#1316

ROBERT BROOKINS

LABOR ARBITRATOR ◆ PROFESSOR OF LAW ◆ J.D. ◆ PH. D.

September 28, 1998

Ms. Leslie Jenkins
Arbitrator Scheduler
Division of Human Resources
Office of Collective Bargaining
106 N. High Street, 7th Floor
Columbus, OH 43215-3009

Grievance #	27-11(5-21-97) 649-01-03
Subject:	Resignation (Voluntary/Coerced)
Grievant:	Thomas Davis
Employer:	Lebanon Correctional Institution
Union:	OCSEA, Local 11

Dear Ms. Jenkins:

Please find enclosed the Arbitrator's notarized opinion in the above referenced matter. Except for the notarization, this is the *very same* opinion that I faxed to you on September 28, 1998. Thanks for the opportunity to serve you.

Sincerely,

Robert Brookins

Robert Brookins

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#1316

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
Lebanon Correctional Institution

-AND-

OCSEA/AFSCME, Local 11

APPEARANCES

For the State
David Burrus, Labor Relations Officer
Tina Krueger, OCB Labor Relations Specialists
Ronald Hart, Labor Relations Officer
Lora Hodgson, Personnel Officer III
Dan Burns, Deputy Warden

For the Union
Robert Jones, OCSEA Staff Representative
Thomas Davis, Grievant
Keith Booth, Union President

Case-Specific Data
Hearing Held: August 12, 1998
Case Decided: September 24, 1998
Grievance # 27-11(5-21-97) 649-01-03
Subject: Resignation (Voluntary/Coerced)

Arbitrator
Robert Brookins, J.D., Ph.D.

I. The Facts

The Ohio State Department of Rehabilitation (DR&C) is the largest agency in Ohio and houses approximately forty thousand inmates. Also, the DR&C employs approximately fifteen thousand employees, and processes thousands of personnel documents for its employees. The Lebanon Correctional institution (LCI or the Employer) is one of thirty organizations that collectively constitute the DR&C. On November 17, 1993, Mr. Thomas Davis (the Grievant) completed a LCI employment application for a position as a Correctional Officer. In relevant part, the following oath appears just above the Grievant's signature: "I solemnly swear or affirm that the answers I have made to each and all of the questions in this application are complete and true to the best of my knowledge and belief. . . ." However, the application did not declare that falsification was grounds for removal. In reliance on his representations in the employment application, LCI hired the Grievant as a Correctional Officer on or about April 4, 1994. After the Grievant submitted his employment application on November 17, 1993, LCI presumably did a background check on him but apparently discovered no misrepresentations at that time. During his two-plus years of tenure with LCI, the Grievant maintained both a discipline-free work record and a wholly satisfactory performance record.[1]

On or about January 17, 1997, Warden Russell informed the Grievant that LCI was auditing personnel files to determine the accuracy of employees' claims of secondary education. Consequently, the Grievant checked the data on his 1993 employment application and found that he had falsely claimed to have earned an Associates Degree in physical education from Roan State Community College in Harriman, Tennessee (Roan). He claimed this accomplishment even though

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[1] Union exhibit 1

LCI does not require its Correction Officers to hold Associate Degrees and, at least in that respect, was not harmed by hiring Grievant. After he discovered the misrepresentation, the Grievant notified LCI.

Nothing in the record suggests that he either received or even applied for a degree from any college. Although he attended Roan, he dropped out after approximately four quarters with a 1.17 cumulative grade point average presumably out of a possible 4.0. The Grievant claims that he dropped out of school because his father's company was being struck by a union, and the Grievant had no money to finish school. According to the Grievant, he concluded that he had earned an Associates Degree because, after he dropped out of school, a Roan administrator said the Grievant had earned sufficient course credits to receive that degree. Apparently the Grievant never actually reviewed his academic record until LCI announced its impending audit in 1997.

After LCI charged the Grievant with falsification of his employment application , he consulted Deputy Warden Daniel Burns (Mr. Burns) and Labor Relations Officer Ronald Hart (Mr. Hart) about the likely disciplinary consequences of falsifying an employment application. Either before or shortly after he began conversing with Mr. Burns, the Grievant invited his union representative to leave the area. The Grievant did not seem particularly distraught when speaking to either Mr. Hart or Mr. Burns. During the ten-fifteen minute conversation between Mr. Burns and the Grievant, Mr. Burns did not advise the Grievant to consult the union representative. But Mr. Burns—who had performed investigatory interviews regarding the Grievant's falsification charge—did advise the Grievant that LCI often fired employees who falsified their employment applications. Also, in Mr. Burns' view, employees' efforts to fight charges of falsification could last for as long as two years. Although it is unclear who raised the subject of the Grievant's resigning, at some point they broached that subject.

