part:

Any violation of the conditions during the one-year period...will be grounds for implementing the decision to remove you without delay....

Even a single incident of a verified positive test result...may be sufficient cause for implementing the removal.
Considering this express violation of the conditions of the abeyance and the Appellant's record otherwise, including prior progressive discipline and continued unauthorized absences during the abeyance period, the Commission had cause to impose the penalty it expressly warned the Appellant would be imposed for those violations, namely Removal from the service.

I have previously held that the procedure of an abeyance of implementation of a Removal under the stated conditions with which an employee must comply, constitutes the reasonable chance at rehabilitation contemplated by the Assistance Program, the Executive Order and the Disciplinary Actions.

The Removal of Ricardo De Leon was for just cause and is upheld.

ISIDRO TESIS

On April 20, 1992 Appellant Tesis, a Line Handler was notified by the Commission's Personnel Director of "a proposal to remove (him) from the services...for (1) refusal to carry out a proper order from an official of the Occupational Health Division as directed, i.e. undergo drug testings, and (2) excessive and repeated unauthorized absences from duty and failure to follow written leave procedures/instructions..."

Appellant admitted the use of cocaine and requested an opportunity for rehabilitation.

The Personnel Director upheld the foregoing second charge and Appellant's Removal from the service, but held the Removal in abeyance because of Appellant's re-enrollment in the Assistance Program on March 2, 1992. The Personnel Director's letter of April 20, 1992 set forth the
specific conditions the Appellant would have to comply with during the abeyance period of one year, including the condition that he remain drug free.

On August 6, 1992 five months after entering the Assistance Program under the "abeyance" conditions, the Appellant tested positive for use of an illegal drug, thereby violating an express condition of the abeyance arrangement. Under that circumstance, and considering the Appellants prior unsatisfactory discipline record, for which he was previously progressively discipline, the Commission had the right to implement the penalty that it warned the Appellant would be imposed for a violation of the abeyance conditions, namely the penalty of Removal.

My ruling holding the Commission's actions and the conditions of the abeyance period to be reasonable, obtain to this case.

The Appellant's moving plea for leniency and for another chance, with particular reference to the drastic impact on his family, especially his children, that would result from the loss of his job, are matters not within the authority of the Examiner to consider. The Examiner's role is to determine if the offense has been committed, and if so, whether the penalty is legally proper. Mitigating considerations in the face of an Appellant's guilt, and where Removal from the service is a legally proper penalty for that offense, are for the Commission to consider, not the Examiner.

The Commission had just cause to Remove Isidro Tesis from its employ. His Removal is upheld.
ALIRIO SANCHEZ

On January 3, 1992 the Appellant, a Drill Rig Operator was notified by the Acting Personnel Director of the "proposal to remove (him)...for unauthorized use of illegal drugs.

The allegation of that drug use is not denied by Appellant in this proceeding.

On January 28, 1991 the Personnel Director wrote the Appellant upholding the charge, but held the Appellant's Removal in abeyance "for a period not to exceed one year from the date you receive this letter" because Appellant had enrolled in the Assistance Program.

As in other similar cases, the "abeyance" was conditioned on certain specific and enumerated requirements. Among them (#4) states in pertinent part:

"Any violation of the conditions during the one year period...will be grounds for implementing the decision to remove you without delay."

"Even a single incident of...a verified positive drug test result...may be sufficient cause for implementing the removal."

By his signature on that letter, the Appellant acknowledged and accepted the conditions.

As of December 17, 1992, less than one year after receipt of the abeyance letter, the Appellant tested positive for use of an illegal drug, thereby violating a condition of the "abeyance" and his continued employment.

As I have rejected the argument that the foregoing condition is unreasonable and have held instead that it is a proper condition for both rehabilitation and continued employment, especially for those in safety
sensitive jobs, which includes this "Appellant," I find that with this violation the Commission had the right to implement the penalty it warned the Appellant would be imposed for the violation.

The Removal of Alirio Sanchez was for just cause and is upheld.

LUIS A. DOMINGUEZ

On July 22, 1991 the Appellant, a Line Handler was notified by the Personnel Director of "a proposal to remove (him) from the service...for: (1) Unauthorized use of illegal drugs; and (2) Reporting for duty under the influence of an intoxicant and refusal to carry out a proper order...as directed, i.e. undergo alcohol/drug testing.

