In the Matter of the
Arbitration Between

State of Ohio, Office of the
Ohio Public Defender

Employer

and

OCSEA, Local 11
AFSCME, AFL-CIO

Union.

Grievance No. 70-00-920128-
0005-01-10
Grievant: Yvonne Jackson
Hearing Date: May 18, 1992
Award Date: June 15, 1992
Arbitrator: Rhonda R. Rivera

#780

For the Employer: Paul Kirschner
Stan Wilder

For the Union: Dane Brady

Present at the Hearing in addition to the Grievant and Advocates were Gregory L. Ayers, Chief Counsel (OOPD) (witness), John D. Alge, Assistant Deputy Director (OOPD) (witness), Jan Love, Personnel Assistant (OOPD) (witness), Adele Shank (OOPD (witness), Eddie Parks, President Chapter of the Union

Preliminary Matters

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

properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Joint Exhibits

1. Discipline Trail - Letter of Removal - Randall Dana to Grievant - January 22, 1992.

2. Grievance Trail:

   A. Grievance
   B. Letter from Eddie Parks to Greg Ayers; request to being grievance procedure at Step 3
   C. Letter from John Alge to Grievant; Agreement to being at Step 3; and notice of hearing
   D. Step 3 response
   E. Request for arbitration by OCSEA

3. September 27, 1991 - letter from Greg Ayers to Grievant.

4. September 27, 1991 - letter from Grievant to Greg Ayers.

5. October 1, 1991 - letter from Greg Ayers to Grievant.

6. October 4, 1991 - letter from Jerome Gotthardt, Ph.D., to Greg Ayers.

7. October 10, 1991 - letter from Greg Ayers to Grievant.

8. October 25, 1991 - letter from Greg Ayers to Grievant.

9. October 25, 1991 - letter from Grievant to Greg Ayers.

10. October 29, 1991 - letter from Ayers to Grievant.

11. October 30, 1991 - memo from Greg Ayers.

12. October 25, 1991 - (received Oct. 31) letter from Jerome Gotthardt, Ph.D., to Greg Ayers.

13. October 31, 1991 - letter to Grievant from Greg Ayers.

14. November 4, 1991 -

    a) Request for Sick Leave from Grievant for September 1 through October 29.

b) Request for Sick Leave from Grievant for October 30 through November 29.

15. November 5, 1991 - Notice of pre-disciplinary meeting to Grievant from Richard Vickers.

16. November 22, 1991 - letter from Randall Dana to Grievant.

17. November 29, 1991 - letter to Greg Ayers from Grievant.

18. December 2, 1991 - letter from Jan Love to Grievant.

19. November 27, 1991 - (received on December 5, 1991) - letter from Jerome Gotthardt, Ph.D., to Greg Ayers.

20. November 25, 1991 - letter from Nan Phillips Neff to Grievant.

21. December 5, 1991 - (received on December 9, 1991) - letter from Jerome Altman, M.D., to Jan Love.

22. December 12, 1991 - letter to Greg Ayers from Jerome Gotthardt, Ph.D.

23. December 20, 1991 - letter from Grievant to Jan Love.

24. December 20, 1991 - letter to Jan Love from Jerome Gotthardt, Ph.D.

25. December 24, 1991 - letter from Greg Ayers to Grievant.

26. January 15, 1992 - letter from Nan Phillips Neff to Grievant.

27. January 21, 1992 - findings and recommendations of Dale A. Baich, hearing officer.

28. January 7, 1992 - pre-disciplinary notice.

29. Performance evaluations.

30. Pre-disciplinary hearing report by Richard Vickers.

Stipulated Issues

Was the removal of Grievant from her position for just cause? If not, what shall the remedy be?

Stipulated Facts

1. Grievant was hired as a Secretary, by the Office of the Ohio Public Defender (OOPD) on February 8, 1988.

2. Her position was changed to Administrative Assistant 1 as a result of the classification modernization program on June 30, 1990.

3. Grievant was removed from her position on January 22, 1992.

4. She was denied disability leave and pay by the Ohio Department of Administrative Services.

5. She has been in therapy since on or about September 19, 1991.

6. The Department requested a second opinion concerning her alleged illness, and it was given by Dr. Jerome Altman, a psychiatrist appointed by the State of Ohio, on December 5, 1991.

Relevant Contract Sections

ARTICLE 3 - UNION RIGHTS
Section 3.02 - Stewards

The Employer agrees to recognize a reasonable number of local stewards as designated by the Union. Stewards and chapter officers as defined above shall be allowed a reasonable amount of time away from their regular duties to administer the Agreement at the facility where they work only within their own Agency unless the Agencies involved agree to representation across agency lines. In situations where there are only a few employees of one Agency working at the facility of another Agency, agreement to such representation shall not be unreasonably withheld. In situations where there are only a few employees of one Agency in a county, the Employer agrees that the right of stewards from one Agency to represent bargaining unit employees from other Agencies shall not be unreasonably denied. The Employer recognizes that to ensure adequate union representation, in

occasional or unusual circumstances limited travel time for stewards may be necessary. The Union will notify the Agency of the stewards designated prior to the steward assuming any duties.

