VOLUNTARY LABOR ARBITRATION
PROCEEDING UNDER THE AUSPICES OF
THE STATE OF OHIO AND THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, OHIO DEPARTMENT OF YOUTH SERVICES,
INDIAN RIVER SCHOOL

-AND-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO
GRIEVANT: PETERZ GARNER
GRIEVANCE NO.: 35-04-(9-29-94) 88-01-03

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: November 13, 1995

Appearances

For the Employer	
E.C. Bradley	Unit Administrator
Robert Maier	Superintendent
Brad Rahr	LRO
Edith Bargar	Second Chair
Barry Braverman	Advocate
For the Union	
Peterz Garner	Grievant
Dennis A. Falcionie	Advocate

Introduction

This is a proceeding under Article 25-Grievance Procedure, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration/Mediation Panels of the Agreement between the State of Ohio, Ohio Department of Youth Services, Indian River School, hereinafter referred to as the "Employer," and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the "Union," for the period of March 1, 1994 through February 28, 1997, (Joint Exhibit 1).

The Arbitration hearing was held on May 10, 1995 at the Office of Collective Bargaining, in Columbus, Ohio. The parties had selected David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both parties indicated they would submit briefs.

STIPULATION ISSUE

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

JOINT STIPULATIONS

1. The Grievant was removed from his position of Juvenile Correctional Officer at Indian River School on August 23, 1994.

2. The Grievant had 2 years and 8 months seniority.

3. The Grievant has the following prior discipline:

2/19/93	Written Reprimand
7/20/93	Oral Reprimand
1/13/94	Written Reprimand
2/11/94	1 day suspension

4. The Grievant last worked on July 24, 1994, for ten minutes.

5. The Employer made reasonable effort to notify the Grievant at his last known address and at the William Dickerson Detention facility in Michigan, for purposes of a Pre-Disciplinary Hearing, return to work notice and the removal letter.

6. The Grievant was arrested and incarcerated for 57 days, from July 26, 1994 to September 22, 1994.

7. Grievant made a collect call to IRS and spoke to acting superintendent, Robert Maier, on August 12, 1994.

8. Written statement of Tom Jones dated April 13, 1995.

9. Written statement of Larry Bussey dated April 15, 1995.

10. The Grievance is properly before the Arbitrator.

PERTINENT CONTRACT PROVISIONS

ARTICLE 2-NON-DISCRIMINATION
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2.02 Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made of these purposes.

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(Joint Exhibit 1, Pg. 4)

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 custody of the State Of Ohio, the Arbitrator does not have the authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

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 oral reprimand(s) (with appropriate notation in employee's file);
B. one or more written reprimand(s);
C. a fine in the amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;
D. one or more day(s) suspension(s);
E. 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 (sic) performance evaluation report without indicating the fact that disciplinary action was taken. Disciplinary action shall be initiated as soon as reasonable possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a disciplinary grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

(Joint Exhibit 1, Pg. 68-69)

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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 notification by the Ohio EAP case monitor of successful completion of the program under the provision of an Ohio EAP Participation Agreement, 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 pre-disciplinary 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.

(Joint Exhibit 1, Pg. 73)

ARTICLE 31 - LEAVES OF ABSENCE

31.01 Unpaid Leaves

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

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C. Extended Illness

For an extended illness up to one year (1), 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 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 regular assigned duties, the Employer may require a decision from an impartial medical doctor paid by the Employer as to determine 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. In the event of conflicting medical opinion in Worker's Compensation Cases, the order of the Industrial Commission District Hearing Officer shall be controlling with regard to the employee's ability to return to work.

D. Family Leave

To care of an employee's spouse, parent, or child with a serious health condition, up to twelve (12) weeks.

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F. Other Unpaid Leave

The Employer may grant unpaid leaves of absences 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, patenting (if greater than ten (10) days), family responsibilities, or holding elective offices (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 similar position if he/she returns to work within one (1) year. The Employer may extend the leave upon the request of the employee.

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.

31.03 Authorization for Leave

Authorization for or denial of leave of absence shall be promptly furnished to the employee in writing by the Agency designee.

31.04 Failure to Return to Work

Failure to return from a leave of absence after the expiration date thereof may be caused 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.

31.05 Application of the Family Medical Leave Act

Leaves granted under the Family and Medical Leave Act shall be applied within the leaves provided under this Article. For any leave which is required under the FMLA, the employee may be required to exhaust all applicable paid leave under the provisions of B,C,D,E, and F above. There shall be no pyramiding of FMLA required leaves during any twelve (12) month period. Eligibility for leaves shall be as provided under this Article.

