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ARBITRATION

IN THE MATTER OF ARBITRATION BETWEEN:

THE STATE OF OHIO	:	Case No. 23-18-(92-10-14)-0882-01-06
and	:	Grievance of Czerny Miller
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO	:	**DECISION AND AWARD**

This matter was heard on September 29, 1993 at the Western Reserve Psychiatric Hospital in Northfield, Ohio.

APPEARANCES:

Mitchell B. Goldberg, Arbitrator
2100 PNC Center
201 E. Fifth Street
Cincinnati, Ohio 45202

For the Employer:

George R. Nash, Advocate-Mental Health
Dick Daubenmire, OCB Representative
James Meyer, Boiler Operator
Joseph McDonnell, Engineer II
Gene Briers, Human Resources Administrator
Adly T. Danial, Powerhouse Supervisor
Roger Beyer, Labor Relations Officer

For the Union:

Robert Robinson, Advocate
Czerny Miller, Grievant
Yancy Jones, TPW
Betty Williams, President, Local Union 7715

I. INTRODUCTION

The Western Reserve Psychiatric Hospital, a facility owned and operated by the State of Ohio and OCSEA, AFSCME, Local 11, AFL-CIO, are parties to a collective bargaining agreement effective January 1, 1992 through January 31, 1994. Article 25 of the collective bargaining agreement contains the grievance procedure. There are multiple steps in the grievance procedure which result in arbitration if the parties are not able to resolve their differences. The undersigned was selected from an arbitration panel agreed upon between the parties as set forth in Section 25.04. The Arbitrator is limited under Section 25.03 jurisdictionally as follows:

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

The grievance which is the subject of this case involves the termination of the Grievant from his employment as an engineer worker in the Powerhouse of the Western Reserve Psychiatric Hospital facility. The Powerhouse operates the utilities of the facility, including the steam boilers. The Grievant was discharged from his position as Boiler Operator I on the alleged grounds that he failed to comply with the conditions of the Employer's Employee Assistance Program ("EAP") Agreement signed between the Employer and the Grievant on January 10, 1992, that the Grievant neglected his duties, falsified official records and engaged in acts of insubordination. The insubordination charges were dropped during

the grievance procedure and no evidence was presented at this hearing with respect to those charges. The Grievant filed his grievance denying the accusations of misconduct against him. The Grievant further claims that the penalty of discharge is too severe under the circumstances and is being used by the Employer in a disparate and discriminatory manner.

II. APPLICABLE CONTRACT PROVISIONS

Article 24 contains the disciplinary provisions of the contract. Section 24.01 sets forth the disciplinary standard:

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

The Employer is bound to follow progressive discipline as set forth in Section 24.02. The progressive disciplinary steps include one or more oral reprimands, one or more written reprimands, one or more suspensions and then termination.

The Employer may engage in investigatory interviews before meting out discipline as set forth in Section 24.04; and, an employee has a right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. The Employer further must identify known witnesses to the events giving rise to the imposition of discipline. The appointing authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute and/or rebut evidence.

The Agency Head shall make a final decision on the recommended disciplinary action no more than 45 days after the conclusion of the predisciplinary meeting. The final decision must be in writing and the Union must receive notice. The disciplinary measures imposed "shall be reasonable and commensurate with the offense and shall not be used solely for punishment."

Section 24.09 establishes the Employee Assistance Program ("EAP"). That Section states as follows:

> **24.09 - 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. Participation in an EAP program by an employee may be considered in mitigating disciplinary action only if such participation commenced within five (5) days of a predisciplinary meeting or prior to the imposition of discipline, whichever is later. Separate disciplinary action may be instituted for offenses committed after the commencement of an EAP program.

III. ISSUE

The stipulated issue between the parties is whether or not the termination of the Grievant's employment was for just cause. If not, the Arbitrator shall determine the appropriate remedy.

IV. FACTS

The Grievant's job record states that the Grievant received the following discipline in the period of 1988 through 1991: On April 14, 1988, he received a verbal reprimand for having an unauthorized visitor in the Powerhouse; on April 6, 1989, he received a verbal reprimand for taking an unapproved leave of

absence; on October 30, 1989, he received a written reprimand for taking an unapproved leave of absence; on January 23, 1990, he received a two day suspension for excessive absenteeism and tardiness; and, on October 16, 1991, he received a six day suspension for leaving work without permission (unauthorized departure) and for failing to notify the Employer that he would be late for work more than one hour before his starting time (late call offs).

