STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES ASSOCIATION LABOR

ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, OHIO DEPARTMENT OF
YOUTH SERVICES, CUYAHOGA HILLS
BOYS SCHOOL

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
Local 11, AFSCME, AFL-CIO

GRIEVANCE: Wiley King (Discharge)

CASE NUMBERS: G87-2810

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: January 7, 1990

APPEARANCES

For the Employer

Robert L. Jackson	Deputy Superintendent
Harold Cole	Building Maintenance Superintendent
Lisa Fribourg	Health Care Coordinator
John Tornes	Second Chair
Don Wilson	Advocate

For the Union

Wiley King	Grievant
Dorothy O. Brown	Chapter President
Gary Bolling	Industrial Relations - Safety and Health Coordinator
Linda K. Fiely	Associate General Counsel
Tim Miller	Advocate

INTRODUCTION

This is a proceeding under Article 25, Section 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Youth Services, Cuyahoga Hills Boys School, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on September 25, 1989 at the Office of Collective Bargaining, Columbus, Ohio. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would submit briefs.

ISSUE

Was the removal of the Grievant for just cause? If not, what shall the remedy be?

STIPULATED FACTS

1. The Grievant, Wiley King, began his employment at the Cuyahoga Hills Boys School as a Maintenance Repair Worker 3 on February 7, 1985. The School is a facility of the Department of Youth Services.

2. On June 10, 1987, Ms. Adella J. Perkins, Personnel Officer at Cuyahoga Hills Boys School received a dictated letter from Dr. Datt indicating that the Grievant was improving and that he should be able to work in a few weeks but recommended not in the same school since this probably exposed him to substances which caused the problem.

3. Mr. King did not return to work on July 8 and on that same day Supt. Luse by letter, ordered him to return to duty on July 20, 1987 and requested that he once again be examined by a state appointed physician specializing in allergies. Mr. King did not report to work on July 20.

4. On August 24, 1987, Geno Natalucci-Persichetti, Director of the Department of DYS sent a letter to the Grievant indicating that he had been scheduled for medical testing to determine if he was allergic to a substance, or substances, in the work environment. The examination was to be conducted by Dr. David Rosenberg.

5. On September 17, 1987, Dr. Rosenberg in a letter addressed to Ms. Adella Perkins, Personnel Director, DYS, spoke to the issue of whether Mr. King had an occupationally-related respiratory condition in which he concluded that the Grievant could return to his previous environment with some degree of clean air restrictions and recommended that he should stop smoking.

6. In a letter dated September 25, 1987, Supt. Luse ordered the Grievant to return to work at Cuyahoga Hills Boys School on October 5, 1987.

7. On October 6 the Grievant was sent a letter to Harold Cole, Building Maintenance Supt. which included a copy of an Incident Report alleging that the Grievant did not return to work on October 5.

8. On October 8, 1987, Supt. Luse ordered the Grievant to return to work on October 19.

9. On October 23, Mr. Cole sent the Grievant an Incident Report re his failure to report to work on October 19.

10. The removal order was effective December 21, 1987.

11. Prior to the removal, the Grievant had no disciplines, and had received satisfactory performance evaluations.

DON WILSON OFFICE OF COLLECTIVE BARGAINING	TIM MILLER OCSEA/AFSCME

PERTINENT CONTRACT PROVISIONS

ARTICLE 11 - HEALTH AND SAFETY

...

Section 11.03 - Unsafe Conditions

...

All employees shall report promptly unsafe conditions related to physical plant, tools and equipment to their supervisor. If the supervisor does not abate the problem, the matter should then be reported to the Agency's safety designee. In such event, the employee shall not be disciplined for reporting these matters to these persons. The Agency designee shall attempt to abate the problem or will report to the employee or his/her representative in five (5) days or less reasons why the problem cannot be abated in an expeditious manner.

No employee shall be required to operate equipment that any reasonable operator in the exercise of ordinary care would know might cause injury to the employee or anyone else. An employee shall not be subject to disciplinary action by reason of his/her failure or refusal to operate or handle any such unsafe piece of equipment. In the event that a disagreement arises between the employee and his/her supervisor concerning the question of whether or not a particular piece of equipment is unsafe, the Agency safety designee shall be notified and the employee shall not be required to operate the equipment until the Agency safety designee has inspected said equipment and deemed it safe for operation.

An employee shall not be disciplined for a good faith refusal to engage in an alleged unsafe or dangerous act or practice which is abnormal to the place of employment and/or position description of the employee. Such a refusal shall be immediately reported to an Agency safety designee for evaluation.

An employee confronted with an alleged unsafe situation must assure the health and safety of a person entrusted to his/her care or for whom he/she is responsible and the general public by performing his/her duties according to Agency policies and procedures before refusing to perform an alleged unsafe or dangerous act or practice pursuant to this Section.

Nothing in this Section shall be construed as preventing an employee from grieving the safety designee's decision.
(Joint Exhibit 1, Pgs. 11-12)

ARTICLE 24 - DISCIPLINE

Section 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.

Section 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.

. . .

Section 24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

Section 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-disciplinary meeting. At the discretion of the Employer, the forty-five (45) days 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 situations 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.

(Joint Exhibit 11, Pgs. 34-37)

...

ARTICLE 31 - LEAVES OF ABSENCE

Section 31.01 - Unpaid Leaves

The Employer shall grant unpaid leaves of absence to employees upon request for the following reasons:

...

