IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF MENTAL HEALTH

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL NO. 11, AFSCME AFL-CIO

DONALD DOMINECK, GRIEVANT

THOMAS P. MICHAEL, ARBITRATOR
COLUMBUS, OHIO

Grievance No. MH-055-OCSEA-022-87, Donald Domineck

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, Office of Support Services, (hereinafter "Employer") and the Ohio Civil Service Employees Association, Local 11, AFSCME/AFL-CIO, (hereinafter "Union").

Pursuant to the Contract, the parties selected Thomas P. Michael as the Arbitrator. The hearing was held at the Office of Collective Bargaining, on July 21, 1988. The record was left open until July 28, 1988, for production by the Employer of Tardiness Policy work rules. The parties have waived the thirty (30) day time period for issuance of this Opinion and Award. They further agreed to allow the Arbitrator to publish this Opinion and Award. This matter has been submitted to the Arbitrator on the testimony and exhibits and authorities offered at the hearing of this matter as well as the above-noted post hearing documents. The parties stipulated that the grievance is properly before the Arbitrator for decision.

APPEARANCES:

For the Employer:

Karlin R. Dunlop
Staff Attorney
Ohio Department of
Mental Health

For the Union:

Michael Munchen
Staff Representative

John T. Porter
Assistant General Counsel
OCSEA/AFSCME Local 11

ISSUE

The parties stipulated that the issue before the Arbitrator is:

> Was there just cause for Grievant's five-day suspension for neglect of duty? 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 Employer reserves, retains and possesses, solely 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.

* * *

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.

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ARTICLE 24 - DISCIPLINE

§24.01 - Standard

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

§24.02 - Progressive Discipline

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

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

B. Written reprimand;

C. Suspension;

D. Termination.

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

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

§24.05 - Imposition of Discipline

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

make a decision on the discipline until after disposition of the criminal charges.

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

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

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

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

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

§24.06 - Prior Disciplinary Actions

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

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

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

§24.08 - Employee Assistance Program

In cases where disciplinary action is contemplated and the affected employee elects to participate in an

Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program, the Employer will give serious consideration to modifying the contemplated disciplinary action.

* * *

FACTUAL BACKGROUND

The parties stipulated to the following operative facts:

1. Donald Domineck was a part-time employee for Office of Support Services, Department of Mental Health, during the time period including November 1986 - March 1987.

2. Serena Peterson was the facility manager during this same time period.

3. Ralph Williams, Tina Brady, Richard Pettit and Richard Skapik were all employees of the Office of Support Services during November 1986 - March 1987.

4. Donald Domineck received a 5-day suspension for Neglect of Duty on April 7, 1987.

5. Specifically, Donald Domineck has been off duty on disapproved leave without pay for the following dates:

11/17/86 - 4 hours;	11/30/86 - 4 hours;
12/03/86 - 1/2 hour;	12/04/86 - 1/2 hour;
12/16/86 - 4 hours;	12/23/86 - 4 hours;
12/30/86 - 1 hour;	01/03/87 - 4 hours;
01/04/87 - 4 hours;	01/11/87 - 8 hours;
01/14/87 - 8 hours;	01/19/87 - 4 hours;
01/20/87 - 4 hours;	01/21/87 - 8 hours;
01/22/87 - 4 hours;	01/24/87 - 4 hours;
01/25/87 - 8 hours;	02/02/87 - 4 hours;
02/03/87 - 4 hours;	02/05/87 - 4 hours;
02/06/87 - 4 hours;	02/15/87 - 4 hours;
02/16/87 - 4 hours;	02/20/87 - 2 hours.

In addition the evidence establishes that Mr. Domineck, who commenced his employment with the Department of Mental Health on December 24, 1984, had received a two-day suspension for neglect of duty (absenteeism) in November, 1986 (Joint Exhibit 15;

Management Exhibit 9-2).

POSITION OF THE EMPLOYER

The Employer suspended the Grievant for five days for just cause for his neglect of duty arising from excessive absenteeism while in disapproved leave without pay status. Grievant was in that pay status on 26 occasions between November 17, 1986 and February 20, 1987. Additionally, Grievant violated written policy by failing to submit leave request forms on ten occasions of absenteeism or tardiness.

