#677

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

State of Ohio

Employer.

Grievance No. 23-04-910410-0157-01-09
Grievant (S. Harbin)

Hearing Date: September 6, 1991

Closing Date: September 18, 1991

Award Date: October 18, 1991

Arbitrator: Rivera

For the Employer: Teri Decker
Tim Wagner

For the Union: Butch Wylie
Harold Bumgardner

Present at the Hearing in addition to the Grievant and Advocates were Stephen C. Pierson, ODMH Cambridge MH Center (witness), Diane L. Wilson, Cambridge MH Center, Jack L. Hayes, Cambridge MH Center (witness), Don Mobley, Cambridge MH Center (witness), Marsha Keadle, Cambridge MH Center (witness), Steve Wiles, OCSEA Staff Representative (witness), John C. Murrell, OCSEA Steward (witness), Deborah S. McConkey, Clerk 3 (witness), Cheryl Logwood, Clerk 3 (witness), Tony DeGirolamo, Arbitration Clerk (observer), Terry Harbin, Grievant's Husband.

Issues

Was the Grievant removed for just cause; if not, what shall the remedy be?

Joint Stipulations of Fact

1. Grievant was hired on July 3, 1978, at Cambridge Mental Health Center/Mental Retardation Center as a Typist 2.

2. The Grievant received a promotion on June 15, 1980, to a Technical Typist and was transferred to Cambridge Mental Health Center.

3. The Grievant received disability benefits from February 25, 1987 to May 19, 1987.

4. The last day that Grievant worked at Cambridge Mental Health Center was February 9, 1987.

5. The Grievant was removed from her position with Cambridge Mental Health center effective March 30, 1991.

Joint Exhibits

1. Contract between the State of Ohio and OCSEA/1989-1991.

2. Discipline Trail

   2a. 2/19/91 Letter from S. Pierson to Grievant.
   2b. Pre-Disciplinary Conference Notice.
   2c. 3/15/91 Removal Order with Personnel Action.
   2d. 3/29/91 Letter Notifying Grievant of her Removal.

3. Grievance Trail

   3a. Grievance
   3b. Step III
   3c. Request for Arbitration

4. Position Description dated 9/15/86.

5. 9/25/86 Request for Transfer.

6. Doctor's Statements

   6a. 1/8/87 from Dr. Tripathi
   6b. 2/5/87 from Dr. Theile
   6c. 3/6/87 from Dr. Theile
   6d. 3/9/87 from Dr. Theile
   6e. 3/12/87 from Dr. Koppera

7. 2/6/87 Letter from J. Hayes to Grievant.

8. Worker's Compensation Claim dated 2/10/87.

9. Industrial Commission of Ohio record - 8/19/87.

10. 7/2/87 Memo from V. Hickman to J. Hayes.

11. 7/8/87 Letter from J. Hayes to Grievant.

12. 7/10/87 Letter from L. Zingarelli to J. Hayes.

13. 7/28/87 Letter from E. Tarpy to L. Zingarelli.

14. 12/7/87 Letter from E. Tarpy to L. Zingarelli.

15. Court of Claims of Ohio Order.

16. Tenth Appellate District Opinion.

17. 1/9/91 Letter from C. Cook to J. Hayes.

18. 1/11/91 IOC from J. Hayes to C. Murrell.

19. CMHC Policy PER 28

    19a. April, 1987/July 19, 1985
    19b. July 19, 1985/June 21, 1991

20. CMHC Policy PER 32

    20a. August, 1987/May 28, 1985 Policy
    20b. 10/1/86 Notice to Employees on transfers.
    20c. 5/11/87 IOC from S. Pierson.

21. CMHC Policy PER 38

    21a. April, 1984/April 28, 1985
    21b. March, 1986/October, 1990

22. Tables of Organization

Employer's Exhibits

1. Agreement between OCSEA and Employer dated 12/15/86

2. Notice Suspension (2) day to grievant dated 2/20/87 for insubordination on 1/6/87.

3. Grievant's attendance record 1986-1987.

4. Letter of Reprimand to Grievant dated 12/19/86.

5. Grievance (dated 2/24/87) of two (2) day suspension. Grievance scheduled for Step 3. Union agreement to postpone Step 3 until Grievant's return to work.

6. IOC from M.J. Keadle to Medical Record Department and Transcription Department Employees dated 1/24/85.

7. IOC to D. McConkey and C. Lelakus from M.J. Keadle dated 2/25/85.

8. IOC to Medical Record and Transcription Employees dated 3/5/85 from M.J. Keadle.

9. IOC to all Medical Record Employees from M.J. Keadle dated 8/12/85.

10. IOC to Grievant and M.B. Hammel and DMC from M. Keadle dated 12/29/86.

11. Request to Transfer by D. McConkey dated 9/25/86.

12. Counseling of D. McConkey dated 8/1/85.

13. Policy PER-27 Leaves of Absence Without Pay.

Union Exhibits

1. Charge and Dismissal of Unfair Labor Charge by M. Keadle against D. McConkey, Grievant, J. Clodfelter, and OCSEA dated 7/16/87.

2. Four (4) letters of appreciation to Grievant for Good Attendance (three months each) (undated).

3. Memo with attachments from Cambridge Mental Health Center to DAS Request for Disability Leave Benefits for Grievant.

4. Letter from DAS to Grievant dated 3/19/87.

5. Letter from DAS to Grievant dated 5/5/87.

6. Agreement dated 2/10/87 between Grievant and DAS.

7. Request for Leave Without Pay by Grievant dated 4/5/87.

8. Request for Leave Without Pay by Grievant dated 6/21/87.

9. Letter from C. Elwood to D. Mobley dated 1/20/87. (Letter admitted solely to corroborate or challenge testimony about the size of the room.)

Relevant Contract Sections

Article 2 (cited by Union in Grievance)

§ 2.01 - Non-Discrimination

> Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio or Executive Order 83-64 of the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, handicap or sexual orientation. Nor shall either party discriminate on the basis of family relationship. The Employer shall prohibit sexual harassment and take action to eliminate sexual harassment in accordance with Executive Order 87-30, Section 4112 of the Ohio Revised Code, and Section 703 of Title VII of the Civil Rights Act of 1964 (as amended).
>
> The Employer shall not solicit bargaining unit employees to make political contributions or to support any political candidate, party or issue.

§ 2.02 - Agreement Rights

> No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes.