(Joint Exhibit 1, Pg. 102-105)

ARTICLE 44 - MISCELLANEOUS

44.01 Agreement

To the extent that this Agreement addresses matters covered by conflicting State statues, administrative rules, regulations, or directives in effect at the time of the signing of this Agreement, expect for ORC, Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

44.02 Preservation of Benefits

To the extent that State statues, regulations or rules promulgated pursuant to ORC Chapter 119 or Appointing Authority directives provide benefits to state employees in areas where this Agreement is silent, such benefits shall continue and be determined by those statues, regulations, rules or directives.

(Joint Exhibit 1, Pg. 162)

CASE HISTORY

The Indian River School is a maximum security institution which incarcerates youths between the ages of fifteen and twenty-one. These offenders have committed crimes that would be classified as first or second degree felonies if they were committed by adults. Peterz Garner, the Grievant, served as a Juvenile Correctional Officer for two years and eight months at the time of his removal. He was scheduled to work the first shift which starts at 7:00 a.m. until 3:00 p.m.

On July 24, 1994, the Grievant arrived for duty at 7:00 a.m. but departed abruptly at approximately 7:10 a.m. The Grievant testified he had experienced hallucinations, paranoia, and heard voices warning him of death threats perpetrated by gangs in the facility. He hastily departed the facility claiming he feared for his life as he dropped off his institutional keys.

The Grievant entered his car and drove off on an extended and uneventful journey. He drove to Canada and eventually found himself in Detroit, Michigan. While allegedly suffering from the previously stipulated mental conditions, the Grievant was incarcerated in several penal facilities in Wayne County.

As stipulated by the parties, the Employer made several unsuccessful attempts to contact the Grievant after his departure. On July 26, 1994, the Employer sent the Grievant a notice to his last reported address ordering him to return to work on July 28, 1994 or provide sufficient documentation to support his inability to report. The Grievant failed to comply with either of the requests contained in the notice. The correspondence was returned by the postal service noting the occupant had moved and left no forwarding address.

On July 28, 1994, the Employer sent the Grievant a Pre-Disciplinary meeting package and also gave one to the Union President. The meeting was to take place on August 2, 1994 to address the allegation of job abandonment for not reporting to work as scheduled. On the date in question, however, neither the Grievant nor a Union representative appeared.

On August 2, 1994, the Employer authored a removal order. It contained the following relevant particulars:

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> You walked off the job and left Indian River School on July 24, 1994 at approximately 7:10 a.m. without notifying the Duty Officer or any other supervisor in the building; and you have been absent without proper notice continually from July 24, 1994 to the present.
>
> This is a violation of DYS Directive B-19, work rule #27, Job Abandonment, "Absent three (3) or more consecutive working days without proper notice."
>
> You are removed from your position as Juvenile Correction Officer effective August 23, 1994.

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(Joint Exhibit 3)

On August 12, 1994, Robert Maier, the Acting Superintendent, accepted a collect call from the Grievant. Maier informed the Grievant about his removal for job abandonment. Maier, moreover, testified he had to solicit the fact that the Grievant was incarcerated at the

William Dickerson Detention Center, Hamtramick, Michigan. The Grievant was eventually released from the detention center on September 27, 1994. He was incarcerated for fifty seven (57) days in this facility.

The Grievant returned to Ohio after his incarceration. On September 26, 1994, he arrived at the facility and received his paycheck and the previously mentioned removal letter.

A grievance contesting the removal was filed on September 29, 1994. In the statement of facts portion of this document, the Grievant provided several justifications for his actions. He noted he walked off the job on July 24, 1994 because of an emotional disorder which caused him to fear for his life. While in Detroit, Michigan, he was incarcerated for destruction of property. He was placed on medication which limited his ability to function properly. As such, he was not able to telephone the facility immediately. Once he regained some of his cognitive ability, and the detention center allowed him to initiate some calls, he eventually got through to Maier on August 12, 1994. The Grievant maintained he requested ninety (90) days leave without pay "through the Family and Medical Emergency Leave Program (Joint Exhibit 2)."

On January 12, 1995, a step three meeting was held dealing with the above referenced grievance. The Employer denied the grievance since his absence was viewed as an unauthorized absence from employment for more than three (3) days.

