In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

Department of Mental
Retardation and Developmental
Disabilities

Employer.

Grievance Nos. G-87-0984 and
G-87-0719

Grievant (Wesley Walker)

Hearing Date: January 22, 1990

Award Date: February 27, 1990

For the Union (on arbitratability): Bruce Wyngaard
For the Union (on merits): Steve Liber

For the Employer (on arbitratability): Tim Wagner
For the Employer (on merits): [redacted]

Present in addition to the Grievant and the advocates named above were the following persons Francine Farmer, MRDD, Personnel (witness), Nelson Able, Jr., MRDD, Maintenance Supervisor (witness), Jason Hooks, MRDD - LRO, (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The

Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. All witnesses were sworn.

Issues of Arbitratability

Is the grievance properly before the Arbitrator?

Facts

Grievant was hired on August 24, 1980.

Grievant was suspended on August 21, 1986 for neglect of duty.

On August 20, Grievant received notice of a Predisciplinary Hearing to be held August 22, 1986 with regard to twenty-three (23) alleged work rule violations occurring between July, 10, 1986 and August 14, 1986.

On September 3, 1986, the Grievant was suspended for fifteen (15) days.

On September 12, 1986 through November 24, 1986, Grievant was on leave of absence.

On September 17, 1986, Grievant was notified of the suspension by registered mail which Darlene Walker signed for on September 19, 1986.

Grievant served the fifteen day suspension from November 26, 1986 through December 16, 1986.

Grievant filed a grievance with regard to the 15 day suspension on November 28, 1986.

On January 26, 1987 and January 28, 1986, the Grievant received notice of allegations of work rule violations on January 5, 1987 and January 13, 1987.

On February 18, 1987, Grievant was removed from his position effective March 7, 1987.

On March 11, 1987, Grievant filed a grievance with regard to his removal.

On March 12, 1987, the 15 day suspension grievance was denied at Step 3.

On April 15, 1987, Grievant was notified that his 15 day suspension grievance was denied at Step 4.

On April 29, 1987, the Union requested arbitration for the 15 day suspension grievance.

On April 17, 1987, Grievant was notified his removal grievance was denied at Step 3.

On May 27, 1987, Grievant was notified that his removal grievance was denied at Step 4.

On January 4, 1987, the Union requested arbitration of the removal grievance.

The arbitration of both grievances were set for October 13, 1987. This hearing was canceled because the Grievant was apparently in the hospital.

The arbitration of both grievances were set for November 19, 1987. This hearing was postponed so that settlement could be

explored.

The arbitration was rescheduled for December 3, 1987, then it was rescheduled for December 9, 1987, and then once more for January 19, 1988.

The grievance was apparently settled between OCB and OCSEA representatives. This settlement agreement was never signed by the Grievant.

The arbitration was scheduled for November 17, 1988. Again, the grievance was apparently settled. This settlement agreement was never signed by the Grievant.

In November of 1989, the grievance was rescheduled to January 22, 1990.

The Union claims that the Grievant received notice of the 15 day suspension in an untimely manner. Although issued in September, the Union claims that the Grievant received no notice until he returned from his leave of absence on November 24, 1987. However, Exhibit J-9A shows that the notice was sent to him by registered mail and was received by Darlene Walker on September 19, 1987. Moreover, the address used was the same address to which both prior and subsequent letters were sent and apparently received. The Arbitrator holds that registered mail to the Grievant's last known address is sufficient notice if received by a person competent to sign at that address.

The Employer objects and asks that the Union be estopped from asserting this Grievance either because the Grievance was rendered null by the doctrine of laches or waived by the Union.

A waiver constitutes an intentional relinquishment of a known right. The Union representatives denies such a waiver, and the evidence is at best inconclusive. The Arbitrator finds no waiver. However, the application of the doctrine of laches must be seriously considered. The doctrine is an equitable one, most fitting in arbitration where the basic ground rule is fairness. Laches is defined as "neglecting to assert a claim over a long period of time so that the other party is prejudiced by the delay." The Employer claims that the long delay has prejudiced their cause in two major ways:

1. The Employer is prejudiced in meeting its burden of proof (§ 24.01) because the passage of time has caused three witnesses to leave or retire from state service and the State is unable to locate them. Moreover, what witnesses remain may have serious problems remembering events which transpired beginning in July of 1986, over 3-1/2 years before the hearing.

2. The long term period increased the potential damages (back pay) many times over.

Under Article 25, the Union is responsible to request arbitration. These requests were made in April and June, 1987, yet no hearing was held until January 22, 1990.

The Union claims that the grievance got lost in the chaos of a new contract and various structural changes which happened in the Union arbitration department. The Union claims that it never intended to waive its rights nor to unfairly sit upon those rights.

