IN THE MATTER OF ARBITRATION

BETWEEN

OHIO REHABILITATION SERVICES COMMISSION

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION

LOCAL NO. 11, AFSCME AFL-CIO

DANIEL CARROLL, GRIEVANT

THOMAS P. MICHAEL, ARBITRATOR
COLUMBUS, OHIO

Grievance No. G-86-1076, Daniel Carroll

This is a proceeding pursuant to Article 25, Sections 25.03 and 25.04, Arbitration Procedures and Arbitration Panel, of the Contract between the State of Ohio, Rehabilitation Services Commission, (hereinafter "Employer") and the Ohio Civil Service Employees Association, Local 11, AFSCME/AFL-CIO, (hereinafter "Union").

Pursuant to the Contract, the parties selected Thomas P. Michael as the Arbitrator. The hearing was conducted at the Office of Collective Bargaining on July 17, 1987. Both parties submitted post-hearing briefs and this matter has been submitted to the Arbitrator on the briefs and the testimony and exhibits offered at the hearing. The parties are satisfied that the grievance is properly before the Arbitrator for decision and that the procedural requirements for removal have been satisfied by the Employer.

APPEARANCES:

For the Employer:

John Connelly
Laura Stehura
Ohio Rehabilitation Services Commission

For the Union:

Linda Kathryn Fiely
Associate General Counsel
OCSEA/AFSCME Local 11

ISSUE

The parties stipulated that the issue before the Arbitrator is:

> Was Grievant removed for just cause?
> If not, what shall the remedy be?

PERTINENT STATUTORY AND CONTRACTUAL PROVISIONS

Section 4117.08(C), Ohio Revised Code.

> Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:
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> * * *
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> (2) Direct, supervise, evaluate, or hire employees:
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> * * *
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> (5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees:
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> * * *
>
> (8) Effectively manage the work force. . .

CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employee reserves, retains and possesses, soley and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08(A) numbers 1-9.

ARTICLE 9 - EMPLOYEE ASSISTANCE PROGRAM

The Employer and the Union recognize the value of counseling and assistance programs to those employees who have personal problems which interfere with their job duties and responsibilities. The Union and the Employer, therefore, agree to continue the existing E.A.P. and to work jointly to promote the program.

The parties agree that there will be a committee composed of nine (9) union representatives that will meet with and advise the Director of the E.A.P. This committee will review the program and discuss specific strategies for improving access for employees. Additional meetings will be held to follow up and evaluate the strategies. The E.A.P. shall also be an appropriate topic for Labor-Management Committees.

The Employer agrees to provide orientation and training about the E.A.P. to union stewards. Such training shall deal with the central office operation and community referral procedures. Such training will be held during regular working hours. Whenever possible, training will be held for stewards working second and third shifts during their working time.

Records regarding treatment and participation in the E.A.P. shall be confidential. No records shall be maintained in the employee's personnel file except those that relate to the job or are provided for in Article 23.

If an employee has exhausted all available leave and requests time off to have an initial appointment with a community agency, the Agency shall provide such time off.

The Employer or its representative shall not direct an employee to participate in the E.A.P. Such participation shall be strictly voluntary.

Seeking and/or accepting assistance to alleviate an alcohol, other drug, behavioral or emotional problem will not in and of itself jeopardize an employee's job security or consideration for advancement.

ARTICLE 13 - WORK WEEK, SCHEDULES AND OVERTIME

§13.01 - Standard Work Week

The standard work week for full-time employees covered by this Agreement shall be forty (40) hours, exclusive of the time allotted for meal periods, consisting of five (5) consecutive work days followed by two (2) consecutive days off.

ARTICLE 24 - DISCIPLINE

§24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

§24.02 - Progressive Discipline

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

A. Verbal reprimand (with appropriate notation in employee's file)

B. Written reprimand;

C. Suspension;

D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

§24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situation which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

§24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline

imposed during the past twenty-four (24) months.

This provision shall be applied to the records and placed in an employee's file prior to the effective date of this Agreement.

* * *

§24.08 - Employee Assistance Program

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program, the Employee will give serious consideration to modifying the contemplated disciplinary action.

* * *

ARTICLE 28 - VACATION

§28.03 - Procedure

Vacation leave shall be taken only at times mutually agreed to by the Agency and the employee. The Agency may establish minimum staffing levels for a facility which could restrict the number of concurrent vacation leave requests which may be granted.

Employees who work in seven (7) day operations shall be given the opportunity to request vacations by a specified date each year. Employees shall be notified of this opportunity one (1) month in advance of the date. If more employees request vacation at a particular time than can be released, requests will be granted in seniority order.