C. For an extended illness up to one (1) year, if an employee has exhausted all other paid leave. The employee shall provide periodic, written verification by a medical doctor showing the diagnosis, prognosis and expected duration of the illness. Prior to requesting an extended illness leave, the employee shall inform the Employer in writing of the nature of the illness and estimated length of time needed for leave, with written verification by a medical doctor. If the Employer questions the
employee's ability to perform his/her regularly assigned duties, the Employer may require a decision from an impartial medical doctor paid by the Employer as to the employee's ability to return to work. If the employee is determined to be physically capable to return to work, the employee may be terminated if he/she refuses to return to work.

The Employer may grant unpaid leaves of absence to employees upon request for a period not to exceed one (1) year. Appropriate reasons for such leaves may include, but are not limited to, education; parenting (if greater than ten (10) days); family responsibilities; or holding elective office (where holding such office is legal).

The position of an employee who is on an unpaid leave of absence may be filled on a temporary basis in accordance with Article 7. The employee shall be reinstated to the same or a similar position if he/she returns to work within one (1) year.

The Employer may extend the leave upon the request of the employee.

If an employee enters military service, his/her employment will be separated with the right to reinstatement in accordance with federal statutes.

...

(Joint Exhibit 1, Pgs. 50-51)

CASE HISTORY

Wiley King Jr., the Grievant, was employed as a Maintenance Repair Worker III at the Cuyahoga Hills Boys School, the Employer. In this capacity, the Grievant performed various maintenance tasks throughout the institution such as repairing plumbing, electrical work, general upkeep and maintenance. Upon the Grievant's removal on December 21, 1987, he had realized an approximate two (2) years of seniority.

Robert L. Jackson, the Deputy Superintendent, acknowledged that the facility required special attention during the time of the Grievant's employment. The Grievant confirmed this assessment and noted that the working conditions eventually led to a severe respiratory problem engendered by asbestos dust.

The Grievant testified that he was initially exposed to the asbestos while performing maintenance work in G and H dorms during January and February, 1985. He purportedly worked in these dorms a total of three and a half to four months; and swept the ceilings in these dorms for approximately three weeks. The Grievant, moreover, performed additional work by replacing bulbs

in the light fixtures and cleaning the air ducts. These activities purportedly covered the Grievant's eyes, ears, mouth, and nose with asbestos dust.

On or about March, 1986, the Grievant allegedly notified the following management representatives that he was experiencing health problems because he worked in an asbestos laden work environment: Robert L. Jackson, Deputy Superintendent; Erma Johnson, Superintendent; and Harold Cole, Building Maintenance Superintendent. The Grievant maintained that none of these individuals seemed interested in his situation. He, moreover, maintained that he asked Cole for a mask but that Cole remarked that he did not have one for distribution purposes.

The Grievant began to experience severe attendance problems for the period August 8, 1986 to November 28, 1986 (Joint Exhibit 3). Several documents jointly submitted by the Parties, including back to work slips and statements of treatment, indicated that the Grievant could return to regular work.

The Grievant's condition seemed to persist toward the end of December, 1986 (Joint Exhibit 4) and throughout January, 1987 (Joint Exhibit 6). The Grievant's physical problems were reinforced in the following comments contained in a Request For Leave authored on December 29, 1986: "Due to pressure and offlication in my chest I feel the urgency to take my medication which is at home. I have informed Mr. Cole of my condition." Also, the Grievant submitted a number of back to work slips for a series of absences covering the period January 21, 1987 to January 29, 1987

(Joint Exhibit 6). It should be noted that these slips were authored by Dr. C. Sachs, a physician at Kaiser Permanent Medical Care Program. Dr. Sachs, moreover, noted that he authorized the Grievant's return to a regular work assignment.

The entire episode seemed to escalate and reached heightened proportions during March of 1987. Once again the Grievant submitted back to work slips for the period March 2, 1987 to March 9, 1987. These slips were authored by Dr. Sachs who also attached a note dated March 5, 1987. The note contained the following comments; "As per my previous note it is suggested that Mr. Wiley King work in an environment free of noxious dusts and fumes." (Joint Exhibit 6.)

On March 20, 1987, the Grievant was given a job assignment which required the changing of bulbs in dorms G and H. The grievant testified that he was covered with dust and this working condition caused a shortness of breath. It should be noted that the Grievant received the same work assignment on March 21, 1987. He testified that he reported off work on March 22, 1987 and that he made an appointment to see Dr. Sachs.[1]

On April 16, 1987, Adella J. Dorkins, the Personnel Officer, issued a letter (Joint Exhibit 7) requesting information from his physician delineating his condition, treatment status, prognosis for recovery, and projected return to work date. She also

[1]Nothing in the record indicates that the Grievant informed Cole that he was ill on or about March 20, 1987. Also, there is nothing in the record to support the allegation that the grievant refused the March 21, 1987 assignment and left work.

requested that this information be received by the Employer on April 24, 1987. This request was complied with because the Employer received a written statement (Joint Exhibit 8) on the above mentioned date.

On May 27, 1987, Geno Natalucci-Penesichetti, the Director, notified the Grievant that "pursuant to Rule 123:1-33-04 of the Administrative Code, you have been scheduled for a medical examination to determine if you are physically capable of performing the duties required of your position." An appointment, moreover, with Stuart Datt, M.D. was schedule don June 8, 1987 (Joint Exhibit 11).

