#144

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF MENTAL HEALTH

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION

LOCAL NO. 11, AFSCME AFL-CIO

LEONARD LUKES, GRIEVANT

THOMAS P. MICHAEL, ARBITRATOR
COLUMBUS, OHIO

Grievance No. G-87-1054, Leonard Lukes

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, Department of Mental Health (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. A formal hearing was held at the Office of Collective Bargaining on December 14, 1987. This matter has been submitted to the Arbitrator on the testimony and exhibits offered at the hearing and authorities provided the Arbitrator after the hearing. The record herein was closed on December 21, 1987, upon receipt of an authority proffered by the Union. The parties stipulated that the grievance is properly before the Arbitrator for decision. They further stipulated to the amendment of the grievance to include allegations of violations of Sections 24.02 and 31.01(C) of the Contract.

APPEARANCES:

For the Employer:

John Rauch
Labor Relations Manager

Karlin R. Dunlop
Staff Counsel
Ohio Department of Mental Health

For the Union:

Gerald Burlingame
Staff Representative

Linda Kathryn Fiely
Associate General Counsel
OCSEA/AFSCME Local 11

ISSUE

The parties stipulated that the issue before the Arbitrator is:

> Was Leonard Lukes terminated 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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> * * *
>
> (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(C) numbers 1-9.

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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 17 - PROMOTIONS AND TRANSFERS

§17.02 - Vacancy

A vacancy is an opening in a permanent full-time or permanent part-time position within a specified bargaining unit covered by this Agreement which the Agency determine to fill.

§17.03 - Posting

All vacancies within the bargaining units that the Agency intends to fill shall be posted in a conspicuous manner throughout he region, district or state as defined in Appendix J. Vacancy notices will list the deadline for application, pay range, class title and shift where applicable, the knowledge, abilities, skills, and duties as specified by the position description. Vacancy notices shall be posted for at least ten (10) DAYS.

The Employer will cooperate with the Union to make job vacancies known beyond the required areas of posting.

§17.04 - Bidding

Employees may file timely applications for promotions.

Upon receipt of all bids the Agency shall divide them as follows:

A. All employees within the office, "institution" or county where the vacancy is located, who presently hold a position in the same, similar or related class series (See Appendix I).

B. All employees within the geographic district of the Agency (See Appendix J) where the vacancy is located, who presently hold a position in the same, similar or related class series (see Appendix I).

C. All other employees of the Agency in the same, similar or related class series.

D. All other employees of the Agency.

E. All other employees of the State.

§17.05 - Selection

A. The Agency shall first review the bids of the applicants from within the office, county or "institution." Interviews may be scheduled at the discretion of the Agency. The job shall be awarded to the qualified employee with the most state seniority unless the Agency can show that a union employee is demonstrably superior to the senior employee.

B. If no selection is made in accordance with the above, then the same process shall be followed for those employees identified under 17.04(B).

C. If no selection is made in accordance with the above, then the agency will first consider those employees filing bids under 17.04(C) and then 17.04(D), and then 17.04(E). Employees bidding under 17.04(C), (D) or (E) shall have no right to grieve non-selection.

§17.06 - Civil Service Examinations

Where a Civil Service Examination has been given, all eligible employees within the county, office or institution of the Agency in which the vacancy exists who passed the examination, shall be considered in filling the vacancy as described above.

§17.07 - Transfers

If a vacancy is not filled as a promotion pursuant to 17.04 and 17.05, then submitted bids for a lateral transfer may be considered. A lateral transfer is defined as a movement to a position in the same pay range as the posted vacancy. Consideration of lateral transfers shall be pursuant to the criteria set forth above.

* * *

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.

* * *

ARTICLE 31 - LEAVES OF ABSENCE

§31.01 - Unpaid Leaves

The Employer shall grant unpaid leaves of absence to employees upon request 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 paid leave 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 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 leave of absence shall be promptly furnished to the employee in writing by the Agency designee.