The six day suspension occurred after the Grievant phoned in late on August 18, 1991 to inform the company that he was sick and that he would not be reporting for work. Again, on August 26, 1991, the Grievant called in sick and requested personal time, but he called in late. Thereafter, the Grievant was charged with two further offenses. The Employer alleged that on March 31, 1992 the Grievant did not report for work at his scheduled starting time of 4:00 p.m. It is alleged by the Employer that he was not seen at work until approximately 4:40 p.m., but, more importantly, the sign-in sheet executed by the Grievant states that the Grievant reported for work at 3:55 p.m. The Employer alleges that the timesheet was falsified because the timesheets were checked at 4:00 p.m. and the Grievant was not at work. On April 16, 1992, the Grievant was expected to report for duty at 10:00 p.m. The Employer alleges that the Grievant did not report for work and failed to call in. The Grievant allegedly reported for work late, at approximately 11:35 p.m.; however, he executed his sign-in sheet stating that he reported for work at 10:30 p.m. The Grievant, on

the following morning, submitted a Request for Personal Leave for the time period between 10:00 p.m. and 10:30 p.m. The request was denied.

The Grievant was then disciplined after these events by being conditionally discharged from his employment. The Grievant's discharge was being held in abeyance for 90 days under the condition that the Grievant complete the required counseling in the Employee Assistance Program. Upon successful completion of the EAP the Employer reserved the right to reduce the discharge to a 6 day suspension. The Grievant was notified that if he failed to comply with the terms of the agreement and the EAP program, he would be removed from State service. The Grievant executed the EAP Participation Agreement on January 10, 1992. At the time the Grievant executed the EAP Agreement, he was on disability leave. He was called back from his leave by the Employer for the specific purpose of executing the EAP Participation Agreement at the facility. The Grievant executed the EAP Participation Agreement without the benefit of Union representation. The specific purpose for the Employee receiving counseling under the EAP program was to address the Grievant's attendance problem. A corrective plan was to be created to deal with his attendance problems and he agreed to meet all of the requirements set forth in the plan. The agreement specifically provides that if the Grievant violates the EAP contract, the recommended disciplinary action of termination will be implemented. The Agreement further provided that the Grievant would be terminated if he continued to have attendance problems.

The Employer subsequently discharged the Grievant for the alleged misconduct on March 31st of reporting late for work and falsifying his sign-in sheet and for the act of alleged misconduct on April 16, 1992 for being late for work and failing to timely report his tardiness; and, for falsifying his sign-in sheet as to the actual time he reported for work. Moreover, the Employer alleges that the Grievant violated the terms and conditions of the EAP. The Employer received evidence that the Grievant failed to meet his scheduled appointment with EAP on January 17, 1992 and he reported late for his appointment on January 30, 1992. According to a letter from the clinical psychologist who consulted with the Grievant, the Grievant denied that he had any particular problem and he did not show any interest in proceeding with the EAP.

V. POSITION OF THE UNION

The Grievant maintains that he should not have been disciplined on August 18 and August 26, 1991, notwithstanding that he admits that he provided late notification to the Employer on those dates. The Grievant testified that he had automobile problems while he was commuting to work. When he finally determined that he could not report to work on time, he called in, but the calls were beyond the one hour grace period before his scheduled starting time.

The Grievant admits that he received his conditional discharge after these events and that he did not file a grievance after receiving the discipline. Nevertheless, the Grievant believes that the discipline for August 18 and August 26, 1991, and the subse-

quent EAP agreement should be voided because of misconduct on the part of the Employer. The Grievant executed the EAP agreement after being called to the facility while he was on a disability leave. He executed the agreement without the benefit of Union representation and the Grievant alleges that he executed the agreement under duress. He stated that the Employer's representative ordered him to execute the EAP agreement and that if he did not execute the agreement, he would be immediately discharged. He should not, therefore, be discharged as a matter of equity for failing to comply with the terms and conditions of the EAP contract when his execution of the contract in the first place was forced upon him by threats of immediate discharge. His Union should have been a party to any EAP agreement in which he was a party.

Insofar as the events of March 31, 1992 and April 16, 1992 are concerned, the Grievant denies that he falsified any of the sign-in sheets. He testified that he reported for work on time, at 4:00, on March 31st, but that the other employees did not notice his presence. Because of ongoing problems with his fellow workers, the Grievant intentionally tried to avoid contact with his fellow employees, except for work related activities. It was not uncommon, according to the Grievant, to perform his work duties for periods of time in which he would not have contact with his fellow workers. Likewise, on April 16th, the Grievant reported 30 minutes late for work at 10:30 p.m. and signed in at that time. He later requested a personal leave for the period of time between 10:00 and 10:30 p.m. in accordance with the policies and procedures of the