After examining the Grievant on June 8, 1987, Dr. Datt authored a report dated June 10, 1987 (Joint Exhibit 12). His report contained the following relevant particulars:

> "...
>
> My impression is that this male has symptoms secondary to inhaling some substance, possibly asbestos. This is not asbestosis which requires a long-term exposure but, rather, a severely allergy-like reaction to asbestos or some other substance with which he came in contact. Apparently, every time he has been exposed to this substance the condition has become exacerbated.
>
> The patient is improving again and should probably be able to work in a few weeks; however, he should not work in the school where he has been working since this exposes him to the substance which has caused the problem.
>
> ..."

(Joint Exhibit 12)

On July 1, 1987, the Grievant conversed with Gerry Luse, the Superintendent, about the Grievant's ability to return to work.

It appears that Luse realized certain specific expectations based upon this discussion which were documented as particulars in a July 1, 1987 letter.

> "...
>
> As discussed during our phone conversation of July 1, 1987, we will expect you back to work on Wednesday, July 8, 1987, with the following understandings:
>
> 1. You can and will perform all routine Maintenance Department tasks in a room that contains an asbestos ceiling, so long as the task at hand does not involve any dislocation or disruption of the asbestos.
>
> 2. If the work at hand does conceivably involve disruption of the asbestos ceiling material, masks of the appropriate type will be provided and worn before you are asked to do the work.
>
> Please understand that this is not "light duty" work in the usual sense of the term. We do not expect that anyone in the Maintenance Department or any other department expose themselves to free-floating asbestos in the immediate concentrations which, for example, could be produced by replacement of a ceiling light fixture. In those cases protection must be provided and used.
>
> ..."

(Joint Exhibit 13)

The Grievant failed to report to work on July 8, 1987. As a consequence, Luse notified the Grievant on July 8, 1987 that he was being ordered to return to duty for his regularly scheduled hours on Monday, July 20, 1987. The Grievant, moreover, was advised that he was going to be examined by another State appointed physician who specialized in allergies. He was also forewarned that violation of this order may result in disciplinary action (Joint Exhibit 16).

Pursuant to Rule 123:1-33-04 of the Administrative Code, the

Grievant was informed on August 24, 1987 that he was scheduled to see Dr. David Rosenberg, an allergist, on September 8, 1987 (Joint Exhibit 21). On September 14, 1987, Dr. Rosenberg authored a report which contained the following conclusion:

> "...
>
> In conclusion, it can be stated with a reasonable degree of certainty, that Mr. King has no specific occupational form of lung disease as a consequence of working at the Cuyahoga County Boys' School. He probably has some degree of asthmatic bronchitis, which probably is the consequence of his cigarette smoking. He may have had transient exacerbation of this condition working in a dusty environment at the school. However, he does not have any long-term consequence or ill affect from this exacerbation. From a functional point of view, he is totally normal and can return to his previous type of employment. there should be some degree of clean air restrictions and he should also stop smoking.
>
> ..."

(Joint Exhibit 22)

Dr. Rosenberg's assessment engendered à Return to Duty order authored by Luse on September 25, 1987 (Joint Exhibit 23). It specified that the Grievant should return to work on October 5, 1987. Again, the Grievant was notified that failure to report to duty would be considered insubordination and may result in disciplinary action. An identical Return to Duty notice was sent by Superintendent Luse on October 8, 1987. The only change dealt with a return to work date of October 19, 1987 (Joint Exhibit 24).

On October 23, 1987, Cole sent the Grievant an Incident Report dealing with the Grievant's failure to return to work on October 19, 1987 (Joint Exhibit 25). It appeared to the Employer

that the Grievant picked up Luse's Return to Work Order on October 13, 1987 (Joint Exhibit 26), and yet, failed to report which constituted insubordination.

On November 10, 1987 a Third Party Hearing was scheduled. It was followed on November 19, 1987 by Luse's removal recommendation. This recommendation was based on the charges of neglect of duty and insubordination, and the additional specification that the Grievant abandoned his job or otherwise failed to report to work as ordered (Joint Exhibit 2).

The recommendation was accepted and a Formal Removal Order was promulgated on December 2, 1987. It contained the following reasons and particulars:

> "...
>
> The reason for this action is that you have been guilty of NEGLECT OF DUTY AND INSUBORDINATION in the following particulars, to wit: On or about 3/20/87, you last reported to work. Since that time you have been absent from your position without proper notification and documentation. Your actions constitute violation of Section 124.34 of the Ohio Revised Code, to wit: Neglect of Duty and Insubordination. You are hereby Removed from your position effective: DECEMBER 31, 1987. Previous Disciplinary Action: None.
>
> ..."

(Joint Exhibit 2)

On December 18, 1987 the Grievant contested the removal by filing a grievance. It contained the following Statement of Facts:

> "...
>
> Statement of Facts (for example, who? what? when? where? etc.):

The union contends the state has willfully violated the contract. When Mr. King went out ill contract states The employer shall grant unpaid leaves of absence Sick leave policy shall be fair and reasonable they shall not be arbitrary or capricious.

. . ."

(Joint Exhibit 2)

On February 2, 1988, the Employer denied the grievance at the Third Step. The denial was based on a number of factors. First, the Grievant was ordered back to work on two separate occasions and yet he failed to return. Second, Dr. Rosenberg concluded that the Grievant could indeed return to work. Last, the Grievant failed to return even though Luse engaged in several efforts to accommodate the Grievant (Joint Exhibit 2).

The Parties were unable to resolve the grievance. No objections raised dealing with substantial or procedural arbitrability, the grievance is properly before this Arbitrator.

