#1279

ARBITRATION

BETWEEN

STATE OF OHIO, OHIO VETERANS HOME

and

GRV. No. 33-00 (97-10-22) 0815-01-04
(Discharge of Charles Douglas)

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 11

APPEARANCES:

For the Home:

Robert D. Day
Human Resources Administrator
Sandusky, Ohio

Heather L. Reese
Labor Relations Specialist
Office of Collective Bargaining

For the Union:

Robert Robinson
Staff Representative
Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Arbitrator

Statement of the Case:

This case arises from the discharge of employee Charles Douglas. He was discharged pursuant to a Letter of Removal dated October 17, 1997, from Director Cook, and reading as follows:

> "This letter will advise you that effective October 17, 1997 you are being removed from your position as Hospital Aide at Ohio Veterans Home. This action is being exercised during the second half of your probationary period."

The Union grieved Grievant Douglas' discharge at Step 3 on October 22, 1997 and therefore within 14 calendar days of the date of notification of the discharge, as provided for in the parties' contract. The grievance reads in pertinent part as follows.

> ". . .
>
> Contract Article(s) allegedly violated: 2.02, 24.01, 24.09, 25, but not limited to these articles in Contract.
>
> Statement of facts . . .: Ohio Veterans Home is in violation of Grievance Settlement #33-00-960719-0715-01-04. On Oct. 17, 1997, Mr. Charles Douglas was removed from his position as Hospital Aide at Ohio Veteran's Home without just cause.
>
> Remedy sought: To be made whole. To be reinstated as Hospital Aide at Ohio Veterans Home. To have data pertaining to this grievance removed from file."

Management's Step 3 Answer reads in pertinent part as follows:

> **Management Position:**
> The grievant was removed in 1996 as a result of AWOL violations. He was returned to his position as a Nurse Aide as a result of a grievance settlement. This grievance settlement established that the grievant would be subject to a reduced probationary period of sixty (60) days. He was removed from his position in the second half of his 'new probationary period' for performance reasons. It is Management's position that this grievance is without merit as a probationary removal is not appealable through the grievance process in accord with Article 6.01 of the OCSEA Contract.

Findings:
The Union alleges the grievant was removed in violation of a previous grievance settlement. Management honored the grievance settlement by reinstating the grievant. The grievant was subject to a 'new' probationary period in accord with the settlement. He was removed in the probationary period, which is not appealable through the grievance process. This grievance has no merit and is denied in its entirety.

Pertinent Contract provisions are set forth in Appendix I.

A meeting was held on October 17, 1997 with the Grievant, Acting Nursing Director DeRose, and Steward William Kessler. Kessler's notes of that meeting, written up October 24, 1997, give an overview of the content of the meeting close in time to its occurrence. It reads as follows:

> On 9/17/97 I was called to Debbie DeRose's office for a meeting with Mr. C. Douglas. Upon arrival the meeting commenced. D. DeRose began by discussing Charles' performance evaluation. She proceeded to discuss several areas she had in regards to job performance relating to his last 2 months of work. She repeatedly commented that reports on his performance were negative and that he was not up to expectations. She brought up the fact that when Charles first reported to work he was instructed by her to go to personnel to have the information turned in before he could begin working. Mr. Douglas left OVH, after going to personnel to get the papers he needed. He went to the health dept and had them filled out and returned to OVH to turn them in. She said he was in trouble for leaving the grounds and not punching out and Mr. Douglas said he thought she said he couldn't work without these papers completed. He offered to then have the time away docked from his pay as he misunderstood her regarding this matter. It is common practice at OVH for all employees to first have the 1st and 2nd step Mantoux TB tests completed before starting to work. Mr. Douglas was prepared to work but mistook D. DeRose's request to mean he couldn't work without it. Since he had just returned from a 13 month absence due to a grievance settlement he wanted to do things properly so as to not mess up his return. D. DeRose then commented on a few areas of work where Mr. Douglas was written up for a lift. Mr. Douglas stated he was acting under the direction of his superior while performing the lift and thought if he refused he would be insubordinate. He again was trying to all he could to make his return to employment last and show he was willing to work hard to do it. D. DeRose continued by stating it was felt Charles was asking too many questions regarding his job duties. Mr. Douglas commented that he was working on a unit the previous time he

was working here and since his return was working as a relief going unit to unit. He asked her if she felt all the units were run the same and the routines were the same she made no comment. He said if she believed that she didn't know what was going on as each unit is different and each units staff did things a little different. He asked a lot of questions because he was trying to make the adjustment to each different palace he worked. D. DeRose again commented on his job performance deficiencies. Mr. Douglas became upset and commented on the fact that he agreed to return without backpay because he felt the job was important and he felt he shouldn't get paid for not working. He also said that when she sent him to personnel he interpreted her order as meaning he could not begin work without the TB paperwork completed. She also mentioned he hurt his back when he first returned to work and missed 3 days because of it. He did provide Dr. verification of his back injury and filled out the leave papers needed. He remained upset and after D. DeRose gave him a copy of his removal letter and performance evaluation letters he got up and left.

