CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration Between:	*	
THE STATE OF OHIO Bureau of Employment Services Piqua, Ohio	*	Case No. 11-09(02-09-88)06-01-09
-and-	*	
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION OSCEA/AFSCME, AFL-CIO Local 11	*	Decision Issued December 4, 1989

APPEARANCES

FOR THE AGENCY

Janice Viau	Agency Advocate
Tim Wagner	State Advocate
Victoria Ullmann	OBES Legal Counsel
Rodney Sampson	Office of Collective Bargaining
John Tornes	Office of Collective Bargaining
Keith Nichols	Human Resources Manager
Teresa Bergman	Piqua Office Manager
Gordon K. Riley	Former Piqua Office Manager

FOR OCSEA

Patrick A. Mayer	Staff Representative
Bruce Wyngaard	OCSEA Arbitration Director
Thomas W. Owen	Grievant
Keith Henley	Witness

ISSUE: Article 24 -- Multiple Disciplines for Neglect of Duty

Jonathan Dworkin, Arbitrator
P. O. Box 236
9461 Vermilion Road
Amherst, Ohio 44001

SUMMARY

The subject of this dispute is discipline. The Union seeks back pay and expungement of records on behalf of an Employee who was issued serial discipline -- a written reprimand, a three-day suspension, and a ten-day suspension. All of the discipline was imposed while the Employee was off work due to a disabling psychological illness. It was premised on supervisory allegations that his absence was improperly reported and its cause was not documented.

Grievant is a Veteran's Counselor assigned to the Piqua, Ohio Office of the Ohio Bureau of Employment Services (OBES). He has approximately twenty years' service and a disastrous history of absenteeism. His record reflects numerous long-term absences, many of which were for assorted claims of illness.

On Friday, July 17, 1987, Grievant worked a half-day and then went to lunch. Near the end of his break, he telephoned his Supervisor to report he would not be back. He explained that he was "extremely emotionally ill," and could not cope with the stresses of his job. According to Grievant, he told his Supervisor that he would be off "as long as thirty days;" but this is one of a significant number of factual disputes which characterize this case. His

Supervisor testified that he said no such thing -- he did not indicate when he would be back and his testimony to the contrary is untrue.

In any event, Grievant was absent continuously from July 17, 1987 to January 12, 1988; and when he did return, he was ordered to leave the workplace because he was in the midst of a ten-day suspension. His Supervisor removed him from the office immediately and abruptly. He declined to grant the Employee time to consult his Steward.

Grievant kept changing addresses during his absence. It seemed that every time Supervision tried to get in touch with him by mail, he had just moved and the letter was returned unopened. Some of the returned envelopes had brief, handwritten messages on them from Grievant's mother, aunt, or landlady, stating that they did not know where he was. From time to time, the Piqua Supervisor was furnished new addresses or new contacts for getting in touch with Grievant, only to find, when he tried to use them, that they were no longer valid. Copies of the ten-day suspension were sent, certified mail, to Grievant at a half-dozen assorted addresses. None were delivered; each was returned to sender.

The Employee also had trouble getting messages to his Supervisor. According to his testimony, his physician mailed an executed sick-leave form in July to verify the cause for the absence -- it

was not received; he himself sent change-of-address notifications on the form prescribed by the State -- they were not received either.

One of Grievant's potential means for communicating with Supervision was his aunt. Although the Employer's policies and Article 29, §29.02 require personal and timely notification when an individual is unable to report for work, the rule had been bent in the past. Grievant's report-offs through third persons had been honored. With respect to the period of absence at issue, Grievant asked his aunt to regularly call the Piqua Office. The evidence indicates that she complied at first, but then the Supervisor withdrew his former permissiveness and tightened enforcement of the policy. On July 28, 1987, he wrote Grievant's aunt:

> I appreciate your having called me in the past to report [Grievant's] status when he was sick and unable to report for work. In the future I will no longer be able to accept these telephone calls. Thank you again for your past service.

He wrote to Grievant on the same subject and, on August 19, wrote another, more strongly worded letter to the Employee:

> This is the second notification. As I indicated in my first letter, I no longer accept telephone calls from other people concerning your absence. It is your responsibility to contact me whenever you are absent. I repeat, <u>the</u> <u>responsibility</u> <u>is</u> <u>yours</u> to contact me . . . whenever you are absent. Because of your continuing failure to contact me, I find it necessary to send these letters to

remind you of your obligation as an employee of the Ohio Bureau of Employment Services.