A chapter president shall be allowed to cross Agency lines to represent employees covered by this Agreement in other Agencies when those Agencies' stewards are not available. The Agencies must be housed in the same building or facility ("facility" as used in this Article is defined to mean a complex of buildings in close physical proximity to one another). Agreement to such representation shall not be unreasonably denied.

ARTICLE 24 - DISCIPLINE
Section 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.

Section 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.

Section 24.08 - Employee Assistance Program

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program, the Employer will meet and give serious consideration to modifying the contemplated disciplinary action.

ARTICLE 31 - LEAVES OF ABSENCE
Section 31.01 - Unpaid Leaves

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

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.

Section 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.

Section 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.

Section 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.

ARTICLE 35 - BENEFITS
Section 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.

Facts

The situs of this grievance is the Office of the Ohio Public Defender (OOPD). The Grievant was hired as a Secretary in that office on February 8, 1988. Grievant was one of four or five secretaries, each of whom had 4 or 5 lawyers for whom they worked on a regular basis. The Grievant was evaluated on a regular basis in that position. In April of 1988, the Grievant received her probationary evaluation, signed by Mr. Ayers, which was above average. The only negative comment was that the Grievant had some attendance problems; however, Mr. Ayers noted that those problems were beyond the control of the Grievant. (See Joint Exhibit 29-A) The Grievant received her final probationary evaluation in June of 1988. Again, the evaluation was quite positive. Mr. Ayers noted that the Grievant "is progressing in performing her secretarial responsibilities. Her attorneys are pleased overall with her work. She has also exhibited a professional attitude in trying to work out any problems that have arisen vis a vis her work or attorneys." (See Joint Exhibit 29-B) In February, 1989, the Grievant received her annual evaluation. She was again rated well above average. Her attendance problems were noted but were labeled by both Deborah Clark and Mr. Ayers as beyond the Grievant's control. Mr. Ayers noted that the Grievant "has a strong interest in her work. The quality of her work is very good and she is a teamplayer..." (See Joint Exhibit 29-C). This evaluation, while dated February

1989, was signed off by Mr. Ayers on May 15, 1989. The Grievant received her next evaluation in March of 1990. She was rated by Deborah Clark, and Mr. Ayers signed off on the evaluation on March 16, 1990. The Grievant was rated Above Average in Quantity and Quality of Work, Above Average in Team Effort, Information Processing, And Using Office Equipment. She Met Expectations in Timeliness and Dealing with the public. Again, some problems appeared with absences. The Grievant noted in her comments that "I will continue to strive to improve my attendance, however with court ordered appearance, the situation is out of my control in most instances." (See Joint Exhibit 29-D) [The Grievant testified at the Arbitration hearing that the absences were caused by a custody battle which was litigated in Cleveland but that the matter now appeared finally settled, and no absences for that reason were now contemplated.]

In March 1990, the Grievant was moved from her position as a Secretary to be an Administrative Assistant to Ms. Anita Lunn, the legal librarian. The Grievant testified that she was first approached by Mr. Ayers' secretary, Deborah Clark and asked if she would consider taking the job. According to the Grievant, Ms. Clark told her that Marsha, Ms. Lunn's current assistant, had trouble working with Ms. Lunn. The Grievant said that Ms. Clark hoped that the Grievant's computer skills would work out in the situation with Ms. Lunn. Ms. Clark, according to the Grievant, told the Grievant that "if it didn't work out, she [the Grievant] could move back to one of the secretarial positions. [Ms. Clark

did not testify.] The Grievant agreed to the change with the understanding that "if it didn't work out, she could go back to being a secretary." According to the Grievant, "Mr. Ayers himself told me that if it didn't work out I could go back. The Grievant's description of the conditional nature of the situation does not differ greatly from Mr. Ayers' description. He testified that Deborah Clark proposed to replace Marsha as Ms. Lunn's assistant with the Grievant. He admitted that he told the Grievant that "if it didn't work out she could go back to her position as a secretary." The significant difference is that he concluded that the time period during which the Grievant could go back was "a short time" so that when problems did develop, he concluded that "the time had passed;" from his testimony, he concluded that the "time" in question was equivalent to a normal probationary period. Mr. Ayers testified that in a period of four years, three different secretaries had worked for Ms. Lunn. He noted, however, that all these women had only worked part-time for Ms. Lunn. He said he assigned the Grievant to Ms. Lunn full-time and gave the other secretaries more attorneys per secretary. Mr. Ayers was asked on cross examination whether he knew Ms. Lunn to be a "difficult" person to work for? His reply was, at best, ambiguous, at worst, evasive; however, the question was not repeated.