The Employer's work rules regarding leave without pay are reasonable. Nonetheless, the Grievant, who was fully aware of those rules, abused them. He is a part-time employee with a historical absenteeism problem. This is evidenced by a prior two-day suspension in November, 1986, for the same problem (Joint Exhibit 15; Management Exhibit 9-2) as well as by two prior oral reprimands and two prior written reprimands for violation of attendence related rules (Management Exhibit 9-1).

Grievant has not been the victim of disparate treatment. Other of his coworkers have also been disciplined for similar violations (Management Exhibits 5, 6, 7, 8). No verification was provided by Grievant to explain his numerous absences. He has been given repeated opportunities to correct his attendance problem to no avail. This is evidenced by the fact that his supervisor, Serena Peterson, re-started Grievant on the progressive discipline steps when she assumed her position in November, 1985, and by the fact that he nonetheless had 26

disapproved occasions of leave without pay in a three-month period.

With regard to the issue of failure to submit leave request forms, Grievant did not submit two of those forms until the time of his pre-disciplinary conference. Nonetheless, this issue is only a small part of the case against Grievant and just cause exists for this discipline regardless of the validity of that charge.

POSITION OF THE UNION

The Employer has failed to meet its contractual burden of proof that there is just cause for a five-day suspension of Donald Domineck for neglect of duty.

The Grievant was charged, in part, with failing to submit leave forms for ten "absences" from the workplace between December 21, 1986, and March 14, 1987. However, five of those occasions were in reality tardiness violations for which there was not a valid policy requiring submittal of leave forms. The evidence also establishes that this Employer has a history of misplacing leave forms which have in fact been submitted. Therefore, the Employer has failed to meet its burden of establishing any violation of its policy regarding submittal of written leave forms.

With regard to the Grievant's admitted absences without approved leave, he has been subjected to disparate treatment in that other of his co-workers were not disciplined for comparable absenteeism violations. Richard Skapik missed 28 work days

during the same time period including 22 days in leave without pay status but did not receive a similar disciplinary action. Tina Brady was not disciplined for similar violations until after Mr. Domineck received this disciplinary action.

Therefore, because of disparate treatment of the Grievant and because of the Employer's failure of proof regarding violations of office policy on submittal of request for leave forms, the Arbitrator should find that there is not just cause for the suspension of the Grievant and rescind the suspension in its entirety.

OPINION

The contract (§24.01) imposes the burden of proof on the Employer to establish just cause for the five-day suspension meted out to the Grievant, Donald Domineck. That burden has been more than satisfactorily met by the Employer in this case.

The major charge of neglect of duty against the Grievant is based upon the uncontested and stipulated fact that this part-time food service worker was absent from the workplace in disapproved leave without pay status on 26 occasions totaling 108 work hours over a fourteen work week time period between November 16, 1986 and February 21, 1987. The following chart, derived from Management Exhibits 1, 1-A, 2, 3 and 4 and the factual stipulation entered into between the parties, graphically supports the neglect of duty charge against Mr. Domineck:

WORKWEEK	HOURS SCHEDULED	LWOP STATUS
11/16/86 - 11/22/86	16 hrs.	4 hrs.
11/23/86 - 11/24/86	20 hrs.	0 hrs.
11/30/86 - 12/06/86	20 hrs.	5 hrs.
12/07/86 - 12/13/86	24 hrs.	4 hrs.
12/14/86 - 12/20/86	20 hrs.	4 hrs.
12/21/86 - 12/27/86	24 hrs.	4 hrs.
12/28/86 - 01/03/87	32 hrs.	9 hrs.
01/04/87 - 01/10/87	28 hrs.	4 hrs.
01/11/87 - 01/17/87	28 hrs.	16 hrs.
01/18/87 - 01/24/87	28 hrs.	24 hrs.
01/25/87 - 01/31/87	28 hrs.	8 hrs.
02/01/87 - 02/07/87	24 hrs.	16 hrs.
02/08/87 - 02/14/87	24 hrs.	0 hrs.
02/15/87 - 02/21/87	24 hrs.	10 hrs.
	340 hrs.	108 hrs.

