OCB-OCSEA VOLUNTARY GRIEVANCE PROCEEDING
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration
Between:

THE STATE OF OHIO
Department of Industrial Relations
Division of Mines

-and-

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, OSCEA/AFSCME
Local Union 11, State Unit 7

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Case No 18-00(90-06-08)0010-01-07

Decision Issued:
December 13, 1990

APPEARANCES

FOR THE STATE

Michael P. Duco	Assistant Chief of Compliance, Office of Collective Bargaining
Mark Taliaferro	Labor Relations Officer, Department of Industrial Relations
Mark Wharton	Assistant Chief, Division of Mines
Barb Trabue	Witness
M.A. Pfeifer	Observer
W.L. Davis, III	Observer

FOR THE UNION

John P. Gersper	OCSEA Advocate
Steve Wiles	OCSEA Staff Representative
Jerry L. Stewart	OCSEA Steward
William L. Strahl	Grievant

ISSUE: Articles 24 & 29: Removal for Violating Agency Sick-Leave Regulations

Jonathan Dworkin, Arbitrator
9461 Vermilion Road
Amherst, Ohio 44001

BACKGROUND OF DISPUTE

This is a removal case. Grievant was a nine-year employee of the Ohio Department of Industrial Relations. He was dismissed on May 25, 1990 for what the Employer characterizes as deliberate and insubordinate refusal to comply with regulations requiring notification when an employee is sick or disabled. The Removal Notice was mailed on May 23, 1990, while Grievant was on disability leave. It set forth the reasons and justifications for the action:

> This letter is to inform you that you are hereby removed from the employment of the Department of Industrial Relations effective at 4:45 p.m. on May 25, 1990 for the violations of department work rules and violations of the agreement between the State of Ohio and OCSEA/AFSCME.
>
> 1. You did in fact sign for a policy manual and that signature attested to the fact that you reviewed its contents. Yet you did not follow sick leave procedure as stated.
>
> 2. The policy manual and the contract state that you will notify your supervisor when you are out of the hospital. Yet you choose (sic) not to notify your supervisor.
>
> 3. You were unaccounted for between March 20, 1990 and April 17, 1990.

Grievant worked for the Division of Mines as an Underground Mine Safety Inspector. His duties were to ensure that mines were relatively safe places to work. He was responsible for checking ventilation and air quality, explosive gases, mine structure and roof control, equipment, electrical installations, storage facilities, cables, miners' apparel and gear; he was empowered to look into mine workers'

safety complaints and order operators to make corrections. His position description included investigating accidents and, "At major accidents takes full charge of all rescue activities until relieved by proper authority."

Grievant's job was critical and challenging. It called for an individual with strong personality attributes -- sound judgment, ability to act reasonably and decisively in stressful situations, and unfailing dedication. These qualities are inseparable from the responsibilities of an Underground Safety Inspector whose lack of discernment could threaten lives, and it is curious that Grievant held his position for nearly ten years. The Employee was (and is) a diagnosed manic depressive. He suffers from a psychiatric disease known as "bipolar disorder." It is a biological illness. It causes turbulent mood swings from clinical depression to extreme rapture without apparent external causation. A recent medical report, filled out and executed by a treating psychiatrist in support of Grievant's application for disability leave, provides insight into the severity of the Employee's suffering:

> **1. Diagnosis.** Bipolar disorder, Adjustment disorder with disturbance of emotion and conduct.
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> . . .
>
> **5. Please describe patient's mood and affect.** Agitated, angry, and depressed.
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> **6. Comment on patient's ability to relate.** Patient relates poorly to others - he is hypersensitive to trust issues,defensive, and angry.
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> **7. Comment on patient's ability to carry out daily activities and follow instructions.** Patient becomes con-

sumed with anger and frustration, therefore has difficulty letting go of this disturbance so that he can follow through on daily routine tasks.

8. Please describe patient's behavior or any changes in behavior. Patient's behavior is characterized by loss of control and temper outbursts. He attempts to gain control and has made gains in controlling.