Ms. Lunn testified. She said that the Grievant "at first was a superb worker" "extremely" capable! However, Ms. Lunn said that after three or four months the Grievant's attendance fell;

she became tardy and did not seem happy. [The Grievant subsequently testified that she had no unapproved leave during her work with Ms. Lunn, nor was she disciplined for any absences or tardiness] Simultaneously, according to Ms. Lunn, the Grievant's work product became "unacceptable." Ms.Lunn said that the Grievant spent "too much time" on Union affairs (Grievant was a Union Steward) and that in reality, the Grievant only did her assigned work "1-1/2 hours a day." Ms. Lunn claimed that the same woman came every morning and spent several hours with the Grievant. Ms. Lunn said that no Chapter business was being conducted but that the Grievant and this lady appeared to be "gossiping." Ms. Lunn said that she wanted to discipline the Grievant but that "they wouldn't allow me to." On cross examination, Ms. Lunn was asked "Is this relationship reconcilable?" Ms.Lunn shook her head negatively and answered "if she [the Grievant] wanted it." Ms. Lunn was asked by the Union advocate ... "The Grievant seems to have made an 180 degree turn in her work performance, did you play any part in that change?" Ms. Lunn answered that she had "no choice but to make the Grievant perform." Ms. Lunn stated that her own supervisory skills were "excellent," but she had not been allowed to exercise them over the Grievant.

The Grievant's view [not surprisingly] was considerably different than Ms. Lunn's. The Grievant was asked by the employer's Advocate, "you knew Ms. Lunn was a difficult person, so why did you take the job?" The Grievant replied: "She had

never been unpleasant with me personally: I only heard from Marsha how difficult she was." The advocate then asked "didn't these rumors give you pause?" The Grievant replied "yes, but I like to judge people personally, and I knew that if it didn't work out, I could go back to my old job." The Grievant testified that from the very first working with Ms. Lunn was "a learning experience." The Grievant said the first problem was that Ms. Lunn wanted her [the Grievant] to teach her [Ms. Lunn] the computer, before she [the Grievant] was taught how to do law library work. The Grievant stated that she had been given no training prior to taking the new position. The Grievant said that Ms. Lunn began then to criticize her: first, for spending time on Union business and then on her computer work. At some point in this time period, the Grievant went to talk to Adele Shank, General Counsel, for OOPD who was the designated EAP officer. Ms. Shank testified [the Grievant waived her privilege of confidentiality] and indicated that the Grievant had come to see her "because she was feeling very upset over her work relationship; she felt that her new supervisor was constantly watching over her shoulder, watching for any mistake." Ms. Shank said she formulated a plan to help resolve the situation. First, she spoke with Ms. Lunn and then Mr. Ayers and then held a meeting with all four persons. Ms. Shank felt that the four person meeting did not help resolve the problem. One issue was filing in various Code services. Ms. Lunn thought the Grievant made too many mistakes and was too slow. Ms. Shank recommended

additional training in this new skill for the Grievant. Ms. Shank said she could not remember exactly but that she probably recommended managerial-supervisory training for Ms. Lunn as well. She told the Grievant that counseling was available through EAP or through a private counselor.

Mr. Ayers indicated in his testimony that he became aware that trouble existed around November of 1990. He said although he remembered talking with Ms. Shank, he had no memory of any recommendations that she might have made. He said that he knew problems were continuing into 1991. He said that Ms. Lunn thought Ms. Clark was inappropriate to work out the problems, so, in July of 1991, Mr. Ayers delegated to Mr. Bay the task of mediating the problem. Mr. Bay is an attorney and an Assistant State Public Defender. Mr. Bay testified that both parties seemed to be more interested, at that time, in proving the other at fault than in resolving the differences. He said that in attempting to resolve the problems he never talked to either protagonist alone nor did he consult with either Deborah Clark or Adele Shank. He met with the parties and attempted to set up mutually satisfactory work using logs and daily meetings. On December 23, 1991, he sent a written report to Mr. Ayers about his efforts. By the time of this report, the Grievant was no longer at work and, in fact, the written report coincided with the decision to discipline the Grievant which resulted in the Grievance now at hand. His conclusion, rendered in that December 23, 1991 memo, was that Ms. Lunn's expectations of the Grievant

were reasonable and that Ms. Lunn's "full supervisory powers" should be restored. (See Employer's Exhibit 1) On cross examination, Mr. Bay said that he had no expertise in such interpersonal problem solving, but he believed that Mr. Ayers had chosen him because of his length of service and his proven ability as a neutral detached administrator.

