#179

CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration Between: THE STATE OF OHIO Bureau of Employment Services District 3 Akron, Ohio -and- OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION OSCEA/AFSCME, AFL-CIO Local 11	*	Grievance No. G87-998 Decision Issued April 21, 1988

APPEARANCES

FOR THE STATE

Kathryn Holden	Management Advocate
Tim Wagner	Office of Collective Bargaining
Ronald A. DeLisio	Regional Manager
William R. Raihall	Akron Manager

FOR OCSEA

Linda Fiely	Associate General Counsel
Keith Fletcher	Steward
Connie Walker	Grievant
Fred W. Patterson	Witness

ISSUE: Article 24 -- Whether discharge for insubordination was consistent with just cause and other contractual principles.

Jonathan Dworkin, Arbitrator
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BACKGROUND OF DISPUTE

The grievance protests the disciplinary removal of a Clerk-Typist employed in the Akron Claims Department of the Ohio Bureau of Employment Services. The stated reasons for the discipline were, "neglect of duty" and "insubordination."

Grievant had six years' seniority. In the four years prior to her dismissal (since 1983), she suffered increasingly severe allergic reactions to numerous common substances; she was especially sensitive to tobacco smoke. She was normally assigned to work in an open area, side-by-side with several other employees, some of whom smoked at their desks. In 1986 Grievant's physical response to smoke became more pronounced and disabling, and she was forced to take relatively long sick leaves. Her first leave was February 3 to June 13, 1986. She returned to work with a partial medical release. Her physician's statement was that she could perform her job provided that she was protected from smoke and other chemical fumes deleterious to her health. The advice was virtually ignored. Grievant was placed back in her regular work station and nothing was done to protect her. Coworkers and claimants continued to smoke in her presence.

Because of the irritants in her workplace, Grievant's return to duty was short-lived. On June 23, 1986, she found it necessary

to take another leave which lasted until November 24. Once again, her release stated that she was fit to return to duty with limitations -- "Avoidance of cigarette smoke and chemical fumes." This time, a temporary accommodation was made. The Claims Supervisor was on vacation. She had a private office separated from the Claims area. The Acting Supervisor permitted Grievant to occupy the office until the Supervisor returned the following week.

Grievant did everything she could to protect the office from pollutants. She kept the door closed, stuffed towels in cracks, opened the window, and set up a fan. She used a space heater for warmth when the window was open. When the Supervisor returned from vacation, Grievant refused to vacate the office. She felt that working outside the protected environment she had created would severely jeopardize her health. First, the Supervisor and her superior, the District Manager, took time to assess the situation. They did not want to force Grievant out summarily, without weighing the alternatives. Ultimately, they concluded that the Employee had to leave the office.

On January 9, 1987, the District Manager sent an inter-office communication to the Supervisor authorizing her to remove Grievant from the office. On January 13, the Supervisor acted in accordance with the Manager's instructions, telling Grievant she would have to leave. At the same time, the Supervisor banned smoking in the non-

monetary area of the Claims Department. Grievant did not consider the accommodation sufficient and refused to vacate. This was reported to the District Manager who, on January 20, 1987, sent a terse directive to Grievant ordering her to leave the office on penalty of discipline. The Manager followed up his directive two days later, when he drove from his location in Canton, Ohio to the Akron Claims Office and personally confronted the Employee. Before facing Grievant, he banned smoking throughout the Claims Office; then he told Grievant to move to her regular work station. He repeated the order at least three times, informing Grievant that smoking was no longer allowed in the workplace and that continued disobedience would necessitate "severe discipline." Grievant indicated that she understood the risk, but absolutely could not leave the office unless and until another, similarly isolated work location was provided her.