Assistant Director of Nursing DeRose identified a formal "Discipline Form" dated October 6, 1997, she issued embodying a verbal warning. The Form recites that "on October 3, 1997, [Ms. DeRose] received a report in which [Grievant] performed a three-man lift on a resident. . . . I have concerns that you placed yourself at risk for injury, in addition to placing the resident at risk for injury. This facility has never inserviced employees on doing a three-man lift." The Form is signed by the Grievant after the following acknowledgment: "I, Charles Douglas, acknowledge receipt of this reprimand on October 17, 1997." It was the Grievant's uncontradicted testimony that he did not receive this discipline until the October 17th meeting, notwithstanding its October 6th date.

Ms. DeRose further indicated that all three employees involved in this three man lift were also disciplined with a formal verbal warning.

Ms. DeRose additionally testified that in recommending the Grievant's termination she also relied significantly on evaluations she'd received principally from charge nurses, and at least one from a peer of the Grievant. The evaluation forms utilized rate an employee in a dozen categories on a scale of 1 to 10, one (1) on the "below" end, and ten (10) on the "above" end. "Comments" are also solicited. Some of the comments and ratings follow. One rating commented "had talk with (Grievant) on his ethics--needs to be more organized and take care of his responsibility"; another: "asks questions about things that should be second nature (to put gown on, do I take his shirt off?) example"; another: "Chuck needs to find things to do. He is very good with the residents, and treats them with respect"; and another: "while working with Chuck he showed no motivation. He had a(n) ice pack on his back every break. He could not keep up. If I hadn't of known him I would of ever thought he ever worked two (2) South." One or another of the raters rated him both above and below five (5) on virtually every category set forth on the rating sheet.

A mid-probation Employee Performance Review form for the Grievant was prepared on 9-28-97 and reviewed by Ms. DeRose on 10-2-97. She recommended a probationary removal. This form calls for an evaluation as to whether the rated employee meets, is below, or is above expectations in nine categories: quantity; quality; timeliness; team effort/cooperation; dealing with demanding situations; performing direct care activities; directing/coordinating behavior of others; communications; and adhering to procedures. In four of these categories the Grievant

was rated "below" expectations. Thus for "quantity" it was noted: "has not generated the expected amount of work due to call offs. Has missed 4 days since start date 9/8/97. For "team effort/cooperation" it was noted: "Has placed additional burden on staff due to absenteeism. Has negative impact on establishing positive working relationships. For "communications" it was noted: "needs concrete instruction, often needs to be repeated. On occasion employee needs to repeat instruction to confirm understanding." For "adhering to procedures" it was noted: "left grounds without supervisors permission, did not clock in and out."

In his testimony the Grievant explained that he would ask, for example, about whether a resident's undershirt should be left on even though the resident was being put into a sleeping gown only because many residents relatives requested that undershirts be left on even when their resident relative was in a gown for modesty reasons. The Grievant also testified that he misunderstood Ms. DeRose, believing that she'd instructed him to leave and go to the Health Department for a T.B. test reading.

The record shows that the Grievant was previously discharged effective July 11, 1996, and reinstated pursuant to the terms of the following Settlement Agreement dated August 14, 1997, and reading in pertinent part as follows:

> WHEREAS, there is now pending a grievance filed by the above named employee and OCSEA against (OVH) pursuant to the Collective Bargaining Agreement, identified as grievance number 33-00-960719-07.5 - 01.04 based on the following allegations: Grievant was removed without just cause.
>
> WHEREAS, (OVH) denies any liability in connection with the alleged claim;

WHEREAS, all parties hereto wish to reach a full and final settlement of all matters and causes of action arising out of the claim hereinafter set forth;

Now therefore, all parties hereto, in consideration of their mutual covenants and agreements to be performed, as hereinafter set forth, agree as follows:

Management agrees to:

1) Re-instate grievant to a full-time permanent position as a Hospital Aide on the 2nd shift (1500-2330).

2) Grievant will have seniority re-instated effective 12/24/95 which was the date he became a permanent employee.

