#1036

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 35-05-930823-18-01-03
and	*	March 27, 1995
	*	
OHIO DEPARTMENT OF	*	Terrence Hopkins, Grievant
YOUTH SERVICES	*	Discharge

Appearances

For the Ohio Civil Service Employees Association:

Lois Haynes, Staff Representative; Advocate
Terrence B. Hopkins, Grievant
Felisha A. Strode, Chapter President

For the Ohio Department of Youth Services:

Barry Braverman, Labor Relations Officer; Advocate
Kim Browne, Labor Relations Specialist, Ohio Office of Collective Bargaining; Second Chair
Nan Hoff, Superintendent, Maumee Youth Center
Linda Bess, former Superintendent, Maumee Youth Center
Mary Creager, Personnel Officer, Maumee Youth Center
Jennilee Barnhart, Personnel Officer, Maumee Youth Center

Hearing

A hearing on this matter was held at 9:00 a.m. on February 14, 1995 at the Ohio Office of Collective Bargaining in Columbus, Ohio before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed, and to argue their respective positions. The oral hearing concluded at 3:00 p.m., whereupon the record was closed. This opinion and award is based solely on the record as described herein.

Statement of the Case

At the time of his removal on July 29, 1993 for insubordination, the Grievant was a youth leader at Maumee Youth Center near Toledo, Ohio. This is a minimum security facility for the incarceration of felony youth offenders. Youth Leaders are responsible for the direct supervision and care of the Department's charges, who can be and are violent at times. The Grievant carried 7-1/2 years of seniority at the time of his removal, was assigned to the so-called "action shift" (3-11 p.m. when the youth are out of school), and had two oral and one written reprimands on his record since July 1, 1990. He also was employed for a period of time in a management position, during which he was disciplined a number of times. The record further discloses that he was informed on the rules of the Department, which discipline grid indicates a 15-day suspension to removal for a first incident of insubordination, and removal on the second.

On May 17, 1992, the Grievant was injured when he helped to break up a fight on the job. Under the terms of the Collective Bargaining Agreement, he was eligible to apply for up to 960 hours of occupational injury leave (hereinafter "OIL") in lieu of Workers' Compensation, and then Workers' Compensation after OIL is exhausted (Joint Ex. 1, Article 34.04 and Appendix K). The Grievant's application for these benefits followed a tortuous course over the next sixteen months. Eventually all 960 hours of OIL were approved and used, as was the Workers' Compensation waiting period coverage provided for in Article 34.02, but the Workers' Compensation claim was ultimately denied on December 8, 1993 and the grievant testified that he did not receive his first OIL until five months after his injury. During this period the Grievant was returned to work for a brief period, beginning August 4, 1992, but was relieved of duty again on August 16 after the OIL application documents indicated he could only perform light duty. He testified he had no difficulty performing his duties (though he broke up two fights) because he did not lift over 25 pounds which was his phycial restriction). The record shows there is no light duty at this facility because all employees must be able to respond to emergencies. The Grievant then mailed a number of certificates signed by his personal physician that eventually covered his absence through August 3, 1993 (Joint Ex. 2A). On June 3, his physician wrote recommending that "when the patient returns to work that he is not in a position where he has to break up fights because this will probably cause recurrence of his rotator cuff tendonitis, disabling him all over again" (Joint Ex. 2B).

In the meantime, the Department was attempting to communicate with the Grievant regarding the necessity to submit various documents, with mixed success.[1] The thrust of these attempts was to have him examined by a State Appointed Physician (hereinafter "SAP") pursuant to 123:1-33-04 OAC. A July 28, 1992 letter notifying him of an appointment was returned as unclaimed.[2] On August 20 he missed this appointment. On August 24, representatives of the Department and the Union hand-carried a notice of the rescheduled appointment. The Grievant kept that appointment and, on September 11, the doctor's report confirmed his inability to return to work at that time (Joint Ex. 4C). In April 1993, the Department was informed by the Ohio Department of Administrative Services--Workers' Compensation Unit that its decision regarding certification for the Workers' Compensation claim was being held in abeyance pending a report of the SAP's exit examination. The Department scheduled an appointment for April 12 and sent another letter so-informing the Grievant. This was returned as unclaimed after two attempts to deliver it. After the Grievant missed this appointment, it was rescheduled for June 9, and again an attempt was made to inform the Grievant. This mail, too, was returned as unclaimed (Joint Ex. 2C). Mary Creager, Personnel Officer at the facility, testified that she confirmed with the physician that the Grievant also missed this appointment. The Grievant says during this period he was living in Michigan and came home about every other

[1]A written reprimand, which the Grievant says he did not receive, was issued July 22, 1992 for failing to supply certain documents regarding his injury-related absences.

