#413

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration	
-between-	**ARBITRATOR'S OPINION**
STATE OF OHIO, DEPARTMENT OF MENTAL HEALTH, DAYTON MENTAL HEALTH CENTER	Grievant: **Richard Pettit**
-and-	
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO	

FOR THE STATE:	**TERI DECKER** **Ohio Department of Administrative Services** **Office of Collective Bargaining** **65 E. State Street, 16th Floor** **Columbus, Ohio 43215**
FOR THE UNION:	**MICHAEL MUENCHEN,** **Staff Representative** **Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO** **8 Triangle Park** **Cincinnati, Ohio 45246**
DATE OF THE HEARING:	**January 9, 1990**
PLACE OF THE HEARING:	**Offices of OCSEA/AFSCME, Local 11** **1680 Watermark Drive** **Columbus, Ohio 43215**
ARBITRATOR:	**HYMAN COHEN, Esq.** **Impartial Arbitrator** **Office and P. O. Address:** **Post Office Box 22360** **Beachwood, Ohio 44122** **Telephone: 216-442-9295**

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The hearing was held on January 9, 1990 at the offices of OCSEA/AFSCME, Local 11, Columbus, Ohio before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:00 a.m. and was concluded at 4:00 p.m.

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On July 7, 1989 **RICHARD PETTIT**, filed a grievance with the **STATE OF OHIO, DEPARTMENT OF MENTAL HEALTH, DAYTON MENTAL HEALTH CENTER**, the "**State**" in which he protested his removal from his job as a Delivery Worker effective July 8 as a result of being charged with "dishonesty and falsifying documents".

The State denied the grievance and after the grievance was processed at the applicable steps of the Grievance Procedure contained in the Agreement between the State and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11 AFSCME, AFL-CIO**, the "**Union**", the grievance was carried to arbitration.

FACTUAL DISCUSSION

The Grievant was employed by the State for roughly five (5) to five and one-half years (5 1/2) before he was removed from his job effective July 8, 1989. As a truck driver the Grievant indicated that he delivered food to patients housed in the facilities of the Dayton Mental Health Center. The Grievant's normal schedule for the week is to work four (4) ten (10) hour days.

The Grievant reported off on the dates of March 31, April 20 and May 1, 1989. The Grievant sought leave without pay on these dates by filling out a request for leave form for each of the days in question. He submitted the request for leave forms to the time keeper Laura

Breitfield. Since the Grievant had exhausted his leave time, Bill Amirante, Dietary Director, requested verification for the leave requested by the Grievant for the three (3) days. For March 31, the Grievant checked the category of "Personal Illness or Injury" on the form and on April 20 and May 1, 1989 he checked the category of Medical, Dental or Optical Examination or Treatment". Since no verification was attached to the request for leave forms submitted to him, Amirante told Breitfield to hold onto the forms until the verification was submitted by the Grievant.

The verification submitted by the Grievant consisted of three (3) separate forms for each of the days on which he was absent. Each of the forms contained a circle around the name of Dr. Richard R. Rabkin and included a handwritten "X" adjacent to one (1) of the numerous "Procedures" and "Diagnosis" that were listed along with the charges for the day at the doctor's office. There was also an "account number" filled in along with the name of the Grievant as well as the date on which Dr. Rabkin apparently saw the Grievant.

Upon receipt of the verification Amirante noticed "two (2) different types of handwriting". He advised Jim McDonald the Operations Director and his immediate supervisor, of the differences in the handwriting. McDonald instructed him to call the doctor's office and obtain verification on whether the Grievant visited the doctor's

office on the dates of March 31, April 20 and May 1, 1989. Amirante called Dr. Rabkin's office and talked to Marsha Cimilluca, his secretary, and asked her if the Grievant visited the doctor on the days set forth on the statements. He went on to testify that Dr. Rabkin's secretary told him that the Grievant did not visit Dr. Rabkin's office on any of the days.Amirante related this information to McDonald. Pursuant to McDonald's instruction, Amirante sent "Marsha" a letter so that she could verify in writing that the Grievant did not see the doctor on the dates in question. The letter prepared by Amirante requested "Marsha" to fill in a box indicating "yes" or "no" as to whether the Grievant saw Dr. Rabkin on March 31, April 20 and May 1, 1989. The letter was returned to McDonald from Dr. Rabkin's office indicating that the Grievant did not see the doctor on the dates listed in the letter.

As a result of receiving written confirmation that the Grievant was not at the doctor's office on the three (3) dates in question, Amirante filled out a "request for corrective action" on May 19, 1989 which included the following findings: "falsification of an official hospital record; making false application for leave. * * " The "request for corrective action" was sent to McDonald who "recommended and requested appropriate corrective action up to and including removal". On the "request for corrective action" form, Joan V. Lackey, Labor Relations Officer, indicated that the Grievant's "file" showed

progressive discipline imposed against the Grievant beginning on February 10, 1987 and which included several infractions by the Grievant since that time.