After meeting with Grievant, the District Manager recommended the discharge. A pre-disciplinary meeting convened on February 12, 1987. The Hearing Officer's concurrence in the discharge recommendation was issued on February 26, 1987. Grievant's removal was effective March 4, 1987. This grievance was initiated in response. The remedy demanded is reinstatement with full wages and benefits "within an environment free of all chemicals and/or agents mentioned in medical reports . . ."

The Union asserts several reasons for overturning Grievant's removal. All dovetail with a single contention -- the Agency violated the negotiated principles that discipline must be corrective, non-punitive, and premised on just cause. These principles are set forth in Article 24 of the Agreement, as follows:

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.

§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 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

. . .

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

The Employer denied the grievance at each level of the contractual grievance procedure. The Union appealed to arbitration. The dispute was heard in Columbus, Ohio on November 19, 1987. At the outset, the parties stipulated that the appeal was procedurally correct and the Arbitrator was authorized to issue a conclusive award on the merits. Arbitral jurisdiction is more specifically defined and limited by the following language in Article 25, Section 25.03 of the Agreement:

> The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

Following the hearing, the parties obtained additional time to brief their closing arguments.

ADDITIONAL FACTS AND CONTENTIONS

The Supervisor of the Akron Claims Department faced a sensitive problem when she returned from vacation. She wanted her office back; Grievant was not about to relinquish the space. The Supervisor was hesitant to engage in a direct conflict of wills over office rights. Apparently, Grievant had filed a legal action against her and she wanted to avoid the appearance of retaliation. She felt that time should be devoted to thinking before taking action. The District Manager agreed.

The delay caused an absurd, almost comical situation. Sometimes, employees were permitted to use the office as a common room for lunch, work breaks, etc. But it was off limits when the Supervisor needed to work privately or perform sensitive duties such as job counseling. In effect, Grievant's refusal to leave deprived the Supervisor of space she needed to carry out her job functions. The fact that the Employee was asserting priority rights to the office was undeniable. She kept the door locked and the space under the door stuffed with towels, not only to secure her encapsulated environment, but also according to her testimony, "to minimize interruptions of my work." The Supervisor had to knock on the door of her own office and obtain Grievant's permission to enter before she could even obtain files kept inside.

The stand-off soon became intolerable. The District Manager determined that it was time for action. On January 8, 1987, he sent the Supervisor the following directive:

> Upon receipt of this memorandum, you are to inform [Grievant] she is to return to her original work station which is located in a non-smoking area. This will free up your office so that it will return to its original use. [Grievant] should be reminded of the Bureau's work schedule and not placed on a permanent flexible schedule. As manager, you should go over [Grievant's] position description and see that she is performing all work assigned. If any assignments are refused, the proper disciplinary action should be taken. If you have any questions, contact me at once.

The Supervisor complied, but without success. She explained to Grievant, more than once, that she had to vacate -- that the District Manager had made the decision. She told Grievant that smoking would no longer be permitted in the the Employee's immediate work area. She offered to have someone from Maintenance move belongings so that Grievant would suffer no inconvenience. Grievant was not swayed. She refused to move. The Supervisor quoted her response in a memorandum to the District Manager:

> "I can understand your need for your desk area, so if need be I can work on the conference table (in the managers office). I cannot and will not work out there (outside the manager's office). So if my equipment is moved outside the managers office, I will have to sit here (in the managers office)

> and be paid for doing nothing. The bureau must provide me with a work atmosphere that fits my doctors [sic] restrictions as closely as possible. On these IOC's I don't see any indication that any of these people are MD's or have any medical background, so they can't properly advise where I am to work."

Five days later, on January 19, 1987, the District Manager sent an unqualified written instruction to Grievant. The order left no doubt as to what was required. It stated:

> You are hereby ordered to vacate the UC Manager's office immediately and return to your original work station, otherwise, you will be subject to disciplinary action.