3) The grievant will be subject to a reduced probationary period of sixty (60) days and will be reviewed for major attendance related violations only (i.e. AWOL, Job Abandonment, etc. . . .). All other violations of the OVH Disciplinary Guidelines will be subject to normal disciplinary measures. Management agrees that unexpected illness and absences related to sick leave within a reasonable amount will not affect his probationary performance evaluation.

4) Removal effective 7/11/96 will be reduced to a suspension equal to time served and will be removed from grievant's filed effective 8/31/97.

5) The grievant waives all rights to back pay and will be awarded forty (40) hours of compensatory time."

It was the Grievant's testimony that he reported for work as scheduled on 8-31-97 but there was no documentation for the supervisory nurse on duty to return him to work, and he was not allowed to commence working. A memo to Human Resources Manager Day from Infection Control Coordinator Linda Wolfbrandt recites in pertinent part:

> I was catching up on some computer work and on checking my records noted that Mr. Douglas had not had TB testing for over 1 year. I applied the first step and told him to report to the Nursing Office on Tuesday, 9-2-97, to be read. I told him he would be responsible to go to the Erie County Health Dept. on 9-8-97 to receive a second step PPD. This would make his TB testing status current if he returned to OVH with in the next 30 days after the second step is given.

On 9-8-97 the Grievant again reported to work. In the interim he had injured his back lifting weights and because of his back

problem, sought from Day permission to not report until the following orientation class. Day declined permission, pointing out he'd be starting an orientation in any event. On the second day, however, the orientation instructor was absent. Additionally, on 9-8-97 the Grievant left the home for the Department of Health to have his second TB test read. He felt he had permission to do so. He did not punch out and punch in.

Former Union President Vanessa Brown indicated that the probationary references in the Grievant's Settlement Agreement of 8/14/97 were at Management's suggestion and to address their concerns, and that the concept of major attendance related violations was the Union's suggestion, to avoid just any little thing costing the Grievant his job again as he'd already been through a probation. Ms. Brown also testified to her understanding to the effect that the Settlement Agreement contemplated that the Grievant would come back to work with his seniority and that the discipline which led to his termination would not be held against him.

The record shows that the initial discharge which led to the Settlement Agreement of 8/14/97, the terms of which are the focus of the instant matter, was pursuant to the following letter, discharging the Grievant dated July 10, 1996:

> "This letter will notify you that effective July 11, 1996 you are being removed from the civil service payroll as a Hospital Aide at the Ohio Veterans Home. Your removal is based on violations of the Ohio Veterans Home Disciplinary Grid. Specifically Grid #13 "Unexcused Tardiness," Grid #14 "Absent Without Leave," Grid #28 "Violation of Section 124.34 of the Ohio Revised Code - Job Abandonment" and Article 29.03 of the OCSEA/AFSCME Contract "Notification."

> On 5/21/96 you were scheduled to begin the three (3) day WSTP program from 0800 to 1630. You reported late on the first day (5/21/96) at 0802. Shortly after the program began, you left without explanation and failed to return. You did not punch out. You also failed to report for duty or call off on 5/22 and 5/23/96. On 5/24 you did not call or report for your shift of duty which was scheduled to begin at 2300. You were called by the House Supervisor and instructed that you were scheduled to work at 2300. You did report at 2343 which was 43 minutes late.
>
> You are further advised that in accord with Article 25 of the OCSEA/AFSCME Contract, you have the right to grieve this action which may be initiated at Step 3 of the grievance procedure within fourteen (14) days of receipt of this letter."

The record further shows that this discharge ran afoul of the arbitral principles concerning double jeopardy, and hence the Settlement Agreement. The record also reflects the "back up" paperwork and the disciplinary incidents which created such paperwork, which lay behind the Grievant's initial termination on July 11, 1996. Thus the record shows such matters as a verbal warning on 2-10-96 for failing to request leave for an absence; a counseling on 4-26-96 and 6-4-96 for pattern abuse/absenteeism due to a "near zero sick leave balance" as well as for tardiness on 4-26-96; a "counseling" on 5-29-96 for refusing to work mandatory overtime "because of mother's care. Your refusal to work overtime will be excused this time. If other instances of refusal to work mandatory overtime occur, disciplinary action could result"; a verbal reprimand on 6-28-96 for refusing to work mandatory overtime "because you needed to be home to care for [your] mother." With respect to the latter matter, the record reflects that the Grievant's mother is in her 80's and ill and that the Grievant is her only son and caregiver. Since the discharge of the Grievant

under scrutiny here, he has worked for the Rumpf Corporation. They furnished the Grievant with the following letter:

> "To Whom It May Concern:
>
> Charles Douglas has been working as a State Tested Nursing Assistant with The Rumpf Corporation of Sandusky since December 25, 1997. During this time, Charles has worked at several of the long term care facilities that we staff.
>
> We have received many compliments from the facilities we have sent him to and he is often requested by name. Charles is a very competent and dependable employee. We often get short notice needs from our facilities and Charles is very flexible with his scheduling. We can count on his availability.
>
> I feel that Charles is a dedicated and reliable employee and is an asset to our Medical Division."