9. Is there any evidence of a thought disorder? Please comment. There is some evidence of a thought disorder. See above.

10. Please comment on patient's judgement and ability to concentrate. [Grievant] has poor concentration skills because of the interference from his psychological needs. His judgement is hampered by the aforementioned difficulties.

. . .

13. Please comment on how the combined symptoms and intensity interfere with job performance. The intensity of [Grievant's] symptoms demand that he participate in an ongoing therapy program on an outpatient basis with regularity. He most likely will need psychotherapeutic intervention and support to assist him with job performance.

The illness played a role in two prior disciplinary events which reached arbitration. Because of an episode of psychological depression coupled with a respiratory infection, Grievant took sick leave from February 2 through 18. 1987. Pursuant to Departmental rules and Article 29, §29.02 of the Collective Bargaining Agreement, he was required to report off by telephone each day, no later than one-half hour after his 8:00 a.m. starting time. He met the obligation every day except February 11, when he overslept and called an hour late. A two-day suspension was imposed. The resulting grievance was heard by Arbitrator Harry Graham who overturned the discipline. Dr. Graham

found the suspension to be "of such great magnitude as to be considered impermissible.[1] He noted, moreover, that Grievant's oversleeping was directly associated with the depression he was experiencing, and held that it fell within the contractual exception to sick-leave call-off requirements -- the portion of §29.02 which states, "unless circumstances preclude this notification."

The second grievance, also presented to Arbitrator Graham, stemmed from a removal. Grievant was charged with dereliction of duty for failing to immediately investigate a report of a hazardous underground situation at the Saginaw Mine in St. Clairsville, Ohio. The award modified the discharge to a two-day disciplinary suspension, basically on findings that Grievant was not culpable for the bulk of the Department's accusations.[2] Before ending his opinion, Dr. Graham made some observations pertinent to this dispute:

> His [Grievant's] failure to act is a manifestation of his mental condition. [Grievant's] mental illness calls into question his fitness to serve as a Mine Safety Inspector. A reading of his medical history as well as his personnel record in its entirety must prompt great reservations about his ability to serve as a Mine Safety Inspector.
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> . . .
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> This Arbitrator does not believe in giving gratuitous advice to the parties. However, in this case it must be clear that the State has erred in discharging the Grievant for his conduct in March, 1987. It must also be clear that [Grievant's] mental condition cannot give rise to any confidence that he will ever be able to properly perform the stressful duties associated with the position of Mine

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[1] Case No. G87-0940; Decision issued, November 30, 1987

[2] Case No. G87-1187; Decision issued, December 7, 1990.

> Safety Inspector. If it is possible for the Employer to consider leave of some sort coupled with a transfer for [Grievant] to a position of lesser responsibility that possibility should be explored. At some point [Grievant's] infirmities may be of such magnitude that his continued employment in his current position will no longer be feasible. [3]

The Employee's disorder was also accountable for several blocks of disability leave during his tenure -- October 16 to 29, 1984; March 13 to May 31, 1986; July 7 to 26, 1986; December 23, 1987 to July 3, 1988 (three leaves with no workdays in between); and the leave connected to this discipline, March 31 to April 27, 1990. According to the record, the 1990 leave segment was preceded by several days off. Grievant reported off (with requisite timeliness) on March 5, 6, 7, 8, 9, 12, 13, and 14. Friday, March 16 was when the incidents precipitating the discipline began. At 8:30 that morning, he telephoned his workplace and informed a Secretary that he had received a psychiatric examination and would have to be on leave. Later that day he called again and spoke with a Labor Relations Officer, requesting disability-leave forms. Afterwards, he voluntarily committed himself to the Cambridge Mental Health Center. Upon admission, he was locked away and denied telephone privileges until Tuesday, March 20. Consequently, the Employer was uninformed of his circumstances on the first scheduled workday of the week, Monday, March 19.