§31.04 - Failure to Return From Leave

Failure to return from a leave of absence within five (5) working days after the expiration date thereof may be cause for discipline unless an emergency situation prevents the employee's return and evidence of such is presented to the Employer as soon as physically possible.

* * *

ARTICLE 42 - SAVINGS

Should any part of this Agreement be declared invalid by operation of law or by a tribunal of competent jurisdiction, the remainder of the Agreement will not be affected thereby but will remain in full force and effect. In the event any provision is rendered invalid, upon written request of either party, the Employer and Union will meet promptly and negotiate a mutually satisfactory modification within thirty (30) days.

ARTICLE 43 - DURATION

§43.01 - First Agreement

The parties mutually recognize that this is the first Agreement to exist between the Union and the Employer under ORC Chapter 4117. To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

§43.02 - Preservation of Benefits

To the extent that State statutes, regulations or rules promulgated pursuant to ORC Chapter 119 or Appointing Authority directives provide benefits to state employees in areas where this Agreement is silent, such benefits shall continue and be determined by those statutes, regulations, rules or directives.

§43.03 - Work Rules

After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall

have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement.

FACTUAL BACKGROUND

Leonard Lukes, the Grievant, was employed by the Department of Mental Health ("Employer"), Fallsview Psychiatric Hospital, as a Hospital Aide from January 3, 1983, until the effective date of his dismissal on March 13, 1987. Grievant was terminated for "excessive absenteeism and failure to follow Hospital Policy regarding Employee Absenteeism."

Grievant's four plus years of employment were marked by no less than fourteen prior disciplinary actions. Immediately prior to his dismissal, Mr. Lukes had served a six-day suspension in January, 1987, for an unexcused absence from his work area. In May, 1986, he received a three-day suspension for neglect of duty stemming from failure to adequately notify the nursing department of absences and failure to report for duty. The remainig disciplinary actions were all in the nature of written or oral reprimands. Fully ten of those disciplines involved unexcused absences from the workplace or required training.

The immediate basis for Grievant's removal order stemmed from his failure to report to work as scheduled on January 21, 1987, and February 5, 1987, as well as his absent without leave status from and after February 4, 1987. On January 27, 1987, Mr. Lukes made a written request for a leave of absence without pay (Joint Exhibit 5), which was denied in writing on February 13, 1987 (Joint Exhibit 4-1). On January 26, 1987, Grievant had also

submitted a written request for leave of absence to Superintendent Barbara Peterson, which was received in her office on January 27, 1987. (Union Exhibit C). While both written requests set forth the reasons for the requested leave, neither request stated the anticipated duration of the leave of absence, as required by §31.02 of the Contract. However, the stated reasons for the leave clearly fall within the permissible reasons set forth in §31.01 of the Contract (parenting/family responsibilities).

Similarly, on January 30, 1987, Grievant filed a written request for a change of his shift with the Employer. (Joint Exhibit 8). That request was denied in writing on February 9, 1987, (Joint Exhibit 4-2), and the denial was received by Grievant on February 14, 1987. (Joint Exhibit 4-7). Neither Grievant nor anyone representing him appeared for a scheduled pre-disciplinary hearing on February 18, 1987. Subsequently, the contested removal order was issued on March 4, 1987, as supplemented by Superintendent Peterson's designation of date of termination (Joint Exhibit 3).

The grievance (Joint Exhibit 2) was filed by Mr. Lukes and requests that he be reinstated to his former position.

