

PERMANENT ARBITRATION PANEL

In the Matter of an Arbitration:

--between--

STATE OF OHIO

--and--

OHIO HEALTH CARE EMPLOYEES
UNION DISTRICT 1199

OCB Grievance No. G87-0677

ARBITRATOR'S OPINION AND AWARD

John Connelly
Asst. Attorney General
For the State

Tom Woodruff
President District 1199
For the Union

June 8, 1988

Calvin William Sharpe
Arbitrator

On March 30, 1987, Robert J. Dirk filed a grievance against the Ohio Rehabilitation Service Commission (Commission) protesting his termination on March 27, 1987. The Commission denied the grievance at each step in the contractual grievance procedure. Being dissatisfied with the relief obtained at earlier stages of the grievance procedure, the Ohio Health Care Employees Union District 1199 has now brought the matter to arbitration. A hearing was held on the issue of substantive arbitrability. On December 7, 1987, the Arbitrator issued an opinion and award holding the grievance to be arbitrable. A second hearing was held on March 29, 1988, on the merits of the grievance.

I. STATEMENT OF THE CASE

A. THE ISSUE

1. Is the grievance arbitrable under the 1986 - 1987 Agreement?

2. If so, does the Commission's separation of the Grievant from his employment violate the 1986 - 1989 collective bargaining agreement between the parties?

2. If so, what is the remedy.

B. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 1 - PURPOSE AND INTENT OF THE AGREEMENT

It is the purpose of this agreement to provide for the wages, hours and terms and conditions of employment of the employees covered by this agreement; and to provide an orderly, prompt, peaceful and equitable procedure for the resolution of differences between employees and the employer. Upon ratification, the provisions of this agreement shall automatically modify or supersede: (1) conflicting rules, regulations and interpretive letters of

the Department of Administrative Services pertaining to wages, hours and conditions of employment; and (2) conflicting rules, regulations, practices, policies and agreements of or within departments/agencies pertaining to terms and conditions of employment; and (3) conflicting sections of the Ohio Revised Code except those incorporated in Chapter 4117 or referred to therein. All references to the Ohio Revised Code within this agreement are to those sections in effect at the time of the ratification of this agreement.

Fringe benefits and other rights granted by the Ohio Revised Code which were in effect on the effective date of this agreement and which are not specifically provided for or abridged by this agreement, will continue in effect under conditions upon which they had previously been granted throughout the life of this agreement unless altered by mutual consent of the employer and the union.

ARTICLE 7 - GRIEVANCE PROCEDURE

[Section] 7.01 Purpose

* * *

Since this agreement provides for final and binding arbitration of grievances, pursuant to Section 4117.10 of the Ohio Revised Code, the State Personnel Board of Review shall have no jurisdiction to receive and determine any appeals relating to matters that are the subject of this grievance procedure.

[7.02 Definitions

A. Grievance as used in this agreement refers to an alleged violation, misinterpretation, or misapplication of specific article(s) or section(s) of the agreement.

[Section] 7.07 Arbitration

* * *

E. Arbitrator Limitations

1. Only disputes involving the interpretation, application, or alleged violation of a provision of this agreement shall be subject to arbitration. 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 express language of this agreement.

ARTICLE 8 - DISCIPLINE

[Section] 8.01 Standard

Disciplinary action may be imposed upon an employee only for just cause.

[Section] 8.02 Progressive Discipline

The principles of progressive discipline shall be followed. These principles usually include:

- A. Verbal Reprimand
- B. Written Reprimand
- C. Suspension
- D. Demotion or Removal

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

C. THE FACTS

The Commission serves the eligible disabled population in the State of Ohio by providing services that lead to employment. Clients are referred to the Commission from a variety of sources and assigned to Rehabilitation Counselors, who interview clients to determine their placement aspirations, needs, and abilities. Following the initial interview, Counselors follow up by securing any diagnostic information that may be necessary to make an eligibility determination. Such information will also assist the Counselor in constructing an Individualized Written Rehabilitation Program (IWRP). Clients begin their rehabilitation plans after Counselors have made their eligibility judgments and drafted the IWRPs.