The parties were unable to resolve the disputed matter. Neither party raised procedural nor substantive arbitrability issues. As such, the matter is properly before the Arbitration.

THE MERITS OF THE CASE

The Position of the Employer

The Employer opines it has just cause to remove the Grievant for job abandonment. The record clearly indicates the Grievant had an unauthorized absence for more than three (3) days; he was incarcerated for fifty seven (57) days. This action violates DYS Directive B-19; Work Rule #27, which deals with job abandonment. Neither the Grievant's incarcerated state, nor the reasons which engendered his incarceration serve as justifiable bars forcing the conversion of the removal order to approved unpaid leave status.

The Employer agreed the record did not support the application of the Family Medical Leave Act (FMLA), the American's with Disabilities Act (ADA) and Ohio Administrative Code 123:1-33-01. None of these statutes apply since notice requirements placed on the Grievant were never fully or properly established.

On August of 1994 interim final regulations on the FMLA as specified in §825.302(c) of the CFR requires that an employee provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA qualifying leave. Here, the Grievant never provided sufficient and clear information to raise certain FMLA related suppositions.

Maier's testimony discounts the notice theory proposed by the Union. The Grievant never disclosed that he was suffering from mental illness, nor that he was requesting medical leave coverage. In fact, without Maier's pointed questioning, the Grievant would not have admitted that he was incarcerated.

Similarly, E.C. Bradley was never informed by the Grievant about his mental and emotional problems. As such, it becomes quite difficult for the Union to establish that the

Employer had constructive knowledge about the Grievant's mental condition.

Maier's telephone conversation with the Grievant's mother further negates the notice allegations raised by the Union. Maier's version should be believed in terms of timing and content. The call took place after August 12, 1994 because the Grievant's mother was concerned about her son's paycheck. The paycheck, more specifically, had already been sent to her son at the William Dickerson Detention Center. She never discussed the medical reasons causing his absence, but rather admitted that he was incarcerated. As such, she never provided the Employer with constructive notice regarding the Grievant's medical status. She, moreover, failed to appear and provide her version of the telephone call in support of the Union's allegation.

Medical related documents (Union Exhibits 1, 3, and 4) introduced by the Union do not substantiate the notion that the Employer must have known that the Grievant was experiencing mental difficulties. Some of these documents were authored after the removal date. A return to work slip (Union Exhibit 2) indicates the Grievant was able to return to work on July 14, 1994 and failed to specify any limitation based on mental infirmity.

For similar reasons the Grievant was not eligible for a reasonable accommodation under ADA. The Grievant never informed the Employer that a disability existed until he filed the grievance. There was, therefore, no need for the Employer to inquire about any potentional accommodation. The Employer never knew the Grievant had a disability and that he was having difficulty performing his job. As such, the Grievant was never terminated as a consequence of his disability. He was merely removed as a consequence of his absence which resulted in a determination that he had abandoned his job.

The Union's Position

It is the position of the Union that the Employer did not have just cause to remove the Grievant. In support of this position, the Union relied on the Grievant's medical condition, the Employer's direct or constructive knowledge of his condition and its willingness to treat the Grievant in the same manner as other similarly situated employees. Based on the circumstances surrounding the grievance, the Grievant enjoyed certain collective bargaining and statutory rights that require conversion of the removal decision to an unpaid leave of absence based on his mental disabilities.

Clearly the record supports the notion that the Grievant was mentally and emotionally disabled prior to and after his departure from work on July 24, 1994. The Grievant was receiving treatment for his condition since January of 1989 (Union Exhibits 1, 2, 3, and 4).

The Employer had prior notice of the Grievant's condition. On July 14, 1994, the Grievant submitted a leave request form with an attached physician's slip (Union Exhibit 2). He submitted the documentation to E.C. Bradley, the Unit Administrator, and stated "I was off due to mental problems." Bradley never countered this contention even though he attended the arbitration hearing. As such, Bradley was obliged to forward this information to Maier who was Acting Superintendent. (Joint Exhibit 3, Joint Stipulation 7 & 8).

Statements authored by other facility employees indicated the Employer was placed on constructive notice regarding the Grievant's condition. The Employer should have known the Grievant was emotionally unstable prior to his departure.

Other forms of notice were raised in support of this theory. The Grievant's mother called Maier on July 29, 1994 and advised him of the Grievant's incarceration and emotional

state. The Grievant phoned Maier on August 12, 1994, some eleven (11) days prior to the effective date of his removal on August 23, 1994. He informed Maier of his location and requested FMLA coverage because he could not return to work until the end of September, 1994. Maier's version of the events should not be believed because he modified his characterization of the telephone conversation.