The Appellant did not deny or contest these charges.

By letter of August 22, 1991, the Personnel Director upheld the charges, but held in abeyance the Appellant's Removal from the service because of Appellant's enrollment in the Counselling and Assistance Program.

That letter contained the usual specific conditions. Among them is the requirement that the Appellant remain drug free for a one year period (from the date the letter is received) as well as the requirement that he successfully complete the Counselling and Assistance Program for a period of twelve months.

The Appellant tested positive for drug use from a specimen collected on December 16, 1991, four months after his Removal was held in abeyance. This violated the foregoing express condition of his continued employment and made him subject to immediate dismissal.

My prior rulings upholding the reasonableness of the foregoing condition, within the meaning of the Counselling and Assistance Program,
within the meaning of the Executive Order and Chapter 751 (Disciplinary Actions), obtain to this case as well. Again I note, as in the prior cases, that the Appellant occupied a safety sensitive job.

Accordingly, the Commission had just cause for the Removal of Luis A. Dominguez. The Removal is upheld.

ROBERTO WEST

The Appellant failed to appear at the hearing on August 26, 1993 though he received due notice.

I directed that the hearing go forward in his absence.

The Appellant was Removed for "unauthorized use of illegal drugs."

By letter dated August 28, 1989 the Appellant was notified of a proposal to "remove (him) from the service...for unauthorized use of illegal drugs." He entered the Commission's Counselling and Assistance Program on June 22, 1989, and his Removal was held in abeyance for one year from the date he received the Personnel Director's abeyance letter of October 10, 1989.

The abeyance was subject to the usual conditions, including the requirement that Appellant remain drug free for that one year period.

Appellant's urine sample collected September 20, 1990, less than one year after the October 10, 1989 abeyance letter, was positive for use of an illegal drug.

Appellant thus violated an express condition of the abeyance which he acknowledged and accepted. The Commission is therefore justified in implementing the penalty which it warned the Appellant would be imposed for that violation, namely the penalty of Removal.
My prior rulings holding that the foregoing procedures and conditions meet the test of reasonableness under Chapters 792 and 791 and the Executive Order, obtain to this case as well.

Accordingly, the Removal of Roberto West was for just cause and is upheld.

LUIS A. COLLINS

By letter dated July 23, 1990, the Appellant was notified by the Personnel Director of the proposal to "Remove (him) from the service... for unauthorized use of illegal drugs."

As the Appellant entered the Counselling and Assistance Program, the Personnel Director by letter dated August 13, 1990, held the Removal in abeyance for the usual twelve month period, subject to the regular conditions including that the Appellant remain drug free for the one year period. The Appellant acknowledged and accepted those conditions of the abeyance.

On November 30, 1990, the Appellant was terminated from the Program because "he did not comply with the treatment plan." The Appellant was Removed from the service effective January 5, 1991.

In the course of the hearing, the Commission established by direct testimony that the Appellant's failure to comply with the treatment plan included a positive test for use of an illegal drug from a specimen collected on March 23, 1990.

As the positive test for use of an illegal drug occurred less than one year after the Personnel Director's abeyance letter of August 13, 1990, the Appellant violated one of the conditions of the abeyance. This
violation justified the imposition of the penalty which the Appellant was warned would be imposed for such a violation, namely the penalty of Removal.

Again, as I have stated before, the foregoing procedure and conditions meet the test of reasonableness under Chapters 792, 751 and the Executive Order.

Accordingly, the Removal of Luis A. Collins was for cause and is upheld.

The Undersigned, duly designated as the Hearing Examiner, and having duly heard the proofs and allegations of the Appellants and the Commission, renders the following DECISIONS:

The Removals of Ricardo De Leon, Isidro Tesis, Alirio Sanchez, Luis A. Dominiguez, Roberto West and Luis A. Collins were for just cause. Their Removals are upheld.