It was obvious to the Director that his January 19 memorandum was not going to solve the problem. He had to act more assertively and, on January 22, he made the hundred-mile round trip between Canton and Akron to confront the Employee face-to-face. Before meeting with Grievant, he conferred with the Union Steward. He banned smoking throughout the work area on the spot. Only after finalizing that directive, did he meet with Grievant. He ordered her to leave the office. She refused. Then he told her that the whole office would be non-smoking so that she did not have to worry about aggravation of her allergies. Grievant still refused. She

declined to leave even after the Manager carefully explained that her continued recalcitrance was insubordinate and called for "severe discipline." Her answer was that she understood the possible consequences but still would not comply. The Manager felt that there was no alternative other than to request discharge, and he acted accordingly.

It would be superficial to simply rule that Grievant was disobedient. That fact is obvious. The issue is whether her removal was consistent with the contractual principles governing the Employer's disciplinary authority. To adequately respond to that issue, it is necessary to examine the quality of Grievant's disobedience -- the factors which prompted an Employee, who had a six-year investment in her job, to stand toe-to-toe with her Supervisor and District Manager and repeatedly refuse to comply with a direct order.

According to the Union, Grievant's stance was at least partially justified by her very real fear that returning to her work station would impair her health. It is critical to realize that the Employee's apprehensions may have been sound. Her suffering was not trivial. Exposure to allergens caused her continual discomfort and forced her to take large blocks of sick leave. Chemicals in smoke and fumes from other substances had brought about some fearful changes in her well being. She was plagued with

breathing difficulties, constriction in her chest, bloodshot eyes, hypersensitivity to light, facial puffiness, dark circles under her eyes, vision difficulties. Before taking her last leave, she lost her eyelashes and nasal hairs. She suffered from itching, stuffiness in nasal passages, post-nasal drip, sinusitis, excruciating sinus headaches, dental problems, irritability, facial numbness and tingling, fatigue, sore throat, vocal hoarseness, and constipation. Her greatest sensitivity was to glycerin, phenol, ethanol, and formaldehyde. Those chemicals are present in approximately two hundred substances which Grievant encountered every day. It is unnecessary to burden this decision with a list of all of them, but it is relevant to observe that, in addition to tobacco smoke, she was allergic to carbon paper, paper products of all kinds, ball-point-pen ink, fountain-pen ink, felt-tip-pen ink, printers ink, newsprint, stamp pads, cosmetics, deodorants, carpeting, paints, cleaners, and polishes.

The fact that Grievant's fear of exposures in the workplace were legitimate is borne out by a flood of medical reports obtained on her behalf before and after the discharge was finalized. The following excerpt from the report of a physician specializing in allergies, clinical immunology, and environmental medicine speaks for all the rest:

> [Grievant] has many problems due to chemical exposures. Tobacco smoke irritates her eyes, causes

her sinuses to feel blocked and makes it hard for her to breathe. Tobacco smoke also causes her face to go numb. The positioning of the air conditioner at work drew fumes from cars into the room and caused irritation also. Both cigarette smoke and the exhaust caused difficulty breathing. [Grievant] states that the incinerator in the basement was not properly vented. She could smell it and it would cause her face to go numb. Her face goes numb also from exhaust fumes. Carbon paper at work caused difficulty breathing. After exposure to these chemicals [Grievant] lost all the hair in her nose and her eyelashes were also gone. She developed hoarseness in her work environment and discovered by Friday afternoon she had all of the symptoms listed above, as well as fatigue and that the symptoms progressively became less troublesome when she left work Friday afternoon and by Sunday evening she was beginning to feel decent again. Symptoms restarted within 15 minutes of going to work.