The Grievant, a graduate of John Carroll University, served as a Rehabilitation Counselor in the Commission's Painesville office. His duties as a counselor included evaluating

prospective clients, determining their eligibility for rehabilitation services, developing a rehabilitation plan, monitoring the client's progress, and securing appropriate placement opportunities for clients and monitoring their work performances. During the Grievant's tenure, he worked under the supervision of Helen Drake, assistant rehabilitation supervisor. Ms. Drake trained the Grievant, monitored his work, and completed annual performance evaluations in 1985 and 1986.

Beginning in the Fall of 1985, Ms. Drake began to observe recurring problems in the Grievant's handling of his counseling responsibilities. Ms. Drake observed deficiencies in the Grievant's information gathering skills for vocational plan development. For example, the Grievant began to neglect psychological or ability testing, or occupational therapy often important in developing a suitable plan. The Grievant began to exhibit an inability to focus, for example, in work related conversation he would try to discuss personal concerns that were irrelevant to the conversation. The Grievant also began to require closer supervision to assure accurate and effective communication with clients. For example, Ms. Drake had to intervene in a client interview on April 30, 1986, to discuss the results of an IWRP, which the Grievant had improperly constructed, and to restructure the interview in order to cover all relevant concerns within the allotted time. The Grievant also began to exhibit, what Ms. Drake considered to be problems of reasoning and judgment, by failing to identify and secure

necessary diagnostic materials before creating vocational plans. Also starting in mid-1986 the Commission received client complaints about the confusing nature of the Grievant's counseling sessions and his failure to provide timely services. One client, who requested a change of counselor, also complained about purposeless repetition in the Grievant's counseling session, a problem that Ms. Drake had also observed in the Grievant's progress reports. Ms. Drake also testified that the Grievant's needless repetition of issues led to his removal from a job seeking and training skills panel. The removal followed complaints from other vocational counselors that the Grievant's behavior was disrupting the workshop. On one occasion, a psychologist who performed counseling services for the Commission, telephoned the Grievant's supervisor to ask whether the Grievant was having a problem. The call was prompted by the Grievant's loss of composure in front of a client where the Grievant cried about the death of his wife. The psychologist thought that, given the amount of time that the Grievant's wife had been deceased, the breakdown was unusual.

The Grievant's performance evaluations reflected a deterioration in his performance in a number of job categories between August 1985 and August 1986. The Grievant's highest marks were in quantity of work, cooperation with other employees, and initiative. Regarding the Grievant's overall performance Ms. Drake said the following in the August 9, 1985, performance evaluation:

"RATER'S COMMENTS

During the past year Mr. Dirk has exceeded his successful rehabilitation closure goal and has reached his competitive closure goal. He works very hard to help place clients in appropriate employment situations & monitor their progress.

Although Mr. Dirk is strong in placement skills, quite a number of problems in other case management areas, general knowledge of skills required in the rehabilitation process, & overall judgement have surfaced during the last year. Mr. Dirk always seems willing to work on his problem areas, but more in depth concentration will be given to them in the next year. A management plan of action is in the process of being developed to work on these areas."

In the 1986 performance evaluation the Grievant's performance fell in the following categories: quality of work, knowledge of work, dependability, adaptability. His marks remained the same in cooperation, judgment, initiative, and personality. The Grievant's dependability score indicated that he needed frequent checking, and his judgment score indicated limited judgment. Ms. Drakes' comments on the Grievant's 1986 evaluation were:

"Mr. Dirk is continuing to work with supervision in an attempt to identify causes for performance problems."

Beginning with the onset of the Grievant's problems, Ms. Drake began to more closely scrutinize the work of the Grievant. She began to require supervisory approval before the Grievant could place clients into extended evaluation, a procedure not imposed upon other vocational counselors. She began reminding the Grievant both orally and in writing to complete routine job assignments. Because of the Grievant's past improper referrals, his client cases were reviewed by Ms. Drake before clients were

referred to job training programs. No other counselors were as carefully supervised as the Grievant.