POSITION OF THE EMPLOYER

The issue before the Arbitrator is whether the Grievant, Leonard Lukes, was removed for just cause from his position as a Hospital Aide at Fallsview Psychiatric Hospital, an institution within the Department of Mental Health. Mr. Lukes was removed

for excessive absenteeism and failure to follow hospital absenteeism policies. This offense is especially serious when considered in context of the Grievant's place of employment. Fallsview Psychiatric Hospital is an acute care psychiatric facility charged with care of adults who are mentally ill, suicidal and in many cases substance addicted. As a direct care worker the duties of a Hospital Aide at Fallsview include supervision and observation; restraint and crisis intervention; and the direct physical care of patients. Covering for a direct care worker's absence requires management to mandate overtime work when volunteers are not available. Furthermore, when the absence is not reported, or reported late, management is unable to cover with overtime and must operate the facility short staffed. This has a serious impact on the quality of care rendered and potentially jeopardizes the safety of patients and employees.

Since his employment in 1983, Mr. Lukes' work history evidences a chronic pattern of excessive absenteeism and failure to follow hospital absenteeism and leave policies. He has been counseled and received progressive discipline, including numerous oral and written reprimands, and most recently, 3 and 6 day suspensions. The evidence will show that Mr. Lukes failed to attend work on his regularly scheduled days from January 2, 1987 until his removal on March 13, 1987. He failed to report off on many dates during that period, did not submit required documentation or verification for his absences, and evidenced a total disregard for his responsibility to the hospital when he

continued calling off work when his request for a leave of absence was denied. The Grievant was given notice that his continued absence would lead to his removal through Hospital policy statements and prior progressive disciplinary action. In fact, management went beyond the requirements of progressive discipline set forth in Article 24.02 of the contract by administering several instances of each type of discipline before moving to the next stage. Any further discipline short of removal would have been futile as is evidenced by Grievant's failure to return to work even after his last suspension served in January, 1987.

Management shall show, through documentation and testimony, that there was just cause for the removal of Mr. Lukes.

POSITION OF THE UNION

Grievant's termination was not for just cause. His removal resulted from the arbitrary and unreasonable denial of Grievant's request for a leave of absence. Contrary to the provisions of §31.03 of the Contract, the Employer did not promptly furnish a written denial of Grievant's request for leave of absence. The Contract specifically recognizes the appropriateness of unpaid leaves of absence for the reasons of parenting and family responsibilities as enunciated by Mr. Lukes.

The Arbitrator should not consider pre-Contract disciplinary actions against the Grievant since those actions were based on a standard for discipline different from that enunciated by the Contract. Further, the work rules relied upon by the Employer

are violative of §43.03 of the Contract since they were promulgated without prior approval by the Union and are unreasonable as applied to the Grievant.

The Grievant was discharged without just cause and he should be reinstated with full back pay and benefits.

OPINION

By Contract (§24.01), the Employer has the burden of proof to establish just cause for the removal of the Grievant from employment. Termination constitutes "economic capital punishment" and heightens the burden of proof on the Employer to produce at least a preponderance of evidence sufficient to warrant discharge (see e.g., Elkouri, How Arbitration Works, 3d ed., pages 661-662). This Arbitrator is satisfied that the Employer has offered more than enough evidence to support a finding that the dismissal of Mr. Lukes was for just cause.

The hub of the Union's position is its claim that the Employer was unreasonable in both the substance and form of its denial of the Grievant's request for leave without pay. A subsidiary part of this argument is the Union's claim that the employer's policy statement relating to leave without pay (Employer's Exhibit 4) is violative of the Contract since it is unreasonable on its face and was promulgated without prior consent of the Union.

First of all, this Arbitrator has concluded that Fallsview's Leave Without Pay policy is not in conflict with Article 31 of the Contract, which relates to Leaves of Absence. Most of that