It is doubtful that Grievant received either letter. He had moved by then and most, if not all letters to him were returned.

Later, the Supervisor posted attendance rules to notify all employees that they had a personal responsibility for report-offs and could not delegate it to others; of course, Grievant did not see the notice. It was posted during his absence.

The Arbitrator does not mean to imply that all communication between Grievant and the Agency was cut off. Quite the contrary, Grievant carried on a one-way contact through a spate of letters to his Supervisor on interoffice-communication forms. From mid-October through early November, he sent a letter every day, asking that his sick leave be continued. Meanwhile, the Employer began imposing progressive discipline for neglect of duty. A written reprimand was issued on October 23, 1987, a three-day suspension on November 17, a ten-day suspension on January 2, 1988.

The record confirms that Grievant did not receive notices of the first two disciplinary impositions or the hearings preceding them. But he did learn of the ten-day suspension after it was issued, and he initiated a timely grievance against it. The Union supported the grievance, contending that the suspension was contrary

to contractual standards. The dispute focuses on the following language in Article 24 of the Agreement:

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.

In addition, §§24.04 and 24.05 are peripherally material to this dispute. They set standards for the disciplinary process, placing time constraints on impositions of penalties and requiring pre-disciplinary hearings.

THE HEARINGS; PROCEDURAL RULINGS

The dispute progressed through the contractual grievance levels, and the Union appealed to arbitration. The hearing convened on September 13, 1989 in Columbus, Ohio. At the outset, the parties agreed that the matter was procedurally arbitrable and that the Arbitrator had authority to issue a conclusive award on its merits. Arbitral jurisdiction is more specifically defined by the following language in Article 25, §25.03 of the Agreement:

> Only disputes involving the interpretation, application or alleged violation of a provision of the 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 expressed language of this Agreement.

When the hearing ended, the parties obtained additional time for briefs.

Grievant was not present at the September 13 hearing. The Union Representative certified that the Employee had been provided adequate notice of the time and place, and the reason for his absence was not known. In the interest of Grievant's right to a fair and complete exposition of his claim, the Union asked for a continuance. The Employer vigorously objected, arguing:

> . . . I would like to argue, first of all, that this case was scheduled back in September (a week earlier). It was postponed at the request of the Union. For what reasons we are not sure, but I believe it was also that they were not ready to go forward. We did accommodate them at one time before.
>
> * * *
>
> The other thing is that the parties have, in the past, been fairly liberal as far as trying to accommodate each other on dates for arbitration.
>
> There have been problems, but I think that it's imperative that we go forward today, because again, as I say, we have rescheduled once before.
>
> We feel that the Union is the moving party. They have the responsibility to do the preparation. As the Union Advocate stated before, there was something that had been discussed about going forward clear back in the beginning of August when these cases were scheduled.
>
> There's been plenty of time for the preparation. It's their responsibility to get ahold of their witnesses. It's our responsibility to release them if they are on State time. And we do that, but it's their responsibility to have them here. And as far as [needing] their witnesses to prepare their case, we think that for them at this late of date now to want to postpone the hearing after we have gone through and prepared our case, brought our people, our witnesses are here. We are ready to go forward. I think it's important, in all fairness, we should go forward. [Transcript, 10-11.]

The Arbitrator directed the Employer to present its case, with the understanding that the hearing would be adjourned when the presentation was finished. The parties were ordered to reconvene on Wednesday, September 20, 1989 at which time the Union was to

proceed to completion or show cause why the record should not be closed. As it turned out, the adjournment granted the Union no special privilege, because the State had not yet ended its case at day's end. When the parties and the Arbitrator met again on September 20, Grievant was present and he testified. He acknowledged on the record that his absence on September 13 was deliberate and in accordance with what he understood to be the advice of his private counsel. At its conclusion, a third hearing day proved to be necessary. Grievant expressed satisfaction that he had received competent representation by the Union and his full entitlement to procedural due process.