§ 2.03 - Affirmative Action

> The Employer and the Union agree to work jointly to implement positive and aggressive affirmative action programs in order to redress the effects of past discrimination, whether intentional or not, to eliminate current discrimination, if any, to prevent further discrimination, and to ensure equal opportunity in the application of this Agreement. The parties will maintain a statewide Affirmative Action Committee composed of an equal number of union and Employer

representative and co-chaired by a Union representative and an Employer representative.

The committee shall review affirmative action plans and suggest strategies to improve achievement of affirmative action goals. The Agencies covered by this Agreement will provide the Union with copies of their affirmative action plans and programs upon request. Progress toward affirmative action goals shall also be an appropriate subject for Labor-Management Committees.

§ 17.08 - Transfers

If a vacancy is not filled as a promotion pursuant to 17.05 and 17.06, the submitted bids for a lateral transfer may be considered. A lateral transfer is defined as a movement to a position in the same pay range as the posted vacancy. Consideration of lateral transfers shall be pursuant to the criteria set forth above. The Agency shall consider requests for lateral transfers before considering external applications. Denial of such transfer requests shall not be grievable.

§ 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.

§ 24.03 - Supervisory Intimidation

An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee.

In those instances where an employee believes this section has been violated, he/she may file a grievance, including an anonymous grievance filed by and processed by the Union in which the employee's name shall not be disclosed to the employer representative allegedly violating this section, unless the Employer determines that the employer representative is to be disciplined.

The employer reserves the right to reassign or discipline employer representatives who violate this section.

Knowingly making a false statement alleging patient abuse when the statement is made with the purpose of incriminating another will subject the person making such an allegation to possible disciplinary action.

§ 31.01 - Unpaid Leaves

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

A. If an employee is serving as a union representative or union officer, for no longer than the duration of his/her term of office up to four (4) years. If the employee's term of office extends more than four (4) years, the Employer may, at its discretion, extend the unpaid leave of absence. Employees returning from union leaves of absence shall be reinstated to the job previously held. The person holding such a position shall be displaced.

B. If an employee is pregnant, up to six (6) months leave after all other paid leave has been used.

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

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

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

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

§ 31.02 - Application for Leave

A request for a leave of absence shall be submitted in writing by an employee to the Agency designee. A request for leave shall be submitted as soon as the need for such a leave is known. The request shall state the reason for and the anticipated duration of the leave of absence.

§ 31.03 - Authorization for Leave

Authorization for or denial of a leave of absence shall be promptly furnished to the employee in writing by the Agency designee.

§ 31.04 - Failure to Return From Leave

Failure to return from a leave of absence within five (5) working days after the expiration date thereof may be cause for discipline unless an emergency situation prevents the employee's return and evidence of such is presented to the Employer as soon as physically possible.

§ 34.01 - Health Insurance

Employees receiving Worker's Compensation who have health insurance shall continue to be eligible for health insurance. the Employer will pick up the employee's share of health insurance after three (3) months for a period not to exceed twenty-four (24) months.

§ 34.02 - Coverage for Worker's Compensation Waiting Period

An employee shall be allowed full pay at regular rate during the first seven (7) calendar days of absence when he/she suffers a work-related injury or contracts a service-related illness. If an employee receives a Worker's Compensation award for the first seven (7) days, the employee will reimburse the employer for the payment received under this Article.

§ 34.03 - Other Leave Usage to Supplement Worker's Compensation

Employees may utilize sick leave, personal leave or vacation to supplement Worker's Compensation up to one hundred percent (100%) of the employee's rate of pay.

§ 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.

Minimum Benefit Level

The minimum level of approved disability leave benefits, pursuant to this Article, shall be no less than seventy percent (70%) of the eligible employee's regular rate of pay.

Other Leave Usage to Supplement Disability

Employees may utilize sick leave, personal leave or vacation to supplement disability leave up to one hundred percent (100%) of the employee's rate of pay.

Disability Review

The Employer shares the concern of the Union and the employees over the need to expeditiously and confidentially process disability leave claims.

The Employer and the Department of Administrative Services shall undertake to review such concerns as: time frames, the appointment of an ombudsperson, paper flow, the issue of light duty, and possible refinement of procedural mechanisms for disability claim approval or disapproval, inviting maximum input from the Union to this review.

Information Dissemination

The Employer recognizes the need to standardize the communication of information regarding disability benefits and application procedures. To that end, the Employer and the Department of Administrative Services shall produce explanatory materials which shall be made available to union representatives, stewards or individual employees upon request.

Orientation

The Employer shall develop a disability orientation program for union representatives so that they may train stewards as part of the information dissemination effort.

Facts

The Grievant in this case was hired as a Typist 2 on July 3, 1978 at the Cambridge Mental Health Center. On June 15, 1980, the Grievant received a promotion to Technical Typist. Prior to the situation involved in this Grievance, the Grievant was stationed in the Transcription Section in a second floor room separate from the Medical Records Section. She occupied this room with three other Technical Typists (M. Hammel, J. Olden, and J. Wilson) (Organization Chart, Joint Exhibit 22). Her

Supervisor was M.J. Dobos, Medical Record Librarian. Ms. Dobos was removed from State service October, 1984, and Technical Typist Wilson resigned December, 1984. Don Mobley was the Director of Operations and had administrative responsibility over Medical Records during this period. He testified that Nettie Patterson, Clerical Supervisor, of the Medical Records Department temporarily assumed supervision in place of Dobos while the Institution recruited a person with appropriate credentials and background to direct the Medical Records Department. Mobley testified that serious management problems existed under Dobos and that the Medical Records Department was cited for violations by JCAH. Mr. Hayes, Labor Relations Officer, testified that Dobos was removed from office for job abandonment. He said that she was often away from the Department on disability leaves but that when she was there she was a lax supervisor.

On or about January 1, 1985, M.J. Keadle was hired. Ms. Keadle had come from Barnesville General Hospital where she directed the Medical Records Department and had previously worked in Medical Records at Children's Medical Center in Akron. She had a degree in Medical Records Science.