Provocation/neutralization of phenol, glycerin, ethanol, tobacco and formaldehyde we have accomplished at this office. With phenol [Grievant] exhibited itchy and heavy chest with chest congestion and stuffy nose. Progressively weaker dilutions of the antigen phenol resulted in improvement to the point where she was as comfortable as when she entered the office. Glycerin was tested in the same way and resulted in a stuffy nose, burning of the right side of the face and congested chest. Neutralization again resulted in improvement. Ethanol, a test for hydrocarbons, resulted in the right eye burning, stuffiness and fleeting ear pain. There was a feeling of pressure on the chest and again neutralization was successful. obacco smoke resulted in a stuffy nose and eyes irritated. Right facial numbness was observed with it. It improved with progressively more dilute antigens. Formaldehyde proved to be again a cause of fatigue, left eye numbness and a feeling of numbness over the frontal sinus area. Again, neutralization was possible.

All of the doctors who examined Grievant supported her belief that it was better for her to work in a pristine environment, protected from chemicals and especially from tobacco smoke. The Union regards the medical opinions as strongly supporting one of its principal arguments -- that although Grievant was disobedient, she was not insubordinate. Arbitrators have universally recognized an exception to the precept that employees must obey supervisory directives. It has been observed time and again that an employee is excused from the requirement if s/he realistically believes that compliance will place him/her in unusual and unacceptable jeopardy to health and safety. This principle ususally has to be inferred by arbitrators, but these parties have incorporated it as an explicit provision of their Agreement. Article 11, entitled, "Health and Safety," contains the following language:

> §11.03 - Unsafe Conditions
>
> . . .
>
> An employee shall not be disciplined for a good faith refusal to engage in an alleged unsafe or dangerous act or practice which is abnormal to the place of employment and/or position description of the employee.

The Union contends that the contractual permission to disobey orders for safety reasons fit Grievant's circumstances. The Employee hon-

estly believed that compliance would put her at significant and intolerable risk. Therefore, she was compelled to act as she did. The Union's post-hearing brief clarifies the argument:

> Based on [Grievant's] testimony at the hearing it is clear that she believed that if she moved back into the work area she had occupied prior to her leave of absence it would be injurious to her health. Based on the medical information provided to the employer and the medical advice given to [Grievant] she felt she could not move back into the general work area which was extremely aggravating to her medical condition. [Grievant] testified that during 1986 she had an extended period of absence due to her allergies from approximately February 3, 1986 through June 13, 1986. She went back to work, but soon went out ill again on June 23, 1986. She indicated she felt she could not work in the general area she had once worked because placement back into the same area would only make her ill again. [Grievant] honestly believed the area was hazardous to her health. Therefore, the union believes discipline is inappropriate in this case. Rather, accommodations should have been made to allow the Grievant to perform in an environment which does not adversely affect her health. [Brief, 4]

The State takes a more literal view of what is permitted by Article 11, Section 11.03. It calls attention to the fact that the provision sanctions safety-related disobedience only when compliance will place the employee under a danger "which is abnormal to the place of employment and/or position description of the employee." In the Employer's judgment, these words demonstrate a clear

negotiated intent to grant only a limited right; certainly not a right as expansive as the Union suggests. The State argues that nothing in the contract permits an employee to disobey orders which do not threaten to cause a risk abnormal to the workplace or the job description. It is perhaps reasonable to speculate that Grievant might legitimately have declined instructions to mow a lawn or climb a scaffold; the risks of such activities would have been abnormal to her Clerk-Typist position. But she was not told to do anything unusual. She was merely instructed to return to her usual work station and perform her regular job. The Employer concludes that Grievant's sensitivity to substances encountered in her classified position is irrelevant. Her fear of performing her normal job in her normal location did not trigger rights under Article 11, Section 11.03.