Grievant did call on March 20. He spoke to the Secretary of the Division of Mines, informing her that he was in the hospital and would probably have to take disability leave. That was his last

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[3] Id., 11.

telephone call to the Agency for three weeks. On April 4, the Assistant Chief of Inspectors became concerned. Because of the critical nature of Grievant's job and the necessity that it be attended to, he reqired better information for scheduling. He needed to know when the Employee could be expected to return to duty. He wrote Grievant a letter, stating in part:

> [The Secretary] informed me that on March 16, 1990 and March 20, 1990, you called the office to report you were going to be on extended leave. Both phone calls were very vague and uninformative. In order for this division to work efficiently and effectively, the Department needs to know your whereabouts. This Department also needs proper paper work and documentation. Failure to do so may result in disciplinary action.

There was no response to the letter for nearly a week. Then, on April 10, Grievant called and spoke with the Agency Labor Relations Officer. There is conflicting evidence on exactly what was said in the conversation. The Officer maintains he was very direct; he told Grievant it was his obligation to the Department to call every single day until his return to duty, or specify how long he was going to be off work or, if he became hospitalized, report when he entered and when he was released.[4] His reference was to Article 29, §29.03 of the Agreement and Section 3.3 of the Department's Policy Manual which had been distributed to Grievant and all other employees. Both

[4] Grievant was released from the hospital on March 28. He did not inform the Employer.

set forth approximately the same requirements. The contractual provision states in pertinent part:

> **§29.03 - Notification**
>
> When an employee is sick and unable to report for work, he/she will notify his/her immediate supervisor or designee no later than one half (1/2) hour after starting time, unless circumstances preclude this notification.
>
> . . .
>
> If sick leave continues past the first day, the employee will notify his/her supervisor or designee every day unless prior notification was given of the number of days off. When institutionalization, hospitalization, or convalescence at home is required the employee is responsible for notifying the supervisor at the start and end of such period.

According to the Labor Relations Officer, Grievant became furious upon hearing the directive. He accused the Agency of making up rules and trying to "get him." He bluntly refused to obey, shouting that he did not have to. The dialogue ended when the Labor Relations Officer told Grievant it was impossible to communicate with him and further discussions would have to be through the Union Steward. Subsequently, the Officer contacted the Steward for assistance.

There was only silence between Grievant and the Agency for another week. Meanwhile, the Employee secured sick-leave forms, filled them out, and enlisted his Steward to deliver them. The Steward took them to the office on April 17. That was the last meeting or discussion until the disciplinary process commenced.

Grievant and his Steward testified to a critically different version of the occurrences on and after April 10. While conceding that his telephone call to the Labor Relations Officer became acrimonious, Grievant maintains he did not resist directives. He was told that the Agency needed leave-request forms and he did his best to cooperate. He filled out and submitted them (through the Steward) within a week. Grievant insists he was never told of a responsibility for daily report-offs. That would have been an uncommon requirement; it was a clear obligation for sick leave, but not for disability leave. He had been on disability leave several times in the past and had never been given that responsibility. Disability leave is basically controlled by statute rather than contract. It is addressed in §123:1-33-12 of the Ohio Administrative Code which establishes a waiting interval for the benefit and provides that an affected employee is in "No-Pay Status" during that period. The Section states that an employee who meets other prerequisites is eligible for disability leave:

> . . . if he is eligible for sick leave credit pursuant to . . . the Revised Code or if he is on disability leave or approved leave of absence for medical reasons and would be eligible for sick leave credit pursuant to . . . the Revised Code except that he is in no-pay status. [Emphasis added.]

Grievant concluded his testimony stating he had always reported off in accordance with rules and would have done so in this instance if he thought the Agency desired it. He asserted his belief that he "came through on everything I was told to do."

The Steward supported Grievant's claims. He testified that the Labor Relations Officer telephoned him on April 10 and requested assistance because he could not communicate with Grievant. The Officer asked for executed sick-leave forms but, according to the Steward, did not mention a call-off responsibility. As Grievant testified, call-offs were not previously required of employees on disability leave; in that respect, disability leave was treated differently from sick leave.