An important question, decided on the second hearing day, concerned the scope of the grievance. On its face, it protested only the ten-day suspension; however, the Union argued that all three disciplinary impositions were at issue. The argument was premised upon Grievant's testimony of what occurred in one of the pre-arbitration meetings. This controversy had been scheduled for arbitration once before, and was returned to Step 3 for additional exploration of a possible settlement. According to Grievant, he informed his Supervisor in the second Step 3 meeting of his understanding that the grievance comprehended all the discipline imposed during his absence, and the Supervisor agreed. Evidence on behalf of the Employer tended to verify Grievant's assertion and, in light

of that evidence, the Arbitrator ruled that his jurisdiction extended to the written warning and the three-day suspension as well as the ten-day suspension.

FACTS AND CONTENTIONS

Grievant has a long history of emotional illness. His original employment application may not have disclosed it and the Employer may not have records of it, but the Employee's testimony convincingly established that he received pyschiatric care on a fairly regular basis since at least 1969. From March 1987 to the point that he took leave from his job, he saw his psychiatrist biweekly.

There were special stresses which impelled Grievant not to return to work after lunch on July 17, 1987. His father was terminally ill and he was in the midst of preparing for trial (he had filed a federal-court action against the State and his Supervisor for alleged employment discrimination). He was also experiencing what he perceived to be extreme pressure on the job. By midday on January 17 he simply could not return to work. He telephoned his Supervisor from Troy, Ohio, stated that he was "extremely emotionally sick," and would not be able to return to work "for as long as thirty days." As stated, the Supervisor denies that Grievant said anything about his projected length of absence.

After finishing the telephone call, Grievant went directly to his psychiatrist's office in Covington, Kentucky (part of the Cincinnati, Ohio Metropolitan Area). The diagnosis was acute anxiety-depression. The physician apparently believed that the Employee would be unable to cope with his work requirements so long as the stresses of the pending trial existed. The trial was set for September, and the psychiatrist agreed that Grievant should have time to recuperate after it ended. Purportedly, he sent the Employer a medical leave request on an approved form (FM-728L) certifying that the Employee would not be able to return to work until January 8, 1988. One of the factors triggering Grievant's discipline was that the Employer never received the form. It is possible it was not sent; Grievant relied on his physician to mail it. However, a "duplicate" was supplied the Agency in January 1988, after the disciplinary impositions had been served and the grievance was at issue. It is noteworthy that the duplicate was accepted by Management, and Grievant's leave of absence was retroactively approved.

The facts of this dispute are convoluted; many are in marked conflict. In order to clarify the case and the conclusions leading to the Award, the Arbitrator has made certain findings of fact. The parties should note that the following chronology does not purport to contain all of the facts, nor does it constitute statements upon which both the Union and the Employer agree. It is simply an

arbitral finding of probabilities on pertinent aspects of the controversy.

July 17, 1987: Grievant did not return to work after his lunch break. He telephoned his Supervisor and reported that he would be off for an extended period. He enlisted his mother and aunt to call the Agency every day during his absence. Grievant saw his physician in Covington, Kentucky and obtained support for his absence on the diagnosis of acute anxiety-depression. His psychiatrist advised him that he would need frequent consultations and should stay away from his family as much as possible. The Employee made arrangements to move to the Cincinnati area in order to be closer to his psychiatrist's office.

July 17-28, 1987: Grievant's aunt and/or mother telephoned the Piqua OBES Supervisor daily to report the absence. On July 28 the Supervisor wrote letters stating that he would no longer accept third-party calls on Grievant's behalf. While the message might not have reached the Employee, it was received by his mother and aunt whom he had designated as his contact agents.

August 19, 1987: The Supervisor wrote a much stronger letter to Grievant informing him clearly that he had an absolute responsibility to call in and personally report his absences. Curiously, the Supervisor's letter said nothing about the alleged lack of medical support for the illness.