The State's position in this dispute is simple and straightforward. Grievant was blatantly insubordinate. She seized her Supervisor's work location and held it against repeated instructions to relinquish it. She was informed that the consequences of her disobedience would be "severe." She accepted the consequences. She turned the relationship between the Employer and the Bargaining Unit upside-down, appropriating vested rights of Management. The Employer insists that her allergies did not license such behavior. Moreover, it was not the first time Grievant displayed a propensity

for insubordination. She received a written reprimand on May 15, 1985 for refusing to obey a work order; she received a three-day suspension less than a month later for a similar violation. Corrective attempts had failed. Supervision's patience in trying to accommodate Grievant and induce her to follow orders also failed. Grievant's continued employment became intolerable and removal was the only viable alternative. In its post-hearing brief, the Employer urges that the grievance be denied because:

> Insubordination is considered an egregious employment offense warranting removal because it undermines management's inherent and contractual right to manage and direct the workforce. An employee who wants to challenge an order perceived unreasonable or in violation of the contract must first obey the directive and file a grievance later. The Grievant's actions and attitudes reveal a flagrant disregard for managerial authority and total lack of understanding of these basic employment principles. [Brief, 1]

DISCUSSION AND OPINION

The Arbitrator agrees with the Employer's position on the question of safety-refusal rights. Neither Section 11.03 nor the general principle that an employee cannot be required to expose him/herself to unacceptable dangers licensed Grievant's conduct. If the Employee had simply declined to work at her regular station,

without flatly refusing to vacate the Supervisor's office, a different dispute might have been presented. Despite the Employer's insistence that the contractual provision reaches only "abnormal" assignments, the argument that the Section could be stretched to cover Grievant's unwillingness to work in a personally detrimental environment is at least debatable. But that is not the case at issue. Grievant was not charged with simply disobeying a work order. Her offense was far more defiant. It was literally mutinous. She took possession of her Supervisor's private office and held it against at least five directives to vacate.

The Union's contention that Grievant's actions should have been excused because they were safety-related is at odds with reason. The misconduct repudiated the basic distinction between rights of employees and rights of Management. The Collective Bargaining Agreement, which guarantees rights, benefits, and working conditions to represented employees, also acknowledges that certain rights are retained by Management. Article 5 provides:

ARTICLE 5 - MANAGEMENT RIGHTS

> Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs.

One of the most rudimentary of the "inherent rights" to manage is

an employer's authority to direct its workforce. This means that an employer is entitled to give orders and employees are obligated to obey. If an employee believes that an order violates his/ her rights, s/he has access to vindication and remedy through the grievance procedure. But open disobedience is not an option except in rare and exceptional circumstances. The precept observed throughout the labor-relations community is, "Obey now, grieve later." Management has the right and the obligation to discipline violations of the precept. When an employee disobeys a directive, s/he threatens the balance between management and labor. Insubordination must be dealt with firmly; the whole contractual relationship suffers if it is ignored.

* * *

The Union's case does not rely solely on the safety question. Other arguments, all related to just cause, were raised. It is appropriate that they be evaluated. It is true that Grievant was insubordinate, and insubordination is a dischargeable offense. But it does not automatically justify the penalty. The Arbitrator is required to weigh the discipline against three, interrelated contractual standards. They are:

1. Discipline must be corrective. While the Agreement does not actually use the word, "corrective," Article 24, Section 24.02 does require the Employer to "follow the the principles of progres-

sive discipline." Progressive discipline and corrective discipline are parts of the same principle. By outlining progressive steps, the former codifies the latter, stating how corrective measures are to be carried out. Both have the same goal -- rehabilitating an employee through increasingly severe penalties.

2. Discipline may not be wholly punitive. Article 24, Section 24.05 states clearly that disciplinary measures must be "reasonable and commensurate with the offense and shall not be used solely for punishment."

3. Discipline must be premised on just cause. It is so stated in Article 24, Section 24.01. "Just cause" is an amorphous term. Unlike other contractual statements, a reference to just cause invokes an arbitrator's individual sense of fairness and justice. The concept may expand or contract according to any particular arbitrator's thinking. It is ambiguous and poorly defined, but it does embrace commonly recognized elements. In fact, it incorporates both of the previously mentioned standards. Discipline which is punitive rather than corrective does not comport with just cause. Just cause also militates against mechanical discipline -- the idea that an offense such as insubordination automatically warrants dismissal. In almost every case, no matter how serious the offense, an employer must consider before reacting. It must weigh an employee's attributes -- his/her length and quality of service, the reasons behind the misconduct, and any other extenuating factors. In short, an employer must seek out reasons for mitigation before deciding upon a penalty. Just cause also implies procedural protections -- rights to due process which, if violated by management, may vitiate the most justly deserved discipline.