Yet the Grievant was never disciplined under the Agreement's disciplinary procedure. That procedure as set forth in Section 8.02 of the Agreement requires progressive discipline including a verbal reprimand, written reprimand, suspension, demotion or removal. Rather Ms. Drake and her supervisor, Delores Parsons, decided that the Grievant did not have a disciplinary problem. They regarded the Grievant as cooperative but simply not able to do the work. Also from their discussions with the Grievant in late 1985 and early 1986 they felt, according to Ms. Parsons, that the Grievant was also concerned about his capacity to handle his job.

On April 7, 1986, Ms. Parsons wrote a memo to Area Manager Robert G. Zamary requesting psychological testing for the Grievant "to help identify the source of problem areas which have exacerbated during the past year". The memo went on to itemize those areas as "poor memory, poor information processing (verbal and written), poor listening skills, poor judgment, poor organizational skills, poor overall counseling skills (rambles and is overly repetitive)".

Ms. Parsons discussed with the Grievant the recommendation of Field Psychological Consultant, Doris ElTawil, Ph.D., that the Grievant undergo neuro-psychological testing from one of a list of four approved psychologist. According to Ms. Parsons the Grievant wanted to find out the reasons for his problems and

agreed to the testing, choosing Douglas W. Crush, Ph.D., whom the Grievant had worked with in the past.

Dr. Crush is a psychologist licensed by the State of Ohio. He has practiced since 1976 and performs services as a Vendor for the Commission. Dr. Crush met the Grievant at a 1984 conference on learning disabilities, and the Grievant has referred cases to Dr. Crush. After approval from the Department of Administrative Services, Commission Personnel Manager Oliver Hardin confirmed in writing an appointment with Dr. Crush for May 22, 1986.

As background to Dr. Crush's examination, the Commission briefed him on the Grievant's difficulties as outlined above. Specifically the Commission outlined the following problem areas: "Bringing up topics or ideas in meetings that were inappropriate or had been previously discussed; problems in dealing with direct services to clients; problems in difficulties in implementing supervisory instructions; inappropriate preparation of rehabilitation plans; inappropriate referrals when knowledge of the situation should have deemed this inadvisable; and difficulty in communicating both verbally and in writing."

In order to test the extent of the Grievant's performance difficulty in these areas Dr. Crush administered a series of neuropsychological tests. In his PSYCHOLOGICAL EVALUATION Dr. Crush set out his findings. He first noted the Grievant's family and educational background as well as his personal, vocational, and medical history. He then described each of the tests administered, their purposes and the results. Dr. Crush administered the Wechsler Adult Intelligence Scale (WAIS) - R,

consisting of six verbal sub tests and five performance sub tests. On these intelligence tests Dr. Crush reported functional ability within the average range with relative weakness in arithmetic and relative strength in background information and vocabulary development. The performance sub test results, on the other hand, indicated significant problems in processing information. Dr. Crush concluded that the Grievant has difficulty "sizing up social situations and demonstrating social insight".

Dr. Crush also administered the Halstead-Reitan Neuropsychological Test Battery. The Grievant scored within the impaired range on five out of six tests, leading Dr. Crush to conclude that the Grievant's impairment index of .8 placed him within the severe range of impairment and that the Grievant does not function well neuropsychologically. The neuropsychological tests included the Category Test, Tactual Performance Test, Seashore Rhythm Test, Speech Sounds Perception Test, and the Trail Making Tests. All indicated impairment except his incidental memory test under the Tactual Performance Test series. On other tests from the Employee Aptitude Test Series, the Grievant scored in a very low percentile when measured against normal male college students and administrative assistants. The Grievant also had difficulty on the Space Visualization Test.

Dr. Crush made the following conclusion:

"Mr. Robert Dirk demonstrates average intellectual ability with significant superiority of verbal over performance skills. Neuropsychological testing indicates impairment in a variety of areas yielding an

impairment index of .8. It can be said with reasonable reliability that Mr. Dirk is not functioning well neuropsychologically.

Dr. Crush also concluded that the Grievant would probably continue to have "significant difficulty" in his present job. He also recommended the performance of neurological studies.