Ms. Keadle testified that upon commencing work, she reviewed the situation and concluded that a number of changes were necessary; in particular, she concluded that the equipment used by the transcriptionists was outdated and inefficient. She testified that before making any changes she consulted with Mr. Mobley, her administrative supervisor; Mr. Mobley confirmed that

she consulted with him prior to the various changes. On January 24, 1985, Ms. Keadle notified (Employer's Exhibit 6) the Department that the Transcriptionists (including the Grievant) would be moved downstairs to the Medical Records Department effective February 11, 1985. In the notice, she stated that partitions had been ordered to afford "privacy." In her testimony, she indicated that the partitions were ordered because employees indicated that certain personality conflicts existed between the Transcriptionists and the Medical Records personnel. On February 25, 1985, Ms. Keadle notified D. McConkey and C. Lelahus that effective March 11, 1985, Ms. Patterson would no longer be their supervisor. On April 3, 1985, Patterson took disability leave through July 7, 1985. Meanwhile, on February 19, 1985, J. Olden, a transcriptionist, went part-time. On March 5, 1985, Ms. Keadle sent a IOC to all Medical Records employees stating work rules. These work rules were as follows:

1. Starting time is 8:00 AM to 4:30 PM.

2. All lunch breaks are for 1/2 hour only.

3. Breaks are for 15 minutes, twice a day.

4. NO ONE IS TO LEAVE THE GROUNDS without first telling the director they are leaving. (If I am not at my desk, leave a note with the date and time that you left).

5. No one is to leave the office for lunch without first telling me so we will know where you are in case of an emergency, (and to know when to answer your phone.)

6. All phones are to be left uncamped. The operator is not responsible for our office.

7. When the Xerox machine is broken and we need to go to the business office for copies, ask the entire

> department if there is anything to be copied so that we cut down on unnecessary trips.
>
> Also, there is no need for two people to go copy reports when one person is very capable of doing this.

On August 12, 1985, Ms. Keadle sent an IOC to all Medical Record employees on "Breaks and lunch schedule." That IOC prefaced the schedules with the following directions:

> Starting today 8-12-85 the following schedule will be followed for breaks and lunch. Please remember these are the times to make personal phone calls, not during regular working hours. Also, please remember to hold these to a minimum as this ties up the office phones.

One of the events which may have precipitated the August 12, 1985 memo was a Documented Counseling given to Debbie McConkey by Ms. Keadle for excessive personal phone calls (over 20 in one day). Ms. Keadle also changed the work hours to 5 8-hour days from 4 10-hour days.

Two other physical moves apparently transpired in 1985. Ms. Keadle said she was told by Mary Beth Hammel, a Transcriptionist, that she was cold because of her desk placement. Ms. Keadle testified that personally she tended to be overly warm and so she changed places with Ms. Hammel. This change also caused the Grievant's desk to be moved. The Grievant acknowledged that the genesis of the move lay in Ms. Hammel's complaint. The Grievant (and everyone else in the department) was moved again in October of 1985 when new transcription and copying equipment arrived. Desks were rearranged to accommodate the equipment and the needed electrical outlets.

The record shows virtually no events until the latter part of 1986. On July 1, 1986, the first contract with OCSEA went into effect. Shortly thereafter, Ms. McConkey, the Grievant, Ms. Clodfelter (Union Steward) and others filed 9 grievances against Ms. Keadle. Under the contract, Ms. Keadle was at that time within the bargaining unit. The grievance apparently contested the right of one bargaining unit member "to supervise" other bargaining unit members. (The grievances were not placed in evidence.) On September 25, 1986 both Ms. McConkey and the Grievant requested transfers. (Employer's Exhibit 11; Joint Exhibit 5)

On October 1, 1986, Superintendent Sulikowski sent an IOC to all employees (Joint Exhibit 20) which was received and initialed by all employees including the Grievant. The Superintendent suspended Policy PER-32 (Request to Transfer) until further notice. Thus, according to the testimony of Mr. Hayes, all requested transfers were put on hold.

Ms. Keadle also filed in early November, 1986 with SERB an Unfair Labor Practice charge against Ms. McConkey, the Grievant, Ms. Clodfelter, and the OCSEA. In that charge, Ms. Keadle alleged that "9" nuisance grievances were filed by the persons charged. She claimed that "the desired resolution of the grievances is a reduction in my supervisory responsibilities and duties which will jeopardize my current state classification and reduce my pay." (Union Exhibit 1)

On December 15, 1986 (Employer's Exhibit 1) the Union and Management settled the issue of Ms. Keadle's position. All the grievances were withdrawn. The Settlement provided as follows:

> In an effort to resolve certain issues arising out the current duties of the Medical Records Librarian the parties to this agreement hereby:
>
> 1) Concur that the level of responsibilities placed upon the incumbent employee are not compatible with inclusion in the bargaining unit but that in effort to accommodate the functions unique to that department and to the incumbent's credential responsibilities that;
>
> 2) The medical records librarian has authority to issue work direction, make recommendation on leave requests, and to verbally counsel the employees whom she supervises.
>
> 3) That verbal discussion or counseling be limited to the purpose of providing direction and information to the record room employees and as proof that the employees were aware of the policy, rule, or direction which was the subject of the discussion/counseling.
>
> 4) Such discussion/counseling shall not be part of the employee's permanent record.
>
> 5) That record room employees shall abide by the policies and direction of the medical records librarian except as modified through and by means of proper grievance advancement and resolution.
>
> 6) That record room employees shall report any absence to the medical records librarian consistent with current section and center rules.
>
> 7) That performance evaluations shall be completed by non-bargaining unit member with input from the Medical Records Librarian.

Sometime in early December, 1986, the Medical Records room was painted over a two or three day period. Grievant said that when she arrived on the first day of painting Ms. Keadle was not

in the department. After trying to work in the area and bothered by the overwhelming paint smell, she located Ms. Keadle and asked permission to work upstairs. Ms. Keadle said yes. The next morning when the Grievant came in to work the paint was still bothersome, and she went upstairs without informing Ms. Keadle where she was going.

On December 19, 1986, the Grievant received a letter of reprimand from Don Mobley, Superintendent of Operations. The core of the letter read as follows: (Employer's Exhibit 4)

> You were absent from your work area without approval at 8:00 a.m. on December 18, 1986. In spite of specific supervisory direction provided by Ms. Hashman, the morning of December 18, 1986, concerning the procedure you were to follow before leaving your work area, you disregarded said direction later that same day. Specifically, you were also absent from your work area without approval on December 18, 1986, from approximately 10:15 a.m. through 11:30 a.m.
>
> This blatant disregard for supervisory direction and Center work rules will result in more severe disciplinary action if repeated.