Employer. He denies that he arrived at 11:35 p.m. as alleged by the Employer. The testimony of Grievant's co-employees should not be believed or credited by the Arbitrator. Mr. M testified that on March 31st it was his responsibility to check the timesheets. He checked for the whereabouts of the Grievant at the starting time, but the Grievant could not be found. He looked for the Grievant around the Powerhouse facility and in the parking lot, but the Grievant was not present. The Grievant denies that Mr. M had any supervisory responsibilities and therefore there was no reason for Mr. M to be checking on the Grievant's attendance. The Grievant and Mr. M had been engaged in an ongoing feud wherein they were ordered by the Supervisor to keep away from each other. The other employee who testified against the Grievant merely testified that he did not see the Grievant at work until after the starting time. This employee could not testify that the Grievant was, in fact, not present in some other work location.

The Grievant further argues that he has been a victim of racial discrimination on the part of management and supervision with respect to work assignments; and, that the decision to discharge him does not compare with disciplinary action issued by the Employer to other employees who had attendance problems. The Union presented a list of other employees who received multiple six day suspension and/or given last chance agreements for being discharged. The Grievant believes that he did not receive the same consideration because of his race and because of his disagreements with other employees and management during his long work tenure.

The decision to discharge him, therefore, was arbitrary, unreasonable and discriminatory. There was no just cause for the discharge and he should be reinstated to his employment with full backpay and benefits.

VI. POSITION OF THE EMPLOYER

There is no question that the Grievant violated the call in policy on August 18 and August 26, 1991. The Grievant's claim of car trouble does not match up with the information contained on the contemporaneous records of the Employer. The Grievant first called on August 26th to inform the Employer that he was sick and would not be at work. This was a late call in. The Grievant then called back two minutes later to inform the Employer that he was having automobile problems and that he would be one hour late. The Grievant stated that he would call back in one hour. The Grievant then placed a third call on August 26th, wherein he requested the day off and left a message asking if he could use compensatory time or vacation time for the day because of his automobile problems. The Employer believes that the Grievant called in late to report that he was sick. He later realized that he committed a violation by calling in after the required report in time. He then called back to announce his automobile problems in order that he could create an excuse for making a late call in.

The Grievant was issued a removal from service on November 5, 1991, which removal would be held in abeyance if the Grievant executed an EAP agreement. There is no provision in the contract which requires the Union to be present at the execution of an EAP

agreement. It is undisputed that the Grievant violated the terms of the EAP agreement by missing one appointment and by arriving late at the second. The Grievant was forewarned that if he did not comply with the terms and conditions of the EAP agreement, he would be discharged. In addition to the Grievant being late for his EAP appointments, he was uncooperative and he denied that he had any problem which could be addressed by the EAP program. The Grievant complains about the circumstances of his executing the EAP agreement, but the evidence at the hearing established that the Grievant had not even informed his Union that he executed the agreement and that no grievance was filed over these alleged improper circumstances.

The Employer presented direct evidence that the Grievant falsified his sign-in sheet on March 31, 1992. Mr. M, the lead person on the work shift, with the responsibility to check attendance, testified that the Grievant reported to work late and that the Grievant was not present at the beginning of the work shift, notwithstanding that the Grievant signed in as if he were present. Mr. M searched for the Grievant throughout the Powerhouse and in the parking lot to verify that the Grievant was not present when the work shift began. Mr. M confronted the Grievant about the falsification, but the Grievant informed Mr. M that "it is none of your business." Likewise, Mr. M testified that the Grievant reported for work at approximately 11:35 p.m. on April 16, 1992, but he signed in at 10:30 p.m.

The charges that the Grievant was framed by Mr. M because of their personal feud, or that the Grievant wase the subject of racial discrimination were not proven by the Grievant through the presentation of evidence in this case. The evidence presented by the Union of disciplinary action taken against other employees is distinguishable from the action taken against the Grievant in this case. None of the other employees were charged with falsification of official records and none failed to comply with the requirements of the EAP in the same manner as that of the Grievant. The Employer has discretion in terms of the nature and extent of the discipline to be issued and the fact that leniency and second chances are given in any particular case should not be used against the Employer unless all of the particular facts and circumstances are taken into consideration.

