ARBITRATION SUMMARY AND AWARD LOG
OCB AWARD NUMBER: 1074

OCB GRIEVANT NUMBER:	27-21-940926-1085-01-03
GRIEVANT NAME:	William Montgomery
UNION:	OCSEA
DEPARTMENT:	Rehabilitation and Correction
ARBITRATOR:	Anna Smith
MANAGEMENT ADVOCATE:	Colleen Wise
2ND CHAIR:	Georgia Brokaw
UNION ADVOCATE:	Michael Hill
ARITRATION DATE:	June 30, 1995
DECISION DATE:	August 18, 1995
DECISION:	Denied - Not arbitrable

CONTRACT SECTIONS
AND/OR ISSUES: Article 1, Recognition, & Article 25 Grievance Procedure

The grievant, while clinically depressed, wrote a letter to the Warden resigning his position immediately. After a discussion with the personnel officer, he decided to apply for stress disability leave rather than resign. The grievant received confirmation from the warden and the grievant was paid his leave balances at the end of April. His disability claim was denied in June and the grievance was file on September 26.

HOLDING:

The Arbitrator found that once the grievant received the letter from the warden he was on notice that there was an issue of his employment status. If he had any doubt it had to have been resolved when he spoke to the warden by phone. The grievance was not filed within the time parameters of the Collective Bargaining Agreement and the reasons for its untimeliness are insufficient to overcome the clear language of the Contract. Therefore, the grievance is not arbitrable.

#1074

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. 27-21-940926-1085-01-03
and	*	August 18, 1995
	*	
OHIO DEPARTMENT OF	*	William Montgomery, Grievant
REHABILITATION &	*	Arbitrability
CORRECTIONS	*	

Appearances

For the Ohio Civil Service Employees Association:

Michael Hill, Advocate
Brenda Goheen, Second Chair
William Montgomery, Grievant
Pam Montgomery, Witness
Pat Carty, Chief Steward

For the Ohio Department of Rehabilitation and Corrections:

Colleen Wise, Office of Collective Bargaining; Advocate
Georgia Brokaw, Office of Collective Bargaining; Second Chair
Bill Blaney, Labor Relations Officer, Orient Correctional Institution
Kim Doyle, Personal Officer, Orient Correctional Institution; Witness

Hearing

A hearing on this matter was held at 9:00 a.m. on June 30, 1995 at the 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 Employer submitted a question of arbitrability and the parties jointly submitted an issue on the merits, which are set forth below. 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 Employer's motion for a bench decision on arbitrability was denied in order that the parties might file written closing statements as requested by the Union. The oral hearing was concluded at 11:00 a.m. on June 30. Written closing statements were timely filed on July 14 and received on July 18, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

Issues

Is the grievance timely and therefore arbitrable?

Did William Montgomery tender a written resignation in a voluntary quit, or was it a constructive discharge, and, if so, what shall the remedy be?

Pertinent Contract Provisions

ARTICLE I - RECOGNITION

1.01 - Exclusive Representation

The Employer recognizes the Union as the sole and exclusive bargaining representative in all matters establishing and pertaining to wages, hours, and other terms and conditions of employment for all full and part-time employees (excluding temporary, interim, intermittent and seasonal employees, except bargaining unit employees serving in an interim position) in the classifications included in certifications of the State Employment Relations Board (SERB).

ARTICLE 25 - GRIEVANCE PROCEDURE

25.01 - Process

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement.

25.02 - Grievance Steps

Step 1 - Immediate Supervisor

....All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event. If being on approved paid leave prevents a grievant from having knowledge of an occurrence, then the time lines shall be extended by the number of days the employee was on such leave except that in no case will the extension exceed sixty (60) days after the event....

Suspension, Discharge and Other Advance-Step Grievances

Certain issues which by their nature cannot be settled at a preliminary step of the grievance procedure or which would become moot due to the length of time necessary to exhaust the grievance steps may by mutual agreement be filed at the appropriate advance step where the action giving rise to the grievance was initiated. A grievance involving a suspension or a discharge shall be initiated at Step Three of the grievance procedure within fourteen (14) days of notification of such action.

