ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 657

OCB GRIEVANCE NUMBER: 34-04-910204-0019-01-09

GRIEVANT NAME: WILLIAMS, HERVEY

UNION: OCSEA/AFSCME

DEPARTMENT: BUREAU OF WORKER'S COMPENSATION

ARBITRATOR: PINCUS, DAVID

MANAGEMENT ADVOCATE: BROWN, BRUCE

2ND CHAIR: DUCO, MICHAEL P.

UNION ADVOCATE: FISHER, JOHN

ARBITRATION DATE: JUNE 28, 1991

DECISION DATE: AUGUST 25, 199

DECISION: MODIFIED

CONTRACT SECTIONS AND/OR ISSUES: REMOVAL FOR ATTENDANCE AND TARDINESS PROBLEMS; UNEXCUSED ABSENCE FOR 3 OR MORE CONSECUTIVE DAYS WITHOUT CONTACT.

HOLDING: EMPLOYER LACKED JUST CAUSE TO REMOVE THE GRIEVANT BUT HAD SUFFICIENT CAUSE TO IMPOSE LESSER DISCIPLINE. SECTION 24.05 WAS VIOLATED BECAUSE 1) 45 DAY TIME LIMIT WAS NOT ADHERED TO AND NO "FORMAL" EXTENSION WAS MUTUALLY AGREED TO; AND 2) BECAUSE DISCIPLINE WAS NOT REASONABLE AND COMMENSURATE. BASIS OF REMOVAL WAS DUE NOT TO AN INTENTIONAL FAULT OF GRIEVANT BUT AS A CONSEQUENCE OF A DEFECT IN MENTAL CAPACITY. GRIEVANT IS REINSTATED WITHOUT BACK PAY. DISCHARGE IS CONVERTED TO A SUSPENSION WITH A LAST CHANCE AGREEMENT. ARBITRATOR RETAINS JURISDICTION.

COST: $860.33

STATE OF OHIO AND OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION LABOR
ARBITRATION PROCEEDING

#657

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, THE BUREAU
OF WORKERS' COMPENSATION

-and-

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

GRIEVANCE: Hervey Williams (Discharge)

OCB Case No.: 34-04-(02-04-91)-19-01-09

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: August 25, 1991

APPEARANCES

For the Employer

Nancy V. Seman	Labor Relations Manager
Diana Prysock	Supervisor
Roberta Bavery	Hearing Officer
Bruce Brown	Advocate
Michael Duco	Chief of Contract Compliance
Gretchen Green	Acting Director of Human Resources

For the Employer

Mark Tincher	Union Steward
John Fisher	Staff Representative
Dennis Williams	Second Chair

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, the Bureau of Workers' Compensation, 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 the period July 1, 1989 to December 31, 1989 (Joint Exhibit 1).

The arbitration hearing was held on June 28, 1991 at the Office of Collective Bargaining, Columbus, Ohio. The Parties had selected 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 not submit briefs.

STIPULATED ISSUE

Was the Grievant, Hervey Williams, discharged for just cause? If not, what shall the remedy be?

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. 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.

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.

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.

...

(Joint Exhibit 1, Pgs. 37-38)

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-discipline meeting. At the discretion of the Employer, the forty-five (45) day 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. The OCSEA Chapter President shall designate the Union representative who shall receive such notice who is assigned to selected work areas under the jurisdiction of the Chapter. 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.

...

(Joint Exhibit 1, Pg. 39)

ARTICLE 25
GRIEVANCE PROCEDURE

...
25.05 - Time Limits

Grievances may be withdrawn at any step of the grievance procedure. Grievances not appealed within the designated time limits will be treated as withdrawn grievances.

The time limits at any step may be extended by mutual agreement of the parties involved at that particular step. Such extension(s) shall be in writing.

In the absence of such extensions at any step where a grievance response of the Employer has not been received by the grievant and the Union representative within the specified time limits, the grievant may file the grievance to the next successive step in the grievance procedure.

...