Dr. Crush met with the Grievant on July 2, 1986, and strongly recommended that he seek a neurological assessment of his problems. Mr. Hardin received Dr. Crush's evaluation recommending further testing. He then arranged for a neurological examination by Norton A. Winer, M.D., who was affiliated with the Grievant's Health Maintenance Organization. Mr. Hardin also supplied Dr. Winer with a copy of Dr. Crush's psychological evaluation. On August 12, 1986, the Grievant was evaluated by Dr. Winer. In his report, NEUROLOGY CONSULTATION, dated August 12, 1986, Dr. Winer found the Grievant to have a normal neurologic exam and normal mental status exam". While noting some abnormality in the Grievant's visual evoked response testing, Dr. Crush concluded that this neurologic study as well as a CAT scan of the brain and electroencephalogram were normal. Dr. Winer stated in a letter to Mr. Hardin, dated November 6, 1986, that Dr. Crush's testing raised the question of significant neuropsychological deficit, but also reiterated his conclusion that these tests presented no clear picture.

On February 20, 1987, Lowell H. Morris, Director of the Bureau of Vocational Rehabilitation, informed the Grievant of his disability separation in the following terms:

"You have experienced significant difficulty in the

performance of your job as a Vocational Rehabilitation Counselor. The aspects of your job which have posed the greatest performance problems include your ability to communicate both expressively and receptively; your ability to provide appropriate counseling to clients; your ability to process and act on information; and, your judgment in the provision of client services.

Because supervisory assistance failed to result in an improvement, a special examination was arranged for you to determine if a health condition exists which may be responsible for the difficulties you are experiencing. The examination revealed that a health condition is present which prohibits you from performing your job as a Vocational Rehabilitation Counselor.

Because the results of the testing performed led the examiner to determine that you are unable to perform your job, it is recommended that you be given a disability separation from the Rehabilitation Services Commission/Bureau of Vocational Rehabilitation."

In a letter dated February 27, 1987, Administrator Robert L. Rabe informed the Grievant by letter of his right to a due process meeting regarding Mr. Morris's recommendation of a disability separation. The Grievant acknowledged receipt of the notice of due process meeting on March 2, 1987.

According to Atty. John Connelly appointed by the Administrator of the Commission on February 27, 1987, to conduct a due process meeting, the meeting was scheduled for Monday, March 9, 1987. By Mr. Connelly's uncontested affidavit, he stated that on March 4, 1987, the Grievant contacted him and said that he would not be attending the due process meeting because he felt "the disability separation was appropriate and he did not wish to contest it". The Grievant maintained this position even after Mr. Connelly reminded him that it was his opportunity to oppose the disability separation and that his failure to attend

would result in the waiver of the meeting. On March 18, 1987, Mr. Rabe notified the Grievant that he was being terminated through disability separation effective the close of business March 27, 1987.

On March 30, 1987, the Grievant filed a grievance protesting his separation. Thereafter, while the grievance was advancing through the contractual procedure, he filed an appeal with the State Personnel Board of Review also protesting the separation. And on April 20, 1987, he filed an application for unemployment compensation. The Personnel Board of Review dismissed the grievance appeal in an order dated June 12, 1987, because the Grievant failed to appear at the previously scheduled hearing. Though contested by the Commission the Grievant was awarded unemployment compensation based on the administrative decision that the Grievant was separated due to illness, was later able to work, and there was no suitable work with his former employer. The Administrator held that the Grievant should not be disqualified from receiving unemployment benefits because of a disability separation.

The Administrator's determination that the Grievant was able to work after his separation was based on medical evidence submitted by the Grievant. On April 1, 1987, and May 7, 1987, Dr. Patrick White, M.D., Ph.D., conducted a psychological evaluation of the Grievant. After administering two of the twenty-three tests that Dr. Crush had administered, conducting two interviews, and reviewing the reports of Dr. Crush and Dr. Winer, Dr. White concluded in a report dated May 14, 1987, that

the Grievant had no neurological condition that would be disabling. He found also "no evidence of psychological condition that would be incapacitating". Based on the Grievant's performance on the WAIS picture completion subtest Dr. White found "reason to believe that a complete neuropsychological re-evaluation under supportive conditions would yield a normal profile." The Grievant has not yet used the White evaluation to apply for reinstatement under the disability separation rules.