Mr. Burns pointed out that resignation was a serious step that warranted careful consideration. Finally, during their conversation, Mr. Burns called Warden Russell to inquire about the prospects of employees' resigning and reapplying for positions with LCI. The Grievant claimed that the Warden was unopposed to his reapplying. Nevertheless, the Grievant understood and appreciated that there was a risk that he might not be rehired after resigning.

The Grievant subsequently spoke to Mr. Hart about his conversation with Mr. Burns. Mr. Hart echoed Mr. Burns's view that LCI often terminated employees who falsify their employment applications. However, while informing the Grievant of LCI's disciplinary practices regarding falsification, Mr. Hart also pointed out that each falsification case stands on its own facts. Eventually, their discussion also settled on resignations and rehires, but, again, it is not clear who raised this issue.

On February 5, 1997, the Grievant resigned from LCI for "personal reasons" (Joint Exhibit 3). After reapplying, he discovered that he was deemed ineligible for rehire. There is some evidence to suggest that the Grievant was simply placed at the low end of the list of eligibles. However, Joint Exhibit 3 clearly states "resigned–not eligible for rehire."

The only witness to address the actual reasons for the Grievant's adverse classification was Ms. Lora Hudson. She stated that the Grievant was adversely classified because of "educational status" or "educational reasons." She later explained that "educational status" or "educational reasons" meant "false claim of education." Ms. Hudson also stated that the Grievant would be flagged because he did not possess an Associates Degree.

On February 5, 1998, Mr. Hart gave the Grievant a new employment application, and the

Grievant completed it at home. Later, he wrote a letter, dated January 26, 1998, to Warden Russell.[2] The letter requested that Warden Russell assist the Grievant in getting rehired. Exactly when the Grievant reapplied for his position with LCI is not entirely clear. Apparently, however, he was otherwise qualified as evidenced by Administrator Michael E. Kelley's letter to him on May 15, 1997(Joint Exhibit 5):

> "You have successfully completed the Ohio correction Officer Psychological Inventory. . . ." Additionally, you have met the minimum requirements of the ability, writing, and Correction Officer Questionnaire components." Upon completion of a preliminary background investigation, a formal interview and fingerprinting will (sic) be scheduled based on the needs of the institution(s) you have selected. . . . Your eligibility is valid for one (1) year from your test date."

Upon learning of the Grievant's adverse classification, the Union filed grievance (27-11(5-21-97) 649-01-03) (the grievance) in his behalf on February 6, 1997 (Joint Exhibit 2). The grievance alleged violations of sections 24.01-24.03 of the collective bargaining agreement. Later, during the hearing of this matter before the undersigned, the Union added the following sections to its list of allegedly violated contractual provisions: sections 2.01, 2.02, 25.01B, and 44.02.

II. The Issues

This dispute contains an issue on the merits and one of substantive arbitrability. The issue on the merits is whether the Grievant's resignation resulted from coercion or intimidation by Mr. Hart or Mr. Burns. Of course the issue of substantive arbitrability is whether the issue on the merits is properly before the Arbitrator.

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[2] It makes no sense for the Grievant to have drafted this letter on January 26, 1998, when he did not resign until February 2, 1998. Therefore, one might reasonably conclude that the letter was drafted on February 26, 1998 but mistakenly dated January 26.

III. Contractual Language

2.01 Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio or Executive Order 83-64, 87-30, or 92-287V of the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, disability, sexual orientation, or veteran status. Except for rules governing nepotism, neither party shall discriminate on the basis of family relationship. The Employer shall prohibit sexual harassment and take action to eliminate sexual harassment in accordance with Executive Order 87-30, Section 4112 of the Ohio Revised Code, and Section 703 of Title VII of the Civil Rights Act of 1964 (as amended).

* * * *

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.

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.

* * * *

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 an 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 performance evaluation report without indicating the fact that disciplinary action was taken. Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline 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.

24.03 Supervisory Intimidation

An Employer representative shall not use the knowledge of an event giving rise to the imposition to intimidate, harass or coerce an employee.