(Joint Exhibit 1, Pgs. 44-45)

JOINT STIPULATIONS

1. No past discipline
2. Hired January 2, 1990

CASE HISTORY

Hervey Williams, the Grievant, was originally employed by the Bureau of Workers' Compensation, the Employer, on January 2, 1990. At the time of the removal, the Grievant served as a Clerk 2 in the Claims Section. Early in the employment relationship, moreover, the Grievant held intermittent employee status.

Diana Prysock, the Grievant's Supervisor, reviewed the circumstances leading to the Grievant's ultimate removal. In June or July of 1990, Prysock had her initial conversation with the Grievant regarding attendance difficulties. It appears that the Grievant had to deal with his grandmother's death which engendered some psychological difficulties. The Grievant was hospitalized for three days as a

consequence of discharging a firearm. Upon being released from the hospital, the Grievant took a few days off because his notoriety became an embarrassment. It should be noted, however, that the grievant did, in fact, inform Prysock about his hospital stay.

The Grievant's emotional problems surfaced when he returned to work in June of 1990. Prysock found the Grievant crying on a stairway shortly after the start of the shift. She counseled the Grievant by suggesting he investigate the possibility of taking advantage of Employee Assistance Program (EAP). She, moreover, cautioned the Grievant that he was placing his job in jeopardy because he was establishing an uneventful attendance pattern.

It appears that the Grievant did make an appointment with an EAP representative. Unfortunately, his attendance record (Employer Exhibit 1) worsened after his initial episode. The Grievant started realizing no show occurrences and failed to call the facility at the appropriate time. He also tended to come into work quite late; and on several occasions had to be escorted from the facility because of incoherent behavior engendered by medication.

On October 19, 1990, Prysock submitted a Request For Disciplinary Action (Joint Exhibit 2). She requested the Grievant's removal, and based the request on the following justification:

"...

> Hervey used 104 hours unexcused absences; 24 hours was used without a leave balance; 80 hours was used without notifying the supervisor of absence. Hervey had been referred to EAP (June, 1990), however, no improvement has been noted. A blatant disregard for Bureau policies and procedures is evident.

..."

On October 31, 1990, the Grievant was informed of the contemplated removal (Joint Exhibit 2). He was charged with violating "...124.34 of the Ohio Revised Code, Article 24 of the Contract of the State of Ohio and AFSCME/OCSEA, and Employee Handbook Memo 6.02 (13b) 'Unexcused Absence - 3 or more consecutive days without contact.' Specifically, October 12, 15, 16, 17, and 18, 1990."

On December 7, 1990, Roberta Bavery, a Hearing Officer, conducted a Pre-Disciplinary Meeting concerning the status of the above-referenced grievance. Bavery ruled that there was just cause for discipline, but mitigating circumstances caused her to recommend a reduction in the imposed penalty from removal to a three or five day suspension.

Bavery testified that she hand drafted a medical release at the hearing which was signed by the Grievant. The release provided her with access to the Grievant's EAP file. She finally received the requested information, but the excessive delay caused her recommendation to be tardy; it was filed on January 11, 1991 (Union Exhibit 1). It should be noted that the released documents supported the Grievant's testimony.

Bavery's recommendation was not supported by the Labor Relations Department. Gary A. O'Neal, a Labor Relations Officer, overruled Bavery's recommendation and recommended removal. He though: "The Hearing Officer got too emotionally involved in the case to make a sound recommendation (Joint Exhibit 2)."

On January 22, 1991, Gretchen Green, Special Assistant for Human Resources, sent a memorandum to Lou Gergely, Chief Administrative

Officer, which supported O'Neal's interpretation and associated removal recommendation (Joint Exhibit 2). This finding was communicated to the Grievant on January 25, 1991. The following particular were tendered in support of the removal:

"...

> This is to inform you that you are hereby removed from employment as a Clerk 2 in the Claims Section of the Ohio Bureau of Workers' Compensation, effective the close of business, Friday, January 25, 1991.
>
> After reviewing the recommendation of the Hearing Officer, it has been determined that just cause exists for this action. The charges that you have been found in violation of include Employee Handbook Memo 6.02 (13B) unexcused leave - three or more consecutive days without contact.

..."