On the same day, the Supervisor wrote a decidedly cynical recount of Grievant's absence, requesting that the Employee be discharged after a fitness-for-duty examination. The request, sent to the OBES Region Manager, stated:

[Grievant] has been absent (Sick Leave) a total of 987 hours out of a possible 1320 hours of scheduled work. He has failed to complete any of the pay periods this year (17) without sick leave. Most of the absences have exceeded 40 hours in an 80 hour pay period. On at least three occasions he has gone to lunch and failed to return. One time he sent word back with Rubye Boyd, once with Richard Lauterbur and the last time (July 17, 1987) he called me from Troy, Ohio and said he was sick and would not be able to return to work. He has not contacted me since. A woman, Alvina Scalea who identified herself as his Aunt called daily to report that he was ill. I sent her a letter indicating that I could no longer accept her calls on behalf of [Grievant]. I also sent him a letter reminding him of his responsibility to contact me or Marilyn Grob in my absence, whenever he wants to request leave. I also informed him that I can no longer accept calls from Alvina Scalea or anyone else on his behalf. About two days after the letters were mailed, a woman identifying herself as [Grievant's] Mother, started calling. She claims that he instructed on Saturday August 1, 8, and 15, 1987 to call in daily to report him as being sick until she hears from him. She claims his illness is nerves. She receives her instructions by telephone. It would appear that he is unable to make any telephone calls, but he gives his mother instructions by phone. During this same period he has called the office (July 27, 1987) and talked to Heather Martin. She reported to me that he was concerned about some veteran placements he had made (two or three) and did not want her to enter them into the system. He also telephoned the Sidney office (August 4, 1987) and talked to John Keeting. This was confirmed by Patty Cagle.

[Grievant] has exhibited a sick leave pattern that can only be considered abusive and deceitful. You cannot depend on him because you do not know when he will be present for work, or if present in the morning, whether he will return after lunch. The Veterans program has suffered from his absence because there are many veterans that want to talk only to the LVER.

The certified letters I sent to [Grievant] and Alvina Scalea on July 29, 1987 were returned on August 17, 1987, unclaimed. The Post Office issued the appropriate notices, but they were not picked up within the required fifteen day time period. I feel certain that he knew

> what the letters were about, because I posted a memorandum in our office next to the Union Bulletin Board about the same subject (Notification of Absence from Work).
>
> I recommend that [Grievant] be examined by DAS [Department of Administrative Services] physicians providing that he comes up with an excuse for his absence. If they cannot substantiate his illness, he should be discharged for abuse of sick leave.

Late September 1989: The federal trial commenced (Grievant lost the case). During a recess, the Employee tried to talk to the Supervisor in the hall, to ask him if there were any problems concerning his leave status. The Supervisor repulsed the approach, believing he should not hold private conversation with an adverse party during a lawsuit trial.

October 2, 1987: Grievant wrote a memorandum to his Supervisor (certified mail, return receipt requested) in which he explained that he had been moving around quite a bit, but considered his legal address to be "4149 Kirby Avenue, Cincinnati, Ohio." He stated that his mail was not being forwarded to him "for . . . medical reasons." His memorandum mentioned his physician's statement, and concluded:

> I've been under an extreme emotional strain + depression recently and I have not always been thinking clearly about things as I probably should have.

October 7, 1987: Grievant sent a transfer request to the Office of Personnel.

October 9, 1987: Acting on the Piqua Supervisor's request for discipline, Grievant was sent notice of a pre-disciplinary hearing

scheduled for October 16, 1987 at 1:30 p.m. Neither Grievant nor a Union Representative attended the meeting.

October 15, 1987: Grievant sent a certified letter to the Supervisor stating that he was moving around on a temporary, day-to-day basis, and that the Kirby Avenue address was no longer valid. He asked the Supervisor to contact his psychiatrist (whose address was included), "if there are any questions about my medical problems - doctors statement & 728-L that he prepared." Apparently, the comment did not raise a question in the Supervisor's mind as to whether or not the leave request had been sent. He assumed it had not because he never received it. He neither contacted the physician nor advised Grievant.

The word, "attachment" appeared at the end of Grievant's memorandum. It referred to a change-of-address form which he allegedly enclosed with the letter. The Supervisor wrote a note on the bottom that no attachment was received, but Grievant submitted a conflicting affidavit in the hearing of an individual who claimed she saw him seal and mail the letter with the form enclosed.