The Position of the Employer

It is the position of the Employer that it had just cause to remove the Grievant because of violations of Section 124.34 of the Ohio Revised Code; with specific reference to neglect of duty and insubordination. Arguments dealing with potential procedural defects and safety defenses were hotly contested by the Employer.

The Employer admitted that the Union specified several provisions in its grievance form which were never truly addressed or supported with any corroborating evidence and testimony. Specific references were placed on arguments dealing with the

following provisions: Section 29.01 - Sick Leave - Accrual; Section 29.03 - Sick Leave - Sick Leave Policy; and Section 31.03 - Leaves of Absence - Authorization for Leave.

It was alleged that the Grievant had previous knowledge of the potential consequences associated with insubordination and neglect of duty; both had possible termination ramifications. Such knowledge was allegedly provided via the following sources: knowledge of contractual provisions, direct orders to return to work, receipt of incident reports, and a number of telephone conversations.

Knowledge concerning Article 31 was specifically underscored by the Employer. Testimony by the Grievant regarding his lack of awareness was challenged because he seemed to be aware of the grievance form (Joint Exhibit 2) which referenced this article. Also, the Union's "newness" argument seemed selectively misplaced.

An alternative notice argument was presented. The Employer maintained that violations of Article 31(c) did not necessarily require express notice. Rather, such misconduct did not require an express designation that discharge can be the consequence.

The Employer argued that the Removal Order (Joint Exhibit 2) was not laden with procedural defects. O.R.C. Section 124.34 was deemed to be enforceable because it was not expressly excluded by other contractual provisions; the Union failed to provide any proofs regarding intent; and a number of Panel Arbitrators have affirmed the Employer's view that O.R.C. Section 124.34 as a

standard of just cause. This standard, moreover, was viewed as subsumed in the traditional definition of due process and just cause.

Timeliness charges raised by the Union were, for a number of reasons, refuted by the Employer. First, a number of Incident Reports (Joint Exhibits 20 and 26) were delivered via certified mail (Joint Exhibit 19) which placed the Grievant on notice regarding his return to work. Second, an extensive period of time elapsed between the initial return to work order (Joint Exhibit 16) and several other attempts (Joint Exhibits 23 and 24). Third, the timeliness concern was, moreover, mitigated by the Agreement (Joint Exhibit 13) reached by the Grievant and Luse which specified certain conditions which needed to exist prior to any return.

The Employer removed the Grievant for insubordination because he failed to return to work following two direct orders by the Superintendent. Also, the Grievant's absences constituted neglect of duty because he could not perform his duties which adversely impacted the facility's overall mission. The Employer also maintained that the Grievant's refusal to perform his assigned task was not based on the standard established by the Supreme Court in Whirlpool Corp. v. Marshall,[2] and thus, totally unjustified and unreasonable.

For the following reasons, the Employer argued that the Grievant did not have "a reasonable apprehension of death or

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[2] Whirlpool Corp. v. Marshall, 100 S. Ct. 883 (1980).

serious injury coupled with a reasonable belief that no less drastic alternative is available."[3] Support for this premise was provided in the form of arguments and proofs dealing with the nature of the work to be performed and its environmental setting; the physical condition of the Grievant; and the Employer's adjustments and accommodations in its attempt to provide the Grievant with assistance.

The Employer argued that the Union failed to establish a prima facie case that the particular work assignment in dispute was dangerous and imminently hazardous. Testimony provided by Gary Bolling, a Safety and Health Coordinator, indicated that the citation issued on May 8, 1986 did not establish that the work site was unsafe. Bolling, moreover, was unable to draw a nexus between the conditions which engendered the necessity for a citation and the Grievant's alleged physical condition. Also, even though the citation was issued by the Division of Occupational Safety and Health, it never attempted to close the facility despite the nature of its inmate population.

In a related fashion, the test results (Joint Exhibit 5) never clearly disclosed that the asbestos level exceeded the required safety levels. Several of the results, more specifically, supported the Employer's contention that the workplace environment was indeed safe. Also, the Union failed to present any medical evidence supporting the Grievant's claim that his absences were related to the work environment; and that the

[3] Id At 886.

environment was of any immediate threat to health or safety.

The elapsed length of time from the initial exposure to the actual raising of the issue engendered certain suspicions concerning the veracity of the safety allegation. Dorothy Brown, the Chapter President, maintained that during January/February of 1985 she observed the Grievant covered in asbestos dust, and noted that visibility in the area was limited to eight feet. Yet, neither the Grievant nor the Union raised the allegation until April of 1987, had the workplace evaluated, contacted any State or Federal agency, nor filed a grievance under Article 11 which deals with safety and health provisions. During this period of time, moreover, no other similarly situated maintenance employees raised comparable apprehensions concerning their safety, allergic reactions, or other similar symptoms.

A number of allegations were proposed by the Employer regarding the actual proofs of physical injury. First, it was maintained that the claim was suspect because the Grievant never applied for an environmental disability under Section 35.06. Second, the last back to work slip presented by the Grievant indicated that the Grievant could return to regular work on March 9, 1987 (Joint Exhibit 6). Third, the Grievant's attendance record for the period February 3, 1985 to December 19, 1987 (Joint Exhibit 15) indicated that the Grievant did not experience a pattern of absenteeism after his alleged initial exposure during January/February of 1985. Rather, his attendance difficulties only emerged during August of 1976; approximately one

and one-half years later. Fourth, a review of overtime approvals for the period of August 23, 1986 to February 23, 1987 evidenced that the Grievant worked a considerable amount of overtime, which therefore limited the Grievant's exposure theory.