(Joint Exhibit 3)

On February 1, 1991, a grievance was filed contesting the removal decision. It contained the following Statement of Facts:

"...

On January 25, 1991, Grievant was removed from his position with the Bureau. The Union charges OBWC with violating Article 24.01 of the contract by failing to prove just cause for the discipline. Violating Article 24.02 by failing to follow progressive discipline. And Article 43.03 by imposing a new work rule onto the disciplinary process.

..."

(Joint Exhibit 2)

The grievance was forwarded to Step III of the grievance procedure. A Step III hearing was held on Thursday, February 28, 1991. Nancy V. Seman, a Labor Relations Manager and Hearing Officer, upheld the Employer's action because it was based on just cause. The timeliness issue was viewed as irrelevant because the Union had verbally agreed to

an extension (Joint Exhibit 2).

The Parties were unable to resolve the present matter. Since neither Party raised substantive nor procedural arbitrability claims, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

The Employer asserted that the removal was proper and based on just cause principles. As such, the termination decision was administered in accordance with Section 24.01.

The Employer maintained that it obtained substantial evidence or proof that the Grievant was guilty as charged. His actions on October 12, 15, 16, 17, and 18, 1990 directly violated Memo No. 6.02, (13b) which deals with unexcused absence. This work rule deals with job abandonment because three or more consecutive days without contact results in removal (Employer Exhibit 2). The facts in support of the removal were uncontroverted.

The Employer alleged that the Grievant was provided with proper and sufficient notice of the possible negative consequences associated with a violation of Memo No. 6.02, 13(b) (Employer Exhibit 2). Prysock testified that she counseled the Grievant on two occasions prior to the eventual termination. In fact, she decided not to discipline the Grievant for similar violations in June and July, 1990 because he was seeking assistance via the Employee Assistance Program. She eventually recommended removal only after she realized the Grievant failed to

demonstrate any reasonable improvement.

The circumstances surrounding the removal do not establish a Section 24.05 violation. The Employer acknowledged that the Hearing Officer's recommendation (Union Exhibit 1) exceeded the (forty-five) 45 day time limit by one day. This deviation, however, did not prejudice the procedural safeguards codified in the contested provision. The Hearing Officer and Mark Tincher, the Union representative, entered into an understanding which recognized the possibility for a valid delay. She advised the Union that her report and recommendation would be withheld pending her review of medical reports solicited from the Grievant's psychologist. After several inquiries the psychologist finally forwarded the documents. The Employer should not be penalized for engaging in an effort to obtain evidence which potentially corroborated his mitigating circumstances claim.

Section 24.02 charges raised by the Union were also refuted by the Employer; progressive discipline principles were not violated because the penalty was commensurate with the offense. Progressive discipline was not appropriate because job abandonment is an "industrial felony." As such, its first occurrence provides adequate grounds for immediate discharge. A penalty of this sort is necessary if the Employer hopes to deter other employees from engaging in similar misconduct.

The Employer maintained that it did not treat this Grievant any differently than other similarly situated employees. The Union failed to submit any proof that it engaged in unequal treatment practices.

The Position of the Union

The Union charged that the Employer did not have just cause to remove the Grievant. The Union admitted that the Grievant's absences in October of 1990 were unexcused, but based its claim on several procedural defects.

The Union asserted the Employer violated the clear and unequivocal requirements contained in Section 24.05. This provision requires a decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five days after the conclusion of the pre-discipline meeting. Here, the Employer exceeded the time limit because the hearing was held on December 7, 1990 and the decision was rendered on January 28, 1991. This period of time represent a total of forty-nine days.

In the opinion of the Union, it never waived this timing requirement by agreeing to a verbal waiver. Tincher testified that he never agreed in writing to mutually extend the time period. Section 25.05 allows the extension of time limits at any step as long as the Parties mutually agree to such an extension and the extension is in writing. The Employer failed to establish these necessary precursors.