Eric J. Schmertz,
Hearing Examiner

DATED: September 15, 1993
STATE OF NEW YORK ) ss.: COUNTY OF NEW YORK )

I Eric J. Schmertz do hereby affirm upon my Oath as Hearing Examiner that I am the individual described in and who executed this instrument, which is my DECISION.
Impartial Chairman, Transport Workers Union of America Local 100, -and- New York Bus Service

In the Matter of the Arbitration between

Transport Workers Union of American Local 100

and

Parochial Bus Systems, Inc., New York Bus Tours and Affiliated Companies

The stipulated issue is the propriety of the discharge of Arthur Porter.

The above-named Union and Company have settled the foregoing issue and dispute and have entered a Settlement Agreement, dated March 1, 1993. At the request of the Union and the Company, I make that Settlement Agreement my Award as follows:

AGREEMENT, made this 1st day of March 1993 by and between PAROCHIAL BUS SYSTEMS, INC., NEW YORK BUS TOURS, INC., and affiliated companies, Interstate 95 at Exit 13, Bronx, New York, 10475 (hereinafter the "Employer), TRANSPORT WORKERS UNION OF AMERICA, LOCAL 100, AFL-CIO, 80 West
WHEREAS, the Employer on February 8, 1993 discharged employee Porter for certain alleged violations of Company rules and regulations, including permitting an unauthorized passenger on the bus to which he was assigned, driving the bus on an unauthorized route, leaving the bus unattended and making personal use of the bus; and

WHEREAS, an arbitration hearing was scheduled for March 5, 1993 before Eric J. Schmertz, Impartial Arbitrator, on the grievance filed by the Union claiming that the Employer did not have cause to discharge Porter; and

WHEREAS, the Employer, the Union and Porter wish to resolve said grievance amicably without further contractual or legal proceedings;

NOW, THEREFORE, the parties hereto agree as follows:

1. The Employer shall reinstate Porter to his former position of employment, which action was taken on March 1, 1993.

2. Porter waives all claims for loss of wages and holiday benefits during the period from February 8, 1993 through February 28, 1993.

3. Porter hereby agrees that he will retire from the Employer effective October 31, 1993 and the Employer
agrees that he will be entitled to receive retirement and pension benefits commencing November 1, 1993.

4. Should Porter fail to comply with all applicable rules and regulations of the Employer during the remaining period of his employment, he shall be subject to further discipline, including if warranted, discharge.

Eric J. Schmertz
IMPARTIAL CHAIRMAN

DATED: APRIL 19, 1993
STATE OF New York )
COUNTY OF New York )ss.


THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY
DISCIPLINARY HEARING

In the Matter of the Discipline:

of : DECISION OF HEARING OFFICER

Gerard Paril :

The Port Authority seeks the discharge of Gerard Paril for a series of offenses set forth in the Charges and Specification (Docket No. 832). (A summary of said Charges and Specifications is attached hereto and made a part hereof as Attachment A).

A hearing was held on September 17, 1993 before the Undersigned, duly designated as the Hearing Officer.

Despite receipt of due notice of the scheduled hearing by registered mail, Mr. Paril failed to appear at the hearing. Representatives of the Port Authority appeared. In response to a motion by the Port Authority the Hearing Officer directed that the hearing proceed.

The proofs and allegations of the Port Authority were heard. Based thereon, the Charges and Specifications have been proved.

The charges are sustained.

Also, by his failure to appear at the hearing, Mr. Paril has "waived" his
right to such hearing.

Article VII of Disciplinary Proceedings, second paragraph of Section A reads in pertinent part:

"...the failure to appear at a hearing after notice shall constitute a waiver of such hearing..."

I find no excusable reason for Mr. Paril's failure to appear. Accordingly, his right to the instant hearing has been waived.

For both of the foregoing reasons - the charges as sustained herein, and his failure to appear at the hearing after due notice - the recommendation and request of the Port Authority that Mr. Paril be dismissed, is granted.

Eric J. Schmertz
Hearing Officer

DATED: September 21, 1993
STATE OF: New York )
COUNTY OF: New York )ss:

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.
The Port Authority seeks the discharge of Gerard Paril for a series of offenses set forth in the Charges and Specification (Docket No. 832). (A summary of said Charges and Specifications is attached hereto and made a part hereof as Attachment A).

A hearing was held on September 17, 1993 before the Undersigned, duly designated as the Hearing Officer.