Asked on cross-examination how many hours the Grievant worked for Rumpf, the Grievant indicated he averaged 24 to 30 hours a week because of his need to care for his mother. Still further in this regard, settlement efforts concerning the Grievant's initial discharge, which culminated in the Settlement Agreement of 8-14-97, included a suggestion from the Grievant and the Union that the Grievant be reinstated as an intermittent or part-time employee, which suggestion was rejected by Management, and indeed, paragraph one of the Settlement expressly states that the Grievant is being reinstated to a "full-time permanent position."

The record also reflects the following Stipulations of Fact:

1) Grievance was filed under the 1997-2000 OCSEA Contract.

2) Mr. Douglas was originally hired as a permanent employee on 12/24/95.

3) Mr. Douglas was reinstated to his position of Hospital Aide as a result of a grievance settlement (333-00-960719-0715-01-04) dated 8/14/97.

4) Mr. Douglas was to return to his position effective 8/31/97 and did not start until 9-8-97.

5) Mr. Douglas missed the scheduled work days of 9/9, 9/10, and 9/23/97.

6) Mr. Douglas met with the Director of Nursing (Deborah DeRose, RN) on 10/17/97 and received his Notice of Removal on that date."

Management's Position:

Management takes the position that the grievance at hand is not properly before the Arbitrator and not arbitrable. It asserts that Grievant Douglas was previously removed from service on July 11, 1996. As a result of a grievance settlement, he was reinstated to his former classification of Hospital Aide on August 31, 1997.

The grievance settlement, which reinstated Mr. Douglas, included language that Mr. Douglas be subject to a 'reduced' probationary period of sixty (60) days as opposed to the normal one-hundred twenty (120) day probationary period. The settlement further clarifies that Mr. Douglas' probationary period be reviewed for only major attendance related violations and that unexpected illnesses and absences related to sick leave within a reasonable amount would not affect his probationary performance evaluation.

Mr. Douglas served forty-one (41) days of his probationary period and was removed based on his inability to perform the duties expected of him. His removal was not solely based on his poor attendance. He was discharged due to poor performance and his election not to follow the directives of his supervisor.

Article 6.01 of the OCSEA Contract offers clear and concise language that speaks to the inherent rights of Management in regards to the probationary periods of employees. The Article states . . . **during an initial probationary period, the Employer SHALL have the sole discretion to discipline or discharge**

probationary employee(s) and any such probationary action shall not be appealable through any grievance or appeal procedure contained herein or to the State Personnel Board of Review.

It is the specific language in Article 6.01 that determines this grievance should not be heard. Such language is given so as to permit Management the ability to operate various facilities within specified parameters. Article 5 of the OCSEA Contract (Management Rights) supports this premise by stating . . . **the Employer reserves, retains and possess, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs.**

To further support the claim that this grievance should not be heard one only need to look to Article 25.01 of the OCSEA Contract. Specifically section B-paragraph 2. The Article states . . . probationary employees shall have access to this grievance procedure **except** those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals. Mr. Douglas was a probationary employee who was removed. In accord with 25.01, Mr. Douglas did not have a right to grieve this action.

The ability to remove employees who do not meet the expectations of the facility is a basic Management tool, which is vital to the success of any organization. The prohibiting of grievances that relate to probationary removals has been standard language in the agreements between the State of Ohio and OCSEA since the inception of bargaining. To allow this grievance to be heard would have an adverse impact on the specific language and rights afforded Management in Article 6.01 and Article 25.01.

A simple review of this case indicates that we have a 'probationary employee' who was removed during his probationary period for failing to meet performance expectations. The Union Contract supplies Management with two Articles (6.01 and 25.01) that permit the probationary removal and the disallowance for grievances as a result of the removal. The Union and the Grievant agreed, upon reinstatement, that he would be subject to a probationary period albeit for only sixty days. The Grievant had been out of employment from the Veterans Home for 415 days and an opportunity to review his performance was critical for Management as it is for all employees. If the issue of a probationary period was problematic for the Union, they should have never agreed to encompass that language in the grievance settlement that brought Mr. Douglas back to work. However, the fact remains he was subjected to a probationary period and that offered Management all the inherent rights to evaluate him accordingly. He did not meet expectations and was removed. The contract is specific that this grievance not be heard.