The above description is a backdrop to the gist of the grievance at issue. September 17, 1991 was the last full day of work which the Grievant rendered at the OOPD. On September 19, 1991, the Grievant called in and requested leave for an illness related to on-the-job stress. On September 25th and 26th, Mr. Ayers apparently called the Grievant. In his testimony he said that "it appeared to him after the call of the 19th, that she (the Grievant) was not coming back." After the conversations of the 25th and 26th, both Mr. Ayers and the Grievant wrote letters on September 27th to each other confirming their understanding of the two conversations. (See Joint Exhibits 3 & 4) In his letter, Mr. Ayers demanded that pursuant to Section 31.01(C) of the Contract, that the Grievant furnish a letter indicating the nature of Grievant's illness and the estimated time of the leave. He demanded an answer by 5 p.m. October 2, 1991. In her letter, the Grievant requested leave without pay after she had exhausted all other forms of leave. Moreover, she inquired as to another position. On October 1, 1991, Mr. Ayers again wrote to the Grievant extending his deadline to Friday, October 4 at 5 p.m. because he had learned that the Grievant had not received his

previous letter. (See Joint Exhibit 5) On October 4, 1991, Dr. Jerome Gotthardt, a licensed psychologist wrote to Mr. Ayers and indicated a leave of 6 weeks and a diagnosis of 309.28 (from DSM-IIIR) Adjustment Disorder with Mixed Emotional Features. (See Joint Exhibit 6). On October 10th by certified mail, Mr. Ayers wrote the Grievant and told her that the Agency was exercising its right to a second opinion [pursuant to Section 123:1-33-04 and Section 31.01 of the Contract]. The letter set an appointment for October 22, 1991 at 12 noon with a Dr. Resor. The letter ended with these words: "If this appointment must be rescheduled, please call Dr. Resor to make the proper arrangements and notify this office of same." (See Joint Exhibit 7) On October 25, 1991, a letter from Mr. Ayers was hand delivered to the Grievant. This letter said that Mr. Ayers could not approve any leave beyond October 29th until the Grievant complied with the order of October 10th with regard to a second medical opinion. The letter stated that the Grievant had failed to keep the appointment set up with Dr. Resor.

That same day, the Grievant wrote to Mr. Ayers indicating that she had not received the October 10th letter. She indicated that upon learning of the request for a second opinion she had called Dr. Resor's office and received the first available appointment, i.e. December 5, 1991. She requested that in the future, letters be either hand delivered or sent by first class mail as she had trouble on her postal route receiving certified mail. (See Joint Exhibit 9) On October 25, 1991, Dr. Gotthardt

wrote Mr. Ayers that the Grievant's disability extended to December 2, 1991, and he gave the same diagnosis. (See Joint Exhibit 12: This exhibit is marked in handwriting: rec'd 10.31 with no signature) On October 29th, Mr. Ayers wrote to the Grievant, and the letter was hand delivered. In this letter, Mr. Ayers said that his letter was in response to the Grievant's letters of the 23rd and the 25th which Mr. Ayers stated were both received on the 28th. [Grievant's letter of the 23rd was not placed into evidence.] Mr. Ayers stated that the Grievant must return to work by the 30th of October and that she must return to the position of library assistant. He said "if you request further leave for your claimed illness, the office will schedule the appointment with the doctor as we must pay for it. Thus, I suggest you cancel your December 5 appointment with Dr. Resor as we will not pay for it." (See Joint Exhibit 10). Mr. Ayers indicated that the Grievant had called him on October 30, 1991 and advised him that she would not be into work; she asked if the Agency had received a letter from her doctor, and he said it had not. Mr. Ayers told the Grievant that she was AWOL. (See Joint Exhibit 11)

On October 31, 1991, Mr. Ayers wrote Grievant that he had that day received her Doctor's letter but that no further leave would be granted until the Agency could obtain a second medical opinion and that the Grievant would have to return to work BEFORE the opinion was obtained. [Emphasis added] Moreover, the letter said that the Grievant was AWOL for two days as of the 31st.

(See Joint Exhibit 13) Joint Exhibit 14A is a Request for Leave Form from the Grievant for the period September 17, 1991 to October 29, 1991 which was approved by Mr. Ayers with the comment "Leave recommended only because office could not obtain a second opinion." Joint Exhibit 14B is also a Request for Leave Form from the Grievant for Period October 30, 1991 to November 29, 1991 which was disapproved by Mr. Ayers for "reasons stated in October 31 letter to Grievant."