The Union contends that Grievant's dismissal was punitive because it was not progressive. The argument highlights a critical provision of the Agreement. Article 24, Section 24.02 sets forth the steps of progressive discipline and requires the Employer to follow them: verbal reprimand for a first offense, written reprimand for a second offense, suspension for a third, and termination only after a fourth offense demonstrates that corrective discipline has not worked. The Agency points out that Grievant had already received a three-day suspension for insubordination and maintains that termination was the next contractually approved step. The Union disagrees. While acknowledging that Grievant was suspended for insubordination in 1985, it calls attention to the fact that the discipline was imposed under the Ohio Civil Service Rules. The Collective Bargaining Agreement did not cover Grievant's employment conditions until it took effect on July 1, 1986 -- more than a year after the disciplinary event. The Civil Service Rules did not accord the Employee just cause or any of the procedural rights later negotiated. In fact, Grievant was not entitled to appeal a suspension of three days and she had no access to review before an impartial arbitrator. Under the circumstances, the Union urges that pre-contract discipline should not be tacked onto discipline under the Agreement to establish the required progression.

The Union's rationale is compelling. There is no way of

ascertaining where Grievant would be today in the progressive-discipline chain had she been entitled to appeal her suspension. It is manifestly unreasonable to assume that the suspension would have been held justified under contractual requirements. But that does not mean that the prior discipline must be ignored. The Union solicits the Arbitrator's recognition that Grievant was entitled to greater leniency because of her six years of employment with the Agency. Length of service, in and of itself, is not a mitigating factor. It does not disclose the quality of the service. In the Arbitrator's opinion, Grievant's longevity loses significance when measured against the proven fact that her years of employment were far from perfect. She presented a disciplinary problem for at least two years. Repeated insubordination was one of the characteristics of her six years' service.

The prior discipline is reviewable for another reason. Whether warranted or not, it reenforced Grievant's understanding of something that every rational adult employee must know -- that s/he must obey supervisory directives. Presumably, Grievant learned first-hand that she was not at liberty to disregard directives with which she did not agree.

Since the Arbitrator believes that the prior discipline was not within the contractual disciplinary progression, the question is whether or not the Employer was required to follow the levels

set forth in Article 24, Section 24.02. The provision appears to be a mandate ("The Employer will follow the principles of progressive discipline . . . Disciplinary action shall include . . ."). In the Arbitrator's opinion, however, it is mandatory in most instances but not in every instance. Implicit in the language is the mutual recognition that some categories of misconduct are so severe, so destructive, as to permit bypassing disciplinary steps and moving to immediate termination. It should be observed that the language does not call for absolute adherence to progressive discipline, it requires the Employer to follow principles of progressive discipline. The principles of progressive discipline allow for leeway. In following them, an employer is not obligated to issue a verbal reprimand for a first offense of murder, mayhem, or sabotage. While insubordination is clearly not as extreme as these examples, it is a most serious breach of employment responsibilities. According to Section 24.02, the Employer must attempt to correct insubordination; but if correction is unlikely, it can end an intolerable situation by imposing termination out of sequence.

The Arbitrator finds that Grievant's history of insubordination, coupled with her adamant refusal to vacate the Supervisor's office, are illustrative of an employee who is beyond correction. Grievant's own testimony in the hearing verified the conclusion. She was asked several times why she did not comply with any of the directives. She responded:

> When I returned the second time, I made up my mind that they were going to have to comply with my doctor's orders.
>
> . . .
>
> I have been harassed enough by the Employer since 1983. I wasn't going to stand for it any longer.