The Grievant is entitled to coverage under ADA. He has a mental impairment that substantially limits one or more of his major life activities, a record of such an impairment, or regarded as having such an impairment. By enjoying actual or constructive notice, the Employer was obligated to make a reasonable accommodation or place the Grievant on involuntary disability separation. These obligations are required by ADA as incorporated in Article 44.02 per ORC 123:1-33-01.

The Employer is also obligated under requirements contained in the FMLA as referred in Article 31.01(D). The phone call on August 12, 1994 placed the Employer on clear notice that he was requesting FMLA coverage. As such, he was entitled to twelve (12) weeks coverage because a serious health condition made him unable to perform his job functions.

The Employer's actions indicate it engaged in a pretext to justify the removal. The Employer, in a letter dated July 26, 1991 (Joint Exhibit 3), requested the Grievant to return to work on July 28, 1994 or provide documentation in support of his absence. And yet, it conveyed a pre-disciplinary notice (Joint Exhibit 3), on July 27, 1994. It, therefore, appears the Employer had made its decision because it never gave the Grievant a reasonable amount of time to respond.

The Employer has placed other employees on involuntary disability separations since January of 1994 to the present (Joint Exhibits 5). As such, the denial of this option in this instance appears capricious which is a clear violation of Article 2.02.

The imposed discipline was not commensurate with the offense. The removal should be modified as a consequence of the Grievant's emotional illness. This appears to be a reasonable option based on the Employer's General Work Rules (Joint Exhibit 4) which states "the actual discipline an employee receives may vary depending on the circumstances."

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony presented at the hearing, and a full and impartial review of the record including all pertinent contract provisions, I find there was proper and just cause to terminate the Grievant. Neither general arbitral axioms nor the statutes referenced by the parties serve as proper justifications to modify the removal.

When an employer discharges an incarcerated employee because of absenteeism caused by an employee's incarceration, the employer usually prevails.[1] The general principle is quite well articulated by Arbitrator Roumell:

> Under the principles enunciated in the arbitration cases discussed above, when an employee is incarcerated, a company has the right to discharge him since he is, for a period of time, unable to work. The reason a discharge is proper in such cases in not because of the crime the employee has commited but rather it is simply that through the employee's own actions, he has made it impossible to fulfill his obligation to report to work. Therefore, in such cases, a company has "just cause" to terminate the employee since he is of no benefit to the company.[2]

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[1] Boeing Services International, 75 LA 967 (Kramer, 1980).

[2] McInerney Spring & Wire, 72 LA 1262, 1265, (Roumell, 1979).

This axiom, moreover, can not be applied in the abstract. The exercise of this discretion must be applied reasonably and even handedly. Once this has been determined, arbitrators will then look to other potential mitigating factors. Normally, an incarcerated grievant has to have a multiple of mitigating factors and extensive years of service before an arbitrator would over turn the discharge for absenteeism.

In the present dispute, the Employer discharged the Grievant for having an unauthorized absence for more than three (3) consecutive days which constituted job abandonment. The Grievant was not discharged because of the conduct he engaged in which led to his incarceration. As such, the question which is posed is whether the Employer has any contractual obligation to extend the Grievant some form of leave justifying his absence and subsequent reinstatement? In the absence of a contractual obligation on the part of the Employer to provide the Grievant with some form of leave, this Arbitrator is without any power to order the Employer to provide the Grievant with a leave of absence. This Arbitrator obtains his power to rule from the Agreement (Joint Exhibit 1) and his power and scope of authority is therefore limited by the Agreement (Joint Exhibit 1).

Neither Article 31.01(D) nor Article 44.02 per ORC 123:1-33-01 provide the Grievant with an absolute right to an unpaid leave of absence under FMLA and/or ADA. Even though I am convinced the Grievant has and continues to experience some form of emotional illness, his collective bargaining and statutory rights are conditioned by certain acts or behaviors which he must initiate before the Employer is required to provide certain statutory entitlements.

Both statutes contain notification requirements. Section 825.302(C) requires verbal notice **sufficient** (Arbitrator's Emphasis) to make the employer aware that the employee needs FMLA-

qualifying leave; and the anticipated timing and duration of the leave. An employee need not expressly assert rights under the FMLA nor even mention the FMLA, he may only state that leave is needed and the reason for the leave request. Further clarifying questions may be necessarily initiated by the Employer, but an employee has an affirmative obligation to initiate the leave request.