The Union's description of arbitration scheduling chaos certainly has merit to those persons intimately involved, such as this Arbitrator. Hence, no intentional relinquishment occurred. However, the doctrine of laches still has viability in this situation. The Employer was prejudiced by the delay; the loss of witnesses and the effect of the passage of time on human memory are both highly detrimental to the Employer's case.

On the other hand, all must take notice of the chaos and confusion and mistakes made by both sides in the administration of this new contract. However, the Union's actions bear some responsibility. A number of the cancellations were at the Union's direct request; moreover, if the Union "owns" the grievance as it stoutly maintains, its failure "to fish or cut bait" when the Grievant twice refused to sign the settlements which the Union worked out for him do evidence to this Arbitrator failures which prejudice the Employer.

However, because of the mutual chaos in many items, the Arbitrator believes to deny arbitration here would be unfair to the Grievant who is entitled to his "day in court". However, should the Grievance be upheld, the Arbitrator intends to consider the effects of the delay upon the question of damages. In addition, the Arbitrator believes that the presence of a thorough paper trail in these two grievances overcomes to a large extent the effect on witnesses of the delay.

The Arbitrator finds the Grievance arbitratable.

Issue on the Merits

Was the Grievant disciplined for just cause in both grievance, if not what shall the remedy be?

Facts

The actual conduct that lead to the disciplines is not really at issue. The Grievant was a 6 year employee with no prior discipline when the series of work rule violations began. A review of the Grievant's evaluations reveal above average evaluations through September 1982. The evaluation of 1984 reveals a slackening of performance and the development of an attendance problem. Evaluations closer to 1986 were not introduced.

His first discipline of a one (1) day suspension was given on August 21, 1986, for a series of approximately 20 incidents of lateness, failure to call-in, improper leave procedure and two AWOLs between April 24, 1986 and June 24, 1986. The 15 day suspension was the result of another 18 incidents relating to tardiness, late call-off, and AWOLs between July 25, 1986 and August 14, 1986. The removal was based on two incidents; one of AWOL on January 5, 1987 and AWOL and no call-in on January 13, 1987. Note that between September 12 and November 24, 1986, the

Grievant was on leave of absence and that between November 26, 1986 and December 16, 1986, he was serving the 15 day suspension.

Almost all the various incidents are well documented in the paper record. The one incident to which the Grievant took exception was 2 hour AWOL on January 5, 1987. The Grievant claims he was in the Union office because he believed he had a disciplinary hearing that day. Mr. Able, the Grievant's supervisor, testified that he and Fletcher Baron searched for the Grievant for 2 hours. The Grievant's position was upheld by Mr. Bailey, a Union official, who claimed that he was with the Grievant for two hours on that day and had notified Fletcher Baron of their whereabouts. The notice to Fletcher Baron seems improbable because he (Fletcher) apparently was jointly searching for the Grievant with Able, a futile job if he already knew where the Grievant was located. All in all, the Grievant had a consistently bad work record for a period from April 24, 1986 through January 13, 1987, an 8 month period during which period the Grievant took a 2 month leave of absence and served a 2 week suspension.

The Union has 2 major arguments:

1. lack of progression, and
2. failure of the Employer to take EAP into consideration.

The Union claims that for a 6 year employee with no previous discipline to go from a 1 day suspension, jump to a fifteen day

suspension and then be removed within a 6 month period is not progressive nor commensurate. However, a review of the number of events in such a short period reflects a serious problem. While one might argue that a number of shorter suspensions were possible (i.e., 3 day, 5 day, 10 day) before the imposition of the 15 day suspension, the 15 day suspension was not clearly unreasonable given the events.

The more serious issue is the relationship of the EAP to this Grievant's case. The Grievant testified that he "signed up with EAP". He testified that in April or May 1986 he went to talk with Ruth Lee, that she counseled him, and that he considered himself "in EAP". Employer's witness from the Personnel Department stated that Ruth Lee was a Social Program Specialist; she is not qualified to counsel, and she only helps people find placements with outside centers. Moreover, Ms. Farmer said that to her knowledge no formal EAP agreement was signed between the Employer and the Grievant.

As Union Exhibit #1, a letter from Stella Maris of Cleveland indicated that the Grievant was in a detox program from March 6, 1987 to March 11, 1987 and was continuing with AA. This work by the Grievant is commendable, and all persons of good will wish for his continued recovery. However, apparently, he sought this help only after he was fired (i.e., March 7, 1987). Moreover, the program was not part of the official EAP program; hence § 24.08 is inapplicable to his case.

Award

Both Grievances denied.

February 27, 1990
Date

Rhonda R. Rivera
Arbitrator