On June 6, 1989 a pre-disciplinary conference was held after which on June 29, 1989 Pamela S. Hyde, Director of the Ohio Department of Mental Health, sent a letter to the Grievant advising him that he had been found guilty of the "charge of dishonesty" as a result of his "falsification of verification for leave". As a result of having been disciplined in the past for various infractions Hyde indicated that it was her decision that the Grievant be removed from his position as a Delivery Worker.

On July 6, 1989 Patricia A. Torvik, Chief Executive Officer of the Department wrote a letter to the Grievant informing him that in accordance with the order of removal by the Director of the Department he was being removed for dishonesty effective July 8, 1989.

DISCUSSION

The issue to be resolved by this arbitration is whether the Grievant was discharged for just cause; if not, what is the remedy to be awarded.

It is undisputed that the Grievant had exhausted his sick leave when he requested leave for March 31, April 20 and May 1, 1989. As a result, the Grievant acknowledged that under the Department's sick leave policy, he was required to provide verification for the days in question.

It is also undisputed that the Grievant changed the dates on the doctor's statements to correspond with the three (3) days on which he was absent. He admitted that he did not visit his doctor on these dates. The Grievant indicated that the doctor's statement on which he altered the dates, are filled out by the doctor for insurance "billing purposes".

At the hearing, the Grievant set forth his reasons for changing the dates on the doctor's statements. He "wanted to show [the State] what was going on"; he "wanted to show what [he] was going through at the time"; and the doctor's statements "were some type of evidence of the problems that [he] had".

There is a world of difference between the meaning that a person states that he intends to convey by his words and actions and the meaning reasonably understood by the person to whom he directs such words and actions. In other words, the test of the meaning given to the verification submitted by the Grievant is objective. It is the meaning to be given by a reasonable person or what the State would

have reasonably believed was the intent of the Grievant. Thus, the test is not subjective. The reasons provided by the Grievant after Amirante, his immediate supervisor found out that he had not visited the doctor's office on the three (3) days and had altered the dates, are not credible. The Grievant's self serving reasons are highly unreliable and do not constitute trustworthy evidence. Had he wanted to show the State "what was going on", what he "was going through" and "evidence of the problems [he] had", he could have simply uttered such statements to the State or written a note to that effect in support of his request for leave for the three (3) days. Instead, he submitted a doctor's billing statement utilized for insurance billing purposes which contains the sum of $35 for "today's charges" on March 31, 1989, and $30 for "today's charges" on April 20 and May 1, 1989. The statement also indicates the "procedures" and "diagnosis" used on the dates in question and on two (2) of the statements when the patient is to "return" to the doctor's office (on the March 31 and April 20 forms, (the Grievant was requested to "return" to the doctor's office in "1" and "2" weeks, respectively). Moreover, the Grievant acknowledged that he was aware that the statements constituted "verification" for his absence on March 31, April 20 and May 1. He further acknowledged that the verification was required to support the request for leave forms which he filled out, signed, and submitted to the State. On the request for leave forms, the Grievant checked either "personal illness"

or "medical * * treatment" as the reasons for his absences. The evidence is compelling to support the State's reasonable conclusion that the Grievant sought to convey the impression that he visited Dr. Rabkin's office on the three (3) days.

The Union indicates that the State is required to prove that the Grievant intended to be dishonest and falsify the supporting data needed to obtain leave. There is the classic hypothetical of the anarchist who throws a bomb into a crowded elevator to kill the King but kills everyone else in the elevator but the King. It cannot be doubted that in law the anarchist is considered to have the required intent to kill the passengers in the elevator. Thus, the subjective state of mind of the actor is not the only test to establish intent. Another test by which intent is established, is that the actor performs an act, and has knowledge with substantial certainty that the result would come about. Accordingly, by submitting the false verification the Grievant had knowledge to a substantial certainty that the State would believe that he visited the doctor on the three (3) days. Accordingly, the Grievant is considered to have possessed the required intent to establish dishonesty.

When the Grievant requested leave for the three (3) days he did not disclose to the State that he was going to visit his doctor. Nor did he tell the State that he was not going to see his doctor. However,

the Grievant knew that since he had exhausted his sick leave, he was required to submit verification in support of his absence on the three (3) days. Thus, in the absence of the Grievant disclosing that he was visiting his doctor on the three (3) days in question, the State reasonably relied upon the verification which the Grievant submitted, to conclude that he visited his doctor. Had he in fact visited his doctor, the Grievant would have complied with the State's sick leave policy; by failing to visit his doctor on the three (3) days he violated the State's policy. Thus, I have inferred that the Grievant submitted the verification in which he altered the dates so that the State would falsely believe that he complied with its sick leave policy. Moreover, it is not incumbent upon the State to ask the Grievant whether he had seen his doctor on the three (3) days. Indeed, the Grievant's verification made such an inquiry unnecessary.