II. CONTENTION OF THE PARTIES

A. THE COMMISSION POSITION

The Commission has moved for reconsideration of the December 7, 1987, arbitrability ruling. In its brief following a hearing on the merits of the grievance, the Commission argues that the grievance is not arbitrable for the following reasons: (1) The Grievant received a disability rather than a disciplinary separation and the former is not grievable. (2) The Grievant was disability separated from his employment; thus, Article I of the Agreement is inapplicable, since such separations are not fringe benefits or other rights granted by the Ohio Revised Code. (3) Section 4117.10(A) of the Ohio Revised Code renders the disability separation non-arbitrable, since it subjects public employers and employees to state or local laws on matters (such as disability separations) that are not addressed by collective agreements. (4) No other provision of the Agreement makes the grievance arbitrable under Article 7, Section 02 of the Agreement.

On the merits, the Commission argues that the Grievant was properly separated from his service with the Commission because of a disability. It further argues that the Commission complied with the disability separation rule. Finally, the Commission argues that the evidence makes it clear that it never intended to discipline the Grievant.

THE UNION'S POSITION

On the Commission's motion for reconsideration of the arbitrability ruling the Union relies upon language from the Arbitrator's initial decision on arbitrability. It reiterates its argument that the Agreement covers disability separations, citing Article I of the Agreement.

On the merits the Union argues that Article I encompasses the OAC. Further, it asserts that a disability separation under the OAC is an employee right, and the Commission's attempt to impose it on the Grievant amounts to "rank paternalism". The Union also claims that OAC 123:1-33-04 requires evidence by a licensed M.D.; therefore, evidence from a psychologist is an inadequate basis for disability separation. In the absence of an employee request for disability separation, the Commission's only recourse is through the disciplinary procedure, a system that protects employees from arbitrary disability determinations. In this case, the Union concludes, there is insufficient evidence that a disability prevented the Grievant from performing a substantial and material part of his job. On the contrary, concludes the Union, the evidence shows that the Grievant had a good closure record through the first quarter of 1987, when he

was disability separated.

III. DISCUSSION AND OPINION

The Commission has moved for reconsideration of the Arbitrator's arbitrability ruling, issued on December 7, 1987. In that decision the Arbitrator held that the dispute was arbitrable on the following grounds:

Notwithstanding the Commission's well-founded argument distinguishing disciplinary and disability separations, the Arbitrator cannot anticipate at this stage of the arbitration whether the claimed disability separation is actually a disciplinary discharge. The facts adduced at hearing may or may not support that conclusion. The point is that the Arbitrator must receive evidence on the merits to determine whether Section 8.01 has been violated. Since a violation of the Agreement may exist, the grievance must be deemed arbitrable.

The dispute is also arbitrable, because it is a grievance as defined by the Agreement. Under the Agreement only the Arbitrator can hear a grievance. Section 7.01 creates a procedure for the "prompt, impartial and fair processing of grievances" and deprives the PBR of jurisdiction over matters subject to this procedure. Under Section 7.02 a grievance is "an alleged violation, misinterpretation, or misapplication of specific articles(s) or section(s) of the agreement". The Dirk grievance alleges violations of Article 1 and Article 8.01, two specific articles of the Agreement. Since the matter is subject to the grievance procedure by definition, the PBR is deprived of jurisdiction and the matter is arbitrable.

It is true as the Arbitrator stated in the December 7, 1987, decision that "grievance disputes are presumed arbitrable unless the parties manifest a specific intent to exclude certain subjects from the arbitration clause of the Agreement. See

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)." However, the Court's holding in Warrior & Gulf Navigation Co. would also deprive an arbitrator of jurisdiction, where the parties manifest their intent to exclude a matter from arbitration. Under Section 7.07E of the Agreement the parties give arbitrators jurisdiction over "only disputes involving the interpretation, application, or alleged violation of a provision of this agreement". Thus, the issue of whether the Grievant's disability separation involves a provision of this Agreement is pivotal to arbitral jurisdiction.