Management takes the position that what is involved here is a simple case of an individual who did not meet the basic performance expectations of Management. Mr. Douglas has been given an extremely fair and equitable opportunity to prove himself worthy of the position as a Hospital Aide at the Ohio Veterans Home. He failed repeatedly despite attempts by Management to correct his acts of negligence and insubordination.

The performance evaluation system used within the nursing department is one that offers those individuals who work closely

with new employees the opportunity to assist in the evaluation process. Evaluations and the determination for retention beyond the probationary period are not at the discretion of one Management employee. They are a combination of opinions and documentation from coworkers as well as Mr. Douglas' fellow union members offered information that was detrimental in his attempts to be retained as an employee at OVH. The peer review process was a union initiative as indicated in the testimony of Ms. DeRose.

Management is very conscious of the need to create harmony and establish sound work ethics within the nursing department. Continuity of care is of utmost concern. Mr. Douglas' lack of abilities to perform to the established levels of expectation rendered him undeserving of his position.

The Grievant received several disciplinary actions during his tenure with the Veterans Home. Corrective action was administered until the point where the actions of Management had to become punitive. His behavior and lack of regard for agency policy dictated that he be removed which he was on July 11, 1996. He was 'suspended' from service for a period of 415 days before his reinstatement as a result of a grievance settlement. Contained in this grievance settlement was the clause, which subjected him to a reduced probationary period of sixty (60) days.

The purpose of this clause was to afford Management the opportunity to evaluate the Grievant and offer the Grievant the chance to prove he was able to perform to the levels of expectation. For one to think that a sixty day probationary period

would be for a specific issue is ludicrous. It is inherent that the employee be evaluated for his abilities to perform.

Mr. Douglas was not a rookie employee. He was previously employed by the Veterans Home and had received inservice and training regarding proper techniques and policies. Mr. Douglas was fairly evaluated and the determination was made that he was not acceptable to serve as a Hospital Aide at the Veterans Home.

The contractual language in Article 6.01 gives Management the sole discretion to discipline or discharge probationary employees and goes further to state that any such probationary action shall not be appealable through any grievance or appeal procedure. The Grievant is even prohibited from appealing to the State Personnel Board of Review.

A review of the grievance settlement that brought Mr. Douglas back to work does not contain language which waives Management's right to discharge a probationary employee. If this was a strong point of contention for the Union, they should have included language, which prohibited a probationary removal. Simply put, Mr. Douglas was a probationary employee, as defined by the grievance settlement, which reinstated him, and he was removed in accord with Article 6.01.

Article 25.01-B (paragraph 2) specifically states . . . probationary employee shall have access to this grievance procedure <u>except</u> those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals. Mr. Douglas was a probationary employee who was removed. In accord with 25.01, Mr. Douglas did not have a right to grieve this action.

Mr. Douglas was treated no differently than other employees subject to a probationary period. Management considered the Grievant and probationary employee and treated him as such. Probationary employees are not entitled to a pre-disciplinary meeting.

So it is that the Home urges that the grievance be denied in its entirety.

The Union's Position:

The Union takes the position that the record evidence shows that not only was the Grievant improperly removed, but there was no just cause to validate any discipline. The testimony and evidence clearly showed that the Grievant was not a probationary employee, nor was the settlement an indication of such. The settlement language had language before and after the word "probationary" to clarify what was discussed, intended, and meant by the word. The testimony showed that the Grievant was not guilty of a major attendance violation. Management has openly acknowledged that they violated the Settlement by initiating a work performance removal. They have stated there was no major attendance violation.

Management initially refused to allow him to work on 8-31-97, in spite of the settlement language, because of his Mantoux shot situation. It is totally ridiculous for Management to insinuate that it was the Union's responsibility to tell the Grievant what was needed to return to work. That is a Management function as defined in Article 5 of the Contract. Then too, argues the Union, the need for the shot that lasts 12 months is questionable; the Grievant had a shot 4 months earlier.

When the Grievant contacted Bob Day on 9-8-97 to tell Day about his back, the Grievant requested to start during the next orientation. This ideal situation was rejected and he was to start in orientation for three days.