On December 29, 1986, Ms. Keadle send an IOC to the Grievant, Ms. Hammel, and Ms. McConkey with regard to verification of illness which read as follows:

> Please be advised that for future verification of illness, the verification must be signed by the physician and include the following statement: "Patient is medically/physically incapable of performing her duties at place of employment." Failure to provide such information on your verification may result in your verification not being accepted. Furthermore, for extended periods of illness, verification may be required prior to your reporting back to work.

> Should you have any questions concerning these procedures, please feel free to discuss them with me. (Employer's Exhibit 10).

On January 6, 1987, an incident occurred directly between the Grievant and Ms. Keadle. Ms. Keadle came into the work area and found the Grievant on the phone at her desk. Ms. Keadle asked the Grievant three times "to whom are you speaking"; three (3) times the Grievant, by her own admission, did not answer. When the Grievant hung up, she immediately began typing and continued to ignore Ms. Keadle. At some point, the Grievant told Ms. Keadle in a forceful manner that "it was none of your business" and threw her headset or some other part of the dictating equipment loudly to the floor. Ms. Keadle then left the room and told the Grievant that they would talk after she (the Grievant) settled down. D. McConkey witnessed the incident and verified the essential nature of the encounter.

On January 8, 1987, the Grievant took 8 hours of sick leave (Employer's Exhibit 3) and on January 8, 1987, Dr. Raj Tripathi wrote the following letter (Joint Exhibit 6).

> TO WHOM IT MAY CONCERN:
>
> This is to certify that the Grievant is under my professional care.
>
> She was in my office today for blood pressure check.
>
> If you need any further information please do not hesitate to contact my office.

The Grievant then worked 8 hours a day from January 8 through February 7; taking 1.5 hours sick leave on two days each (January

12 and February 4). On February 9, she is credited with 3 hours work (Employer's Exhibit 3), and since that time, she has not worked at the Cambridge Mental Health Center.

On February 5, 1987, Dr. Rubert O. Theile wrote the following letter (Joint Exhibit 6B).

> To Whom It May Concern:
>
> This is to medically verify that the Grievant has had to be treated on at least 5 occasions for acute anxiety, hypertension and insomnia allegedly activated by certain factors regarding her employment at CMH & DC. It has been intimated that these changes have been brought about through harassment and subordination by her supervisor.
>
> It is hereby recommended that a transfer from present area or disability time be initiated.

On February 6, 1987, Mr. Hayes, the Labor Relations Director wrote the following letter to the Grievant.

> My office has this date received from you a physician's statement indicating that you are suffering from acute anxiety, hypertension, and insomnia and that these conditions/symptoms are thought by you to be caused and/or exacerbated by your workplace. The physician offers two recommendations for administrative action.
>
> After consultation with Center administrators, it has been determined that we are prepared to approve sick leave, vacation, personal leave, and/or a medical leave of absence based upon the submitted documentation. That leave would be limited to thirty days unless additional leave time is shown to be necessary.
>
> It is our further observation, however, that should you determine to seek such leave that you might also wish to consult James Ball regarding possible compensation. Should you make application for disability leave, we would, of course, approve such leave pending determination of your claim.

On February 10, 1987, the Grievant signed a standard form whereby Cambridge Mental Health Center advanced money to the Grievant while she sought Workers' Compensation. The agreement required the Grievant, if her claim were denied, to pay back any money received after twelve weeks of disability pay to which she was entitled from Cambridge (Union Exhibit 6). In this form, the Grievant stated that December 19, 1986 was the date of her on-the-job injury. On February 10, 1987, the Grievant filed a claim for Workers' Compensation with the Ohio Bureau of Workers' Compensation. The date of the alleged injury was December 19, 1986 and the nature of the injury was described as follows "acute anxiety, hypertension, and insomnia due to supervisor harassment. (Joint Exhibit 8)

On February 13, 1987, Mr. Sulikowski, Superintendent of Cambridge, forwarded to DAS, the Grievant's request for Disability Leave from the State as her employer (as to be distinguished from Workers' Compensation). In Mr. Sulikowski's transmitting letter, Mr. Sulikowski noted that he recommended approval. However, he noted "we ... have reservations about the cited reasons." (Union Exhibit 3) Attached to her Application for Disability Leave was a doctor's statement by Dr. Theile dated February 10, 1987 wherein he noted

> Acute anxiety, hypertension and insomnia. These are allegedly activated by certain factors regarding her employment at CMH & DC. It has been intimated that these changes have been brought about through harassment and subordination by her supervisor. (Union Exhibit 3)

On February 20, 1987, DAS notified the Grievant that Disability Leave with pay was approved from February 25 through March 8, 1987. The letter noted that her doctor released her to return to work on March 9, 1987. The letter also noted that the payments were an "advancement of Workers' Compensation benefits" (Union Exhibit 3).

On February 20, 1987, the Superintendent notified the Grievant that she was given a 2 day suspension for her insubordination on January 6, 1987 and that the suspension would be served upon her return from Leave (Employer's Exhibit 2). The Grievant received the discipline notice on February 23, 1987. On February 24, 1987, the Grievant filed a Grievance on the suspension (Employer's Exhibit 5). The Union and the Employer agreed to postpone the Step 3 hearing until the Grievant returned to work. On March 19, 1987, DAS extended the Grievant's disability leave from March 9 to April 5 based on a March 9, 1987 statement by Dr. Theile which mirrored his earlier statement (Union Exhibit 4).

On March 12, 1987, Dr. Koppera wrote the following letter:

> I had the opportunity to evaluate the Grievant, a 37 year old pleasant female whom you referred to me for medical evaluation. She has hypertension which is well controlled with medication. She also has hypothyroidism for which she is on medication. She has marked work related anxiety. I do not believe any anxiety medication would help her. I also believe that both her hypertension, anxiety and symptoms of hypothyroidism would all be worsened by her work related condition. The only solution I would recommend for her would be medical transfer to a more suitable environment. Pending this she should be given the benefit of total temporary disability until such a suitable medical transfer is found.

> She is an excellent worker. She has no major psychotic disorder and the State of Ohio could find her suitable employment within her capacity. (Joint Exhibit 6E)

This examination by Dr. Koppera was undertaken by direction of the Employer and with the cooperation of the Grievant.

On May 5, 1987, DAS informed the Grievant that her Disability Leave Benefits were extended from April 6 through May 19, 1987. The DAS letter stated that on May 19, 1987, the Grievant's 12 week maximum wage advancement would be exhausted and directed her to Workers' Compensation. The letter also stated that she could appeal this decision, how to appeal, and gave June 18, 1987 as the time limit for appeal (Joint Exhibit 5).