The arbitrability issue in this grievance is complicated by the complex of state laws bearing upon the Agreement. The issue is also unique in this case, because the Grievant's allegations call for an examination of the merits before the question of arbitrability can be fully answered.

State Laws

With some explicit exceptions, Section 4117.10(A) gives the parties the authority to exclusively determine their wages, hours, and terms and conditions of employment by Agreement. It also ousts the personnel board of review and civil service commission from jurisdiction over any disputes arising under the Agreement, if the Agreement contains a provision for final and binding arbitration. Where the parties choose not to exercise this authority, by not addressing a particular matter in the Agreement, the statute subjects the parties to state and local

employment.

In Article I of the Agreement the parties chose to exercise this statutory grant of authority by expressly purporting to determine wages, hours, and terms and conditions of employment and specifically modify or supersede conflicting rules, regulations, and practices of the Department of Administrative Services and other departments or agencies.

At the same time the parties did not attempt to address all issues relating to employment. Rather, in a catchall provision they agreed to preserve "fringe benefits and other rights" granted by statute but not specified or modified by the Agreement. This preservation of benefits and rights language of Article I carries forward certain wages, hours, and terms and conditions of employment and makes them subject to the exclusive jurisdiction of the contractual grievance procedure. On the other hand, terms and conditions of employment that are not "fringe benefits or other rights" granted by the Ohio Revised Code would not be preserved by Article I or subjected to the contractual grievance procedure by that provision.

Is A Disability Separation A "Fringe Benefit Or Other Right"

Granted By The Ohio Revised Code?

The Commission argues that disability separation is not a right under the Ohio Revised Code (ORC); rather, the authority for or right to a disability is contained in the Ohio Administrative Code (OAC). The Commission further argues that

the ORC and the OAC are distinct authorities, and the language in Article I limits the source of "fringe benefits and other rights" to the ORC. This conclusion is reinforced, the Commission suggests, by other references in the Agreement to rights contained in the OAC. Noting that the parties presented no evidence at the hearing that the authority for or right to a disability separation is found in the the ORC, the Commission urges that the reason is because the ORC contains no reference or mention of disability separation and cannot be a source of the disability separation right.

An examination of the ORC reveals that the Commission's argument misses the mark. While legislative rules, found in statutes, and administrative rules, such as those contained in the OAC, are promulgated by different bodies, administrative rule-making must be authorized by statute. When administrative rules are promulgated to implement some express statutory provision, they are regarded as substantive rules and have the force of law. See K. Davis, Administrative Law Section 5.03, p. 126 (3d, ed. 1972). The Arbitrator takes judicial notice of ORC Section 124.385, a provision that defines employee eligibility for disability benefits and directs the director of administrative services to establish a disability leave program by administrative rule-making. OAC Section 123:1-33-02, which spells out the disability separation right, was promulgated pursuant to this grant of authority under ORC Section 124.385. Based on this ORC provision and the nature of administrative rule-making the Arbitrator is not persuaded that the parties

rule-making the Arbitrator is not persuaded that the parties intended to exclude from the purview of Article I's catchall provision, rights granted generally by the ORC but spelled out at the direction of the statute in the OAC.

However, both ORC Section 124.385 and OAC Section 123:1-33-02 contain a more subtle distinction that removes a disability separation such as that alleged in this case from the coverage of Article I. Both provisions confer disability rights upon employees who meet the stated qualifying conditions. Neither gives an employer the right to take such action sua sponte, because of an employee's demonstrated incompetence on the job. Yet, in the instant case the Commission exercised a management prerogative in giving the Grievant a disability separation, while applying the terms of OAC Section 123:1-33-02. As the Union pointed out in its closing argument, OAC Section 123:1-33-02 involves an employee right and not a management right.¹

¹ The Union made this argument, however, in a slightly different context, arguing that OAC Section 123:1-33-02 gave the Commission no authority to impose a disability separation in lieu of discipline. As discussed below, this matter is only relevant in determining whether the disability separation was used by the Commission as a pretext for taking disciplinary action against the Grievant. The record in this case contains ample evidence that the Commission has used the disability rules to initiate disability separation, even though the language of the rules appears to confer only an employee right. The question of whether the Commission's good faith use of the rules in this manner is proper is one for the PBR and state courts.