In those instances where an employee believes this section has been violated, he/she may file a grievance, including an anonymous grievance filed by and processed by the Union in which the employee's name shall not be disclosed to the Employer representative allegedly violating this section, unless the Employer determines that the Employer representative is to be disciplined.

The Employer reserves the right to reassign or discipline Employer representatives who violate this section.

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25.03 Arbitration Procedures

The parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator.

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Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

* * * *

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

Section 44.02

To the extent that State statutes, 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 statutes, regulations, rules or directives.

IV. Arguments of the Parties

A. Substantive Arbitrability

1. Employer

The original grievance (27-11(5-21-97) 649-01-03) alleged that LCI had violated sections 24.01, 02, and 03 of the collective bargaining agreement. Clearly, those sections were not violated and are, thus, inapplicable. Moreover, the Union failed timely to amend grievance 27-11(5-21-97) 649-01-03 to include other applicable contractual provisions. At the end of the grievance procedure, the Union added sections 2.01, 2.02, 25.01B, and 44.02. to the list of provisions that LCI allegedly violated. These amendments are untimely, and, therefore, the Union waived its right to amend grievance 27-11(5-21-97) 649-01-03. Consequently, according to LCI, this grievance fails to cite an applicable contractual provision and, thus, lacks substantive arbitrability.

2. Union

The employer waited until the advocates began to prepare to arbitrate this case before it raised the issue of arbitrability.

B. The Merits

1. Employer

The Grievant resigned of his own free will to avoid the prospect of severe discipline and perhaps other unpleasant prospects. He was not the victim of coercion, intimidation, or discrimination.

2. Union

By advising the Grievant to resign rather to process his grievance, LCI coerced, intimidated, and discriminated against the Grievant in violation of several provisions of the collective bargaining

agreement.

V. Analysis

A. Substantive Arbitrability

Generally, substantive arbitrability addresses whether the collective bargaining agreement encompasses a given dispute.[3] In this case, LCI offers two reasons to support its claim that the grievance is not arbitrable. First, LCI correctly notes that the grievance originally claimed violations of only sections 24.01-24.03. In LCI's view, the grievance is not arbitrable because these sections are inapplicable to the instant dispute. Second, LCI argues that the Union's contention that LCI also violated sections 2.01, 2.02, 25.01B, and 44.02 is not arbitrable because the Union did not amend the grievance to include these contractual provisions in a timely manner.

Both of LCI's arbitrability arguments are wide of the mark, however. Its first argument merely restates the position that provisions 24.01 through 24.03 are either inapplicable or were not violated. It is one thing to argue that a cited contractual provision does not contemplate the subject matter of a grievance; it is quite another to argue that the collective bargaining agreement itself does not encompass that subject matter. The latter mirrors the essence of substantive arbitrability. LCI does not contend that the subject matter of the grievance falls without the scope of the contract, only the inapplicability of the cited provisions therein. Mere arguments about a provision's applicability do not remove that provision from the scope of the contract. Finally, resolution of issues involving the applicability of provisions 24.01-24.03 is exactly why the parties submitted the grievance to

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[3] Although LCI focuses on substantive arbitrability, its contention actually address both substantive arbitrability. To the extent that LCI is arguing that the Union cited the wrong contractual provisions, the claim is one of substantive arbitrability. However, to the extent that LCI focuses on the timeliness of the amendments, it's claim addresses substantive arbitrability.

arbitration in the first instance.

Although LCI's second argument is sounder, it too fails to carry the day on the issue of substantive arbitrability. Essentially, LCI's contends that the Union's failure to timely cite several contractual provisions somehow precludes consideration of those provisions. That contention is subject to at least two provisos, however. Labor arbitrators rarely deny consideration of contractual provisions simply because those provisions were omitted from the original grievance or added during subsequent stages of the negotiated grievance procedure. Thus, one noted authority observes:

> Arbitrators seldom refuse jurisdiction of a grievance because a grievant or the Union failed to cite the correct labor agreement provision in support of the claim . . . so long as the company was not misled by this failure. . . . If the grievance clearly states the relevant facts, arbitrators generally hold that adequate notice concerning the claim has been given, even if the basis for the claim at the hearing varies from the claim asserted at the first step."[4]

*In Re Pearl Brewing Company and United Brewery Workers, Loca*l 100, 48 LA 379, 381383 Howard, Arb.) typifies this approach. In *Pearl Brewing*, the Grievant was suspended. Instead of citing contractual provisions that cover suspensions, the union cited provisions that addressed discharges and layoffs. Later the union untimely amended its grievance and again cited contractual provisions dealing with discharges and layoffs. The employer argued that the original grievance was without merit and that the attempted amendment was untimely. In rejecting the employer's position, the arbitrator held that: (1) the original and amended grievance captured the essence of the dispute—the Grievant's suspension; (2) the amended grievance cited the "just cause" provision, which generally reflects the proper basis for the dispute; and (3) the contractual five-day time limit was inapplicable to grievances that addressed disciplinary actions.