The Employer maintained that Dr. Sachs, the Grievant's physician, and other state appointed physicians did not validate the Grievant's allegations concerning his inability to return to work. Documentation supporting Sachs' purported recommendation that the Grievant should not return to a work area saturated with noxious fumes and dust was never provided. Testimony and evidence presented by Lisa Fribourg, a Health Care Coordinator, seemed to further rebuff the Grievant's interpretation. She contacted Sachs and asked him a number of questions regarding his memo dealing with the Grievant's diagnosis, treatment, and prognosis (Joint Exhibit 8). Fribourg's interview resulted in the conclusion that Sachs could not substantiate that the Grievant's problems were caused by working around noxious fumes, dust, and molds (Joint Exhibit 9(B)).

Similar evidence was purportedly disclosed by reports submitted by Drs. Datt (Joint Exhibit 12) and Rosenberg (Joint Exhibit 22). for the most part, these reports allegedly supported the Employer's view that the Grievant could return to his previous work environment with a minimal amount of precautions.

It was also emphasized that the Employer was not intolerant as evidenced by its attempts to accommodate and assist the Grievant. The Employer introduced Luse's July 1, 1987 memo (Joint

Exhibit 13) and Deputy Superintendent Jackson's testimony in support of this premise. Jackson noted that this document was promulgated in response to the Grievant's request, and despite a paucity of medical and physical evidence in support of the alleged claim., The Employer also questioned the Grievant's account regarding the memo in light of his evasive and inconsistent testimony.

The Position of the Union

It is the position of the Union that the Employer did not have just cause to remove the Grievant for neglect of duty and insubordination. A variety of procedural defects were raised by the Union. In addition, evidence and testimony supporting the validity of the Grievant's reasonable refusal to return to work were also discussed.

The Union alleged that the Removal Order (Joint Exhibit 2) was defective because it referenced Section 124.34 of the Ohio Revised Code rather than specific contract provisions. This section, moreover, holds the Employer to a lesser standard than either Section 31 or Section 24 which were negotiated and mutually agreed to by the Parties. Reliance on Section 124.34 diminished certain agreed to due process and procedural rights because it does not require just cause and progressive discipline standards. The controlling virtues of the Agreement (Joint Exhibit

1) were also reinforced by a recent Ohio Supreme Court decision.[4] The Court ruled that negotiated agreements prevail over the provisions of the Ohio Revised Code; and that the Code cannot be used to supplement and indirectly usurp provisions negotiated by parties to a collective bargaining agreement.

In a related fashion, the Union contended that the Removal Order and its particulars (Joint Exhibit 2) should be the focus of the present analysis rather than particulars contained in internal management documents. The Union, more specifically, challenged the Employers reference to Article 31; an item referred to in a statement attached to an incident report dated July 21, 1987 (Joint Exhibit 20).

A number of notice related defects were raised by the Union. First, the Employer violated Section 24.04 because the Grievant was never fully informed in writing of the possible form of discipline that he could expect as a result of the specified violations. Jackson purportedly testified that none of the correspondence dealing with this matter specifically identified the nature of the expected discipline. The Grievant, moreover, alleged that he did not anticipate that his job was in jeopardy because he was under doctor's care. Also, the pre-disciplinary notice (Joint Exhibit 2) did not specify the contemplated discipline.

Second, the Removal Order (Joint Exhibit 2) was defective

[4] State, ex rel. Rollins v. Cleveland Heights, University Heights Board of Education, 40 Ohio St. 3d. 123, 532 NE 2d 139 (1988).

because it expanded the nature of the alleged charges. This conclusion was based upon an analysis of the Pre-disciplinary Notice dated November 3, 1987 and the Removal Order (Joint Exhibit 2). The charges specified in the Pre-disciplinary Notice dealt with the Grievant's failure to return to work on October 19, 1987 as directed by the Superintendent and documented the Incident Report dated October 22, 1987. The Removal Order, however, indicated that the Grievant was being disciplined for absences which occurred from March 20, 1987 to October 19, 1987.

The above discrepancy suggested that additional Section 24.04 violations took place. A violation allegedly took place because the Employer never conducted a pre-disciplinary conference to discuss the incidents preceding the October 19, 1987 violation. Also, this lack of specificity engendered an additional notice defect because the Employer failed to inform the Grievant and the Union of the reasons for the contemplated discipline and the possible form of discipline.

Third, in a related manner, due process requirements were violated because the Employer failed to abide by its unilaterally promulgated notice policy. Such a standard is provided for in Policy B.34 entitled Administration of Employee Discipline (Union Exhibit 5). It states in pertinent part that a Pre-disciplinary Conference provides a notice of the charges and an opportunity to present evidence on an employee's behalf prior to the final recommendation.

Additional procedural defects dealing with Section 24.02

were raised by the Union. The Employer allegedly failed to initiate disciplinary action as soon as reasonably possible, and thus violated the timeliness standard negotiated by the Parties. Once again, the Union referenced the Employer's reliance on the Grievant's failure to report from March, 1987 until October, 1987. Yet, the Employer only issued an Incident Report on July 21, 1987 (Joint Exhibit 20), issued another Incident Report on October 6, 1989 which was subsequently withdrawn, and issued a final Incident Report (Joint Exhibit 26) dated October 22, 1987 dealing with the Grievant's failure to report on October 19, 1987. Thus, the Union opined that the Employer's disciplinary action was based upon a series of incidents which failed to engender any disciplinary action at the time of their occurrence.