On November 5, 1991, the Grievant was notified of pre-disciplinary conference for the offense of three days AWOL. That Conference was held on November 13th, and a recommendation made on November 20th. The Pre-disciplinary hearing officer recommended that no discipline was warranted. Furthermore, he recommended that the Grievant's leave without pay be extended until a second opinion was obtained and that after the opinion was rendered the agency could decide whether further leave without pay was warranted. (See Joint Exhibit 30)

On November 22, 1991, Randall Dana, State Public Defender wrote to the Grievant and extended her leave until December 2, 1991. The letter asked the Grievant to notify Mr. Ayers if she did not intend to return to work on the 2nd. If she notified Mr. Ayers that she did not intend to return to work on the 2nd, that notice must be accompanied by a doctor's statement. If the Grievant were to make a request for further leave, the letter indicated that the Agency would schedule a second opinion. (See Joint Exhibit 16) On November 29, 1991, the Grievant notified

the Agency that she would not be returning to work on Dec. 2nd. (See Joint Exhibit 17) On November 27, Dr. Gotthardt wrote to Mr. Ayers extending the Grievant's disability until March 3, 1991. (See Joint Exhibit 19; this exhibit is marked rec'd 12-5-91, but no signature accompanies the mark)

On December 2, 1991, Jan Love of OOPD Personnel wrote the Grievant that the appointment for a second opinion was scheduled for December 4th with Dr. Altman. (See Joint Exhibit 18) On December 5, 1991, Dr. Altman rendered his opinion to Ms. Love. Dr. Altman first reviewed the documents he had received.

> REVIEW OF RECORDS:
>
> The request for examination is for an impartial second opinion regarding Grievant's ability to return to employment.
>
> Grievant works as an assistant librarian and has been in this job for approximately one year. Records indicate that the work is not considered stressful and involved few deadlines.
>
> October 25, 1991: This apparently is a rebuttal to a physician review written by Gregory Ayers. The report notes that the agency does not believe the employee's claimed illness is a valid work related illness. The report further states that the claimant was overheard remarking to an administrative assistant that if she could not find another position she was going to collect disability benefits for as long as she could and then resign. Also she had been working in a bar on the weekends.
>
> Medical records: Diagnosis of migraine headaches and depression.
>
> October 25, 1991; Jerome Gotthardt, Ph.D.: This is a one paragraph report noting that it is his opinion that the claimant needs at least six weeks off work. He makes a diagnosis of adjustment disorder with mixed emotional features. This may seem accurate however, there is no

description given.

November 25, 1991; Letter to Grievant from Nan Phillips Neff, Disability Insurance Administrator: This is a letter that describes the claim has been disallowed.

Dr. Altman concluded his four page report by stating that he agreed with the diagnosis of adjustment disorder, and he further stated that the Grievant's sick leave "is valid on a psychiatric basis." However, in an addendum below his signature he added: "In accordance with the union contract and your request to determine claimant's physical disability to return to work: I detect no physical disability. Claimant does not have a physical impairment that would prevent any type of employment."

On December 12, 1991, Dr. Gotthardt wrote Mr. Ayers and extended the Grievant's disability leave until February 3, 1992. (See Joint Exhibit 22) On December 20, 1992, the Grievant released the record of her examination to the agency. (See Joint Exhibit 23) On December 20, 1991, Dr. Gotthardt wrote a letter to Mr. Ayers with a full diagnosis and commentary on the Grievant. (See Joint Exhibit 24) On December 24, 1991, Mr. Ayers wrote to the Grievant. The letter stated

> This is to advise you that the office has received Dr. Altman's report on your medical condition. A copy of his report is enclosed as you have authorized us to release it to you.
>
> Because Dr. Altman determined that you are physically capable of returning to work, I am hereby ordering you to return to work on Monday, December 30, 1991, pursuant to Section 31.01 C. of the OCSEA contract.
>
> Dr. Altman's opinion that your sick leave is

valid is based upon his acceptance of your statements regarding your relationship with Anita Lunn. Since his opinion is not medically-based, I have determined that the factual basis underlying it is inaccurate. I reached this conclusion based upon my knowledge of the situation and consultation with others, particularly attorney/administrator John Bay who monitored/mediated your relationship with Anita prior to your leaving. Thus, there is not a valid factual or medical basis for your current request for sick leave.

When you return to work, I will meet with you, Anita Lunn and John Bay to discuss your working relationship with Anita, including your responsibilities. In addition, any union representative you wish to attend the meeting will be welcome.

Upon your return, John Bay will continue to monitor/mediate your relationship with Anita, as he did prior to your leaving. I will instruct him to report to me within a few weeks of your return regarding his conclusions and recommendations.

If you do not return to work on December 30, 1991, I will institute disciplinary action for your being AWOL (absent without leave) consistent with the disciplinary guidelines in the Employee Handbook. (Joint Exhibit 25

On January 7, 1992, the Grievant was notified of a pre-disciplinary meeting to be held on January 15, 1992. (See Joint Exhibit 28) This notice alleged that the Grievant had been AWOL for more than three (3) days since December 27, 1991. Mr. Ayers testified that he recommended discipline based on his reading of the Report of Dr. Altman. Mr. Ayers testified that "as I read the report, no medical basis existed for the Grievant's leave." He said this reading of the report coupled with Mr. Bay's report formed the basis for his decision to recommend discipline.

The pre-disciplinary meeting was held on January 15, 1992.