The disciplinary process began on April 20, 1990, three days after the sick-leave forms were delivered. It concluded with the Removal Notice on May 22. There were procedural defects in the interim, particularly with respect to the contractually required three-day notice of a pre-disciplinary hearing, but they were waived by the Union. A timely grievance was initiated and appealed to arbitration. The hearing convened in Columbus, Ohio on October 23, 1990. At the outset, the Representatives of the parties stipulated that the Arbitrator was authorized to issue a conclusive award on the merits of the grievance, subject to the following limitations set forth in Article 25, §25.03 of the Agreement:

> Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

THE ISSUES

The issue stipulated by the parties is whether or not Grievant's removal was supported by just cause. This is the fundamental question in every dispute over discipline arising under the Agreement. Just cause is the mandate of Article 24, §24.01, which states:

ARTICLE 24 - DISCIPLINE

§24.01 - Standard

> Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action.

The just-cause principle is fleshed out by other provisions of Article 24. Section 24.05 contains the following paragraph:

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

In most instances, just cause does not exist unless discipline is progressive. This precept is set forth generally in Article 24, §24.02, and specifically with regard to sick-leave abuse in Article 29, §29.04. Those provisions state in pertinent part:

§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. One or more verbal reprimand(s) (with appropriate notation in employee's file);

B. One or more written reprimand(s);

C. One or more suspension(s);

D. Termination

. . .

ARTICLE 29 - SICK LEAVE

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§29.04 - Sick Leave Policy

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III. Procedure

. . .

C. Unauthorized use or abuse of sick leave

When unauthorized use or abuse of sick leave is substantiated, the Agency Head or designee will effect corrective and progressive discipline, keeping in mind any extenuating or mitigating circumstances.

When progressive discipline reaches the first suspension, under this policy, a corrective counseling session will be conducted with the employee. The Agency Head or designee and Labor Relations Officer will jointly explain the serious consequences of continued unauthorized use or abuse of sick leave. The Agency Head or designee shall be available and receptive to a request for an Employee Assistance Program in accordance with Article 9 (EAP). If the above does not produce the desired positive change in performance, the Agency Head or designee will proceed with progressive discipline up to and including termination.

D. Pattern abuse

> If an employee abuses sick leave in a pattern . . . the Agency Head or designee may reasonably suspect pattern abuse. If it is suspected, the Agency Head or designee will notify the employee in writing that pattern abuse is suspected. The Agency Head or designee will use the "Pattern Abuse" form for notification. The notice will also invite the employee to explain, rebut, or refute the pattern abuse claim. Short of a satisfactory explanation, the Agency Head or designee may begin corrective and progressive disciplinary action.

These Sections all have pertinence to the issue. The Agency contends that Grievant's discipline was for substantial just cause and commensurate with the misconduct. The Union argues that there was no misconduct; that Grievant performed every requirement which was known, or reasonably should have been known, to him. Alternatively, if the Employee did commit violations, the Union argues that the Agency's rush to terminate him was flagrantly excessive and in disregard of progressive-discipline requirements.

ADDITIONAL FACTS AND CONTENTIONS

A subject of profound dispute between the parties is whether Grievant was on sick leave or disability leave when he was incommunicado. The Union introduced several documents to support its disability-leave argument. A letter of March 28, 1990 from the Department's Personnel Administrator illustrates that the Agency had some knowledge nearly a month before discipline was proposed that Grievant was applying for disability leave. The letter stated:

> It is my understanding that you have not received the disability forms you requested a couple weeks ago. Enclosed please find the forms required to file a disability claim and a copy of pertinent rules.
>
> Please return the completed forms to my attention for processing.
>
> If you have any questions, please call.

A second factor the Union believes germane to the controversy is that Grievant actually applied for and received disability leave. The Notice of Allowance was mailed to him by the Ohio Department of Administrative Services on May 14, 1990 -- eight days before the removal was finalized; and benefits were backdated to March 31 -- twenty-one days before the Labor Relations Officer initiated the disciplinary mechanism.

The importance of these facts is their relationship to the alleged difference between reporting responsibilities for sick leave and disability leave. The Union contends that individuals on disability leave are not required to call their supervisors daily or notify the Employer of their releases from hospitals.

Surprisingly, the Agency concedes the point. It agrees that there is a long-standing custom (or practice) of distinguishing between the two kinds of leave and placing call-off obligations only on employees taking sick leave. But the Employer insists that Grievant did not have disability leave until he received the allowance in May. Until then, he was either on sick leave or leave without pay. In either case, he was required to call-off to obtain leave approval. His failure to do so placed him in AWOL status.