Employees in seven (7) day operations can also request vacations at other times of the year. If more employees request vacation than can be released, requests will be granted on a first come/first serve basis with seniority governing if requests are made simultaneously.

Emergency vacation requests for periods of three (3) days or less may be made by employees in seven (7) day operations as soon as they are aware of the emergency. An employee shall provide the Employer with verification of the emergency upon return to work.

Other employees shall request vacation according to current practices unless the Employer and the Union mutually agree otherwise. The Employer shall not deny a

vacation request unless the vacation would work a hardship on other employees or the Agency. The Employer shall promptly notify employees of the disposition of their vacation requests. Unless the Employer agrees otherwise, an employee's vacation will not exceed one (1) year's accrual.

If an employee going on vacation desires that his/her pay check be mailed to a given address during the vacation, he/she may make a written request to this effect. Such requests shall be honored.

When an emergency exists as defined in Section 13.15, all vacation leave requests may be denied, including those requests already approved. If an employee is called to work from a scheduled vacation leave period, the employee will have the right to take the vacation leave at a later time and will be paid at time and one-half (1-1/2) for the time the employee is in on-duty status. The employee shall also be reimbursed for any costs incurred as a result of cancelling or returning from his/her vacation upon submission of appropriate evidence.

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ARTICLE 31 - LEAVES OF ABSENCE

§31.01 - Unpaid Leaves

The Employer shall grant unpaid leaves of absence to employees upon requests for the following reasons:

A. If an employee is serving as a union representative or union officer, for no longer than the duration of his/her term of office up to four (4) years. If the employee's term of office extends more than four (4) years, the Employer may, at its discretion, extend the unpaid leave of absence. Employees returning from union leaves of absence shall be reinstated to the job previously held. The person holding such a position shall be displaced.

B. If an employee is pregnant, up to six (6) months leave after all other pay has been used.

C. For an extended illness up to one (1) year, if an employee has exhausted all other paid leave. The employee shall provide periodic, written verification by a medical doctor showing the diagnosis, prognosis and expected duration of the illness. Prior to requesting an extended illness leave, the employee shall inform the Employer in writing of the nature of the illness and estimated length of time needed for leave, with written

verification by a medical doctor. If the Employer questions the employee's ability to perform his/her regularly assigned duties, the Employer may require a decision from an impartial medical doctor paid by the Employer as to the employee's ability to return to work. If the employee is determined to be physically capable to return to work, the employee may be terminated if he/she refuses to return to work.

The employer may grant unpaid leaves of absence to employees upon request for a period not to exceed one (1) year. Appropriate reasons for such leaves may include, but are not limited to, education; parenting (if greater than ten (10) days); family responsibilities; or holding elective office (where holding such office is legal).

The position of an employee who is on an unpaid leave of absence may be filled on a temporary basis in accordance with Article 7. The employee shall be reinstated to the same or a similar position if he/she returns to work within one (1) year. The Employer may extend the leave upon the request of the employee.

If an employee enters military service, his/her employment will be separated with the right to reinstatement in accordance with federal statutes.

§31.02 - Application for Leave

A request for a leave of absence shall be submitted in writing by an employee to the Agency designee. A request for leave shall be submitted as soon as the need for such a leave is known. The request shall state the reason for and the anticipated duration of the leave of absence.

§31.03 - Authorization for Leave

Authorization for or denial of a leave of absence shall be promptly furnished to the employee in writing by the Agency designee.

FACTUAL BACKGROUND

Daniel Carroll, the Grievant, was an employee of the Rehabilitation Services Commission ("Employer"), from March, 1966, until his discharge, effective January 16, 1987. The Grievant worked as an Account Clerk II in the division of Case

Services Accounting. As such, he was responsible for auditing authorizations for payment received from field employees of the Employer.

The Removal Order (Joint Exhibit 2) listed "neglect of duty" as the immediate reason for the Grievant's discharge. In particular, he was charged with lying to his supervisor about the reason for his absence from work when he called in on November 17, 1986, and with being absent without leave on November 18, 1986.

The grievance (Joint Exhibit 3) was filed on Mr. Carroll's behalf by Laura Hardie, a Union Representative, on January 22, 1987. The grievance requests that the "Employee be made whole, reinstatement of job with back wages, E.A.P. monitering (sic) of alcohol treatment."

POSITION OF THE EMPLOYER

Daniel Carroll, a twenty-year employee, was terminated for just cause as a result of the deterioration of his work performance and his excessive absenteeism. Grievant's problems stem from his alcoholism which has caused him to be absent from the work place more than twenty percent of the time during 1986. This created a hardship on Grievant's fellow employees, some of whom were asked to spend parts of their lunch period and breaks to do Grievant's work.