[2]All correspondence was sent by regular and certified U.S. mail to the address provided by the Grievant. He did not change his address with his employer during the period.

weekend, but had no phone messages from the Department. He testified that whenever he inquired of Ms. Barnhart about his Workers' Compensation claim, he was always told it was in process; additionally, he was unable to reach Workers' Compensation by the phone number provided.

The disciplinary process was invoked thereafter, but this, too, was frustrated by futile attempts to reach the Grievant. The pre-disciplinary meeting notice of June 23 (sent certified and regular mail) was returned as unclaimed and neither the Grievant nor the Union appeared. The Union requested that the meeting be rescheduled, so a second notice was sent June 30, fixing the date for July 6. Again no one appeared for the Grievant. On July 29, the Grievant was discharged. The removal notice (Joint Ex. 2) states in part:

> On or about April 29, 1993, and June 9, 1993, you were scheduled for a medical examination with a State appointed physician. This examination was scheduled in accordance with Section 123:1-33-04 of the Ohio Revised Code. You failed to report for either examination and failed to reschedule the appointments.
>
> Your actions violate Department of Youth Services Directive B-19, Rule #6(b) Insubordination--willful disobedience of a direct order by a supervisor.

A grievance protesting this action was filed August 5, 1993. A Step 3 meeting was held on August 26. The Grievant was not present (he testified because he had no way to get there), but the Union offered that he had been removed inappropriately on account of having a pending Workers' Compensation claim. The State rejected this argument as it had no awareness of such a claim. In fact, the record shows that the Grievant signed his application to reactivate the claim on August 23, 1993 and the physician's signature was

dated August 25, 1993 (Joint Ex. 4E, C-85A). This petition was denied on December 8, 1993, as was the claim itself.

Being unresolved, the case was appealed to Arbitration on February 17, 1994, where it presently resides for final and binding decision, free of procedural defect.

Issue

As stipulated by the parties, the issue before the Arbitrator is the following:

Was the Grievant terminated for just cause? If not, what shall the proper remedy be?

Arguments of the Parties

Argument of the Employer

The Department's position is that it had no choice but to terminate the Grievant. On two occasions he failed to follow the Employer's order to be examined by a SAP to determine if he could perform his duties. Nevertheless, the Employer took every possible step before removing him: resetting appointments and meetings, mailings, even hand-delivery. The Grievant says he got letters from the Department of Administrative Services, so there is every reason to assume he also got the mail from the facility.

The exam was ordered in compliance with State law and the instructions to the Grievant were clear and understandable. He knew where to go and the examination was at no cost to him. The Grievant acted in willful disobedience of an order and he knew the consequences.

The Union, by contrast, has not shown the Department was arbitrary, capricious or abusing its discretion when it imposed removal. Although the disciplinary grid shows

flexibility in discipline for insubordination, one must take into account the Grievant's prior discipline. What, asks the Employer, is corrective when the Grievant has been silent for 18 months since his termination? He did not attend his pre-disciplinary or third-step meetings. Instead, the Union came in with the flimsy excuse of a pending Workers' Compensation claim that was not even filed until after his removal. On top of this, none of the Management witnesses present at the arbitration knew if he can perform his job duties.

The Department concludes that it had just cause for terminating the Grievant and asks that the grievance be denied.

Argument of the Union

The Union's position is that the Grievant was discharged under specious conditions. Although there was no dispute about his injury, Management wanted to deny his OIL claim. Documents went back and forth, the Grievant submitted the application but the doctor delayed. Dates on the letter show it was the Grievant who had to call Columbus to get the claim straightened out. Meanwhile, the Grievant was despondent with no income.

Other facts show Management's attitude towards the Grievant: other employees performed light duty work and the Grievant handled fights when he was on the job in August, 1992. The Union says it has also shown why the Grievant was not at home when Management's notices were delivered, but that he checked his messages regularly. Management hand-delivered one, but not the later ones despite Management's own recommendation that it do so.

The Union goes on to argue that the discipline imposed here was not progressive in accordance with the Collective Bargaining Agreement and Management's own policy; as

there were only oral reprimands and one written reprimand that was neither signed nor received.

Finally, the Union says the reason the Grievant has not contacted the Center in the last eighteen months is because he was fired. It asks that the termination be overturned, the Grievant be reinstated and awarded all backpay and benefits.