The Union takes strong exception to the Employer's argument. It points out that Grievant intended to take disability leave from the beginning, and followed through with the necessary documents. According to Ohio Administrative Code §123:1-33-13(A), he had forty-five days to file the application and §123:1-33-12(B) subjected his benefits to a fourteen-day waiting period. The Union points out that the Agency was thoroughly aware of these statutorily imposed delays. It knew as well that Grievant was applying for and was likely to obtain disability leave. Nevertheless, according to the Union, the Labor Relations Officer plunged into an unjustified dismissal based on an ingenious but spurious concept that the Employee was somehow on sick leave.

The arguments are not trivial. They bring to light a significant contractual ambiguity. Is an employee who intends to file for disability leave or is awaiting an allowance on sick leave? Does s/he have to comply with sick-leave reporting requirements in the interim? At some point in time, the parties may resolve these questions through bargaining or arbitration. However, this is not the dispute where the answer will be given. As will be observed, the Arbitrator finds it unnecessary to decide the issues because they have scant relevancy to just cause as it concerns this controversy. Even if Grievant was not required by law or contract to obey a call-off order, he was obligated to comply with a supervisory directive -- whether or not the directive was justified. The determinant issue, therefore, relates to perceptions. Did Grievant understand that he was expected to report off regularly and notify the Employer when

he was released from the hospital? If he did, his omission was properly a disciplinary event.

* * *

The Employer emphasizes the Labor Relations Officer's testimony. It contends that Grievant was told, ten days before disciplinary action was instituted, that he was responsible for complying with the Agreement, rules of the Department of Administrative Services (applicable to all State employees), and rules of the Department of Industrial Relations. The Officer carefully explained the notification requirement, but Grievant would have none of it. Instead of trying to understand what was expected of him, he became bellicose and accusing. Ultimately, he refused to obey.

According to the Agency, Grievant's recalcitrance was consistent with his employment history. He routinely fashioned his own work schedules irrespective of Department rules. His absence rates were extraordinary and intolerable. Not only did he take leaves in great blocks of time, his occasional absences were suspiciously patterned. They appeared to be connected to when he had to go underground; the day after, he ordinarily reported off on sick leave. Grievant became equivalent to a part-time employee and undermined the Department's critical mission. As the Employer argues in its written opening statement:

> A review of [Grievant's] attendance history . . . shows that his attendance has been bleak at best. [Grievant] held a very important and responsible position. His presence is necessary to ensure the Public's health and safety. His absence causes the jockeying around of assignments, thus some assignments are not accomplished.

> While the Employer is empathetic to Grievant's plight, it must accomplish its mission. The State is not a charity, it is responsible to the Public, specifically the miners and their families. The Safety and Health of the public must come first.

The State regards Grievant's failure to report his absences in March and April, 1990 as job abandonment. It ties the concept to the fact that the Employee did not notify Supervision of his March 28 release from Cambridge Mental Health Center. This, in the Employer's view, violated not only departmental rules, but the Agreement as well. The reference is to Article 29, §29.04 which states that institutionalized or hospitalized employees are "responsible for notifying the supervisor at the start and end of such period." Grievant's disregard of the regulation was brazen, and the Agency concludes:

> The omission of notice is a resignation or an objective manifestation of job abandonment. Thus, the Employer had no alternative but to sever the employment relationship.

The Employer requests a decision reflecting consideration of Grievant's entire record and its dire impact on the Division of Mines. It recommends that the Arbitrator adopt the wisdom of Arbitrator Edwin R. Teple who denied a similar grievance in the private sector, stating:

> At some point the employer must be able to terminate the services of an employee who is unable to work more than part time, for whatever reason. Efficiency . . . can hardly be maintained if employees cannot be depended upon to report for work with reasonable regularity. Other

> arbitrators have so found, and this Arbitrator has upheld terminations in several appropriate cases involving frequent and extended absences due to illness. [5]

* * *

The Union's arguments are less complex than the State's. They consist of two premises: 1) Grievant breached no requirements; 2) the Agency glaringly violated its disciplinary obligations.