The Employer specified certain time limits regarding the issuance of Incident Reports in Policy B-34 entitled Administration of Employees Discipline (Union Exhibit 5). It provides that an Incident Report must be completed within twenty-four (24) hours of an incident. The Union, more specifically, alleged that Section 24.01 was violated because the twenty-four (24) hours criterion was violated. It was alleged that the incident took place on October 19, 1987, and yet, the report was not written until October 22, 1987 (Joint Exhibit 26), and eventually delivered on October 23, 1987.

Progressive discipline concerns were also raised by the Union; it perceived the Employer's actions as direct violations of Sections 24.02 and 24.05. The Employer, more specifically,

"built a case" against the Grievant by allowing the situation to develop from March 20, 1987 to October 19, 1987. Thus, the Employer never administered a lesser penalty prior to discharge in an attempt at corrective action.

The Union claimed that the Grievant should not have been removed for insubordination because his refusal was based upon a good faith expectation that he was exposing himself to a dangerous situation. This theory was bolstered by evidence and testimony in support of two (2) criteria discussed by the Supreme Court in Whirlpool[5]: whether the employee reasonably believes that the working conditions pose an imminent risk of death or serious bodily injury; and the employee has a reasonable belief that no less drastic alternative is available.

The Union argued that the Grievant acted as a reasonable person who had a good faith fear for his safety. These adverse expectations were allegedly nurtured by the Grievant's actual work experience and the Employer's response once they became aware of the Grievant's situation.

The Grievant testified that he initially experienced respiratory problems during June of 1985 when he was hospitalized. He, moreover, contended that his physical condition persisted each time he worked in areas that contained asbestos in the ceiling tile and the fixtures surrounding the ceiling. Oftentimes he found himself totally covered with dust. His condition, however, seemed to improve whenever he was assigned job duties which did

[5]Supra Note 3.

not expose him to asbestos dust.

The Union maintained that the incident which precipitated the disciplinary action took place on March 20, 1987. On this date, the Grievant was at dorms G and H when he was asked to remove bulbs from the light fixtures. Once again his activities engendered physical maladies. He was given the same assignment on March 21, 1987 and reported off of work on March 22, 1987 because he went to see his attending physician.[6]

The Union argued that the Employer was fully informed about the working conditions, and their adverse impact on the Grievant, but failed to acknowledge the existence of these contingencies. The Union maintained that he periodically discussed his health condition and the work environment with Management representatives. These discussions took place for the period of March, 1986 through March 20, 1987. In fact, the Grievant noted that he spoke to Cole on March 21, 1987. During one of these conversations, moreover, the Grievant requested a mask but the Employer refused to provide this devise.

By failing to react to the Grievant's concerns the Employer purportedly violated Section 11.03. This Section requires that the safety designee shall evaluate the complaint.[7] The Employer, more specifically, failed to properly investigate the Grievant's

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[6]The record does not indicate that the Grievant refused the March 21, 1987 assignment as alluded to in the Union's Brief on page 3.

[7]This Arbitrator does not totally agree with the Union's interpretation of this provision.

complaint and continued to place him in perilous working conditions. A thorough investigation would have disclosed that specific equipment or methods should have been used to clean asbestos laden material. These standards were clearly specified in federal laws, OSHA, and EPA regulations (Union Exhibit 3). All of these regulations were in effect prior to March 20, 1987.

Additional foreknowledge should have been provided by the asbestos tests conducted at the facility as early as February of 1986. Bolling testified that he conducted tests in February, informed the Employer about the test results during april of 1986, and issued a citation which was dated May 8, 1986 (Union Exhibit 2).

The Grievant's reasonable apprehensions were also supported by medical evidence and workers' compensation rulings. His personal physician, Dr. Sachs, advised him on several occasions not to work around noxious agents (Joint Exhibit 8). This opinion was confirmed by Dr. Datt, a state appointed physician, who recommended that the Grievant experienced an allergy-related reaction, and that he should not work in the schools where the substances which elicited the reaction was housed (Joint Exhibit 12). Another state appointed physician, Dr. Rosenberg, partially supported the prior diagnosis when he noted that clean air restrictions should be present in the Grievant's work environment (Joint Exhibit 22). The Grievant maintained that he did not totally concur with Rosenberg's findings because of the types tests employed and the thoroughness of his evaluation.

A workers' compensation ruling authored by Kenneth H. Krol, District Hearing Officer, on September 22, 1987 allegedly indicated that asbestos was present and that the Grievant was injured as a consequence (Union Exhibit 1). Krol ruled that the Grievant sustained an injury by inhaling asbestos in the course of and arising out of employment. He, moreover, ordered that medical bills be paid for on allergy-like reactions to asbestos.

Luse's letter dated July 1, 1987 (Joint Exhibit 13) was not viewed as a reliable accommodation because it did not adequately address the Grievant's concerns. The Grievant testified that the assurances specified in the letter did not fully comply with the particulars required by Dr. Sachs. The assurances discussed dealt with the type of air the Grievant should work in and the nature of the precautionary measures which could be anticipated. Based on the Employer's past record and its unwillingness to take the Grievant's problems seriously, the Grievant legitimately concluded that masks would not be provided and that the situation would not change.