The Grievant claims he had "no reason to lie". I disagree. He had a reason to lie, namely, to comply with the State's policy on sick leave.

Amirante first found out on May 9, 1989 that the Grievant did not visit his doctor on the three (3) days and therefore had altered the verification to support his application for leave. It was not until the Grievant was notified that a pre-disciplinary conference was scheduled for June 6, 1989 that he (the Grievant) was apprised of the

charges of the State. The Union indicates that the State should have raised the charge of dishonesty immediately or soon after Amirante found out of the Grievant's submission of the false information from Dr. Rabkin's office on May 9.

I cannot conclude that the Grievant was prejudiced by the State's delay in notifying the Grievant of the false verification which he submitted. There is no substantive difference between informing the Grievant on or soon after May 9 or in the State's notification to the Grievant of the pre-disciplinary conference which was scheduled for June 6, 1989. Instead of explaining his reasons for the alteration of the dates on or soon after May 9, 1989, the Grievant was given his opportunity to do so at the June 6, 1989 disciplinary conference. The Union is not suggesting that the Grievant's reasons for the false information would have been different had he been informed of the State's charge of dishonesty before he received notice of the pre-disciplinary conference.

Amirante was aware of the Grievant's "health problem". The Grievant said he "told everyone" at the State's facility "about [his] hearing problems". His "most recent operation" in connection with an ear infection occurred in March, 1989. Amirante acknowledged that the Grievant had been on "disability leave" as a result of medical problems with his ear.

At the June 6, 1989 pre-disciplinary conference, the Grievant submitted an "Authorization to return to work or school" slip from Dr. Rabkin's office, dated June 5 which indicated that the Grievant had office visits on March 21, March 29, May 3 and May 24, 1989. The doctor's slip goes on to indicate that the Grievant had appointments with Dr. Rabkin on April 19 and May 17, 1989 that were "not kept".

I find this evidence of little, if any weight. The Grievant did not have an office visit on the three (3) days in question, but his verification would indicate to a reasonable person that he did see the doctor on such days. Moreover, I do no believe it is disputed that he Grievant was under Dr. Rabkin's care during the latter part of March, April and May, 1989. Nevertheless, being under the doctor's care during that period of time does not change or mitigate the offense of dishonesty or alteration of a record in support of the Grievant's application for leave on March 31, April 20 and May 1, 1989.

DISPARATE TREATMENT

The Union contends that the State acted in a discriminatory manner by discharging the Grievant for dishonesty and falsification of records. In support of its claim of disparate treatment, the Union relies upon several episodes. The first situation involves Janice Young, a bargaining unit member who submitted a request for vacation in December, 1986 that was denied. She then called in absent on six (6)

days in December while indicating that she wanted emergency vacation for the days in question. Young failed to submit verification and the request was denied. On February 4, 1987, Young submitted an emergency vacation request for the dates in December with a "work excuse" attached, signed by a doctor. The file copy of the "work excuse" in the doctor's office contained only one (1) day, but the copy of the "work excuse" submitted by Young contained more than one (1) days. Young failed to explain who had altered the document. Furthermore, Young falsified hospital records by "clocking in late but made entries on the nursing office sign-in/out log book "as if you were in earlier". In light of these findings, the State concluded that Young was "guilty of Neglect of Duty, Failure of Good Behavior, and/or Dishonesty". Furthermore, the Grievant had previously been suspended for neglect of duty on September 26, 1986. The State suspended Young for six (6) days.

The State objected to the Union's evidence concerning Young because it entered into a settlement agreement with the Union. The State indicated that the agreement which provided for six (6) days suspension of Young would discourage future settlement agreements between the parties.

I agree with the State's position that the settlement agreement provided for the six (6) day disciplinary suspension of Young is to be

given no weight. There are various considerations which might motivate parties to enter into a settlement agreement. These agreements are usually specifically applicable to the facts. That the State has entered into a settlement agreement concerning Young and might not do so in connection with another errant employee is within its discretion. Accordingly, the settlement agreement concerning Young is not entitled to any weight in this case.

The Union also referred to an incident involving Kenneth Stinson, a bargaining unit member. The State charged Stinson with excessive absenteeism and fraudulent documentation of absence for April 7 through April 13, 1989. Stinson apparently submitted a doctor's note dated May 2, 1989 indicating that Stinson informed him (the doctor) that his wife went to Florida and that he was required to stay with his son due to "Impetigo". In his note, Stinson's doctor confirmed that he saw Stinson's son in his office on March 28, 1989 for "Impetigo". The doctor also set forth in the note that Stinson's son was prohibited from attending school until the Impetigo was "cleared up".