The Union points to the testimony of Steward William Kessler concerning Ms. DeRose's meeting with the Grievant and himself on October 17, 1997, asserting that Kessler testified to the effect that the entire meeting centered around weak complaints of asking too many work-related questions; performing a three person lift on a patient, even though he was following orders; going to take the Mantoux test without permission. The Union asks rhetorically: why would the Grievant leave work to have the second test read, if he had not been instructed to do so. Kessler also indicated that in that meeting Ms. DeRose mentioned the three days missed as more of an afterthought than a real issue. Kessler further indicated that at no time in this meeting did Ms. DeRose tell the Grievant that he had committed a major attendance violation. She handed him a removal notice; no charges; no pre-disciplinary hearing. The intent to usher out this person they had been forced to take back was so evident, that they never gave him keys the entire seven weeks he worked. Everyone gets keys when they hire in or return after an absence except the Grievant.

The Union's perception of the Grievant's conduct is that he was forced out of work until 9-8-97, but did not complain in order to avoid trouble; the Grievant was told to get a Mantoux test reading and forced to lose another 1-1/2 hours, all without grievance or complaint; the Grievant worked the floor and did as he was told and

disciplined for following instruction to perform a three man lift; the Grievant was criticized for asking job-related questions in an attempt to provide decent care. It's hard to believe that given the glowing consideration of his present Employer that he is the same person the Home claims to be incompetent.

The Union takes the position that the Settlement Agreement speaks for itself. Nothing in it indicates probationary as a new employee on handling work performance.

The Union asserts that the Grievant accepted no money with his Settlement in an attempt to show that he would work for a living. After the Settlement was violated on August 31, 1997, he did not grieve it to keep the peace. He informed Mr. Day before start time on September 8, 1997, that his back was hurt and he would agree to delay his return to work date until the next orientation. He did not grieve the initial violation of the Settlement to keep peace. This request was denied with the understanding he would be sitting in orientation and it did not materialize. When he saw Ms. DeRose, she told him he would have to have the second step of the Mantu test before he could start work. He left work to get it, but had to go out of pay to do so, then on September 11, 1997 he had to have the test read. Following what he understood Ms. DeRose's instructions were, he had the test read and upon his return, she said he had left without permission. This time she denied his leave without pay request for 30 minutes. From the intended start up date until he was removed, management in general set up road blocks for the Grievant. It is clear that they had no intentions of keeping the Grievant, even if it meant violating the Settlement

Agreement. Had the Grievant failed on his accord, we would not be here. However, that settlement was negotiated in "good faith." It was violated, but not by the Grievant. Not only did the Grievant uphold his part, he went the extra step to succeed. To discipline the Grievant without due process is a total violation of his rights.

It is for the reasons stated that we ask for the removal to be overturned and the Grievant made entirely whole, including lost over-time opportunities and interest, due to the maliciousness of this removal.

The Issues:

Management's Issue: Is the Grievant properly before the Arbitrator?

Union's Issue: Did Management violate the Grievant's right to due process by denying a Pre-Disciplinary meeting?

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

Discussion and Opinion:

The issues here are numerous. The first issue to be answered is whether the instant grievance challenging the Grievant's discharge as without just cause is arbitrable. The answer to that question rests upon a determination as to whether or not the Grievant was, upon his reinstatement, properly regarded as an employee in his initial probationary period, as understood in Articles 6.01 and 25.01. Thus, as Management contends, Articles 6.01 and 25.01 clearly allow for probationary removals for employees in their initial probationary period, and disallow the

right to grieve (and perforce arbitrate) such removals. For the reasons which follow, I find that the Grievant cannot properly be regarded as an employee in his initial probationary period. Hence, Articles 6.01 and 25.01 are inapplicable and the grievance is arbitrable. Thus the record clearly shows that the Grievant had already served his initial probationary period as a full-time Hospital Aide, prior to his discharge as a Hospital Aide on July 11, 1996. Indeed, the discharge letter of July 10, 1996 clearly recognizes that the Grievant had "the right to grieve under Article 25," that is, it clearly recognized that the Grievant's discharge was purportedly for "just cause"; it clearly recognized that the Grievant's discharge was not a probationary removal. As the record shows, the Grievant did indeed grieve. Pursuant to the terms of the Settlement Agreement of 8-14-97 concerning that grievance, at paragraphs 1 and 2, the Grievant was reinstated to his full-time Hospital Aide job without loss of seniority. This circumstance brings one to consider some basic and fundamental principles and/or understandings applicable in Labor-Management relations, and that is, that absent some express understanding to the contrary, it is axiomatic that when an employee is reinstated without loss of seniority following his discharge, whether by settlement entered into by the parties (as here), or pursuant to an Arbitrator's Award, there simply is no requirement that the employee, upon reinstatement, commence to serve a probationary period. It's clear that Management recognized this principle here, for as part of the Settlement Agreement it sought to obtain just an express understanding imposing a form of a probationary period. Thus