On January 21, 1991, Hearing Officer Dale A. Baich made his report. Mr. Baich noted that on December 24, 1991, the Agency concluded that the Grievant was physically capable of returning to work, and she was ordered to report to the Agency on Monday, December 30, 1991. Mr. Baich assessed the problem as follows:

> It is apparent that Grievant, who was seeking an unpaid leave of absence, complied with the requirements of notification to the agency of her illness and verification by a medical doctor. Under section 31.01, the agency requested a second opinion as to Grievant's ability to return to work.
>
> I accept the conclusions of Dr. Altman and Dr. Gotthardt that Grievant has an adjustment disorder with mixed emotional features. However, both Dr. Altman and Dr. Gotthardt conclude that the problem which exists, whether real or perceived, must be resolved internally by the agency.
>
> The agency has made a good faith effort to resolve the apparent conflict. While Grievant was working, Mr. Ayers and Mr. Bay were actually involved in trying to resolve the dispute. When Grievant was ordered back to work on December 24, 1991, the agency again stated that Mr. Bay would continue to monitor and mediate the relationship between Grievant and Ms. Lunn. It appears that Grievant is not willing to assume her duties but will only return to work if she is offered a position in which she will not be supervised by Ms. Lunn.
>
> I have no doubt that Grievant is suffering from the adjustment disorder as described by the doctors. The solution, according to both doctors, is for the dispute to be resolved between the agency and Grievant. Dr. Altman specifically stated that "therapy" is not going to resolve any conflicts. Dr. Gotthardt also concluded that Grievant's condition would gradually improve as she resolved her conflicts at work.
>
> Given the diagnosis of both Doctor Altman and Doctor Gotthardt, Grievant is not suffering from the type of illness for which extended illness

> leave should be granted. (emphasis added) The findings by DAS also weigh heavily against granting Grievant extended leave. DAS twice reviewed Grievant's claim for disability benefits. A consulting physician found that the evidence submitted by Grievant was insufficient to support a disability. The condition from which Grievant claimed she was suffering was not of such severity as to render her incapable of performing her duties as an Administrative Assistant.
>
> The prognosis for recovery is based upon the parties resolving the conflict between themselves. The agency has offered to monitor and mediate the employment relationship. Based on the past efforts of the agency and particularly the efforts of Mr. Bay, it would appear that the agency is sincere in its offer to continue to mediate and monitor the relationship once Grievant reports back to work. If those efforts would fail, Grievant would have available to her the Grievance Procedures as outlines under Article 25 of the OCSEA Contract to resolve any disputes between herself and Ms. Lunn. (See Joint Exhibit 27).

On January 22, 1992, the Grievant was notified of her removal for being AWOL for three (3) days beginning December 30, 1991 after properly being ordered to return to work. (See Joint Exhibit 1). On January 28, 1992, the Grievant filed a grievance with regard to her dismissal. She alleged that her removal was unfair (which the Arbitrator interprets as "lacking just cause") and that the discipline was neither commensurate nor progressive. The Grievance also alleged violation of Articles 2 and 30. (See Joint Exhibit 2A) The Union requested that the Grievance begin at Step III. (See Joint Exhibit 2B) The Agency agreed. (See Joint Exhibit 2 C) On March 10, 1992, Randall Dana denied the Grievance at Step III (See Joint Exhibit 2D) and the Union requested arbitration on March 31, 1992. (See Joint Exhibit 2E)

The Arbitration hearing was held on May 18, 1992.

Employer's Position

The Employer's positio is well stated by Mr. Baich. (See pp. 22-23)

Union's Position:

The Grievant's request for leave falls into one of the categories listed in section 31.01 of the governing collective bargaining agreement between the State of Ohio and OCSEA. This provision mandates the Employer to grant unpaid leaves of absence to employees upon request for the following reasons: "(C) for an extended illness up to 1 year if employee should exhaust all other paid leaves." This provision is not discretionary. It is mandatory. Grievant's initial request for an unpaid leave of absence due to work related stress was made orally on September 19, 1991. Grievant received phone calls starting on September 25 and again on September 26 from her intermediate supervisor threatening charges of absent-without-leave and disciplinary action.

Randy Dana, the agency director - via letter dated November 21, 1991 - advised the Grievant no disciplinary action would be taken and that her leave was granted to December 2, 1991 based upon her doctor's recommendation and the recommendation of hearing officer Dick Vickers. She was directed to submit additional medical documentation if she would not be returning on

December 2, 1991. In compliance with this directive, the Grievant's doctor, via letter dated November 27, 1991, recommended an extension of medical leave to March 3, 1992.

The impartial physician's decision was originally submitted to the agency on December 5, 1991. The decision of Dr. Altman was as follows: 1) he agreed with the diagnosis of adjustment disorder which is due to the situational reaction between supervisor and employee, and 2) he stated the sick leave is valid on a psychiatric basis and that she could not return to work under the supervision of Ms. Lunn. No place in the body of this decision is the employee determined to be physically capable to return to work. The addendum is ambiguous, and management's interpretation of this cannot be clearly extrapolated.