The record clearly fails to establish that the Grievant provided the Employer with actual or constructive notice documenting his leave request prior to his proper removal for job abandonment. The various medical documents (Union Exhibits 1, 3, and 4) introduced at the hearing fails to support the notice requirements because the majority were authored after the removal date. Reliance on the leave request form and attached physician's statement (Union Exhibit 2) is equally defective. These documents would not lead a reasonable person to conclude that the Grievant was suffering from an on-going mental disorder. Why would he be released to work if he was suffering from such a debilitating condition. Nothing on the form, itself, suggests that FMLA-qualifying leave is being requested or considered. Even if the Grievant has told Bradley "I was off due to mental problems," one could not reasonably conclude that he was providing verbal notice sufficient to make the Employer aware that he needed FMLA-qualifying leave. The Grievant never testified he told or indicated to Bradley that "some condition" necessitated a leave of anticipated timing or duration.

My review of the record fails to support the Union's claim that Maier changed his testimony regarding the telephone conversation with the Grievant on August 12, 1994. In fact the Grievant admitted Maier had to ask him whether he was incarcerated. He failed to independently provide this critical bit of information. Maier's testimony appears credible in light

of contemporaneous notes (Joint Exhibit 3) taken by Maier and entered into the Grievant's file shortly after the telephone conversation. Nothing in this document indicates the Grievant requested any sort of leave let alone inform Maier about his emotional condition.

Even if one believes the Grievant's version of the telephone conversation with Maier, the Union would have the Employer retroactively apply information received after the Grievant had been legitimately removed. The Union would have to supply case law in support of this severe form of accommodation based on the efforts engaged in by the Employer to contact the Grievant prior to his actual removal. The Grievant must share some responsibility especially when one considers he was required to provide some form of notice regarding the need for FMLA-qualifying leave.

Maier's telephone conversation with the Grievant's mother is similarly defective in terms of proper notice requirements. The timing of the call and the content of the conversation were never properly articulated. Her presence at the hearing would have shed significant light on the matter. The Grievant's attempt to articulate the nature of the conversation, when one considers it never took place in his presence, strains the liberal stance most arbitrator's hold regarding the admission of hearsay evidence.

Nothing in the various statements (Joint Exhibit 3, Joint Stipulations 7 & 8) introduced at the hearing indicate that the Employer was, or should not have been aware, that the Grievant was experiencing mental and emotional disabilities prior to the removal decision. Standing alone, they fail to establish constructive notice. These individuals should have been asked to appear to clarify the timing and accuracy of their observations. Also, none of these statements indicate with sufficient clarity that these concerns regarding the Grievant's condition were ever

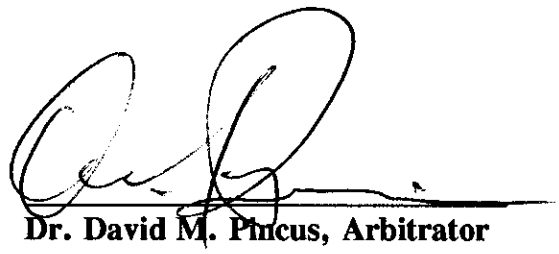
properly conveyed to the Employer.

The previous analysis regarding the FMLA claim applies equally to the ADA arguments raised by the Union and will not be reiterated by the Arbitrator. One, however, needs to understand that any ADA claim made by the Union suffers a similar notice defect. An ADA claim requires an employee to inform or notify an employer that a disability exists which requires an accommodation. Only when an employer has some knowledge that a disability exists and the employee is having problems performing his job, then the employer may initiate inquiries determining whether some form of accommodation is necessary. The record fails to support either scenario.

Section 2.02 arguments were not properly supported. Just because the Employer has allowed a number of employees disability separations from January, 1994 to May, 1995 (Joint Exhibit 5) does not establish a discrimination claim under Article 2.02. Whether any of these individuals were similarly situated to the Grievant in terms of circumstance, malady, length of service and prior disciplinary record is extremely difficult to determine based on the record. evidence and/or testimony establishing the necessary requisites for any unequal treatment or disparate treatment claim were never shared by the Union.

AWARD

The grievance is denied.



November 13, 1995

Dr. David M. Pincus, Arbitrator