Statement of the Case

The Grievant, William Montgomery, was employed by the State of Ohio in November 1978. At the time of his alleged resignation, he was a Correctional Supervisor I (Sergeant) at the Orient Correctional Institution. In April 1994, while he was clinically depressed, the Grievant wrote a letter to the warden resigning his position effective "immediately" (Joint Ex. 2). On or about April 11, his wife delivered the letter to the personnel office at the institution where it was left on the personnel officer's (Kim Doyle) desk during her absence. She also called Ms. Doyle at home and discussed the situation with her. As a result of this conversation, Mr. and Mrs. Montgomery decided he would apply for stress disability leave rather than resign. In another phone conversation, Mrs. Montgomery told Ms. Doyle their decision and was informed that the warden, who had been given the letter addressed to him, wanted to talk to the Grievant. The disability

application papers were mailed from the institution and an appointment made with the warden for April 18. The Grievant did not keep either that appointment or the rescheduled one on April 20 because of a conflicting engagement and car problems. He and his wife testified they thought the resignation had been rescinded by the personnel officer as evidenced by having received the disability application. Mrs. Montgomery said she believed her husband's appointment with the warden was to discuss management problems. In any event, the warden accepted the resignation on April 20, wrote him a letter to that effect and confirmed it when the Grievant telephoned him. The resignation was subsequently processed and the Grievant was paid his leave balances at the end of April.

The disability claim was denied June 7 on the basis that he had resigned prior to expiration of the waiting period. At some point--the record is unclear when--Mrs. Montgomery spoke to Dorothy Evener in the Department's personnel office. She testified Evener told her this was not a union matter, but one that had to be appealed at the Department of Administrative Services. The Grievant then applied on June 14 for a refund of his accumulated contributions to PERS and filed an appeal of the disability decision which he ultimately lost.

On September 26 a grievance was filed alleging violation of Article 24 (Discipline) of the Collective Bargaining Agreement. Said grievance was denied at Step 4 on the grounds that the Grievant had no standing (being a nonemployee at the time it was filed) and that it was untimely filed. The case was then appealed to arbitration where it presently resides for final and binding decision.

Arguments of the Parties

Argument of the Employer

The Employer is of the view that the grievance is not arbitrable because although the Grievant was aware by the end of April that his resignation had been processed on April 20, 1994, he did not file a grievance until September 26, 1994, well outside all contractual time limits set forth in Article 25.02. Arguing that the doctrine of laches applies, the Employer says the Grievant slept on his rights, subjecting the Employer to backpay liability. The negotiated time limits should be upheld and the grievance found to be untimely and therefore dismissed as not arbitrable.

Referring to Articles 1.01 and 25.01, the Employer also argues that inasmuch as the Grievant was not an employee on September 26 (having voluntarily resigned), he was not covered by the terms of the Collective Bargaining Agreement. As he lacks standing to grieve, the case should be dismissed as not arbitrable.

Turning to the merits, the Employer contends that the evidence shows the Grievant voluntarily quit his employment and was not, as the Union argues, constructively discharged. No discipline was ever issued in accordance with Article 24. No coercion or demand that he resign was placed on the Grievant by Management. He clearly voluntarily resigned and his behavior of not coming to work, not calling off and not responding to inquiries are indicative of that. The Employer cites *Pepsi-Cola Bottling of Miami and United Steel Workers, Local 7609*, 70 LA 434 (Blackmar, 1978), on constructive discharges and two panel arbitration decisions, *Ellen Jenkins vs. Ohio Department of Youth Services*, OCB Award No.

539 (Rivera, 1991) and *Franco Iulianelli vs. Ohio Department of Taxation*, OCB Award No. 781 (Cohen, 1992).

Regarding the Grievant's mental capacity, anxiety and depression alone do not shield a person from the consequences of their actions, says the State, citing *Cedar Coal Company, Denny Division and United Mine Workers of America, Local 1766*, 79 LA 1029 (Dworkin, 1982), *John Eilerman vs. Ohio Department of Rehabilitation and Correction*, OCB Award No. 463 (Dworkin, 1990), and *Iulianelli*.