The Union argued that Section 24.02 was violated because the penalty was not commensurate with the offense. The mitigating circumstances discussed and relied on by Bavery (Union Exhibit 1) should have been considered by the Employer. The Grievant had no prior disciplinary action on his work record. The record, moreover, adequately supported the Union's contention that the Grievant was suffering from severe emotional stress and under professional care in an

EAP. These facts adequately support the need to consider these unique mitigating circumstances.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, and a full and complete review of the record developed by the Parties, it is my opinion that the Employer did not have proper cause to remove the Grievant. the Employer did, however, have sufficient cause to impose discipline at a level lower than removal. For the reasons enumerated below, a penalty modification is in order based on the totality of circumstances and several procedural defects.

Section 24.05 - Imposition of Discipline was clearly violated by the Employer because the time limit negotiated by the Parties was not adhered to. This Section requires that discipline be imposed as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the Pre-Discipline meeting. Here, the Pre-Disciplinary meeting was held in Columbus, Ohio on December 7, (Union Exhibit 1). Bavery eventually issued her Pre-Disciplinary hearing recommendation on January 11, 1991 (Union Exhibit 1). The Grievant, however, received formal notice of the termination on January 28, 1991 (Joint Exhibit 3); a total of fifty-two (52) days transpired between these two bench mark dates. Even if one relies on January 25, 1991 as the termination date, the Employer still exceeded the forty-five (45) day proviso negotiated by the Parties.

The previously mentioned proviso was not formally waived by the Union because it was not extended by mutual agreement. Section 25.05 allows extension of the time limits at any particular step of the grievance procedure as long as such extensions are mutually agreed to and documented in writing.

Bavery's testimony failed to establish that a formal extension was agreed to. This Arbitrator does not doubt her testimony regarding the difficulties she faced in procuring the requested documents from the Grievant's psychologist. Yet, the medical release form signed by the Grievant, and the Union's awareness of her difficulties do not substitute for the formal written extension specified in Section 25.05. As a Hearing Officer, she should have anticipated this potential procedural defect in light of the document problems she experienced. Her reasons for requesting these documents did not minimize the import attached to the time limit and extension requirements. Bavery also testified that Tincher agreed to waive the time limit requirement if it became necessary. She should have asked for a formal written extension. A mere verbal acknowledgement cannot substitute for a formal written extension. If this Arbitrator concurred with the Employer's interpretation, he would, in effect, be legislating rather than interpreting the Agreement (Joint Exhibit 1). Such an outcome would conflict with Section 25.03 requirements dealing with the scope of an arbitrator's authority. This provision prohibits an arbitrator from adding to, subtracting from or modifying any contractual term and condition of employment. Recognition of a verbal extension option would

result in an illegal "addition" to Section 25.05.

Some of the actions engaged in by the Employer during the course of the Grievant's employment resulted in "negative notice". Written rules covering certain types of misconduct may not be enforceable if an employer has knowingly let certain violations go unpunished. By condoning such conduct, misconduct may be viewed or perceived to be acceptable.[1]

The Grievant was removed because he violated Work Rule 13(b) which deals with unexcused absences. It prohibits three or more consecutive days without contact; with the first offense resulting in removal. And yet, the Grievant's Attendance Interruption Report (Employer Exhibit 1) indicates that the Grievant engaged in similar misconduct but was not formally reprimanded. On August 30 and 31, 1990, the Grievant realized two (2) unexcused absences and was not reprimanded. During the same time period, the Grievant also realized two hours and fifteen minutes worth of excused absence without pay. A similar absence incident took place during the pay period ending October 6, 1990. Once again, the Grievant realized sixteen hours of unexcused absence without pay on September 25, 1990 and September 26, 1990 (Employer Exhibit 1).

Prysock's conversations with the Grievant do not minimize the "negative notice" conclusion discussed above. She stated that she had two conversations with the Grievant; one took place in June of 1990,

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[1]Misco Precision Casting Co., 40 LA 87 (Dworkin, 1962); U.S. Springs & Bumper, 5 LA 109 (Prasow, 1946); Armco Steel Corp., 52 LA 101 (Duff, 1969).

while the other took place in October of 1990. On both occasions she warned the Grievant that he was "burning up" his personal days and that his job could be in jeopardy. She admitted she neither reviewed nor specifically discussed any Section 13 (Employer Exhibit 2) violations and associated penalties. It is important to note that similar types of conversations did not take place on or about the unexcused absence occurrences which took place during August and September of 1990. More focused counseling interactions and the use of progressive discipline could have prevented the October, 1990 unexcused absence incidents.