paragraph 3 of the Settlement Agreement of 8-14-97 sets forth a sixty (60) day probationary period. The crux of the parties' dispute in the instant grievance centers on the parameters of this sixty (60) day probationary period. Acknowledging the frequent observation concerning the low threshold necessary for finding "plausibility" in differing interpretations of the same language and hence ambiguity in the language, which in turn warrants recourse to the principles of contract interpretation and settlement negotiations history in an effort to clarify the ambiguity, I am nonetheless constrained to find that Management's construction to the effect that paragraph 3 creates a contractual initial probationary period (modified as to duration), is simply not plausible. In my view the language of paragraph 3 is clear and unambiguous. The language used, in clear and unambiguous terms, provides that for a period of 60 days the Grievant is to be reviewed for major attendance related violations only. Examples of such "major attendance violations" are set forth, namely AWOL and Job Abandonment. Further elucidation of what the parties intended by their reference to "major attendance related violations" is to be found in the last sentence of paragraph 3, wherein they expressly note that "unexpected illness and absence related to sick leave within a reasonable amount" are not to "affect his probationary performance evaluation." Assuming arguendo that there is some plausibility to Management's construction of paragraph 3 to the effect that a plenary contractual initial probationary period was what the parties contemplated, such that an ambiguity can be said to exist, one of the major and more persuasive of the rules of

interpretation readily serves to undermine Management's construction, to wit, "to express one thing is to exclude another," a principle often referred to by the judiciary in its Latin expression, namely, "expressio unius est exclusio alterius." Thus when the parties expressly set up a truncated probationary period looking toward a review "for major attendance violations only," by the clearest of implications, probationary review for other violations was not intended. Literally no doubts to the contrary can be inferred in light of the parties' express written articulation in paragraph 3 to the effect that "all other violations . . . will be subject to normal disciplinary measures." This being so, there are simply no grounds to conclude, as Management urges, that in paragraph 3 the parties' Settlement Agreement conferred on Management the right to probationarily remove the Grievant for performance shortcomings. To the contrary, any performance shortcomings, in contrast to major attendance related violations, were to be "subject to normal disciplinary measures." Having served an initial probationary period successfully, it is to be inferred that Management had previously determined that the Grievant was competent as a Nurse Aide. Under the parties' contract performance issues arising subsequent to this initial probationary period are expected and required to be treated as disciplinary issues, subject to the discipline and grievance provision of Articles 24 and 25, respectively. The Settlement Agreement of 8-14-97 created no exceptions to this expectation and requirement.

Accordingly, when Management discharged/removed the Grievant without adhering to the due process safeguards of Article 24 and Article 25, they were in serious violation of these contractual provisions. The Grievant's discharge in the face of his being deprived of the due process safeguards of Article 24 rendered his discharge as without just cause. Accordingly, he must therefore be reinstated. However, other remedial components are not that clear. One component apparently sought by the Union is the rescission of the Grievant's discipline for the matters which underlay his July 11, 1996 discharge, based on the wording of paragraph 4 of the 8-14-97 Settlement Agreement. It appears that the Union contends that this paragraph provides that the discipline stemming from the matters outlined in the discharge letter of 7-10-96 were intended to be "removed from the Grievant's file effective 8/31/97." I disagree. A plain reading of the phrase "will be removed from the Grievant's file effective 8/31/97" can only be read to refer back to "Removal." Thus paragraph 4 in effect provides that the removal of 7/11/96 will be removed from the Grievant's file and in lieu thereof a suspension equal to time served, some 400 plus days, would be imposed. This certainly constitutes most severe discipline. It's illogical to infer that in the very same paragraph, indeed in the very same sentence, the parties would agree to an exceptionally severe penalty of a 400+ day suspension and simultaneously agree to its being removed from the Grievant's file. Another troublesome component is the element of full back pay. As has been seen, the actions of the Grievant upon which Management relies were measured against the wrong standard, namely,