During this period of disability pay (April 6-May 19, 1987), while the Grievant was not at the facility, Dr. Pierson, CEO of the facility, issued on May 11, 1987 an IOC to all employees entitled "Lateral Transfer Posting." This IOC replaced the suspended transfer policy PER-31. (Exhibit: number has been misplaced by the Arbitrator.) Pursuant to the replaced policy, D. McConkey's transfer request (Employer's Exhibit 11) was honored and in August of 1987 she was transferred out of Medical Records to Client Benefits (Joint Exhibit 22).

The Grievant filed a Request for Leave Form for the Period May 20, 1987 to July 20, 1987. This Request for Leave For stated that the request was based on a work-related injury (Union Exhibit 8). This request was approved.

On or about July 2, 1987, Virginia Hickman, from Cambridge Personnel, talked with the Grievant and ascertained that she was working full time for another employer. During the course of that conversation, the Grievant claimed that "her doctor will not release her to return to work to the Center." (Emphasis added) (Joint Exhibit 10) Ms. Hickman's IOC said that Ms. Hickman reminded the Grievant that she (the Grievant) was on medical leave from the Center.

The Grievant at the hearing testified that she went to work on June 30, 1987 and that her new employer, the hospital, had contacted her some two or three weeks before because a former employee working at the hospital found out she had no job. She said she had to go to work because her benefits ceased May 19. She said she did not believe she had any way to obtain benefits after May 19, 1987.

On June 30, the Industrial Commission held a hearing on Grievant's claim. On July 8, 1987, Cambridge sent the following letter to the Grievant.

> You are currently on a leave of absence from your position of technical typist at the Cambridge Mental Health Center. The indicated reason for such leave is medically related. It has come to our attention that you have accepted employment at another organization performing similar work. You are, hereby, notified that your leave of absence is cancelled and that you are expected to return to work immediately <u>but no later than Tuesday, July 14, 1987</u>.
>
> Should you determine that you do not wish to continue in employment at this facility, your resignation is indicated. A failure to either return to duty or to resign your position will make it necessary for this Center to seek your removal.

> Please feel free to contact either my office or that of Ms. Virginia Hickman, Employment Manager.

Mr. Hayes testified at the Arbitration Hearing that the July 8, 1987 letter was mandated by the Disability Leave Rules. After May 20, 1987, since Disability Leave was no longer in effect and since the Grievant had not yet appealed that decision but had continued to request leave for a work-related injury, she was still on approved medical leave, albeit without pay. (See PER-27, Leaves of Absence Without Pay, Policy 27, Employers Exhibit 13) According to PER-27, "If it is found that a leave is not actually being used for the purpose for which it was granted, the Superintendent may cancel the leave and direct the employee to report for work." (Employer's Exhibit 13) In addition, Mr. Hayes noted the Disability Leave Benefits Policy (PER-28) had a similar policy. "An employee receiving benefits will be subject to disqualification if the employee: 3. Engages in any occupation for wage or profit." (Joint Exhibit 19)

On July 10, 1987, Cambridge received a letter from Larry Zingarelli, the Grievant's attorney, which said,

> You have sent my client a letter ordering her to return to work from her Leave of Absence. As you know, two (2) doctors have indicated that the Grievant should not return to work under Marsha Keadle. Your letter did not indicate whether the Grievant would be working under Ms. Keadle or not. Would you please advise me on this information.
>
> My client does not resign, she only wishes to be permitted to work in a setting which does not jeopardize her health. We will be waiting to hear from you on the above requested information.

Mr. Hayes testified that he did not reply to this letter because he was ordered not to by the Attorney General. The Attorney General wrote the following letter to Mr. Zingarelli.

> Enclosed is a copy of Motion for Stay which was filed in the Court of Claims in the above-captioned case, on July 23, 1987.
>
> I have just received a copy of your July 10, 1987 letter to my client, addressed to Jack Hayes at the Cambridge Mental Health Center. I immediately contacted my client and learned that a letter was sent by Mr. Hayes directly to the Grievant regarding her leave of absence status.
>
> I have informed my client that no employee of the Center is to communicate with your client or with you directly. Rather I will contact you in the event my client needs to forward information to or requests from your client or from you. In turn, I would appreciate it if you would direct your correspondence and or inquiries concerning this case directly to me as counsel for Cambridge Mental Health Center.
>
> I suggest that you and I discuss this case.

The Hearing at Industrial Commission was held on June 30, 1987. While the decision was not typed until August 17, 1987, nor mailed until August 19, 1987, obviously the employee knew its content because the employee's lawyer had filed a motion to stay the decision in the Court of Claims prior to the July 10, 1987 letter from the Attorney General.

The Industrial Commission disallowed the Grievant's Workers' Compensation claim in these words:

> 1). Claimant has not met the burden of proof with regard to showing an injury in the course of and arising out of employment. At hearing, the claimant requested an allowance of "aggravation of pre-existing hypertension and hypothyroidism." There is insufficient evidence on file demonstrating that the alleged harassment which the claimant received at work

from her supervisor caused or substantially aggravated any hypertensive or hypothyroid condition. In his report dated 2-5-87, Dr. Theile stated that he had treated the claimant for acute anxiety, hypertension, and insomnia "allegedly activated by certain factors regarding her employment..." The doctor also stated that "it has been intimated that these changes have been brought about through harassment and subordination by her supervisor." Dr. Theile's report is not persuasive evidence on the issue of causation since by its own terms it is, at, best indefinite. Nor does the 3-12-87, report of Dr. Koppera constitute persuasive evidence on the issue of causation. While Dr. Koppera states that he believes the claimant's hypertension, anxiety, and symptoms of hypothyroidism would all be worsened by her working conditions, there is no indication of how or to what degree these conditions were worsened. **Thus, the claimant has not demonstrated a causal relationship between the alleged harassment and her physical conditions, either directly or by substantial aggravation.**

2). Even if it is assumed that the claimant has demonstrated the necessary causal relationship between the alleged harassment by her supervisor and her physical conditions, the claim must still be disallowed because the claimant has not met the standard set forth by the Ohio Supreme Court in Ryan v. Connor. The type of stress and tension alleged by the claimant does not rise to the level of the Ryan standard. **While the claimant was arguably subjected to strict supervision, any resulting stress or tension does not seem greater, in terms of Ryan, than that which all workers occasionally experience.** The type of supervision described by the claimant does not appear to be that unusual; nor was she singled out for strict supervision, since the affidavits on files from her co-workers indicate that everyone in the office was subject to the same type of supervision. Therefore, the claimant has not met the Ryan standard, and the claim is disallowed on that basis as well. (Emphasis added)

On December 7, 1987, on behalf of the Cambridge Center and the Department of Mental Health, the Attorney General made the following offer to the Grievant.