October 18 - November 2, 1987: Grievant sent a deluge of memorandums to his Supervisor -- practically one per day. Each contained basically the same statement, "Please continue to place me on sick leave status . . ." The memos were supplemented by telephone messages from Grievant's mother despite her understanding of the earlier instruction that her call-offs no longer would be accepted. A note from the Supervisor to the Regional Manager describes a two-day "snapshot" of the period:

> On 10-19-87 [Grievant's] mother called the office at 8:00 am. She stated that [Grievant] was sick and unable to work today. Marilyn Grob took this call and explained to her that we can no longer accept messages from her.

> On 10-20-87 [Grievant's] mother called again at 8:00 am. She talked with Marilyn Grob stating that [Grievant] was sick and would not be in again. She explained to her again that we could not accept her calls. She stated that She was sorry, but she had to call in for him.
>
> On both of the above days I received a registered letter from [Grievant] stating that he would be off because of illness per Doctor's statement, but there was no Doctors statement attached.

Meanwhile, Grievant was subjected to progressive discipline without his knowledge. The Supervisor's recommendation for a State fitness-for-duty exam and possible removal was set for a pre-disciplinary hearing. Notice was sent to Grievant, but not delivered. It was returned with a message that the Employee no longer lived at what the Employer believed was his current address. The hearing went forward in the absence of both Grievant and his Union Representative. The recommended discipline was modified to a written reprimand, issued on October 23, 1987.

A day before, on October 22, Grievant was sent notice of another pre-disciplinary conference scheduled for October 27. Again, the notice was not delivered although it was sent to several addresses. One of the letters, mailed in care of the Employee's aunt (whom he had initially designated as his "agent" for communications), was returned accompanied by a note:

> [Grievant] does not live at 2160 Queen City Ave. I do not know his address at this time or when I will see him again. I could hold his mail but I do not open it. This letter could be important so I am returning it to you.

The pattern continued. In October, the Supervisor wrote Grievant requesting that he submit a proper change of address form.

The letter was returned unopened. Handwritten messages kept arriving from Grievant's mother and aunt. For example, On October 29, 1987, his mother wrote the Assistant Supervisor of the Piqua Office:

> I wanted to write to you to let you know I still have not been able to give my son . . . your message about a letter you have at his office since I've been telephoning you, I did receive a short letter from him two weeks ago.

November 17, 1987: Neither Grievant nor anyone on his behalf appeared at the second pre-disciplinary conference. The three-day suspension was issued on November 17, to be served December 1-3. Grievant did not receive the notice of suspension, but he did find out about it sometime in December. He began to initiate grievance proceedings.

January 2, 1988: A third pre-disciplinary hearing had been held in Grievant's and his Union's absence. The ten-day suspension was issued on January 2. It was to be served through January 19.

January 7, 1988: Grievant called the Piqua Office collect. The person who answered the telephone refused to accept charges. He called again later (on his own dime) and spoke with the Supervisor. He asked if there was any problem with his leave status in that he expected to return to work the following week. Curiously, his question was stonewalled. The Supervisor did not inform him he had been suspended and it would be futile to report to work before January 20. He also did not tell him that he needed a sick-leave request executed by his physician.

January 12, 1988: Grievant tried to return to work. He was ushered out of the office by the Piqua Supervisor who told him he was on suspension. Subsequently, Grievant was not permitted to

return to work on January 20 when the suspension ended. He was told he would first have to obtain a medical statement covering his entire absence. Grievant protested that the form had been sent in July, 1987, nearly seven months earlier. But Supervision claimed not to have received it and demanded a new one.

January 22, 1988: Grievant was returned to duty. He brought in a Form 728-L and a letter from his physician. The letter stated:

> On July 27, 1987 I completed and signed a Sick Leave Form (728-L) authorizing [Grievant] to be off work due to acute anxiety and depression from date 7-17-87 (a) 1 PM to 1-8-88 (a) 5 PM. The original of that 728-L was mailed to Gordon Riley, Manager, Ohio Bureau of Employment Services, on July 28, 1987.
>
> [Grievant] was authorized and released to return to work 1-11-88(a) 8AM. I have completed and signed a new Sick Leave Form 728-L for [Grievant] again authorizing his sick leave from work 7-17-87 (a) 1 PM to 1-8-88 (a) 5 PM because [Grievant's] employer requested him to have me do so.

The Supervisor recommended that the sick-leave request be disapproved. His written remarks supporting that position were:

> This 728L was not received until 1/22/88 (a similar copy was received 1/11/88). I cannot approve it because it was not received in a timely manner. It was actually received after the effective dates . . .