policy statement merely outlines the procedures to be followed in processing a request for leave without pay. The policy's statement itself does not purport to vary the contractual bases for obtaining such leaves. Secondly, the Employer in this instance considered and acted upon the Grievant's handwritten request without requiring him to formally complete the Request for Leave form prescribed by the Department of Administrative Services. Grievant was benefitted by the Employer's action in waiving use of that form and providing him with a prompt review of his request by the Superintendent, thereby waiving the intermediate steps set forth in the policy statement. Finally, the Arbitrator finds the testimony of Superintendent Peterson more credible than that of the Grievant on the issue of the date he became aware that his request for leave was denied. Having found that Mr. Lukes was orally informed by Superintendent Peterson on January 30, 1987, that his request was denied, this Arbitrator cannot conclude that Grievant was prejudiced by a two-week delay in receiving a written verification of that denial. This is especially so in light of the fact that the Grievant invited this delay by not completing the Employer's designated form which includes a space for the written decision of the appointing authority. Thus, under the circumstances of this case, it is the conclusion of the Arbitrator that there has been substantial compliance with the procedural requirements of Article 31 of the Contract.

This Arbitrator is similarly satisfied that the Employer has not acted unreasonably in denying a leave of absence to this

Grievant. Section 31.01 of the Contract specifies several categories of requests for leave which the Employer is mandated to grant. The reasons offered by the Grievant fall outside those mandatory categories and within the discretion of the Employer. So long as the Employer articulates a legitimate nondiscriminatory reason for the denial of such a leave request, this Arbitrator is wont, as well as without authority, to interpret the Contract in a manner so as to convert parenting and family responsibilities into justification for a mandatory leave.

The Union presented no credible evidence indicating that Mr. Lukes was subjected to disparate treatment on his request for leave. The Grievant had fully one month to arrange for child care from the date his wife left him on January 18, 1987, until his scheduled predisciplinary hearing on February 18, 1987. Further, no attempt was made by the Employer toward his removal until at least February 6, 1987, at which time the Grievant had exhausted every available form of leave available to him. The testimony of Superintendent Peterson establishing that the Grievant's shift was already short-staffed at the time of his request is uncontradicted. The fact that three of that shift's sixteen Hospital Aides, as well as a licensed practical nurse, were already on disability leave at that time provides a reasonable basis for the Superintendent's denial of Grievant's leave request.

Finally, the Arbitrator finds no merit, in the circumstances of this case, to the Union's contention that Grievant's long disciplinary record should be overlooked because it is largely

pre-contractual. The parties have, to the contrary, agreed that pre-Contract disciplinary actions are to be considered under the same guidelines as post-Contract actions (§24.06). The Gerald Gregory Arbitration Award (Grievance No. G-87-0351), cited by the Union, is not persuasive to the contrary. While this Arbitrator fully agrees with Arbitrator Rivera that the purpose of discipline is to rehabilitate, this case differs from the Gregory decision in that there is no credible evidence here upon which this Arbitrator can conclude, as did Arbitrator Rivera, that his numerous prior disciplines for similar violations had prmopted this Grievant to improve his work habits. Even recognizing that the pre-Contract disciplines of this Grievant should be somewhat discounted due to the lesser standard applied, the pattern demonstrated by those violations is unmistakeable.

In sum, this Employer treated the Grievant with great deference and patience for four years. The Grievant was afforded a reasonable time to arrange for child care, a not uncommon problem of many state employees, and neither the Contract nor any other standard requires more of this Employer.

Finally, there is no evidence that the Employer was unjustified in denying a shift change to the Grievant. The Union did not attempt to contradict the Employer's assertion that there were no openings on other shifts available for bid. Further, Assistant Superintendent Cheek correctly noted the contract requirements which would have prohibited a discretionary shift change for the Grievant. (Article 17).

AWARD

Grievant, Leonard Lukes was dismissed for just cause. The grievance is denied and dismissed.

Thomas P. Michael, Arbitrator

Rendered this Twenty-sixth day
of January, 1988, 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 26th day of January, 1988, upon: John Rauch, Labor Relations Manager, 30 E. Broad Street, Room 1360, Columbus, Ohio 43215; and Linda Kathryn Fiely, Associate General Counsel, OCSEA/AFSCME Local 11, 995 Goodale Boulevard, Columbus, Ohio 43212.

Thomas P. Michael