> This letter is the Department of Mental Health's formal response to the Grievant's offer to settle the

above referenced case. To reiterate, the Grievant's demand, which you conveyed by phone on December 2, 1987, includes the following; $8,000 cash and reinstatement of her job as a technical typist at the Cambridge Mental Health Center, under a supervisor other than Ms. Marsha Keadle.

I communicated your client's demand to Ms. Kate Haller at the Department of Mental Health. The Department's response to the Grievant's offer is as follows; the Department will not pay any money to the Grievant. However, the Department will permit the Grievant to return to work as a technical typist, no later than December 28, 1987. There is no guarantee that the Grievant will be reassigned to a supervisor other than Ms. Marsha Keadle. However, if the Grievant accepts the Department's offer, she can fill out a request for reassignment, upon her return to work. At that point, the Department will evaluate her case. The Grievant will be afforded every consideration and the circumstances which gave rise to this case will be taken into consideration.

This offer will remain open only until December 22, 1987.

On February 22, 1989, the Court of Claims found against the Grievant. The Court arrived at the following conclusions:

1. However, assuming, arguendo, that such a negligent cause of action in the workplace would be recognized, the court does not find a breach of a duty pertaining to the employment conditions as represented. **The plaintiff has not shown by a preponderance of the evidence that the defendant negligently inflicted distress.** (Joint Exhibit 15 at page 4)

2. Upon review of the record, it is the opinion of the court **that plaintiff has not proven by a preponderance of the evidence that defendant's actions, through Keadle, were extreme and outrageous.** There is no doubt that the working atmosphere in the office was tense and unpleasant for the plaintiff. The court is of the view that the plaintiff subjectively believes that the events occurring at work were terribly stressful, but the court does not find the events described at trial as "extreme and outrageous." The "tense" situations that arose in the office between plaintiff and defendant **were aspects of an employer-employee relationship.** As supervisor, Keadle had the discretion

> to exercise certain decisions or policies within the office--her actions cannot be regarded as atrocious or utterly intolerable. The court surmises that the plaintiff's prior supervisor was not as authoritative or controlling as Keadle and that plaintiff could not adjust to Keadle's personality. **The court refuses to find liability for personality conflicts or unpleasant working conditions,** without a showing of extreme and outrageous conduct. Accordingly, the court does not find that plaintiff has proven her claim of intentional infliction of emotional distress. (Joint Exhibit 15 at pages 7 and 8) (Emphasis added)

The Grievant appealed and on December 6, 1990, the Court of Appeals of Ohio (10th Appellate District) found against the Grievant (Joint Exhibit 16).

The Appellate Court noted that the Court of Claims found that the Grievant "did not show that the furniture was moved an exorbitant number of times" and did find that the furniture movement "was done for valid reasons." After reviewing all the findings of the Court of Claims, the Appellate Court found no error and affirmed the judgment against the Grievant.

On January 9, 1991, the Attorney General notified Cambridge that the Grievant's appeal rights passed on January 3, 1991 and that consequently her personnel file was returned to Cambridge (Joint Exhibit 17).

Shortly thereafter, the Grievant's husband called and arranged a meeting with Dr. Pierson, CEO of Cambridge. On January 14, 1991, the Grievant, her husband, and Chris Murrell of OCSEA met (Joint Exhibit 18).

On February 19, 1991, Dr. Pierson sent the following notice of discipline letter to the Grievant.

> I appreciated the recent opportunity to meet with you and your husband regarding your employment status at this facility. A review of the documentation surrounding your lengthy absence from the hospital, the conditions which you have placed upon any return to service, and the direction which I have received from my administrative superiors and their legal counsel lead to the conclusion that this Hospital should consider the termination of your employment as the only option available.
>
> Notification of a pre-disciplinary conference, wherein you may respond to the allegations of neglect of duty and offer your side of the story, is attached. (Joint Exhibit 2)

On February 19, 1991, the Grievant was notified of a Pre-Disciplinary meeting. As noted, the meeting was held February 25, 1991 (Joint Exhibit 2). On March 15, 1991, the Grievant was dismissed for Job Abandonment/Failure to Follow Order of Return to Work (July 14, 1987) (Joint Exhibit 2). On April 9, 1991, the Grievant grieved her dismissal. On April 29, 1991, at Step III was held, and the dismissal upheld. On May 21, 1991, a request for arbitration was made.

At the Hearing held September 6, 1991, the Grievant testified. She maintained that she was the object of supervisory harassment by Ms. Keadle and that her hypertension was a direct result of that harassment. She maintained she was disabled in the sense that she could not work under Ms. Keadle. She said that the harassment consisted of being "constantly" moved around. She alleged she was targeted for removal because Ms. Keadle had a friend who wanted a job. She said she was able "to hold on" through 1985 and 1986 because "I was the last one to be picked on." She acknowledged that she had not approved of the change in

location of the transcriptionists nor the reinstatement of 5 8-hour days instead of 4 10-hour days. She said she had no prior health problems until 1985. She said she had had in 1973 an EKG for chest pains. She said her current health problems started in 1985. She said she did not appeal the discontinuance of her Disability Leave benefits because she thought she could not get them. She said she was willing to work in summer of 1987 but only if not under Ms. Keadle because she was disabled in that situation.

Under cross-examination, the Grievant was asked if she was still suffering hypertension, she said no. She was then asked if you went back to work under Ms. Keadle, how do you know you'd suffer hypertension again? She said "well, in that sense, I'm still hypertense." Then she was asked if you were put back to work, would you work for Ms. Keadle. The Grievant said "No." The Grievant said that she had not appealed to the Ohio Supreme Court because she lacked the necessary funds. She said she had filed recently at Ohio Civil Rights Commission for Handicap Discrimination. She said her current handicap was "hypertension, anxiety, and insomnia."

Employer's Position

In July, 1987, the Grievant accepted employment at Guernsey Memorial Hospital, performing essentially the same functions she had at CMHC, the transcription of medical records. When CMHC became aware of this, the Grievant was ordered to return to work.

On 7/14/87, the Grievant responded through her attorney that the only condition under which she would return was if she was not required to work under Ms. Keadle. The Grievant thus abandoned her position by placing conditions upon her employment.