In my judgment Prysock's testimony regarding the Grievant's EAP participation is a bit self-serving. She maintained that the chose not to discipline the Grievant for these earlier similar offenses because of his EAP participation. She finally disciplined the Grievant because the EAP intervention proved to be ineffective. One has to wonder how she was able to reach this conclusion when the undisciplined incidents (September 25-26, 1990) took place a mere sixteen (16) days prior to the October of 1990 incidents. Also, the Grievant had only participated in an EAP for approximately four (4) months prior to the incidents leading to the removal. One would be hard pressed to render such an opinion with such a limited observation period. This is especially true without a fully articulated after care plan.

The Employer violated Section 24.05 because the disciplinary measure imposed was not reasonable and commensurate with the offense. This Arbitrator is not minimizing the Grievant's attendance difficulties because they are not nominal and need to be reversed. His record speaks

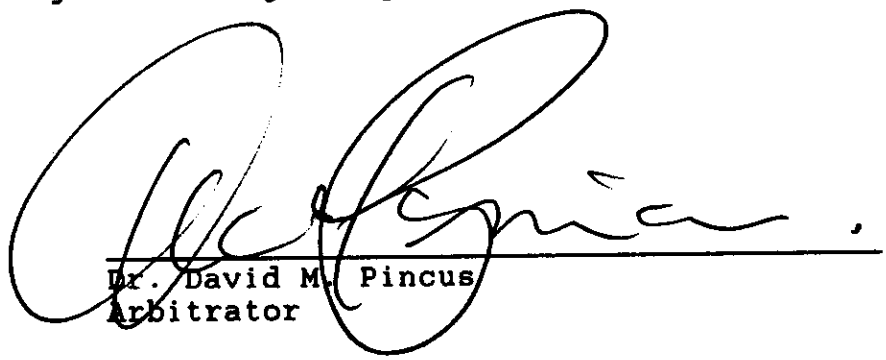
for itself and the facts were never contested by the Union. As such, the Employer had just cause to discipline but I am modifying the administered penalty. The basis of the removal was due not to an intentional fault of the Grievant but as a consequence of a defect in mental capacity. As early as June of 1990, the Grievant began experiencing emotional difficulties. Prysock acknowledged that the Grievant had to be involuntarily hospitalized for three (3) days after he buried his grandmother. A similar difficulty preceded the October, 1990 attendance incidents. Bavery testified that the Grievant became distraught when a divorce decree granted his wife custody of his son. Prysock acknowledged the Grievant needed psychological help because he could not take care of his personal problems. These difficulties, moreover, tended to spill-over onto his daily work performance.

Within this context, I am convinced that a conditional reinstatement is appropriate. Nothing in the Agreement (Joint Exhibit 1) specifically precludes a Panel Arbitrator's authority to modify an administered penalty where mitigating, aggravating circumstances or procedural defects suggest the imposed disciplinary measure is unreasonable and not commensurate with the offense. Such a potential outcome is envisioned in Section 24.05. Section 24.01 contains a specific limitation on an arbitrator's authority but it deals with modifying the termination of an employee committing abuse; a situation that does not play a role in the present determination.

AWARD

The Employer is ordered to reinstate the Grievant to his former

position without back pay. As such, I am converting the discharge to a suspension and conditionally reinstating the Grievant. The Union, Grievant and Employer are ordered to enter into a Last Chance Agreement specifying certain programmed care arrangements which are readily validated and evaluated. The terms and conditions need to be mutually agreed upon prior to implementation and need to reflect a reasonable recovery, therapy and observation period. In addition, these terms and conditions must include a probationary period with regard to any occurrences of unjustified absenteeism. Once agreement is reached, any deviation from the agreed to criteria would be treated as a voluntary quit. This Arbitrator retains jurisdiction in the event the Parties are unable to reach agreement regarding the Last Chance Agreement's particulars.



August 26, 1991

Dr. David M. Pincus
Arbitrator