#1007

In the Matter of Arbitration	
Between	Case Number:
OCSEA/AFSCME Local 11	24-14-(110893)-943-01-04
and	Before: Harry Graham
The State of Ohio, Department of Mental Retardation and Developmental Disabilities	

Appearances: For OCSEA/AFSCME Local 11:

Robert Robinson
Staff Representative
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For Department of MR/DD:

Carolyn S. Collins
Labor Relations Coordinator
Department of MR/DD
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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on September 28, 1994 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

> Was the Grievant's removal for just cause? If not, what shall the remedy be?

Background: There is no dispute over the events that give rise to this proceeding. The Grievant, Valerie Harris, has been employed for the past nine years as a Cook 1 at the Warrensville Developmental Center in Highland Hills, OH. During the course of her employment she accumulated numerous instances of discipline. These were largely related to problems associated with attendance. On May 14, 1993 Ms. Harris entered into a Last Chance Agreement with the Department. It established certain attendance standards to be met by Ms. Harris as the condition of her continued employment. On July 12, 13, and 14, 1993 Ms. Harris was absent from work. She did not call the Warrensville facility to report off. Consequently, she was considered to be Absent Without Leave (AWOL). This was regarded by the Employer to be a violation of the May, 1994 Last Chance Agreement. Ms. Harris was discharged. That discharge was protested in the grievance procedure of the parties. No resolution of the dispute was reached and the grievance is now properly before the Arbitrator for determination on its merits.

Position of the Employer: Preliminary to consideration of the events prompting the State to discharge Ms. Harris the Employer points to her disciplinary record. She had accumulated thirteen instances of discipline for attendance related problems prior to discharge. Discipline for other infractions had been imposed as well. In May, 1993 Ms. Harris

had entered into a Last Chance Agreement with the Department. It provided that for a 365 day period from May 14, 1993 that discharge would result if she violated any policies of the Warrensville Developmental Center. The Superintendent of the Center was given discretion to make exceptions to the Agreement based upon any mitigating circumstances. Any grievance protesting discipline arising under the Agreement was limited to the question of whether or not the Grievant violated a policy of the Warrensville Developmental Center. If a violation of a policy were found to have occured the Arbitrator was explicitly prohibited from modifying any discipline that might have been imposed by the Employer.

In July, 1993 Ms. Harris was absent from work. Her absence commenced on July 7, 1993. Various reasons were provided by the Grievant for her absence. In one account, she was attacked by a Warrensville resident. In another account, she wrenched her back lifting kitchen utensils. On July 7, 1993 Ms. Harris was seen at the Kaiser facility and received from them documentation for her absence on that date. She subsequently saw her personal physician and received from him documentation that she would be absent from work to July 26, 1993 for back problems. Ms. Harris called off work on July 8, and 9, 1993. No call was received by the facility on July 12, 13 and 14, 1993. Ms. Harris' failure to call off on those dates represented a violation of the policy of Warrensville

Developmental Center. Policy No. 10-86 IV A provides that employees who cannot report to work are to notify their supervisor. Ms. Harris did not do so on the days in question. She violated the explicit terms of her May 14, 1993 Last Chance Agreement. As she violated the Policy of the institution and the Superintendent found no mitigating circumstances the Arbitrator has no authority to modify the discharge under review in this proceeding according to the State. Hence, it insists that its action must stand.

Position of the Union: According to the Union the discharge under review in this proceeding fails to meet the contractually established test of "just cause." At Section 29.03 the Agreement provides that an employee on sick leave is to notify the Employer "at the start and end of such period." Ms. Harris met the contractual standard of notice.

When the Grievant was treated for back problem's on July 7, 1993 she received medication for her pain. The medication was motrin, 800 mg. and morflex, 100 mg. These had an adverse effect upon Ms. Harris. They made her sleepy and incapable of calling-in. Furthermore, she had a bona-fide belief that she did not have to call-in due to the language of the Agreement.