The Grievant's workers' compensation claim was disallowed as she could not prove that supervisory harassment had lead to or caused any adverse medical condition to develop. She also filed a lawsuit against CMHC with the Ohio Court of Claims seeking damages for intentional emotional distress allegedly caused by the actions of her supervisor, Ms. Keadle. The court found that the Grievant could not prove her claim of intentional infliction of emotional distress. This decision was appealed to the 10th Appellate District Court. The Appellate Court affirmed the judgment of the Court of Claims on 12/4/90. The Grievant had until 1/3/91 to appeal this decision to the Ohio Supreme Court. No such appeal was filed.

Shortly after this, the Grievant contacted the CEO, Steve Pierson, at CMHC to discuss her status as an employee. A meeting was held between the Grievant and Mr. Pierson. An eventual pre-disciplinary meeting was set up and a decision to remove the Grievant was made. Between 7/14/87, when the Grievant was ordered to return to work and 3/23/91, when she was removed, the Grievant never reported for work.

The delays in removing the Grievant occurred as a result of her own actions. It was the legal opinion of the Department of Mental health's counsel that if she was removed from her position

while she was pursuing administrative and legal proceedings against the Department, this could lead to further charges of harassment. Additionally, if she was removed from her position and the Department was found to be at fault, there could have been substantial back pay liability involved.

During the period, the Grievant was considered to be an employee in a no pay status.

The Union argues that the Grievant was off work due to doctor's orders because of supervisory harassment and that the action was untimely as it took four (4) years to remove her.

Regarding the doctor's excuses, close inspection will reveal that two courses of action were recommended. One that the employee be given disability, which she received until a determination was made that she was not eligible. Or two, that a transfer be given due to her supervisor's actions causing her to have medical problems. For Management to unilaterally agree to transfer an employee because they did not get along with their supervisor would be a breach of our contractual duty to other employees.

The issue of supervisory harassment is not relevant. the Industrial Commission of Ohio, the Ohio Court of Claims and the Tenth Appellate Court have all held that the Grievant's hypertension, anxiety and insomnia cannot be directly attributed to her supervisor's actions. Moreover, the truth of the matter is that the Grievant is not suffering from any work related malady. Rather, it appears that she has availed herself to some

form of hope that she can choose a supervisor of her liking. Testimony and evidence presented establishes that the Grievant and the other employees in the Medical Record Department were unhappy when Ms. Keadle became their supervisor. A number of factors contributed to this dislike but the overriding one was that the Department went from virtually no supervision prior to Ms. Keadle to a more strict, disciplined environment with her as supervisor. The Grievant became very disgruntled with Ms. Keadle. The situation came to a head in January, 1987, over an incident between the two. Shortly thereafter, the Grievant quit coming to work. She never attempted to correct any problems between herself and Ms. Keadle. The Grievant's solution to the problem was to demand that her supervisor be changed before she would return to work. "Change my supervisor, I can't work from Ms. Keadle," is the cry still being heard some 4 years later. Had the Grievant reported back for work when ordered to do so, she would have been afforded a transfer as soon as one came available.

Management has shown that the Grievant was removed for just cause.

Union's Position

Based upon the evidence and testimony presented at the hearing, no just cause existed for the removal of the Grievant.

She did not quit or abandon her job. She was constructively removed by the actions of her supervisor, Marsha Keadle. The

Grievant had continuously expressed her intent to return to state employment. The employer itself has presented testimony that the Grievant was not allowed to return to work in a different position. Reinstatement is the proper remedy under these facts. The Union has also proven that the employer has failed to provide the due process protections negotiated into the 1989 Collective Bargaining Agreement.

Discipline must be progressive and corrective. This Grievant was given no opportunity to correct her behavior. She was removed after her first and only offense. While offenses exist which warrant removal for a first infraction, this is not such an offense. The employer had other options which were ignored.

The evidence shows that the Grievant received notice to return to work in July of 1987. Also shown is that the employer proceeded to do nothing for three and one-half (3-1/2) years after the Grievant did not return to work. The Union has proven that the Grievant did not return to work because of a reasonable belief that returning to her former position under Marsha Keadle would be harmful to her health. The Grievant would once again suffer the same medical problems.

The Grievant also reasonably relied on her employer's actions. The evidence showed that no disciplinary action was taken for over three and one-half (3-1/2) years. This was clearly in violation of section 24.02 which requires the timely imposition of discipline. This led the Grievant to believe that

the employer would not impose discipline for her extended absence.

The last notice issue concerns the employer's transfer policy. The Grievant was prejudiced by the employer's interpretation that no transfers could be given to employees who were in a no-pay status, which was not communicated to the employees. The employer admitted in testimony to this fact. Therefore, the employer failed in its duty to notify the Grievant of its policies and did not impose discipline in a timely manner, all to the detriment of the Grievant.

The Union urges that due to the prejudicial effect of all the employer's procedural errors, the Grievant must be reinstated. The employer's actions, taken altogether, lead to the conclusion that no just cause existed for removal.

Therefore, based on the following procedural errors: 1) Lack of notice; 2) failure to impose discipline in a timely manner; 3) discipline was neither progressive nor corrective pursuant to section 24.02; 4) failure to fully investigate prior to imposing discipline; and 5) failure to consider valid mitigating circumstances, the just cause standard negotiated by the parties was not met prior to the removal of the Grievant. Reinstatement is the proper remedy. Additionally, the Grievant never abandoned her job and has continuously expressed her desire to return to work.

Lastly, the union requests that the Grievant be given a position away from the supervision of Marsha Keadle.

If the above requested remedy is not possible, the Union requests that the Grievant be reinstated to her former position and that the Arbitrator retain jurisdiction and direct the employer not to harass or treat the Grievant with prejudice.

The Union requests that the Grievant be made whole.