Additionally, the quality of Grievant's work performance had deteriorated, forcing supervisory personnel to check more of his work for accuracy than should have been necessary. He was also

taking much longer to perform his duties than he should have. Grievant's problems resulted in a fifteen day suspension in August, 1986, for neglect of duty for being absent without leave on six days in May and June, 1986. In spite of that prior discipline, and in spite of numerous prior attempts by Grievant at alcohol treatment programs, including Alcoholics Anonymous, he missed work because of drunkeness in November, 1986, and lied to his supervisor about the reason for his absenteeism.

The Grievant has been given numerous second chances. In light of his long history of unsuccessful treatment for alcoholism, the deterioration in his work performance and his increased absenteeism, the next logical step in a program of progressive discipline is, regrettably, removal. The termination of Grievant was for just cause and should be upheld.

POSITION OF THE UNION

Daniel Carroll had been employed by Rehabilitation Services Commission since March, 1966. After over twenty (20) years of employment, Mr. Carroll was discharged effective January 16, 1987. At the time of his removal he was employed as an Account Clerk II.

The Removal Order (Joint Exhibit 2) indicated Mr. Carroll was fired for being absent without leave on two (2) occasions, November 17, 1986 and November 18, 1986. He had called his employer properly in accordance with procedures. He reported his November 17, 1986 absence was due to illness. On November 18, 1986, he called in and indicated he could not report to work

because he had been drinking. Upon his return and submission of a request for leave form for vacation pay (Joint Exhibit 4), his supervisor questioned him because she did not believe he had been ill on November 17, 1986. He admitted he was not able to come to work on November 17, 1986 because he was suffering from the after affects of excessive drinking. After that conversation, he modified his request for leave form and requested approved leave without pay. (Joint Exhibit 4). This request was denied. (Joint Exhibit 4). At the time, he had a balance of 353.4 hours of vacation. (Union Exhibit 11).

The Removal Order indicates that the two offenses "coupled with previous disciplinary actions" warranted discharge. (Joint Exhibit 2). The previous disciplinary record cited as taken into consideration by the Employer in deciding to discharge the Grievant included a letter of reprimand dated March 3, 1982; a three (3) day suspension dated June 21, 1983; a five (5) day suspension dated July 16, 1984 and a fifteen (15) days suspension dated August 25, 1986. (Joint Exhibit 2). The Employer's reliance on prior discipline which was to be expunged from Grievant's record so patently taints the Employer's action so as to require reversal of the decision to remove the Grievant. References to Grievant's prior record permeate the Employer's justification for removal. (See Joint Exhibit 2; Joint Exhibit 3 - 4 through 3 - 6; Joint Exhibit 5; and Joint Exhibit 12).

The policy behind Section 24.06 of the parties' Agreement is to allow employees a fresh start once they are able to again prove themselves and sustain a clean record for two (2)

years subsequent to a suspension. The Employer's reliance on Mr. Carroll's past record renders Section 24.06 meaningless.

Mr. Carroll suffers from the disease of alcoholism. He has struggled to overcome this illness for the last several years. Over the years he has received in-patient treatment at Riverside Hospital, St. Anthony's Hospital and Brookwood Recovery Center. In order to address his drinking problems, he has participated in Employees' Assistance Program, after-care counseling subsequent to hospitalizations, psychiatric counseling and Alcoholics Anonymous meetings.

The Employer, the Grievant and the Union all acknowledged that the two (2) incidents cited in the Removal order stem from Grievant's alcoholism.

The Removal Order did not cite excessive absenteeism or poor job performance as reasons for the discharge. The only relevant prior disciplinary action, which was effective August 25, 1986, does not cite excessive absenteeism or job performance, as the grounds for discipline. Fundamental fairness dictates that an Employer is bound by the grounds cited in its formal notice of removal.

In consideration of Grievant's many years of employment, the presence of only one prior disciplinary action properly in his record, his efforts to receive treatment for the disease which led to his work-related problems, and the nature of the business Rehabilitation Services Commission is in, Grievant should be reinstated to his job with Rehabilitative Services Commission and be made whole for all lost wages and benefits. The record of Mr.

Carroll's discharge and all prior discipline (other than the fifteen (15) day suspension) should be removed from any and all files of the State and be destroyed.

In the alternative, the Union asks that the discharge be modified and Mr. Carroll be reinstated with a penalty less than removal, and to the extent deemed appropriate by the Arbitrator, he bemade whole for lost wages and benefits.

OPINION

It is the opinion of this Arbitrator that the Grievant was discharged for just cause by the Employer. While this Arbitrator is loathe to affirm the dismissal of a long-term state employee who, by all accounts, was once an efficient and valuable member of the workforce, I must conclude that Grievant's dismissal was consistent with both the letter and spirit of the disciplinary provisions of the contract.