On December 24, 1991, Greg Ayers wrote a letter discounting the doctors' medical decision and substituted his own medical expertise ordering the Grievant to return to work on December 30, 1991 and informing her that she would return to work under Anita Lunn, despite the recommendations otherwise of two medical doctors. Section 31.01 gives the Employer the discretion to require a decision from an impartial medical doctor if the Employer questions the employee's ability to perform his or her regularly assigned duties. The impartial medical doctor clearly concurred with the Grievant's private doctor that the Grievant could not perform her regularly assigned duties under the supervision and stress of her immediate supervisor. At this juncture, the Employer had no choice but to grant the employee's

request pursuant to 31.01(C).

The Union further asserts management's definition of absent without leave to be lacking. Absent without leave is defined in the administrative code section 123:1-31-03 and states in pertinent part: "any employee in the classified service who absents himself from duty for 3 or more successive duty days, without leave and without notice to his superior officer may be subject to removal . . ." Comparing the instant set of facts to this test: (1) the employee/Grievant is in a classified service; (2) the Grievant was absent from duty 3 or more successive duty days; (3) the Grievant was without (paid) leave; (4) the Grievant's superior had notice of the reasons for such absence. As such, no violation of the absent without leave provision could exist. Management failed to acknowledge the absent without leave test as having four-parts. It is a pre-requisite to meet each of the four prongs.

The Grievant had been employed by the Ohio Public Defender Commission for four years. Her performance evaluations are above average, and she has no prior discipline. The Union respectfully requests that the Grievant be re-instated, granting the medical unpaid leave of absence pursuant to 31.01(C) until March 2, 1992 as requested by the Grievant's doctor and be given full back pay commencing March 2, 1992 and for benefits to continue as though tenure had never been interrupted.

Discussion

The gist of Grievant's requests for leave fell under Section 31.01, and this factor was well recognized by the Agency. The Grievant was not requesting Disability Leave from the Agency under Section 35.03. Apparently, the Grievant did at some point request Disability Leave from DAS. However, that proceeding is essentially irrelevant to this Grievance because what the Grievant was requesting from OOPD was unpaid leave under 31.01. (Moreover, at least facially, given the Grievant's claim of work-induced stress, the proper forum ultimately probably should have been under Worker's Compensation; however, that factor is also irrelevant to the determination of this Grievance.) Article 31, Section 31.01(C) mandates that the employer "shall grant unpaid leave to employees upon request for ... an extended illness up to one (1) year, if an employee has exhausted all paid leave. (C) requires that the employee shall provide periodic, written verification by a medical doctor showing the diagnosis, prognosis, and expected duration of the illness. Throughout her leave, the Grievant has provided periodic, written verification of her illness, and these verifications have provided a diagnosis, prognosis, and expected duration. However, none of the Grievant's statements came from a medical doctor; they came from a licensed psychologist. However, the Agency never raised this issue with the Grievant, and the Arbitrator considers that the Agency has waived its right to insist retroactively on a medical doctor. However, if verification should be required in

the future, the Agency can insist that any diagnosis of mental illness by verified by a Psychiatrist (MD) because the contract calls expressly for a "medical doctor." The Grievant did comply with the reporting criteria of 31.01(C). However, more than reporting is clearly contemplated by the section. The section does not expressly say that leave can be denied if the reason for the leave is found to be not founded in fact, fraudulent, or based in deceit; however, that unpaid leave for an illness can be denied if no illness exists or if the employee is lying is clearly the case. The Agency retains the right to a second opinion. That right implies that if a medical doctor would find that no illness existed then leave can be denied.

In this case, Dr. Altman rendered the second opinion for the agency. Having selected Dr. Altman, the Agency must abide by (is estopped to deny) his opinion. Dr. Altman agreed with both the diagnosis and prognosis of the Grievant's licensed psychologist. Hence, Dr. Altman found that the Grievant was suffering from a form of mental illness.

However, contract section 31.01(C) also requires that 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." In a footnote to his lengthy report, Dr. Altman says that although he agrees with the psychologist's diagnosis, the Grievant is physically capable to return to work. To say the least, these two opinions in the letter, seemingly inconsistent, render Dr. Altman's letter ambiguous at the minimum. What are we

to make of the phrase "physically capable"? Webster's Dictionary defines physically as the adverb of the word "physical." The same reference defines "physical" as "of or relating to the body." Taken literally, a person is physically capable of returning to work if the employee can bring his/her "body" to work. Certainly, in that sense, the Grievant was capable of returning to work. However, the Arbitrator refuses to adopt such a literal and narrow definition of "physically capable"; such a reading would be nonsensical. For example, an employee could have a migraine headache; he or she could come to work "physically" but be incapable of working. A person suffering severe depression could show up at work but be incapable of rendering meaningful service. If read literally, the phrase "physically capable" would require that all illnesses of the mind be ignored for the purpose of defining "illness" under 31.01(C). This Arbitrator defines "physically capable" to mean "able in mind and body to work."