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[4] FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION 96 (Ray J. Schoonhoven, ed., 3rd. ed. 1991).

The facts in *Pearl Brewing* deviate from those in the instant case in one respect. The distinction is that, in *Pearl Brewing*, the contractual time limit was inapplicable. In the instant case, however, sections 25.02, steps 1-3 implicitly militate against untimely amendments.

Two reasons support this conclusion. First, these sections contain rather strict time limits for filing and processing grievances. The parties would hardly stress strict guidelines for filing and processing grievances and yet tolerate untimely amendments thereto. In addition, the first sentence in section 25.02, step 2 explicitly requires the Union to reduce the grievance to writing. At a minimum, crystalizing the grievance in writing affords the parties a stable, stationary target for subsequent discussions and bargaining in the grievance procedure. Thus, it seems clear that tardy amendments would not comport with the parties' intent in section 25.02. Ultimately, then, this distinction between *Pearl Brewing* and the instant case neither disturbs nor dilutes the persuasiveness of *Pearl Brewing* regarding the presence of substantive arbitrability in the instant case.

Moreover, several reasons suggest that the parties in the instant case intended to accommodate amendments of grievances in their grievance procedure. First, as a practical matter, amendments are part and parcel to grievance processing. Second, and more important, by not objecting to the fact that the Union amended the grievance but rather objecting to the tardiness of that amendment, LCI impliedly concedes that timely amendments are acceptable.

Therefore, the remaining question is whether the challenged amendments are fatally tardy. The threshold question then becomes what constitutes an untimely amendment to a grievance under the parties' collective bargaining agreement. Because the collective bargaining agreement offers no explicit time limit for amending grievances, and because amendments are permissible, a reasonable time limit should be imposed. Furthermore, one should determine reasonableness in light of the

explicit time limits for filing and processing grievances under section 25.02, steps 1-3. LCI offered unrefuted testimony that the Union amended the grievance only after it had been processed through the grievance procedure. This would constitute an untimely amendment under any measure of reasonableness, unless the Union clearly demonstrated that despite due diligence an earlier amendment was impossible. The Union has made no such demonstration and, accordingly, the amendment is untimely.

Yet, an untimely amendment is not necessarily a fatality in the sense of either an effective waiver or deficient arbitrability. As pointed out in *Pearl Brewing*, at least two questions must be answered before one equates untimeliness with either of those conclusions: (1) did the tardy amendment disadvantage or harm LCI; and (2) whether the original grievance captured the essence of the basis for the grievance in the first instance. If the answers are no and yes respectively, then fairness, arbitral precedent, and the undesirable consequences of stifling grievances suggest that the grievance is substantively arbitrable.

With respect to the first inquiry, LCI did not allege that the untimely amendment of the grievance somehow prejudiced it. Nor does the record contain evidence of such prejudice. As to the second inquiry, the original grievance alleged that:

> [The] Grievant was told that the state's practice for someone falsifying their application was to terminate that person. Grievant was also advised by management (Dan Burns) that if he resigned, he could make another application with the state and he would be rehired. This was all done before the scheduled pre-hearing. Grievant feels that he was *coerced* into resigning because management said it would be better on him to resign as to termination. He feels that a hearing now would save his job.[5]

On its face, the original grievance effectively communicated the pith of the Union's contention, i.e.,

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[5] Emphasis added.

the Grievant was *coerced and intimidated* into resigning. In light of the foregoing discussion, the Arbitrator holds that the grievance does not lack substantive arbitrability.

VI. The Merits

A. Discrimination

The issue on the merits is whether Mr. Burns, Mr. Hart, or both coerced or intimidated the Grievant into resigning from his position as a Correctional Officer with LCI rather than face the prospect of possible termination. Because LCI did not discipline the Grievant, this dispute is not disciplinary in nature, and there is no issue of just cause before this Arbitrator. Moreover, because the Union alleges coercion and intimidation, it has the burden of persuading the Arbitrator with preponderant evidence in the record as a whole that the Grievant's resignation emanated from coercion or intimidation.