Despite receipt of due notice of the scheduled hearing by registered mail, Mr. Paril failed to appear at the hearing. Representatives of the Port Authority appeared. In response to a motion by the Port Authority the Hearing Officer directed that the hearing proceed.

The proofs and allegations of the Port Authority were heard. Based thereon, the Charges and Specifications have been proved.

The charges are sustained.

Also, by his failure to appear at the hearing, Mr. Paril has "waived" his
right to such hearing.

Article VII of Disciplinary Proceedings, second paragraph of Section A reads in pertinent part:

"...the failure to appear at a hearing after notice shall constitute a waiver of such hearing..."

I find no excusable reason for Mr. Paril's failure to appear. Accordingly, his right to the instant hearing has been waived.

For both of the foregoing reasons - the charges as sustained herein, and his failure to appear at the hearing after due notice - the recommendation and request of the Port Authority that Mr. Paril be dismissed, is granted.

Eric J. Schmertz
Hearing Officer

DATED: September 21, 1993
STATE OF: New York )
COUNTY OF: New York )ss:

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.
The Port Authority seeks the discharge of Gerard Paril for a series of offenses set forth in the Charges and Specification (Docket No. 832). (A summary of said Charges and Specifications is attached hereto and made a part hereof as Attachment A).

A hearing was held on September 17, 1993 before the Undersigned, duly designated as the Hearing Officer.

Despite receipt of due notice of the scheduled hearing by registered mail, Mr. Paril failed to appear at the hearing. Representatives of the Port Authority appeared. In response to a motion by the Port Authority the Hearing Officer directed that the hearing proceed.

The proofs and allegations of the Port Authority were heard. Based thereon, the Charges and Specifications have been proved.

The charges are sustained.

Also, by his failure to appear at the hearing, Mr. Paril has "waived" his
right to such hearing.

Article VII of Disciplinary Proceedings, second paragraph of Section A reads in pertinent part:

"...the failure to appear at a hearing after notice shall constitute a waiver of such hearing..."

I find no excusable reason for Mr. Paril's failure to appear. Accordingly, his right to the instant hearing has been waived.

For both of the foregoing reasons - the charges as sustained herein, and his failure to appear at the hearing after due notice - the recommendation and request of the Port Authority that Mr. Paril be dismissed, is granted.

Eric J. Schmertz
Hearing Officer

DATED: September 21, 1993
STATE OF: New York )
COUNTY OF: New York )ss:

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.
On June 29, 1992, in resolution of pending disciplinary charges before Hearing Officer E. Schmertz, Esq., you agreed to a penalty that included a final warning, reassignment to another facility, and set a 3-week deadline for attaining your CDL, for having failed to have and/or produce a valid driver's license for an indefinite period of time commencing in August, 1990, and for ten (10) occasions of absence without leave (AVOL) totaling fifty seven (57) days and three and a half (3 and 1/2) hours.

Despite this prior disciplinary action, on April 22, 1993, you were arrested in Hudson County, New Jersey, during your tour of duty for the commission of the following act: Unlawful taking of means of conveyance, in violation of N.J. State Statue 2C:20-10, as specified in Charge 1, Specification 1.

On April 22, 1993, you were arrested in Hudson County, New Jersey, during your tour of duty for the commission of the following act: Possession of drug paraphernalia, in violation of N.J. State Statue 2C:36-2, as specified in Charge 1, Specification 2.

On April 22, 1993, you were arrested in Hudson County, New Jersey, during your tour of duty for the commission of the following act: Under the influence of a Controlled Dangerous Substance, in violation of N.J. State Statue 2C:35-10b, as specified in Charge 1, Specification 3.

On April 22, 1993, you were arrested in Hudson County, New Jersey, during your tour of duty for the commission of the following act: Operating a motor vehicle under the influence of drugs, in violation of N.J. State Statue 39:4-50, as specified in Charge 1, Specification 4.

On April 22, 1993, you were arrested in Hudson County, New Jersey, during your tour of duty for the commission of the following act: Driving while licenses were suspended in New York and New Jersey, in violation of N.J. State Statue 39:3-40, as specified in Charge 1, Specification 5.