Opinion of the Arbitrator

Insubordination implies a willful or intentional disregard of lawful and reasonable instructions. The Union does not challenge the Department's right to order a physical examination under these circumstances, but it does contend, in the first place, that the Grievant could not have willfully disobeyed orders of which he was unaware. In the second place, the Union suggests that the Grievant was actually a victim of Management's unfair treatment in the handling of his claim, which it wanted to deny. Finally, the parties disagree as to whether the penalty was progressive as called for by the Collective Bargaining Agreement.

The communications sent from the Department to the Grievant's home address clearly issue a reasonable order and state disciplinary consequences for failure to comply. The Grievant was informed on the Department's work rules, so must be held accountable for knowing suspension or removal were possible outcomes if he disobeyed. The only element of insubordination at issue is whether the Grievant received and thus understood the order. The Employer argues that since he received other mail at his home address, it must be assumed he received these mailings, too. I would tend to agree that receipt of other mail increases the probability that this mail was received, but it does not create its

certainty. Otherwise there would be no traffic in certified mail. What is odd, however, is that it is only adverse communications that the Grievant alleges were not received. One also wonders whether the letter carrier left notices when s/he was unable to deliver the letters and, if so, why the Grievant did not respond to them. The Union correctly observes that Management might have done more. (It considered and evidently rejected another hand-delivery when the April 16, 1993 certified mail was returned unclaimed and there is a curious lack of evidence of phone calls.) But the real question is not whether it *could* have done more. It is whether Management did *enough*. This arbitrator has never required any party to use all available means or to turn over every stone. She uses lesser standards such as "reasonableness" and "fairness." The record is replete with Employer attempts to communicate with the Grievant and get him to supply requisite documents, as well as many calls and letters to physicians. The record as a whole supports the view that the Employer spent considerable effort in the Grievant's behalf but was frustrated by his lack of cooperation. He did not inform Management of his whereabouts and he did not complete and file paperwork in a timely fashion. Then, in arbitration, he attempts to blame Management and his doctor for the delay by, for example, stating he filled out and signed the OIL application on June 10 and sent it in. He does not, however, say when he mailed it. Delay in mailing would account for Employer requests for documentation (including the Union's own Exhibit 1), the Employer's assertion that it did not receive the application until August 3, and the Grievant's statement that he did not hear from Management about it until August 4. The contention that the Employer sat on its hands is without foundation, and under the circumstances, giving the Employee a second chance to respond to the order

to submit to a medical examination by rescheduling the appointment itself and again attempting to inform the Grievant through regular and certified mail to the only address the Employer had, constitutes reasonable effort.

The Union also claims the Employer unfairly refused to grant the Grievant light duty, pointing to incidents of other youth leaders working while injured and his own ability to break up fights while on the job in August of 1992. This overlooks the fact that it was the Grievant's own physician who placed restrictions on the Grievant. That he was not re-injured when he was working is fortunate, but did not reduce the risk of future injuries (had he continued to work) or the Employer's exposure should his incapacity be a factor in injuries to others. It is worth mentioning that only two weeks after he was relieved of duty, the State Appointed Physician noted the Grievant's fear of using his right arm to break up fights and was of the opinion that he could continue his job as youth leader "provided he does not have to use his right upper extremity to break up fights" (Joint Ex.4C). The very nature of his job, which exposes him, his co-workers and the youth in his care to violence, makes the Employer's decision to relieve him completely understandable.

Finally, one comes to the reasonableness of the penalty. The purpose of discipline under the just cause standard is correction of undesirable behavior. Although insubordination is a cardinal offense which might justify discharge on the first incident, I do not sustain the removal of this grievant because of that. I do so because, having found him guilty of insubordination and the case clear of fatal procedural flaw, there must be some reason to expect a lesser penalty to have a corrective effect and to believe the Grievant is now capable of performing his assigned duties. The Employer, facing an employee who had

twice ignored an order to submit to a physical exam and who had twice failed to appear at scheduled pre-disciplinary hearings, had no reason to believe a suspension and a third order would obtain the desired result.

While it is tempting to believe that the Grievant was in a situation beyond his control, being caught in a morass of bureaucratic red tape, without funds, and depressed at his predicament, I cannot get over the hurdle that he essentially removed himself, when he became unavailable to his Employer's communications, not even responding to impending disciplinary action. The Employer did not abuse its discretion when it chose not to afford the Grievant third chance.

Award

The grievance is denied in its entirety.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
March 27, 1995