The basis of the Union's first contention is Article 35, §35.03 of the Agreement which separates disability leave from sick leave both physically (sick leave is addressed in Article 29) and conceptually. Section 35.03 begins with the following statement:

> **§35.03 - Disability Leave Eligibility**
>
> Eligibility shall be pursuant to current Ohio law and the Administrative Rules of the Department of Administrative Services in effect as of the effective date of this Agreement.

By adopting this language, the negotiators relegated disability leave to existing Administrative Services regulations and Ohio law -- nothing else. The Union maintains, without refutation by the Agency, that Grievant complied entirely with the law and Administrative Services rules. Moreover, his conduct was entirely consistent with past practice of his own Agency. It was his absence and his alone that fostered new Industrial Relations Department call-off procedures which

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[5] Cleveland Trencher Co., 48 LA 615, 618-619 (E. Teple, 1967).

the Union accurately contends "have never been applied to disability leave in the past for any employee." In short, the Union maintains that Grievant did nothing wrong -- nothing for which discipline was appropriate.

At one point in its presentation, the Union moved off its primary focus and dealt with the implied charge that Grievant was insubordinate to the Labor Relations Officer. While denying the accusation, it also sought to explain it as an excusable facet of Grievant's illness. It argued:

> The Union contends that the state did not have just cause to remove [Grievant] from his position as Mine Safety Inspector II. The Union also contends that [Grievant], due to his specific disability, cannot be held accountable for much of his behavior and actions while on disability.

The main thrust of the Union's position is that the Employer cavalierly violated its commitment to progressive discipline. Despite Grievant's allegedly poor attendance and disregard of regulations, he was never disciplined for failing to observe sick-leave or disability-leave procedures.[6]

Assuming he violated the rules in this instance, (a proposition the Union vigorously denies) his discipline should have been corrective and progressive rather than terminal. In the Union's judgment, the Employer had little if any choice in the matter. It was generally bound by the requirements and outline in Article 24, §24.02 of the

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[6] The only exception was his discipline for a late call-off in 1987, but Arbitrator Graham set it aside.

Agreement; and it was specifically bound by Article 29, §29.04 III C. That provision, which was quoted earlier, is precise on the permissible discipline for sick-leave infractions. It states plainly that an Agency Head or designee confronting the problem must "effect corrective and progressive discipline, keeping in mind any extenuating or mitigating circumstances." The Section reinforces the theme by requiring a job counseling "when progressive discipline reaches the first suspension, under this policy." The Union notes that Grievant was denied the job-security benefits that were negotiated for him and every other member of the Bargaining Unit. He received no correction, no progressive discipline; he was not counseled at the first suspension level because there was no first suspension. Without observable justification, the Agency bypassed the contractually imposed steps and moved directly to termination.

The Union believes that the Employer's action was unprecedented in its ruthlessness and demonstrated the Agency's contempt for the Agreement. For this reason, the Union asks that the ordinary reluctance of arbitrators to replace Management's discretion with their judgment be put aside in this case. It concludes:

> The Union demands that the Arbitrator substitute his judgement for that of the State in the instant grievance and that he reinstate [Grievant] to State Service with full back pay, seniority, and with no loss of benefits.

OPINION

In every discipline dispute governed by just-cause principles, there is a rudimentary issue which immerses everything else. It is:

Was the aggrieved employee guilty of misconduct justifying discipline? Actually, the question contains two parts; arbitral examination must start with whether or not the employee committed misconduct. The examination should be circumscribed by the employer's allegation(s) against the employee. The fact that an individual cannot be punished legitimately for something not charged is too obvious for discussion. Accordingly, the first step in this decision-making process is to review the Agency's charges against Grievant. There were three, and they bear repeating:

> 1. You did in fact sign for a policy manual and that signature attested to the fact that you reviewed its contents. Yet you did not follow sick leave procedure as stated.
>
> 2. The policy manual and the contract state that you will notify your supervisor when you are out of the hospital. Yet you choose (sic) not to notify your supervisor.
>
> 3. You were unaccounted for between March 20, 1990 and April 17, 1990.