On April 22, 1993, you were arrested in Hudson County, New Jersey, during your tour of duty for the commission of the following act: Application for license while suspended, in violation of N.J. State Statue 39:3-34, as specified in Charge 1, Specification 6.

On April 22, 1993, you were arrested in Hudson County, New Jersey, during your tour of duty for the commission of the following act: Using a motor vehicle without consent of owner, in violation of N.J. State Statue 39:4-48, as specified in Charge 1, Specification 7.

On April 21, 1993, while on your 11:00 p.m. - 7:00 a.m. tour of duty, you failed to report for the 11:15 p.m. roll call and were located at about 1:30 a.m., in Staten Island, New York, in a Port Authority vehicle you did not have authorization to use. At about 2:00 a.m. you were instructed to return to the Lincoln Tunnel. You failed to return and were arrested at 6:40 a.m. At the time of your arrest, you admitted to signing in at the 11:00 p.m. start time, although you arrived at your work site at 9:00 p.m., and left shortly thereafter. You also admitted that you purchased crack-cocaine and smoked it, as specified in Charge 1, Specification 8.
You also failed to notify the Port Authority within one business day after your CDL was suspended of said suspension. This one day notification is required by the Federal Commercial Motor Safety Act of 1986, as specified in Charge 1, Specification 9.

Also, you failed to acquire your CDL within a three week period as you agreed to on June 29, 1992, and your driving privileges, along with your CDL, were suspended when you reported to your new assignment on January 31, 1993, as specified in Charge 2, Specification 1.

Furthermore, you do not and have not possessed a valid driver’s license or a valid CDL since November 10, 1992, due to the suspension of said licenses. Since possession of a valid driver’s license and a CDL is a requisite of your position as a Trades Helper (Electrical), you fail to meet the minimum requirements of that position. You also willfully and knowingly operated Port Authority vehicles while said licenses were suspended, as specified in Charge 2, Specification 2.

Finally, on February 4, 1993, and April 6, 1993, you were absent without leave (AWOL), as specified in Charge 2, Specification 3.

These actions are in violation of the General Rules and Regulations for All Port Authority Employees, Chapter 10, Disciplinary Action, Paragraph 2, which states, "Disciplinary action may also be taken against employees for repeated violations of orders and rules, for repeated neglect or failure to perform their duties, or for other repeated conduct warranting discipline, even though action has been taken separately on some or all of the series of actions upon which a charge is based. Such repetition of misconduct is in itself chargeable as a separate offense."
ERIC J. SCHMERTZ, INDEPENDENT FIDUCIARY


APPEARANCES:

Vladeck, Waldman, Elias & Engelhard, P. C.
By: Irwin Bluestein, Esq.
Owen Rumelt, Esq.

Clifton Budd & DeMaria
By: Howard Estock, Esq.
Introduction

At meetings of the Boards of Trustees of the Printers League - Graphic Communications International Union Local 119B, New York Pension Fund, the Graphic Communications International Union Local 119B, New York - Printers League Welfare Trust Fund, the Printers League - Graphic Communications International Union Local 119B, New York Special Displacement Fund, the Printers League - Graphic Arts International Union Local 43B, New York Pension Fund, the Printers League - Graphic Arts International Union Local 43B, New York Welfare Fund, the Printers League - Graphic Arts International Union Local 43B, New York Special Displacement Fund and the Printers League - Graphic Arts International Union Local 119B-43B, New York Annuity Fund (collectively the "Funds") held on June 17, 1993, it was noted that Martin Dillon ("Dillon") and Morris Weintraub ("Weintraub") continued to serve as Employer Trustees of the Funds although they had ceased employment in the graphic arts industry. It was suggested that, in recognition of such service, Dillon and Weintraub be reasonably compensated for their attendance at meetings of the Trustees. A motion was made, seconded and unanimously adopted directing Fund counsel to research and report to the Trustees on the legal issues raised by the proposed compensation of the Employer Trustees. Subsequently, at the meetings of the Boards of Trustees held on September 22, 1993, counsel advised the Trustees that reasonable compensation of a fiduciary who was not receiving full time pay from an employer or
sponsoring association of employers whose employees participate in the plan was permitted under the terms of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Nevertheless, certain procedural issues raised the possibility that the adoption by the Trustees of a motion to compensate Dillon and Weintraub might constitute a prohibited transaction under the terms of ERISA. Counsel recommended, and the Trustees subsequently authorized, the appointment of an independent fiduciary to consider and determine the compensation issue. This matter has come before me, as independent fiduciary, for a determination as to whether Dillon and Weintraub shall be reasonably compensated for their services as Trustees of the Funds and, to the extent they may be so compensated, to determine the level of compensation to be paid. Having reviewed the facts presented and applicable statutes and regulations, I hereby find as follows.