Several other considerations led the Union to believe that "actual" insubordination did not take place. First, the Grievant testified that he stated at the pre-disciplinary conference that he would return to work if in fact he was given some specific assurances that he would not be assigned to work in areas where asbestos dust was present. If the Employer would have agreed to these specific conditions, he would have returned to work. Second, the Grievant possessed a good faith fear for safety even

if the danger did not actually exist. Thus, insubordination did not actually take place because a "real" fear existed. Third, the Grievant cooperated with the Employer throughout the investigation by participating in the following activities: state appointed physician appointments; made himself available to the Superintendent to discuss his return to work; attempted to discuss his problems with his Supervisor prior to the altercation; and made every attempt to provide the Employer with information from his treating physician. Last, the Grievant had good cause to believe that his refusal to report back to work had been excused. This expectation was bolstered by the very fact that several prior incident reports never resulted in any documented discipline.

The Union argued that based upon the above evidence and testimony the Grievant's actions were reasonable and legitimate. He, more specifically, had good reason to believe that the environment contained asbestos and posed a serious health hazard. Without clear assurances from the Employer, the Grievant's refusal to return to work was clearly justified.

THE ARBITRATOR'S OPINION AND AWARD

It is a well-established arbitral principle that an employee's unjustified refusal to follow an employer's orders may be adequate grounds for discharge. Normally, "self-help" is viewed as unjustified and employees are required to carry out

their job assignments. Once these are accomplished, employees are encouraged to then turn to the grievance procedure for relief.

There is, in addition, an exception to the "obey now - grieve later" standard. Although arbitrators have taken a number of varying approaches in their attempt to articulate this standard, the "reasonable person" approach appears to be the most prevalent. The various approaches fall into two (2) major categories. One category consists of those arbitrators who apply a subjective test of what a particular employee believes, while others apply an objective test which focuses upon what a "reasonable person" would have believed under the existing circumstances.[8]

The above approach attempts to determine whether the facts and circumstances known to the employee at the time of the incident would have caused a "reasonable person" to believe that by carrying out the work assignment he/she will endanger his/her health and safety. This particular view, moreover, requires a reasonable basis for the allegation that the assignment is dangerous and at least _prima facie_ evidence that the work is unsafe.[9] If these conditions are established, then the "protection" exception attaches. Arbitrator Wilber Bothwell articulated this prevailing view as follows:

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[8] _Hercules Inc._, 48 LA 788 (1967); _A.M. Castle & Co._, 41 LA 666 (1963).

[9] _Western Airlines, Inc._, 67 LA 486 (1976).

> The principle applicable here is that an employee may refuse to carry out a particular work assignment, if at the time he is given the work assignment, he reasonably believes that by carrying out such work assignment he will endanger his safety or health. In such an instance the employee has the duty, not only of stating that he believes there is risk to his safety or health, and the reason for believing so, but he also has the burden, if called upon, of showing by appropriate evidence that he had a reasonable basis for his belief. In the case of dispute . . . the question to be decided is not whether he actually would have suffered injury but whether he had a reasonable basis for believing so. This is so well understood that the chairman does not believe that the general acceptance of this principle requires documentation.[10]

It should also be noted that this standard is alluded to by Parties in Section 11.03, and is in compliance with the standard discussed by the Supreme Court in Whirlpool.[11]

Having adopted the above standards as controlling in this case, this Arbitrator must now determine the facts and circumstances relevant to this standard. In this Arbitrator's opinion, the evidence and testimony were sufficient to establish that at the time the Grievant was given the order to return to work, the order and the related work assignments should not have engendered a reasonable belief that there was a risk to his health and safety.

The series of events, and the timing of same, led this Arbitrator to believe that the Grievant's response was unreasonable. The Grievant testified that he was initially exposed to asbestos dust and was hospitalized during June of 1985

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[10] Laclede Gas Co., 39 LA 833, 839 (1962).

[11] Supra Note 3.

with a respiratory condition. He, moreover, noted that he continued to work under these environmental conditions for an extended period of time prior to raising safety and health concerns with representatives of the Employer. If, in fact, the conditions were so onerous and physically damaging one would think that either the Grievant or his attending physician would have raised the issue much earlier and with greater assertiveness. The Grievant also admitted that during this entire episode he never submitted any sick leave requests.

Attendance (Joint Exhibits 3, 4 and 6) and Overtime (Joint Exhibit 10) records support the above conclusion. A pattern of absence following the initial exposure never seemed to materialize. In a like fashion, an employee with asbestos related misfortunes would not have exposed himself to "noxious" agents by accepting overtime opportunities.

The Union failed to establish a prima facie case that the work setting was unsafe. Much of the testimony provided by Bolling failed to support the Union's hazardous setting theory. Bolling testified that although a citation (Union Exhibit 2) was issued the facility was never closed by the Department of Industrial Relations, Division of Occupational Safety and Health. He also noted that the State has closed other facilities if it deemed the existence of and eminent danger situation. Two test results were also conducted which failed to evidence that asbestos amounts exceeded the recommended standards. Of utmost import was the air particle test conducted fourteen (14) days after the

initial assessment. Once again the results disclosed an environmental condition well below the recommended guidelines. Bolling's description of the work environment also minimized the veracity of the Grievant's assertions. He, more specifically, maintained that he never observed the Grievant entirely covered with asbestos, and never observed the work setting so saturated with asbestos that one could not see eight (8) feet directly in front. Bolling also provided medical expertise which indicated that the Grievant's condition might be caused by something other than asbestos.