When asked whether she understood that she was supposed to obey her supervisors, she commented:

> I should obey them when they are right. But when they're wrong, I don't think I have to do what they say.

It is all too obvious that any discipline short of removal would have been meaningless. Grievant had from May, when her employment was terminated, to November, when the hearing convened, to reconsider her insistence that she was privileged to commit insubordination -- to regret her misconduct. She expressed no regret. To the contrary, she made it clear that if she obtained reinstatement, she intended to violate supervisory orders again if she disagreed with them. Through her own testimony, she negated every reasonable implication that she might achieve rehabilitation through corrective rather than terminal discipline.

The Union's other arguments are unconvincing. For example, it is contended that Grievant was lulled into a sense of security by the delay in discipline. She held the office in notorious disregard of her Supervisor's rights since early December and was not removed until May 4. The Union states the argument as follows:

> Section 24.02 further requires that disciplinary action shall be initiated "as soon as reasonably possible". Although, [Grievant] occupied the office since November 24, 1987, a pre-disciplinary hearing was not scheduled until February 12, 1987. Section 24.02 of the contract requires that "an arbitrator deciding a discipline grievance must consider the timeliness of the employer's decision to begin the disciplinary process". The beginning of the predisciplinary process is the predisciplinary hearing. Discipline is to be swiftly administered. The Union submits that the time lapse in this case unfairly worked against the Grievant's expectations as to what discipline she could reasonably fear from her employer as a result of her actions. Because of the Employer's delay in taking action in this case and failing to make its intentions clear to Grievant, [Grievant's] termination should be nullified. [Brief, 3]

The argument is astounding. The delay resulted from Management's good-faith attempts to accommodate Grievant, to induce her to obey instructions. It is clear from the evidence that, had Grievant moved from her Supervisor's office as late as January 22, she would not have been disciplined. In any event, the offense triggering the removal was Grievant's refusal to comply with the

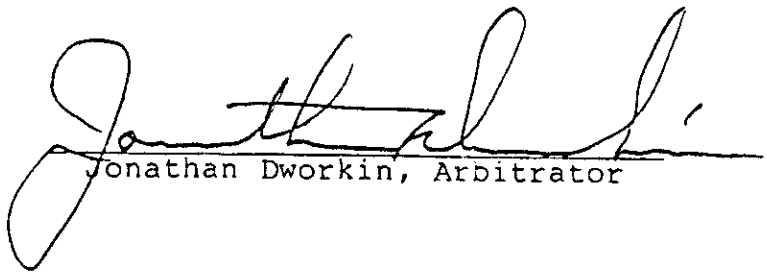
January 22 directive of the District Manager. There is no question but that her refusal on that day was attended by full understanding of the nature and potential consequences of her stand. The discipline which followed complied with all contractual timelines.

The remaining arguments of the Union all pertain to just cause. The Union states that Grievant believed that she was being treated disparately because another employee suffering from smoke allergy had been provided an alternative work station. The argument is unpersuasive because it begs the question. Disparate treatment violates employment rights and may be subject to a justiciable grievance, but does not authorize insubordination. Similarly, the Union contends that Grievant should be credited because she made personal efforts to accommodate for her disability. She attempted to secure a transfer. She contacted several state and federal environmental agencies. Through her efforts, an illegal incinerator in the building was shut down by the Ohio Department of Industrial Relations. All of these facts are interesting, but do not dispose of the most important factor in this case -- Grievant was incorrigibly insubordinate and deliberately authored her own dismissal. The Arbitrator is sympathetic to Grievant's illness, but his decision is controlled by the Agreement. Sympathies are immaterial. The ultimate issue is whether there was just cause for Grievant's removal, and the evidence demonstrates that there was. Accordingly, the grievance must be denied.

AWARD

The grievance is denied.

Decision Issued:
April 21, 1988



Jonathan Dworkin, Arbitrator