Findings

Section 406(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), provides that a fiduciary of a plan shall not cause the plan to engage in a transaction if he knows that such transaction constitutes a transfer to a party in interest of any assets of the plan. Section 406(b) of ERISA provides that a fiduciary of the plan shall not deal with the assets of the plan in his own interest or for his own account. However, section 408(c) of ERISA provides that
[n]othing in section 406 shall be construed to prohibit any fiduciary from receiving any reasonable compensation for services rendered,...in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan...shall receive compensation from the plan...

Dillon is the former Executive Vice President of the Printers League Section of the Association of the Graphic Arts, Inc. (the "Printers League"), a sponsoring organization of the Funds, having retired from that position in 1989. Weintraub is the former President of L & M Bindery, Inc. a former contributing employer to the Funds. L & M Bindery, Inc. ceased operations in 1992. Neither Dillon or Weintraub is currently receiving any compensation from "an employer or an association of employers, whose employees are participants in the plan." Accordingly, there is no statutory impediment to their being compensated for their services as Trustees of the Funds, provided such compensation is reasonable.

Dillon and Weintraub have served as Funds Trustees since 1985 and 1980 respectively. Their historical knowledge and experience are invaluable to the operation of the Funds. Although they are no longer employed in the graphic arts industry, they have continued to attend approximately four to six meetings and special meetings of the Trustees each year and have made themselves available on an "as needed" basis for telephone consultations on matters relating to the ongoing administration of the Funds. In addition, the Printers League is in the process of winding down its operations in...
the graphic arts industry, and the Funds documents have been amended to reflect this fact and to provide for removal of the current Employer Trustees and selection of successor Employer Trustees by vote of the contributing employers. The current contributing employers have continued Dillon and Weintraub as Trustees, and were either Dillon or Weintraub to resign as Trustees, there is some concern that it might prove difficult to replace them as Employer Trustees. Based upon the foregoing, I find that it is reasonable for Dillon and Weintraub to be compensated for their services as Trustees of the Funds.

The issue then arises as to the level of compensation to be paid. Department of Labor Regulation section 2550.408c-2 provides that the question of whether compensation is reasonable depends upon the particular facts and circumstances of each case. As previously stated, the Trustees of the Funds have approximately four to six meetings and special meetings each year. All of the Funds generally meet on the same day and each set of meetings generally takes between three and six hours. In the Trustees' discussions during their June 17 meetings, it was suggested that Dillon and Weintraub be compensated a nominal sum for their attendance at each of the four to six meetings and special meetings.

Decision

Based upon the foregoing, I hereby determine that Martin Dillon and Morris Weintraub shall be compensated for their services
rendered as Trustees of the Printers League - Graphic Communications International Union Local 119B, New York Pension Fund, the Graphic Communications International Union Local 119B, New York - Printers League Welfare Trust Fund, the Printers League - Graphic Communications International Union Local 119B, New York Special Displacement Fund, the Printers League - Graphic Arts International Union Local 43B, New York Pension Fund, the Printers League - Graphic Arts International Union Local 43B, New York Welfare Fund, the Printers League - Graphic Arts International Union Local 43B, New York Special Displacement Fund and the Printers League - Graphic Arts International Union Local 119B-43B, New York Annuity Fund in the amount of $25.00 per Fund for each meeting or special meeting of the Boards of Trustees of the Funds that they attend.

Dated: December , 1993
New York, New York

__________________________
ERIC J. SCHMERTZ

State of New York  )
 ) ss.:  
County of New York  )

I, ERIC J. SCHMERTZ, do hereby affirm upon my oath as Independent Fiduciary that I am the individual described in and who executed this instrument, which is my Decision.

December , 1993

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ERIC J. SCHMERTZ, Independent Fiduciary