Upon studying the expressed reasons for the discharge, as explicitly set forth in the Removal Notice, it readily becomes apparent that several of the Employer's arguments are misdirected; they go beyond the boundaries of the original discipline and seek arbitral approval of the action on the sweeping ground that Grievant was a bad employee and deserved to be removed.

The Arbitrator agrees that Grievant's record was less than ideal; he finds merit in Dr. Graham's advice in the previous case that this Employee probably ought to have a less critical job than Underground

Inspector. But he cannot act on the generality; he must repress the impulse to "do right," and look exclusively to whether or not Grievant committed the violations charged. For this reason, the following contentions are found to be irrelevant to the initial part of the resolution process:

> **The Employment Record.** As inadequate as it was, Grievant's history of repeated and prolonged absenteeism has little to do with this case. Arbitrator Teple's ruling in Cleveland Trencher set forth a basic principle regarding employees who are unwilling or unable to meet their working schedules. But it has no relationship to a dispute where the employee was not so charged. Grievant's history would certainly be an appropriate factor to review on whether the discharge penalty should or should not be modified. That issue cannot be reached, however, unless and until the seminal question of guilt or innocence is decided.
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> **Insubordination.** Testimony of the Labor Relations Officer concerning the April 10 telephone conversation provided ample support for an allegation that Grievant committed this most serious breach of his elemental commitments as an employee. But the Employer elected not to use insubordination as a ground for discipline, and the Arbitrator cannot improve the Employer's case. This too is an appropriate area for analysis in assessing the magnitude of the penalty, but it has no application to whether or not discipline was warranted.
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> **Job Abandonment** is simply not at issue. It is not included in the Notice of Removal. It may perhaps be reasonably inferred from Charge No. 3 -- "You were unaccounted for between March 20, 1990 and April 17, 1990" -- but the word-

ing is too vague to support the allegation. If the Employer truly believed that Grievant abandoned his job, it certainly would have leveled the accusation with greater specificity.

Patterned Absenteeism. The Arbitrator is frankly puzzled by the State's concentration on this factor during the hearing. If Grievant was guilty of patterned absences, the Employer had only one permissible resource for dealing with it -- Article 29, §29.04 III D. It was contractually bound to address the problem with progressive discipline. Grievant's disciplinary record for absence abuse was clean; accordingly, his pattern had no application in this dispute.

* * *

A broadly accepted labor-management axiom is that employees are liable for justified discipline if they break rules of which they are aware or should be aware. The Removal Notice issued to Grievant alleges that rules were broken. However, the Union interposes a cogent response. It contends that the rules were not known to Grievant or, for that matter, to any other Agency employee. It argues, without contradiction, that no employee in the disability-leave application stage, including Grievant, was ever required to satisfy sick-leave notification requirements.

The Arbitrator finds that the argument is a complete defense. He arrives at this decision even though he accepts as true the Labor Relations Officer's testimony that he told Grievant what to do. But the Officer himself admitted that he was unable to get through to the Employee and had to use the Union Steward as a conduit. That statement attested to the fact that Grievant was too ill on the day

of the conversation, April 10, to comprehend what was expected of him. The Labor Relations Officer responded to the problem in a logical way, but neglected to complete the communications circuit. The Steward's unrebutted testimony was that he was not informed of a new call-off requirement. All he was told was that Grievant had to file leave-request forms, and he saw to it that the instruction was obeyed.

In summary, the Arbitrator finds that the rules fostering the removal were new and unprecedented. They changed existing disability-leave practices and, as such, had to be conveyed before they could be enforced. There was not effective communication; as a result, the Employee could not properly be held culpable for his violations. The grievance will be sustained.

AWARD

The grievance is essentially sustained. The Employer is directed to reinstate Grievant to employment status with unbroken seniority, and full restoration of benefits from May 25, 1990. The Employer shall expunge all records of this discipline.

The Union's demand for back wages is denied. According to Grievant's own admission, he has remained disabled since his removal and could not have returned to work at any time between May 25 and today. It follows that there is no wage loss to be compensated.

Decision issued at Lorain County, Ohio, December 13, 1990.

Jonathan Dworkin, Arbitrator