Discussion

The Grievant, from February 19, 1987 until September 6, 1991, has consistently maintained that she cannot and will not work under her current supervisor, Ms. Keadle. She has maintained that Ms. Keadle has, as a supervisor, harassed her and thus, caused her (the Grievant's) hypertension. **No entity to date including her Employer has ever challenged the fact that in early 1987 she had hypertension. However, that hypertension has been found by three judicial bodies not to have any causal link to the supervisor's behavior. This Arbitrator also finds that no supervisory harassment occurred** and, consequently, no link can exist between the Grievant's illness and her work. The Grievant dated, in all relevant documents, the onset of her illness as December 16, 1986, apparently the date of the "painting incident"; however, she claims that the harassment of others and herself was continuous from late 1985 (when, according to her arbitration testimony, her "illness" began). Her main complaint, prior to December, 1986, was "constant" moving. The record shows from late 1985 to late 1986, 4 moves occurred, all the moves justified by work related reasons. (The Court of Claims found as

a fact that the moves were "valid".) The Grievant failed to prove more than 4 moves and utterly failed to show those moves were either unnecessary or retaliatory. The painting incident is also invalid as a instance of supervisory harassment. Certainly, the supervisor cannot be blamed for paint smell nor the need to have an office painted. When the Grievant asked to move because the paint smell was overwhelming, she was immediately allowed to move. The next morning she moved herself without proper authorization. She (and others) left phones untended and the supervisor unaware. All she had to do was follow standing procedures and notify her supervisor. She did not. She was reprimanded. Supervisors are clearly within reason to require employees to report their location and changes.

On January 6, 1987, an incident between the supervisor and the Grievant occurred. By her own admission, the Grievant refused to answer three times a legitimate question posed by her supervisor. She then deliberately put her headset on to again avoid an answer. Lastly, she spoke and acted in an abusive way. This last incident was basically confirmed by her co-worker and her witness.

The Arbitrator believes that prior to Ms. Keadle, the Grievant enjoyed a situation away from supervision which allowed certain comforts which then disappeared. The move downstairs, the change of work hours, the change of equipment, the enforcement of lunch and break hours, and phone rules were all

legitimate supervisory actions. However, neither the Grievant nor some of her co-workers liked these changes.

The Grievant need not like rules, but as an employee, she must obey legitimate and reasonable rules. If she does not believe the rules are legitimate or reasonable, she may grieve them but she must obey and then grieve. The Grievant here chose not to grieve but to go on disability leave.

This Arbitrator finds no medical evidence to show that her hypertension was caused by supervisory harassment. First, no supervisory harassment existed. Second, no medical evidence was provided. The Arbitrator cannot rely on statements on doctor's notes obviously derived from self-serving statements made to the doctors by the Grievant. A doctor can legitimately diagnose an illness. However, a statement that an illness is caused by events of which the doctor has no evidence is not credible. A doctor is an expert who is generally deferred to in medical matters. However, a doctor's rehash of a patient's allegations has no standing as medical evidence. Perhaps, evidence adduced from a psychiatrist or a psychologist would be more relevant; however, an internist cannot prescribe legitimately a "transfer" as a medical statement, nor can an internist medically conclude that hypertension is caused by one supervisor. Such a statement is nonsense.

A doctor might be able to conclude that "working" per se was impossible for a person with hypertension. However, the doctors did not so conclude. Moreover, since the Grievant went back to

work at the same exact job in another medical facility, she obviously can work.

To declare one is only disabled under one particular supervisor is to indirectly accomplish what an employee cannot accomplish directly, namely chose one's supervisor.

Since no supervisory harassment occurred and since on July 14, 1987, the Grievant was fully capable of working, the Grievant abandoned her job when she failed to return to work on July 14, 1987.

The Union alleges a number of procedural errors which in the Union's eyes are so egregious as to cumulatively overcome any substantive job abandonment on the part of the Grievant. The first procedural error according to the Union's belief is a lack of notice to the employee that discipline (removal) could result. The Union notes that discipline was held in abeyance for 3-1/2 years. First, the July letter clearly notified the employee that if she failed to return to work, discipline including removal, could occur. Secondly, the employee herself effectively tolled the contract rule of "timeliness." She chose to pursue the claims in court, as was her perfect right. If she had been successful, she would have been found to be disabled by her working conditions and could have collected Workers' Compensation. Secondly, if successful, the court would have found supervisory harassment. If she had been successful, the Employer would have been bound to return her to work under another supervisor. She made the choice to go to court with the

prospect of ultimate success. As part of that strategy, she and her lawyer chose to ignore the July letter. She could have grieved that order to return to work; she did not. In essence, the Union is estopped to argue timeliness due to the Grievant's choice to ignore her contractual remedies until the completion of her court cases. The Employer was, in essence, gagged by its own lawyers. This gag-order was a reasonable and valid position given the Grievant's choice of the court. However, the Attorney General did forward an offer to allow the Grievant to return to work in late 1987. She apparently chose to decline that offer as well. When the Appeals Court decision was final, the Grievant immediately contacted the Employer. That delay in contact whereby the Grievant waited until after the court case, implicitly recognizes that the Grievant herself caused the Employer's delay. Once ungagged by the Attorney General and once the time was not tolled by the Grievant, the Employer acted in a timely manner. The Union argues that the Employee was not given a chance to correct her behavior. The Grievant could have tried again on July 14, 1987, and she could have tried again on December 31, 1987. At the arbitration hearing itself, the Grievant clearly refused to return to work under her supervisor. How the employer is to encourage corrective behavior in this instance escapes this Arbitrator. The Union argues that the discipline was not progressive. When a person absolutely refuses to work in their valid position, what other discipline exists other than removal? The Union argues that during the period when

the Grievant was off work that the Employer had a duty to notify her that the transfer policy was reinstated. Mr. Hayes testified that he did furnish the Attorney General's Office with all relevant materials including the reinstatement policy. However, no evidence was adduced to show that the information reached the Grievant's agent, her lawyer. The Arbitrator cannot clearly find a contractual duty for the Employer to notify an employee on alleged medical leave of a re-instated transfer policy. However, assuming arguendo that such a duty existed and was breached, the employee would have had to return to work under her current supervisor and await a transfer. Transfer was not a matter of right; however, the Employer alleged that had she returned to work, she would have been given a transfer at the first opportunity. This situation is exactly the offer made by the Attorney General to the Grievant in late December, 1987. She ignored that offer and, in essence, refused it. Neither law nor equity demand that anyone do a futile thing. Therefore, the Arbitrator finds no duty on the part of the Employer in this case to do more with regard to transfer rights than it did.

Neither the Employer nor the Union was in control of these events. The Grievant chose a route of behavior that she hoped would vindicate her. She was not vindicated, and she cannot come back and claim that she has been harmed by the passage of time she herself caused. Arbitration has its basis in equity. Her behavior tolled the Employer's duties under the contract, and the doctrine of laches underlies this decision.

Award

Grievance denied.

October 18, 1991
Date

Rhonda R. Rivera
Arbitrator