But he was overruled by the District Manager, Division Director, and

OBES Administrator. Grievant's sick leave was granted after-the-fact, but it was approved.

* * *

The Employer's arguments are direct and uncomplicated. They consist of assertions, supported by evidence, that the contractual mandate for progressive discipline was strictly followed. The fact that the Employee was not notified of his discipline is, in the Agency's judgment, inconsequential. It was not Management that caused the break in communications, it was Grievant. It was he who deliberately insulated himself from Supervisory reach, keeping his addresses secret and declining to fulfill his obligation to <u>personally</u> advise his Supervisor of the status of his absence.

It is not as if Grievant was unaware of his responsibilities. He was a nineteen-year employee who had changed addresses in the past and had taken sick leave so often that he was an "expert" in the formalities of supporting absences. The Employer charges that Grievant manufactured the sick-leave form and the official change-of-address form after the fact to bestow artificial legitimacy to his claim.

The Agency's position is best summarized by the following excerpt from its opening statement:

> The grievant was not hospitalized for this lengthy period of time, nor was he on disability leave or under the constant care of a doctor. During this period of time, he had many forwarding addresses for Cincinnati and Michigan. Every reasonable attempt was made to communicate with the grievant about his unauthorized absence and about disciplinary meetings. A pattern is discernible that as soon as information was mailed to the grievant, the grievant would then mail a letter to someone in management that he has a new residence, thus, giving the impression that he has been in receipt of nothing. If the grievant had no knowledge of management's attempts to communicate with him, nor the content of such communications, it would seem irrational for him to continue to send to management a new address after every management attempt. The situation turned into a "cat-and-mouse" game. You missed me, try again. The predisciplinary hearing notification for the ten (10)-day suspension was sent to three (3) addresses for the grievant, and the suspension letter was sent certified mail to four addresses.

In the Union's view, the Employer's arguments are speculative assertions that were not proven. It contends there is absolutely no evidence that the Employee attempted to evade his responsibilities; to the contrary, he did everything possible to meet them. He kept Supervision constantly advised of his condition. Every time he changed his address, he sent notice -- and he sent it on an official form. An independent affidavit verified the mailing in mid-October. The Supervisor claimed not to have received it, but he also claimed not to have received the original sick-leave form. Grievant's doctor apparently convinced upper Management that the form <u>was</u> mailed, and that it probably was received. If anyone fab-

ricated a position in this case, according to the Union, it was the Supervisor, not Grievant. He had an obvious purpose for doing so -- to set the Employee up for eventual discharge.

The Union maintains that the discipline imposed upon Grievant violated three rudimentary principles of just cause. The first is the most obvious -- an employee cannot be disciplined unless s/he commits a violation. What was Grievant's violation? He did everything he was supposed to do. He called and reported his absence. He caused a medical certificate to be sent to the Employer on an official sick-leave form. He kept the Employer advised of his condition and his addresses, and he did so in a timely manner. The only conceivable "violation" was that Grievant nominated his mother and aunt to call in for him on a daily basis. But that procedure had been acceptable to the Supervisor in the past, and there was no reason for Grievant to believe it was not still acceptable. It was not his fault that the Supervisor changed the rule in midstream. He could not have seen the newly posted notice requiring employees to call off personally, because he was on leave when it was posted.

The second principle is that discipline must be corrective rather than punitive. Assuming there was something in Grievant's behavior that needed correction, the reprimand was sufficient. Nothing following it could possibly have been corrective because the Employee had not received notice even of the reprimand, let alone the subsequent disciplinary impositions.

The third principle is that no employee can be subjected to multiple discipline (double jeopardy) for the same offense. The Union asserts that Grievant was subjected to triple jeopardy.

For all these reasons, the Union demands that all items of discipline be expunged and that Grievant be awarded his lost pay and benefits.