The Employer goes on to claim this case is distinguisable from the *Eilerman* and *Davis v. Marion County Engineer*, 60 Ohio St.3d 53 (1991) cases relied on by the Union. In those cases, the affected employees attempted to withdraw their resignations before they were acted upon. Here, the Grievant's resignation was "effective immediately" and, unlike Davis, he did not continue to work nor did he attempt to submit a letter of rescission after he was told his resignation was in the hands of the warden.

The Employer concludes that the Grievant resigned voluntarily with full knowledge of the consequences of his actions and his conduct thereafter shows he intended to quit. It therefore asks that the grievance be denied in its entirety.

Argument of the Union

The Union makes several points. First, that the Grievant withdrew his resignation, Management was aware of this, and that Management's actions led him to believe it had been withdrawn. Doyle, who directs the personnel program at the institution, was put on notice that the Grievant did not want to pursue his resignation; disability forms were mailed before any action was taken on the resignation; and the warden knew the Grievant wanted

to withdraw it before he accepted it. In the *Davis* case, the Court held that it is not necessary for a rescission to be in writing for it to be valid. Therefore, contends the Union, the resignation the warden accepted did not exist. Citing the Employer's failure to give consideration to the Grievant's withdrawal and the *Eilerman* case, the Union argues that the grievance should be sustained.

The Union also claims the Grievant relied on poor information provided by the Department's personnel director who told Mrs. Montgomery that the Department of Administrative Services (DAS) was the proper forum for resolving the disability and resignation issues. He followed this bad advice and consistently maintained to DAS that his resignation had been properly withdrawn. He did not slumber on his rights, he relied on representatives of Management and ought not now to suffer from it. The Union contends these are unusual circumstances justifying hearing on the merits even thought the grievance may have been untimely filed. It therefore asks that the Grievant be reinstated to his former position with full back pay, benefits and seniority.

Opinion of the Arbitrator

Whether this case is arbitrable depends on when the Grievant became aware or should have become aware of the event giving rise to the grievance. The event was the Employer's failure to accept the Grievant's alleged withdrawal of his resignation, which occured on April 20 when the warden signed the letter informing the Grievant that his resignation was accepted. Up until the point that the Grievant received this letter, he may claim to have been under the impression that he had successfully rescinded the resignation, but it is clear that once he received it he was on notice that there was an issue of his

employment status. If he had any doubt, it had to have been resolved when he spoke to the warden by phone on or about April 27. Thus, time began to toll in late April. Counting from late April, there is no grievance filing deadline in the Contract that is met by a grievance filed on September 26.

The language of Article 25 is clear in its specification of fixed time limits. Such language must be upheld except in the case of waiver or unusual circumstances. The Union claims that the Grievant was given misinformation and poor advice by Management representatives and that this constitutes unusual circumstances sufficient to overcome the clear Contract language. This theory of detrimental reliance is not supported by the record. The conversations with Ms. Doyle the Grievant and his wife said they relied upon took place before the warden's letter was received. Additionally, Ms. Doyle testified she informed Ms. Montgomery that the case was out of her hands. The record of what transpired between Mrs. Montgomery and Ms. Evener, Chief of Personnel of the Department, is too ambiguous to be relied upon, consisting only of hearsay evidence and lacking specification of when it occurred. On the other hand, the record does support the Employer's claim that the Grievant knew to consult his Union, as he testified to having tried to reach both a local steward and staff representative. When this happened and why he did not follow through until his attorney's recommendation remains unexplained.

In sum, the grievance was not filed within the time parameters of the Collective Bargaining Agreement and the reasons for its untimeliness are insufficient to ovecome the clear language of the Contract. It is therefore not arbitrable and I lack authority to answer the question on the merits.

Award

The grievance is dismissed as not arbitrable on account of being untimely filed.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
August 18, 1995