On July 15, 1993 Ms. Harris came to the Warrensville facility and provided documentation that she would be absent to July 26, 1993. The Employer knew the duration of her expected absence. To discharge her under these circumstances

is impermissible in the Union's opinion.

The Union points to Ms. Harris' history of discipline. During the course of her employment at Warrensville she worked in the Dietary Department. While in Dietary she was the recipient of continual discipline. For ten months she worked in the Housekeeping Department. During that period, no discipline was incurred. There existed an environment of hostility to Ms. Harris in the Dietary Department. In essence, the Union urges this discipline be viewed as an attempt to "get" Ms. Harris. As such, it should be set aside and the Grievant restored to employment with all pay and benefits provided to her.

Discussion: The terms of the May 14, 1993 Last Chance Agreement are very specific. They provide that:

> 1) All parties agree that should the employee, within 365 days of effective date of this agreement, violate any W.D.C. policies will (sic) result in termination with the exception of mitigating circumstances which will be at the discretion of the Superintendent.
>
> 2) Any grievance arising out of this disciplinary action shall have the scope of arbitration of this grievance limited to the question of whether or not the grievant did indeed violate said policy. The arbitrator shall have no authority to modify any disciplinary action received unless the arbitrator finds that no violation of WDC policies regarding absenteeism, tardiness, or attendance occurred.

That Agreement was entered into by all concerned in this proceeding. It bears the signatures of the Grievant and the President of the Local Union Chapter. It also is signed by the Superintendent of the Warrensville facility and the Labor

Relations Officer at Warrensville. It represents the committment of the parties to modify the "just cause" standard for discipline found in the Agreement. The Superintendent of Warrensville is explicitly given the sole discretion to determine if any mitigating circumstance existed in this situation. He found none.

The Last Chance Agreement provides that any violation of polices of Warrensville Developmental Center "will" result in termination. Employer Exhibit 1 in this proceeding is a compilation of the operating policies of the Warrensville facility. Under AWOL it provides for removal for the first offense. Employer Exhibit 4 defines AWOL as "no contact was made by the employee regarding absence from duty, and the employee did not report to work as scheduled." The record in this situation establishes that the Grievant did not call in on July 12, 13, and 14, 1993. Whatever might be the contractual standard established by the Agreement, the parties agreed to modify it by the explicit terms of the Last Chance Agreement. That Agreement was signed by the Grievant. She knew what she was required to do. It was her obligation to call the Center in instances of absence. Ms. Harris did not inform the Employer until July 15, 1993 that she would be absent to July 26, 1993. This represents a violation of the absence Policy, Employer Exhibit 4. It is also a violation of the Call-In (Call-Off) Policy, Employer Exhibit 5 in this

proceeding. That policy provides for members of the OCSEA/AFSCME represented bargaining units that employees must notify their supervisor when they will be unable to report to work. Ms. Harris did not do so. She had nine years of service at the facility and should have been aware of the procedure to be used in instances of absence. Employer Exhibit 6 shows that on March 8, 1993 she received instruction on the call-off procedure. She did not comply with it in this instance. By the explicit terms of the Last Chance Agreement as Ms. Harris violated policies of the Warrensville Developmental Center there can be no outcome of this dispute other than confirmation of the action of the Employer.

When the parties came to negotiate the Last Chance Agreement of May 14, 1993 the Grievant was on notice that the Agreement was what it purported to be: the terms under which she was provided her last chance at continued employment. The Agreement gives to the Arbitrator no discretion to find any mitigating circumstances. Only the Superintendent has that authority. Once a policy violation has been found to have occurred the Arbitrator has "no authority" to modify discipline. The terms of the Last Chance Agreement represent the understanding of the parties with respect to the manner in which discipline might be imposed on the Grievant for one year subsequent to May 14, 1993. Those terms have been met.

Award: The grievance is DENIED.

Signed and dated this 10th day of October, 1994 at South Russell, OH.

Harry Graham
Arbitrator