Medical evidence introduced at the hearing also failed to serve as justification for the Union's reasonableness theory. As late as March 5, 1987, the Grievant's attending physician, Dr. Sachs, issued a back to work slip which indicated that the Grievant may return to regular work. Several other similar instances were readily apparent when one reviews the numerous call-off slips introduced at the hearing (Joint Exhibits 3, 4 and 6). Testimony provided by Fribourg was extremely damaging and was not adequately rebutted by the Union. She conversed with Dr. Sachs who told her that he was unable to substantiate that the Grievant's problems may be arising from working around noxious fumes, dust, and molds (Joint Exhibit 9(B)). Interestingly enough, Fribourg's version of the conversation was submitted as a joint exhibit. Also, one would think that the Union would have presented some document from the Grievant's attending physician in support of the Grievant's assertions. Finally, Drs. Datt and

Rosenberg provided statements (Joint Exhibits 12 and 22) which did not totally substantiate the Union's theory. Rather, they supported the accommodation efforts initiated by the Employer.

Probably the most damaging facet of the Union's argument dealt with the Employer's accommodation efforts. This Arbitrator is convinced that some meeting of the minds took place between Luse and the Grievant on or about July 1, 1987. Conditions dealing with the date of return and the working conditions upon return were discussed. Such matters had to be agreed to otherwise Luse had no reason to articulate the particulars contained in Joint Exhibit 13. In fact, the Grievant supported this circumstance during his testimony although he never admitted that a formal arrangement had been mutually agreed to by Luse and the Grievant.

In this Arbitrator's opinion, even if the Grievant did experience asbestos-related physical problems, the conditions discussed in the July 1, 1987 letter (Joint Exhibit 13) provided the Grievant with a reasonable alternative. An alternative which should have been attempted rather than rejected out of hand. In other words, the conditions viewed in the context of the entire episode would have led a reasonable person to return to work. It is my judgement that the particulars reasonably and accurately addressed the Grievant's concerns. They, more specifically, limited and partially modified the Grievant's work assignment because it would no longer involve the dislocation of disruption of the asbestos. If the work did, in fact, involve the disrup-

tion of the asbestos ceiling material, an appropriate mask would be provided before the Grievant was asked to do the work.

The reasons proffered by the Grievant in support of his decision to refuse the accommodation were viewed as a pretext by the Arbitrator. Testimony provided by the Grievant was highly evasive and inconsistent which dramatically reduced his credibility. Under direct examination the Grievant stated that the particulars did not comply with Sachs' requirements. He noted that the physician was asking for more information in terms of the type of mask and degree of exposure in terms of duration. Under cross-examination, however, he noted that he was not sure whether he reviewed the July 1, 1987 letter (Joint Exhibit 13) with his physician, and did not know whether this was enough information for Sachs. Also, he noted that his physician did not ask for anything else but information concerning a mask and other protective garments. This Arbitrator is convinced that regardless of the particulars offered in the accommodation, the Grievant was determined not to return to work. A response totally inappropriate and unreasonable in light of the facts and circumstances.

The above analysis clearly indicates that the Employer had just cause to discipline the Grievant. Several procedural defects, however, clearly indicate that the discipline must be modified because the Employer failed to comply with several contractual procedures mutually agreed to by the Parties. Such a disposition, more specifically, recognizes that the offense has

indeed been committed, that procedures have been violated, but does not declare the entire action a nullity.

The Removal Order (Joint Exhibit 2) was defective for a number of reasons. First, it cited Section 124.34 of the Ohio Revised Code rather than pertinent sections of the Agreement (Joint Exhibit 1). The Employer failed to introduce any evidence or testimony equating this standard with the standards specified in either Article 31 or Article 24. Reliance on this section, moreover, conflicts with a recent Ohio Supreme Court decision[12] which found that the Code cannot be used to supplement and indirectly usurp provisions negotiated by the parties.

Second, one could easily confuse the conflicting particulars contained in the Pre-disciplinary Hearing Notice and the Removal Order. The former document referred to one insubordinate event, while the latter referred to a series of events prior to October 19, 1987. This circumstance failed to provide the Grievant with proper and timely notice as required by Sections 24.01 and 24.04. In my judgement, moreover, it may have prevented a full and exact defense for the entire episode.

Another Section 24.04 violation dealt with a misspecification concerning the notice of the proposed discipline. A review of the grievance chain (Joint Exhibit 2) indicates that the Grievant was never specifically informed that his actions could result in removal. Although the Employer alluded to Section 31.01 violations, it never formally specified this charge but

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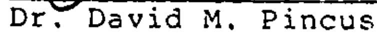
[12] Supra Note 3.

alluded to it in one document by referencing O.R.C. Section 123:1-33-04 (Joint Exhibit 21). The Employer attempted to skirt this issue by alleging that the Grievant's actions amounted to a malum in se offense. This Arbitrator disagrees with this conclusion because the nature of this specific insubordinate offense differs significantly from the "obey now - grieve later" situation.

Finally, progressive discipline requirements as specified in Section 24.02 were also violated. Again, this violation partially relates to the Removal Order (Joint Exhibit 2) violation discussed above. If the Employer viewed the Grievant's actions as a dischargeable offense then it should have administered its discipline at an earlier stage. This conclusion is especially true if the Employer placed any reliance on events prior to October 19, 1987.

AWARD

The grievance is sustained in part and denied in part. The Employer is ordered to reinstate the Grievant to his former position without back pay and full seniority. It should be noted that no back pay is given to evidence the seriousness of the offense. But for the procedural defects described above, the Grievant would have been removed. Thus, the Grievant should be placed on notice that he must obey the rules.



Dr. David M. Pincus

January 7, 1990