Simple mathematics establishes that the Grievant has thereby missed a staggering 31.8% of his scheduled employment over that fourteen week period. As the above chart also demonstrates, in only the second and thirteenth work week did the Grievant have an unblemished attendance record.

Statistics tell much and arbitrators listen. This Employer cannot be faulted for taking the logical next step on the trail of progressive discipline. This is especially true in light of Mr. Domineck's own testimonial admissions that his absence from the workplace adversely affected management's job performance. That conclusion is consonant with the testimony of Ms. Peterson regarding the delays in obtaining substitute employees for the Grievant due to management's uncertainty regarding his attendance.

The Union has posited two arguments in an attempt to overcome the Employer's overwhelming evidence. The first claim is that there has been a failure of proof by the Employer on the charge

of ten paperwork violations by the Grievant in failing to submit request for leave forms. The Union points to the fact that the Office of Collective Bargaining has ruled, subsequent to this disciplinary action, that the Employer's policy of requiring written leave requests for tardiness was inappropriate. The Union argues that this thereby negates five of the ten paperwork violations charged against the Grievant.

Putting aside the Employer's claim that the Union waived the tardiness/leave request argument and the conflicting testimony thereon, this Arbitrator nonetheless finds just cause for this five-day suspension. Even disregarding those five occasions ,the Employer has proven by a preponderance of the evidence that the Grievant failed to complete the requisite leave request forms on the five remaining dates listed in the notice of suspension. The Grievant's attempt to late-file one or more of those leave forms at his pre-disciplinary conference does not cure those violations of written policy (Joint Exhibit 4; March 19, 1986 Policy: Delinquent Leave Forms). This Arbitrator is not persuaded by the testimony that the Employer may have lost leave request forms in this case because a previous supervisor admittedly had done so several years ago. In addition, this Grievant's admitted excessive absenteeism as discussed above is more than sufficient in and of itself to establish just cause for this suspension and is completely in accordance with the disciplinary grid in effect in the Spring of 1987. (Joint Exhibit 6).

The second claim posited by the Union is that of disparate treatment. An examination of the documents in evidence does not

support that argument. The most significant violator of absenteeism policies, aside from the Grievant, is Richard Skapik, a full-time employee. However, analysis of Mr. Skapik's attendance record (Joint Exhibit 10) shows that he was in disapproved leave without pay status for only about 18% of his scheduled work time during the same period of time that the Grievant missed 31.8% of his work. The evidence submitted by the Union does not establish that the Grievant has been unfairly singled out for discipline.

Nor can the Grievant find solace in the contractual provisions for an Employee Assistance Program. The parties have agreed (Contract, §24.08) that disciplinary action may be delayed by the Employer if the affected Employee elects to participate in an Employee Assistance Program. However, the evidence submitted on behalf of this Grievant does not convice this neutral that he has in fact made a good faith effort to successfully complete such a program. While he is entirely within his private rights in refusing to provide proof of his counseling sessions, he must bear the consequences of that refusal. The contract does not mandate the Employer to delay or modify a disciplinary action due to an employee's participation in E.A.P. Additionally, it specifically contemplates that an Employer be provided with verification of "successful completion" of such a program by the affected employee before the employee is required to give serious consideration to a modification of discipline. The Grievant has voluntarily chosen not to advantage himself of that contractual safeguard.

AWARD

The grievance is denied in its entirety. The Employer had just cause to suspend the Grievant for five workdays.

Thomas P. Michael, Arbitrator

Rendered this Twenty-sixth day
of October, 1988, at Columbus,
Franklin County, Ohio

CERTIFICATE OF SERVICE

I hereby certify that the original Opinion and Award was mailed to Eugene Brundige, Ohio Department of Administrative Services, 65 E. State Street, Columbus, Ohio 43215, with a copy of the foregoing Opinion being served by United States Mail, postage prepaid, this 26th day of October, 1988, upon John T. Porter, Associate General Counsel, OCSEA/AFSCME Local 11, 995 Goodale Boulevard, Columbus, Ohio 43212.

Thomas P. Michael