VII. DISCUSSION

The Grievant was disciplined by receiving a termination held in abeyance for his late calls on August 18 and August 26, 1991. He did not file a grievance over the issuance of this discipline, notwithstanding that there were claimed mitigating circumstances (car trouble) accounting for his failure to make a timely call on August 26th. He alleges that he signed the EAP agreement under duress and without the presence of any Union representative. Yet, the Grievant did not file a grievance over the circumstances surrounding his execution of the EAP agreement. This Arbitrator finds that these contentions on the part of the Grievant are inconsistent and out of character. The Grievant was portrayed in

the evidence as an outspoken employee who was not afraid to assert his rights. These character traits have led to friction with other employees and confrontations with his supervisor. There is no evidence that the Grievant was denied Union representation upon request during the execution of the EAP agreement. The Arbitration Case No. 23-18-911230-0751-01-04 decided by Arbitrator Donnelly on July 31, 1992 is dispositive of the issue as to whether Union representation is required during the execution of an EAP agreement. It is not. The contract language does not provide for such representation. The arbitration authority cited by the Union is distinguishable from the case decided by Arbitrator Donnelly. The case cited by the Union does not involve the specific issue as to whether Union presence is required during the EAP process.

Therefore, at the point in time when the Grievant signed the EAP agreement, the Employer had provided the Grievant with all procedural and substantive rights with respect to the issuance of discipline. The Employer applied the principals of progressive discipline. The Grievant received oral reprimands, written reprimands and a six day suspension from work. The disciplinary action in each case was commensurate with the offense in accordance with the Employer's policies, and was comparable to the discipline issued to other employees under similar circumstances.

The Grievant was then required to comply with the terms of the EAP agreement and to not engage in any further attendance problems or other acts of misconduct. The evidence is undisputed that the Grievant failed to comply with both the letter and the spirit of

the EAP agreement. He was late for one meeting, tardy for another, and he showed a somewhat disinterested attitude by insisting that he did not have a problem which could be addressed and resolved by the EAP.

The events which occurred in March and April of 1992 in which the Grievant is alleged to have falsified his sign-in sheets involve a credibility determination with respect to the evidence presented. Mr. M and his supervisor testified that it was Mr. M's responsibility to check attendance. The Employer supplied an outdated job description for Mr. M's position which contained this responsibility. Mr. M was acting as a lead person on the work shift. It is understood that Mr. M was not a supervisor because supervisors are not included within the bargaining unit. Nevertheless, certain non-supervisory employees may be given responsibilities such as checking attendance and there are employees who are called "lead persons" or "working foreman" who are many times included within the bargaining unit. This Arbitrator finds from the evidence that during the period in question, Mr. M, in fact, had the responsibility to check attendance.

The Union is requesting that this Arbitrator accept the Grievant's testimony over that of Mr. M because of the alleged hostility between the two employees and because there was an atmosphere of racial discrimination within the work place. However, the testimony of Mr. M was not discredited by the Union in any material respect and the charges of race discrimination or other hostility sufficient enough to motivate Mr. M to perjure

himself on the record was not established by the Union. Moreover, the Employer had a basis to discharge the Grievant for failing to comply with the EAP agreement, even if the subsequent events with respect to the alteration of the Grievant's sign-in sheets could not be clearly proven.

This leaves the issue of whether or not the Grievant was a victim of disparate treatment. The instances of other discipline issued to other employees in which other employees received second chances or further EAP counseling are distinguishable from the events and circumstances in this case. The Grievant clearly ignored the terms and conditions of the EAP agreement, notwithstanding his clear knowledge of his past infractions and the certainty that the Employer would terminate him if he did not correct his attendance problems. He was forewarned of the impending consequences of his actions. In none of the other cases was the EAP process ignored to the same extent as in this case and in none of the other cases was there evidence of any falsification of sign-in sheets as testified to by fellow employees.

Employers in discipline cases are given considerable discretion within the bounds of the language of the collective bargaining agreement in the form and severity of discipline to be issued in given circumstances. The Employer's decision will not usually be second guessed or overturned by an Arbitrator unless there is evidence that the decision was arbitrary, discriminatory, or completely unreasonable under the circumstances. The Grievant, in this case, was a long term employee and that is one factor that

should be taken into consideration. Nevertheless, he received progressive discipline, he knew the consequences of his actions, he received an opportunity to save his employment by complying with the EAP; but, nevertheless, he did not show any initiative to correct his problem. It cannot be said that the decision of the Employer was arbitrary or unreasonable. Further, there was no evidence beyond the testimony of the Grievant that the friction and discord between the Grievant and his fellow workers and management was sufficient enough to cause the management witnesses to be untruthful in their testimony or that they otherwise embellished their testimony; that the Employer engaged in discriminatory conduct on account of the Grievant's race; or that the Grievant was so clearly mistreated relative to the treatment of other employees that the Employer's decision to terminate him should be overturned.

VIII. AWARD

The grievance is denied.

Date: Oct 6, 1993

Mitchell G. Goldberg, Arbitrator

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