OPINION

The Arbitrator does not agree with the Union's contention that Grievant did nothing to warrant discipline. Even if he sent all the messages he claims to have sent -- the sick-leave application, timely status notices, and change-of-address forms, his conduct was still blameworthy. He covered his absence with an absolutely ingenious device designed to insulate him from any and all potential confrontations with his Supervisor. He literally hid from Supervision by appointing his aunt and mother to be his alter egos. They were delegated his responsibility of telephoning the Piqua Office daily and reporting that he was still sick and still needed to be on leave. The Supervisor justifiably assumed that the mechanics of communication worked both ways; that the mother and aunt were authorized to receive messages on Grievant's behalf the same as they were authorized to convey messages. But that is not how the

system Grievant created worked. Every time the Agency tried to send Grievant official notice via his designated agents, the notices were returned to sender with messages that the Employee did not live there and no one knew where he was or how to locate him. The effect was devastating; the Arbitrator can well imagine and sympathize with the Supervisor's frustration.

Management does not have to post a rule or obtain contractual language to inform employees of what they already know. For example, every rational adult human being knows, without being told, that stealing from one's employer is disciplinary misconduct. A posted rule or a contractual prohibition to that effect would be surplussage; it would do nothing to enhance an employee's understanding. By the same token, employees are presumed to know that they must be available for communications from their employer when on indefinite leaves of absence. Grievant certainly understood his obligation in this regard. He had been on numerous similar leaves in the past. He attempted to cure what he knew to be a deficiency in his conduct by wallpapering the Piqua OBES Office with written memorandums. But that did not suffice. So long as he closed himself against messages from the Office, he was in violation of a basic work rule. It was Grievant's duty to make himself accessible. It was not Supervision's duty to seek him out -- to find him wherever he might have been.

Indeed, when the case was first presented, the Arbitrator regarded Grievant's conduct as equivalent to job abandonment and he wondered why the Agency did not take that approach. When an employee disappears and makes certain that he cannot be contacted by Supervision, he may be held to have quit his job voluntarily. The obligation to create open channels for two-way communication is that important. When an employee abandons his/her job, management has no need to apply progressive discipline; such action would be an exercise in futility. All it has to do is identify the voluntary quit, accept it as a fact, and remove the employee from the payroll.

But the Supervisor of the Piqua Office did not regard Grievant's absence as a job abandonment. He understood that the Employee was on sick leave regardless of whether or not he received the form mailed by the physician. If he had any doubts, they were officially cured by the after-the-fact acceptance and approval of the sick-leave form. The core fact of this case is that Grievant was on approved sick leave throughout his absence.

Notwithstanding the propriety of the leave, the Agency had abundant justification for placing Grievant on a disciplinary track. The Employee's obdurate refusal to make himself available for direct communication from his Supervisor constituted sufficient grounds. Therefore, the remaining question is whether all three disciplinary impositions comported with contractual guidelines.

When the State of Ohio adopted the Collective Bargaining Agreement, it committed itself to abide by two critical restrictions on its disciplinary authority. In Article 24, §24.01 it agreed that all discipline of any nature whatsoever was to be measured against just cause. In §24.02 it agreed that most discipline would be progressive and would follow four defined steps. The requirements are separate and distinct, but just cause is the overriding consideration.

Progressive discipline cannot subsume just cause. The disciplinary priorities are the other way around. In other words, the fact that the Employer strictly follows progressive-discipline steps does not automatically assure that any or all of the disciplinary impositions will be for just cause; and discipline is not for just cause unless it is corrective. Progressive penalties which are demonstrably punitive and non-corrective will be set aside by arbitrators.

All mechanical discipline is suspect under the just-cause standard. The Agency's "mistake" was that it failed to recognize this precept. It applied progressive discipline to Grievant's situation without regard for the fact that correction was impossible. This finding is supported by the Employer's own evidence. Its submissions illustrate that the pre-disciplinary meeting on the three-day suspension was set <u>the day before</u> the written reprimand was

even issued. It is apparent that the Employer adhered to §24.02 but paid little attention to §24.01.

Obviously, Grievant's own misconduct was the cause for the lack of correction. But it was the same misconduct that was the subject of discipline. In the final analysis, the Employer's right and obligation were to use discipline to correct Grievant's misbehavior. It is the Arbitrator's opinion that the multiple impositions, none of which Grievant learned about until shortly before he returned to work, crossed the line between correction and punishment.