separation does not involve an employee right preserved under Article I. A different case would be presented, if the Grievant had applied for a disability separation or reinstatement after a disability separation and been denied. Such a case would create an issue analogous to the Tegethoff grievance, where the Grievant had a right to hazardous duty pay under the Code even though the Agreement did not specifically provide for such pay. In such a case the employee right would be preserved by Article I. In this case, on the other hand, the Grievant is objecting to rather than seeking disability separation.

Thus, if the Commission's action was indeed a disability rather than a disciplinary separation, it would not involve a matter addressed by the Agreement. Accordingly, the Grievant's complaint would not involve an "alleged violation, misinterpretation, or misapplication of specific article(s) or section(s) of the agreement" and trigger the application of the grievance procedure. In this event, the Grievant's complaint would not be arbitrable, and ORC 4117.10(A) would require the Grievant to pursue his claim before the Personnel Board of Review.

Disciplinary or Disability Separation?

The thrust of the Union's argument is that the Commission's action was actually discipline masquerading as a disability separation. When this type of claim is made on the arbitrability issue, it is virtually impossible for an Arbitrator to ultimately decide the arbitrability issue without

taking evidence on the merits. This is particularly true where management's action, if not a pretext, would not be cognizable under the grievance procedure. In this case, a finding that the disability separation was a pretext for discipline would make the grievance arbitrable under Articles 7 and 8 and quite likely establish the Commission's action as a violation of the contract. If the evidence did not support the inference of pretext, not only would there be no violation of the agreement but the grievance would not be arbitrable.

After reviewing the evidence, the Arbitrator is persuaded that the Grievant was separated in good faith adherence to the Commission's disability separation procedure. From the time that the Grievant's supervisors began to notice his persistent lack of capacity to perform the rudiments of his job, the focus was on the Grievant's psychological health. The Grievant's supervisors testified that they did not regard his behavior as presenting a discipline problem, since he showed a desire but inability to improve. The separation decision was made only after thorough examinations by Dr. Crush, a psychologist, and Dr. Winer, a neurologist, both chosen by the Grievant.

The Union's argument that the Commission was actually disciplining the Grievant is not altogether untenable. As noted earlier OAC 123:1-33-02, the rule cited by the Commission as a basis for the disability separation does not specifically give an employer the right to initiate a disability separation. Thus, it is arguable that the rule is intended to permit such separations only when employees desire them. If this

interpretation of the rule were correct, it would appear that the Commission improperly used the rule in lieu of more appropriate procedures such as discipline.

While the Union argument is tenable, it simply is not supported by the evidence in this case. According to Mr. Hardin, the Commission has historically used the disability separation procedure to terminate employees because of medical and psychological disabilities. Its use in this case cannot, therefore, support an inference of pretext or improper use of the disability procedure. Also, because of the strong evidence supporting the existence of a link between the Grievant's subpar performance and neuropsychological causes, this case does not present the issue of whether the contractual disciplinary procedure rather than the disability separation procedure should have been used by the Commission.²

² The Union's concern about the Commission's misuse of the disability separation procedure to circumvent Article 8, the Discipline provision, of the Agreement is answered by arbitral review in this type of case. Since the arbitrability determination safely cannot be made until after evidence is taken on the merits, the Arbitrator will always be in a position to determine whether an employee's performance problems called for application of Article 8 rather than disability separation.

Regarding the Union's argument that predecessor administrators at the State's Office Of Collective Bargaining agreed to submit the grievance to arbitration, the Arbitrator holds that the record shows the Commission preserved its arbitrability objection from the earliest stages of the grievance procedure. The Commission's Steps 2 and 3 answers both assert that the grievance is non-arbitrable on the merits. Under these circumstances, the Commission may not be held to have waived its objection to arbitrating the merits of this grievance.

IV

AWARD

The grievance is denied, based on lack of arbitrability.


CALVIN WILLIAM SHARPE

6/8/88
DATE