they were measured against the Employer's virtually unbridled discretion, based upon the erroneous assumption that the Grievant was properly to be regarded as an employee in his initial probationary period, albeit foreshortened to 60 days instead of 120 days. It's uncertain, however, whether any of the conduct (other than the three man lift incident) would have become the subject of formal discipline had Management appreciated that faulting the Grievant for this conduct would have had to pass muster under the just cause standard. At the same time it must also be noted that the Grievant's purported shortcomings as outlined on 10-17-97 were cumulative. Thus, had the Grievant been formally disciplined at the outset, perhaps he would have responded, with exemplary conduct thereafter. The discipline might have had its intended effect--correction of behavior. It is nevertheless observed, however, that some of the Grievant's conduct was disturbingly recidivist, such as his failure to punch out. Even if one accepts the Grievant's "misunderstanding" justification, it seems to me that the Grievant ought to have known that he was nonetheless expected to punch out, since failing to punch out was one of the express grounds for his 1996 discharge. Additionally, as in the past, the Grievant was embarked on the beginnings of a pattern of chronic absenteeism. This is of particular concern given the nature of the off duty injury which precipitated his absences, namely, a back injury. It is noted that at some point such absenteeism, even when caused by legitimate illness, can constitute just cause for discharge. The Union would have the arbitrator determine whether or not each matter relied on by Ms. DeRose at the 10-17-97 meeting warranted

discipline under the just cause standard, and, if so, how much. However, except for the three man lift situation, I find such a task to not be feasible given all the uncertainties outlined hereinabove. Concerning the three man lift situation, the Grievant was simply following the charge nurse's orders. Presumably supervisors can modify policies in appropriate circumstances. In this regard it was the Grievant's uncontradicted testimony that use of the mechanical lift was not feasible. Accordingly, I find no just cause for the Grievant's verbal warning concerning the three man lift incident.

Furthermore, there is uncertainty as to the Grievant's attendance had he remained in the Employer's employ, given his need to care for his aged mother. Thus it will be recalled that in his prior period of employment he had been counselled, and then subsequently disciplined, for refusing to work overtime, purportedly because of his need to care for his mother. And it was the Grievant's testimony that since his 10-17-97 discharge he's been working typically but 20 to 30 hours per week due to his needs to care for his mother. Then too there is the fact that in seeking to settle his first discharge he sought to return on a part-time basis only, again, due to his needs to care for his mother. In light of all the foregoing circumstances and uncertainties, I find that to award the Grievant full back pay would be to give him a bonus. Harbor Furniture Mfg. Co., 85 LA 359, 364-365 (Richman, 1985). Here, as in Harbor Furniture, supra, I find that it would be inequitable to give him an award of full back pay in light of the many uncertainties in his situation vis-a-vis being in a

position to fully discharge the duties of a full-time Nurse Aide in the back pay period. Accordingly it is found that the Grievant is entitled to but 70% of the pay which he would have earned had his discharge not occurred, less interim earnings. There being no showing of malice, as alleged by the Union, interest is denied.

Award:

For the reasons more fully set forth hereinabove, the grievance is sustained in part and denied in part. The Grievant was not discharged for just cause. He shall be reinstated to his former position without loss of seniority and with 70% of back pay. Nineteen days remain to be served on the Grievant's major attendance related probationary period. The verbal warning issued concerning the three man lift incident is to be removed from the Grievant's file. All other remedies requested are denied.

Dated: May 3, 1998

Frank A. Keenan
Arbitrator

APPENDIX I

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 for these purposes.

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in The Ohio Revised Code, Section 4117.08 (C), Numbers 1-9.

ARTICLE 6 - PROBATIONARY EMPLOYEES

6.01 - Probationary Periods

All newly hired, promoted and laterally transferred employees shall serve a probationary period. The probationary period shall be one hundred twenty (120) days for classifications paid at grades 1 to 7 and grades 23 to 28 or one hundred eighty (180) days for classifications paid at grades 8 to 12 and grades 29 to 36.

During an initial probationary period, the Employer shall have the sole discretion to discipline or discharge probationary employee(s) and any such probationary action shall not be appealable through any grievance or appeal procedure contained herein or to the State Personnel Board of Review.

An employee's probationary period may be extended by a period equal to employee leaves of fourteen (14) consecutive days or longer, except for approved periods of vacation leave.

ARTICLE 24 - DISCIPLINE

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 or custody of the State of Ohio, the arbitrator does not have 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(I).

24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension, a fine or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. Absent any extenuating circumstances, failure to appear at the meeting will result in a waiver of the right to a meeting. An employee who is charged, or his/her representative, may make a written request for a continuance of up to 48 hours. Such continuance shall not be unreasonably denied. A continuance may be longer than 48 hours if mutually agreed to by the parties. 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. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The Employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. 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 or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.