The Arbitrator's task is to fashion an award remedying what he regards as the Employer's mistake. Two of the disciplinary impositions will be dismissed because Grievant's violation consisted of a single, unbroken element of misconduct. The written reprimand was never received by the Employee. He testified, in fact, that it was not in his personnel file when he reviewed it during the grievance procedure. The Arbitrator accepts his testimony and finds that the reprimand was moot. Moreover, it is apparent that the reprimand was proposed at a time when the Agency believed it might be corrective. Later it found out that it was not. The fact that it began processing the three-day suspension before the reprimand was issued indicates that Supervision regarded the misconduct as much more serious and pervasive than it first appeared. It recognized that

stronger discipline was warranted. The Arbitrator does not disagree. He too finds that Grievant's misconduct was extreme and deliberate, and concludes that the three-day suspension was fully warranted even though it skipped one of the contractual steps. In making this decision, he notes that Article 24, §24.02 states: "Disciplinary action shall be commensurate with the offense." In view of the willful content of Grievant's offense, the initial three-day suspension was commensurate with the offense and fully compliant with just cause.

The ten-day suspension stands out as an exercise in mechanical discipline with little observable regard for correction.

REMEDY

The grievance demands an astounding array of remedies:

> Removal from all O.B.E.S. and other state agency records-any records, documents, etc. regarding disciplinary action taken against the Grievant. Provide a fair hearing to the grievant in which he can present evidence and witnesses to refute charges against him prior to any disciplinary action taken against him. Promote Grievant to Employment Manpower Rep.
>
> 1) Removal and expungement from all state of Ohio records including O.B.E.S. & The Dept. of Administrative Services all documents regarding any suspension or disciplinary action taken against [Grievant].
>
> 2) Provide a Pre-disciplinary Hearing to [Grievant] regarding charges which resulted in any suspensions or disciplinary action taken against him prior to 1-11-

88.

3) Properly notify the grievant of any disciplinary action to be taken against him.

4) Grievant requests to be made "Whole" with respect to the effect the disciplinary action had on his employment with O.B.E.S. and potential and chance for promotion and transfer to positions he requested consideration for in O.B.E.S and with other employers & state agencies.

5) Be awarded any promotions and/or transfers he requested but was denied as a result of violations of the contract that [Grievant] has outlined.

6) Be awarded any wages, benefits loss (sic) due to violations of contract.

7) Be restored to job responsibilities & job assignments changed, reduced or assigned to other employees or eliminated that Grievant performed prior to grievance.

8) Postponed filling of Emp. Ser. Supervisor I, II, III positions in O.B.E.S. District 6 & Cincinnati until Grievant has exhausted grievance appeals.

In sum, Grievant asks not only that the discipline be removed -- he also demands that the Arbitrator invade Management Rights by redesigning his job and providing him an advantage for promotional opportunities. He goes farther than that. He requests that the Arbitrator order the Agency to award him immediate promotion to the position of Employment Manpower Representative.

The demands frankly leave the Arbitrator breathless. Were he to comply, he would vitiate any finding in Grievant's favor. His

award would be so far removed from the evidence and the limitations on the scope of arbitral authority as to annul the entire decision.

The award will be much less complicated than Grievant demands. It will simply set aside the written reprimand and the ten-day suspension, leaving the three-day suspension intact. Grievant will be restored wages and benefits lost as a result of the ten-day suspension.

AWARD

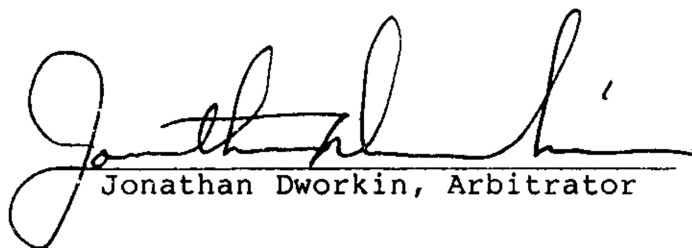
The grievance is sustained in part and denied in part.

The written reprimand and the ten-day suspension are hereby set aside. The Employer is directed to expunge them from Grievant's personnel records.

The three-day suspension shall remain intact.

The Employer is directed to reimburse Grievant all wages and benefits he lost in consequence of the ten-day suspension.

Decision Issued:
December 4, 1989



Jonathan Dworkin, Arbitrator