The doctor's note was inconsistent with a previous document submitted by Stinson concerning the dates of April 7 through 13 which the State had indicated was "fraudulent". In any event, the State relied upon the doctor's note which stated that Stinson advised the doctor that it was necessary to stay at home with his son due to the

"Impetigo" between April 7 and 13, 1989. The State considered this factor a weighty mitigating circumstance and withdrew its charge that Stinson committed the act of "fraudulent documentation". No such mitigating factor is present in this case. Accordingly, the facts of the instant case are materially different than the Stinson episode. Parenthetically, it should be noted that Stinson was discharged in June, 1989 for his failure to "complete" the Emergency Assistance Program (EAP) agreement and due to his "continued" negligence of duty "and * * assigned schedule of work".

In its effort to prove disparate treatment by the State, the Union's witness indicated that some of the employees in the Department left early but signed out at the regular quitting time. Breitfield said that since May, 1989 she had worked in the kitchen over weekends. She said that some of the employees work through the break and leave early which, at times, is in excess of fifteen (15) minutes. Breitfield said that management was aware that employees were leaving early but signed out at quitting time. Breitfield's testimony was confirmed by Debra Bradley, another bargaining unit employee who prepares food, "runs" the tray lines and performs other duties in the kitchen. She indicated that some of the employees "combine breaks" and leave early but get paid for the full shift. Amirante said that when he found out about the employees in the kitchen leaving early he discontinued the practice.

The circumstances involving the kitchen employees are materially different than the facts of the instant case. Moreover, I do not believe it is reasonable to conclude that because the kitchen employees who are signing out after their actual quitting time because they have completed their daily tasks by working through breaks means that employees, with impunity, can commit dishonesty and alteration of documents to support a leave of absence. I believe that the offenses are different. The Grievant's offense is more serious given his silence and fraudulent intent in submitting the verification. The kitchen employes worked through their breaks and concluded their various job duties and left earlier than their clocked out time. These circumstances do not rise to the gravity of the offense committed by the Grievant. In my judgment, the circumstances are not similar. As a result, the Union failed to prove disparate treatment.

PENALTY

Pursuant to Hospital Policy AD: P-89-16, Section 4, the State is to determine "the appropriateness of corrective action only after serious consideration has been given to:

a. Circumstances surrounding the violation.

b. The seriousness of the offense.

c. The past record of the offender.

d. The intent of the offender.

e. The corrective action taken in similar situations".

I have concluded that the State has given serious consideration to each of the factors set forth in Section 4. The "circumstances surrounding the violation" indicate a deliberate act by the Grievant to induce the State to believe that he visited Dr. Rabkin on the days in question. Had the State not detected the different handwriting on the forms, and made its inquiries into the matter, the State would have reasonably believed that the Grievant complied with its sick leave policy.

The "seriousness" of the Grievant's offense of dishonesty and alteration of medical documents must be underscored. Such conduct is unacceptable in the workplace.

A review of the Grievant's past record indicates that it is unsatisfactory. Since February, 1987, the Grievant has received two (2) written reprimands for failure to follow sign-in procedures, failure to complete leave requests timely, AWOL, and failure to provide verification for leave with pay. On August 19, 1987, the Grievant received a two (2) day disciplinary suspension for failure to provide verification for leave with pay; and on August 5, 1988, the Grievant was subject to disciplinary suspension for six (6) days due to

tardiness, falsification of time sheets and failure to complete an assigned task.

I have established that the Grievant's "intent" to be dishonest and submit an altered document is based upon the standard of a reasonable person reading the verification, and that the Grievant acted with knowledge to a substantial certainty of achieving a particular result, namely, the State relying upon the verification to conclude that he visited Dr. Rabkin's office on the three (3) days.

Finally, I have concluded that the Union failed to prove disparate treatment in its penalty of discharging the Grievant.

The State has complied with its grid containing progressive discipline in its "Standard Guide for Disciplinary Action" for the offenses of "Dishonesty", including "falsification of * * official records, and "Making false application for leave"; and "Abuse of sick leave rules".

Finally, consistent with Article 24, Section 24.01, the State has proved by clear and convincing evidence that the Grievant has been discharged for just cause.

AWARD

In light of the aforementioned considerations, the State has proved by clear and convincing evidence that the Grievant has been discharged for "just cause" as required by Article 24, Section 24.01 of the Agreement.

The grievance is denied.

Dated: April 23, 1990
Cuyahoga County
Cleveland, Ohio

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