By Contract, the Employer has the burden of proof to establish just cause for termination of the Grievant (Section 24.01). The ultimate severity of the punishment imposed on this Grievant places the burden on the Employer to demonstrate by at least a preponderance of the evidence proof of wrongdoing sufficient to support discharge (See, e.g., Elkouri, How Arbitration Works, 3d ed., pages 661-662). In this instance, the evidence presented by the Employer is overwhelming in support of discharge.

Whether or not the Grievant's work record and associated disciplinary actions prior to August, 1984, are considered, the

termination of the Grievant is consistent with the principles of progressive discipline. Two instances of neglect of duty by absences without leave within less than a six-month period are sufficient to constitute just cause for dismissal. This is especially so when a fifteen-day suspension apparently was ineffective in correcting the absenteeism of the Grievant.

The Union argues that the Employer improperly reied on prior disciplinary actions which should have been expunged from the Grievant's record pursuant to Section 24.06 of the Contract in determining whether to impose discipline. However, it appears to this Arbitrator that the Removal Order merely incorporates the language of the Suspension Order of August, 1986, (Joint Exhibit 5), which recounts in almost the exact words of the Removal Order the prior disciplinary actions taken against the Grievant. Those prior disciplinary actions were proper considerations in fashioning the August, 1986, Suspension Order since the disciplinary proceeding which culminated in the Suspension Order was initiated prior to the effective date of this Contract. Therefore, Section 24.06 of the Contract did not act as a bar to consideration of those prior disciplinary actions in fashioning that fifteen-day suspension.

The Grievant was given several opportunities to rehabilitate himself by the Employer prior to his dismissal; unfortunately, he failed to take advantage of those numerous "second chances". The Union and the Grievant have asked this Arbitrator to consider Mr. Carroll's long employment history in mitigation of the penalty levied against him. It would be inconsistent and unfair to the

Employer to consider the Grievant's employment history while simultaneously refusing to consider his work habits and increased absenteeism during that time period.

Further, the Arbitrator disagrees with the Union's argument that if the Grievant's performance and attendance records merited discipline in the past the Employer is somehow barred from considering or presenting that evidence since no discipline was in fact undertaken. This Arbitrator does not agree that the Employer should in effect be punished for its patience and attempts to help this employee in the past. (Compare, State of Ohio, Ohio Department of Mental Health, Fallsview Psychiatric Hospital and Civil Service Employees Association, Case No. G-86-0977, Arbitrator Pincus, 6/3/87). The evidence is clear and convincing that the Grievant had been warned informally and formally on numerous occasions of the consequences of his continued alcohol addiction. His failure to improve his performance despite several attempts at rehabilitation render the action of the Employer herein just and reasonable.

Grievant's post-termination alcoholism treatment, while commendable, is not persuasive on the issue of just cause for termination. The great weight of authority is to the effect that post-termination events are not germane to the issue of just cause as of the date of discharge. Pickands Mother & Co., 80 LA 851, Arbitrator Vernon; Armstrong Furnace Co., 63 LA 618, Arbitrator Stouffer.

The Grievant presented himself well at the arbitration hearing. He also provided impressive testimony from

professionals concerned with his well-being and convinced that he was making a sincere attempt at rehabilitation since his entry into House of Hope and afterwards. However, any decision by the Employer to rehire the Grievant must be voluntary and is not required by the Contract.

Nor was the Employer in violation of the Contract by refusing to grant leave without pay or vacation pay for November 17 and 18, 1986. The Grievant did not qualify for unpaid leaves under any of the provisions of Article 31 of the Contract. The provisions for vacation also contemplate an application in advance by the employee (Sections 28.03) and mutual agreement by the Employer and employee as to vacation time.

AWARD

The grievance is denied and dismissed.

Thomas P. Michael, Arbitrator

Rendered this Fourth day
of September, 1987, at
Columbus, Franklin County, Ohio

CERTIFICATE OF SERVICE

I hereby certify that the original Opinion and Award was mailed to Eugene Brundige, Deputy Director, Ohio Department of Administrative Services, 375 S. High Street, 17th Floor, Columbus, Ohio 43266-0585, with copies of the foregoing Opinion

being served by United States Mail, postage prepaid, this 4th day of September, 1987, upon: John Connelly, 4656 Heaton Road, Columbus, Ohio 43229, and Linda Kathryn Fiely, Associate General Counsel, OCSEA/AFSCME Local 11, 995 Goodale Boulevard, Columbus, Ohio 43212.

Thomas P. Michael