The Union first cites sections 2.01and 2.02 as controlling the issue of discrimination, coercion and intimidation. Clearly, section 2.01 controls discrimination, but just as clearly there simply is no evidence that LCI discriminated against the Grievant. Section 2.01 prohibits LCI from discriminating against employees "on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, disability, sexual orientation, or veteran status." Nowhere has the Union alleged that the Grievant was discriminated against because of any of these reasons. Nor does the record support such an allegation.

B. Explicit Intimidation and Coercion

Section 2.02 is more to the point. It protects employees from being "intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement." Nevertheless, because preponderant evidence in the record as a whole does not indicate that either coercion or intimidation

triggered the Grievant's resignation, LCI has not been proven to have violated section 2.02.

Several reasons support this holding. First, whether Mr. Hart and Mr. Burns actually advised the Grievant to resign is an issue of credibility on which the Grievant did not prevail. When testifying at the hearing, Mr. Hart and Mr. Burns stoutly and credibly denied having advised the Grievant to resign. Indeed, Mr. Hart actually thought the Grievant could resign and be rehired. He testified that, given the Grievant's job performance, he did not know why the Grievant would have been classified as ineligible for rehire. Mr. Hart and Mr. Burns insisted that they merely offered honest, solicited views of the likely disciplinary outcome of falsification charges. No one guaranteed the Grievant that either Mr. Hart or Mr. Burns were seers in this matter.

Second, even if they did advise the Grievant to resign, that advice without more hardly constitutes coercion or intimidation. To be effective, coercion and intimidation require an atmosphere of implied or explicit threats. Yet, neither Mr. Hart nor Mr. Burns overtly threatened the Grievant. Of course, one might argue—like the Union seems to—that, coming from management, dire predictions of discharge together with strong advice to resign are inherently coercive.

Generally that might be so, but there are two other considerations. First, the only conceivable threats that Mr. Hart or Mr. Burns could have asserted were already evident: (1) the Grievant might very well be obliged to endure a lengthy wait before this dispute is settled; (2) ultimately, his grievance might be denied in arbitration; and (3) he might very well be disqualified for rehire. Neither LCI nor the Union introduced evidence relating to the penalties that Ohio has historically imposed in cases involving established falsification charges. Still, a brief survey of the arbitral literature reveals that charges of falsification, if proven, commonly precipitate severe discipline, including discharge. Because such outcomes are relatively common in falsification cases, neither Mr. Hart nor Mr. Burns

was in a position to use dire threats of discipline to leverage the Grievant into resigning. Second, the Grievant affirmatively sought a managerial perspective regarding likely penalties for falsification of employment applications and got that perspective from Mr. Hart and Mr. Burns. Neither Mr. Hart nor Mr. Burns approached the Grievant and volunteered their advice. When the Grievant affirmatively sought the advice of Mr. Hart and Mr. Burns, he might have reasonably prepared himself to be either disheartened or comforted.

Third, nothing in the record suggests that the Grievant sought to balance the advice of Mr. Burns and Mr. Hart by consulting his duly elected union representative(s) about the likelihood LCI would prove the charges and, if so, the likely severity of any resulting penalties. Indeed, during his conversation with Mr. Burns, the Grievant dismissed a union representative.

C. Constructive Coercion and Intimidation

Also, the Union seeks to establish that Mr. Hart and/or Mr. Burns constructively coerced the Grievant through material misrepresentations. In other words, they deliberately concealed the full panoply of consequences that were likely to accompany resignation with pending falsification charges, thereby giving the Grievant a distorted sense of security regarding resigning and successfully regaining his job. Specifically, the Union points out that neither Mr. Hart nor Mr. Burns advised the Grievant that an employee who resigns under a cloud of unresolved charges might be ineligible for rehire.

To establish this allegation, the Union must show that Mr. Hart and/or Mr. Burns possessed either actual or constructive knowledge of this "rule" and consciously withheld it to mislead the Grievant into concluding resignation was less costly or risky than fighting the charge. The first difficulty is that the Union failed to show that either Mr. Hart or Mr. Burns actually knew that the

Grievant would be ineligible for rehire.