The next question, of course, is whether the Grievant was able "in mind and body" to work. This Arbitrator is unable to reach a conclusion based on Dr. Altman's letter. The decision under 31.01(C) is a decision that the contract has given to a medical doctor. When Mr. Ayers concluded in his letter that Dr. Altman's decision "is not medically based," he violated the contract by substituting his judgment for that of a medical doctor; moreover, Mr. Ayers as a representative of the Agency was bound to follow the decision of the medical doctor that the

Agency selected. In retrospect, a better course would have been to jointly (with the Grievant's representative) to have asked for clarification.

A second problem arises with Mr. Ayers' conclusion that Dr. Altman's decision was based on erroneous facts. The Agency provided the facts to the doctor. The doctor reviews at the outset of his opinion the various documents furnished by the agency: two items clearly missing were a position description and the Grievant's prior evaluations. The Agency that had total control over the provision of the facts to the doctor cannot be heard to complain that the Agency did not agree with his conclusions.

The Arbitrator could conclude at this point by re-instating the Grievant to the unpaid leave status she requested and then require the Agency to provide Dr. Altman with more facts and the Arbitrator's definition of "physically capable" and ask him to clarify his opinion. Unfortunately, this Grievance is too complex for such an easy out. Other issues remain to be addressed:

The Arbitrator believes that the Agency in the persons of Ms. Clark and Mr. Ayers did promise the Grievant that if working with the law librarian did not work out, she could return to her former position. Moreover, the evidence does tend to show that the law librarian is a "difficult person to work for." Ms. Lunn is a lawyer, a fellow colleague, and the Arbitrator suspects that none of her colleagues wanted to go on the record that despite

the fact that she is an excellent law librarian, they probably would not like to work FOR her. The interpersonal work problem raised by the Grievant's reaction to Ms. Lunn and Ms. Lunn's style of management probably seemed insignificant compared to the important and necessary legal work done by the Office of the Ohio Public Defender, and in one sense, the problem was comparatively unimportant. However, such interpersonal problems contaminate the mission of all organizations and if not dealt with effectively, impede the mission. This Arbitrator has the highest regard for the work done by the Ohio Public Defender Office. In their well-understood zeal to accomplish their mission, this Arbitrator believes that the Agency chose to sacrifice a "good secretary" rather than a "good law librarian." This decision, while perhaps expedient, was not contractually sound under section 31.01(C). Moreover, the decision was neither humane nor fair (to either party). Early on in the situation, General Counsel Shank, who was also the EAP contact, suggested training for both parties; that suggestion was ignored. A well-versed legal secretary no matter how skilled with computers does not intuitively understand various legal book services and their filing intricacies. The Arbitrator will take arbitral notice that the finest trained lawyers and law librarians are not trained in interpersonal office skills (some would argue that law school robs all law students of whatever interpersonal skills they once possessed).

The Arbitrator is left with three conclusions. First, that

unpaid leave was improperly denied the Grievant. The second medical opinion received by the Agency was ambiguous and not the proper basis for a decision that the Grievant was physically capable in mind and body to return to work. Second, the Grievant was promised that if the job did not work out, she would be returned to her job as a legal secretary. No time limit was set of this offer and while Mr. Ayers' internally constructed time limit was not unreasonable per se, the time limit on the offer was not communicated to the Grievant when she began work with Ms. Lunn. Third, the interpersonal problems were not of the Grievant's sole making. One cannot ignore four years of excellent reviews prior to working with Ms. Lunn and conclude that the Grievant went from Jekyll to Hyde in a matter of months. The Arbitrator found that the testimony of Ms. Lunn supported the conclusion that she was in some measure the source of the interpersonal conflict. Her charges that the Grievant only worked on Agency work for 1-1/2 hours a day, that she gossiped daily with some unnamed woman, and that she was tardy and absent is totally unsupported in the record.

Award

These conclusions were not easily arrived at nor is the award easily formulated. The request of the Grievant for Unpaid Leave under 31.01(C) shall be granted from December 2, 1992 to July 1, 1992. On July 1, 1992, the Agency shall offer the Grievant a position as Secretary (i.e. to return her to the job

she had before becoming the assistant to the librarian). The Grievant at that point can chose to request leave without pay for an illness (which she must support with a verification of a medical doctor) or to return to work. [This award does not rule out a purely voluntary choice by the Grievant to return to the librarian assistant position. The Arbitrator imposes on that third option that the Grievant receive training in the filing etc. of legal materials and that Ms. Lunn receive formal training in supervision with an emphasis on interpersonal skills.]

June 15, 1992
Date

Rhonda K Kinnee
Arbitrator