Nonetheless, the Union apparently sought to establish constructive knowledge of this outcome by introducing *State ex rel. Lyons v. Ness, Director of Public Safety*, 39 N.E.2d 849, 850 (Ohio 1942) (Union Exhibit 3). In *Lyons*, the Supreme Court of Ohio held: " a rule of the Civil Service Commission of Cleveland which provides that a resigned employee may be reinstated within one year from the date of his resignation. . . . is not available to an employee who resigns while charges are pending against him. . . ." Obviously the facts of this case fall squarely within *Lyons*. In fact, on its face, *Lyons* militates against the Grievant because his resignation was effective when he submitted it on February 5, 1997 (Joint Exhibit 3), rather than on some future date. Thus, under *Lyons*, the Grievant had no chance to recant his resignation. Presumably, by citing *Lyons*, the Union attempts to argue that Mr. Hart or Mr. Burns had constructive knowledge of the rule in that case and, thus, they still had a duty to informed the Grievant of its holding. If, indeed, the Union's contention and purpose for introducing *Lyons*, then that position fails because it was never established that either Mr. Hart or Mr. Burns should have known of the *Lyons*' decision.

D. The Impact of Section 44.02

Also, the Union cited section 44.02 of the collective bargaining agreement which states: "To the extent that State statutes, 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 statutes, regulations, rules or directives.*[6] Although the parties' collective bargaining agreement is indeed silent regarding employee resignations, the Union failed to identify any rights or benefits to which the Grievant was entitled.

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[6] Emphasis added.

Nor has it demonstrated that LCI deprived him of any such benefits. Consequently, section 44.02 also does not assist the Union in this case.

Regarding coercion and intimidation, the record ultimately establishes that, when confronted with falsification charges, the Grievant made at least two voluntary and independent decisions; (1) he decided to seek advice from those he apparently trusted; and (2) he decided that resignation was the path of least resistance to reinstatement.

E. Propriety of the Ineligibility Classification

Here, the Union asserts that LCI wrongfully classified the Grievant as ineligible for rehire. Indeed, Mr. Hart testified that he was at a loss to understand why the Grievant was not eligible to be rehired. As noted earlier, the collective bargaining agreement is silent regarding LCI's right to classify employees upon re-application and nothing in the record shows that LCI violated section 44.02 by somehow denying the Grievant a statutory right.

On the other hand, the management rights clause (Article 5) restricts those areas of employers' authority covered in the contract but otherwise affords employers, "The sole and exclusive rights and authority [which].. . include specifically, but are not limited to, the rights listed in The Ohio Revised Code, Section 4117.08 (C), numbers 1-9. The rights referenced in section 4117.08 include the right to:

(1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;
(2) Direct, supervise, evaluate, or hire employees;
(3) Maintain and improve the efficiency and effectiveness of governmental operations;
(4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;
(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign,

schedule, promote, or retain employees;
(6) Determine the adequacy of the work force;
(7) Determine the overall mission of the employer as a unit of government;
(8) Effectively manage the work force;
(9) Take actions to carry out the mission of the public employer as a governmental unit.[7]

The silence of the parties' contract on resignations and rehires together with the broad language cited above (for example, numbers 2 and 8) strongly favor LCI's right to: (1) accept the voluntary resignation of an employee charged with falsification; and (2) decline to rehire the employee. This is especially true where the employee resigns under pending charges and where evidence of falsification is strong—though not necessarily irrefutable.[8]

VIII The Award

For all the foregoing reasons, the Arbitrator holds that the **grievance is denied**.

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[7] Baldwin's Ohio Revised Code Annotated, Title XLI, Labor and Industry Chapter 4117. Public Employees' Collective Bargaining Collective Bargaining

[8] Arbitrators usually subscribe to one of two approaches regarding falsification: (1) because falsification addresses an employee's morals and ethics and violates the principle that truthfulness is a precondition to employment, a proven falsification charge automatically strips an employee of his rights to the job in question; or (2) falsification is only a basis for discharge where the subject of the misrepresentation is somehow job-related.

Notary Certificate

State of Indiana)

)SS:

County of Marion

Before me the undersigned, Notary Public for Marion County, State of Indiana, personally appeared Robert Brookins, and acknowledged the execution of this instrument this 30th day of Sept., 1998

Signature of Notary Public: Julie R. Trent

Printed Name of Notary Public: Julie L. Trent

My commission expires: 9-9-02

County of Residency: Howard

Robert Brookins

Robert Brookins