IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF YOUTH SERVICES

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11, AFL-CIO

#1652

Grievant: Lawrence Fehrenbacher

Case No. 35-03 (20010829) 0132-01-03

Date of Hearing: March 24, 2003

Place of Hearing: Warrensville, Ohio

APPEARANCES:

For the Union:

Advocate: Victor Dandridge
2nd Chair: Patricia Howell

Witnesses:

Lawrence Fehrenbacher

For the Employer:

Advocate: Kate Stires
2nd Chair: Ray Mussio

Witnesses:

Darlene Schmidt
Stuart Sims
Beverly Nicholson
Susan Stukey
Patrice Hudson

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: May 12, 2003

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2000 through February 28, 2003, between the State of Ohio and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support the fifteen (15) suspensions of the Grievant, Lawrence Fehrenbacher ("Fehrenbacher"), for violating Employer's General Work Rules: Rule 1(a) (neglect of duty); Rule 6(c) (insubordination); Rule 11 (leaving work area without permission); and Rule 22(b) (failure to report for duty as scheduled).

The discipline of the Grievant was issued on August 24, 2001 and was appealed in accord with Article 24 of the CBA. This matter was heard on March 24, 2003 and is properly before the Arbitrator for resolution. Both parties had the opportunity to present evidence through witnesses and exhibits. Both parties submitted post-hearing statements, with the record being closed as of April 7, 2003.

BACKGROUND

The Grievant worked for the Department of Youth Services ("DYS") as a Juvenile Correctional Officer ("JCO"). DYS operates eight correctional and rehabilitation facilities for youth felony offenders whose ages are from 10-21. Fehrenbacher worked first shift, 6:00 a.m. until 2:00 p.m. and was assigned to the Cuyahoga Hills Correction Facility ("Cuyahoga"). Cuyahoga was a medium security facility that could house up to five hundred (500) youth offenders.

JCOs were required to be on call twenty-four hours a day, seven days a week. Additionally, JCOs were required to work mandatory overtime.

In early 2001, Fehrenbacher participated in the Transitional Work Program ("TWP"). TWP allows an employee with certain medical restrictions the option to perform other duties for a maximum of ninety (90) days per calendar year. (Employer ("ER") 1). At the expiration of

Fehrenbacher's TWP, the employer requested a return to work slip be obtained from his physician that cleared the Grievant to work without restrictions.

The Grievant provided a medical release on April 17, 2001 that stated he could return to work with no restrictions, but recommended that Fehrenbacher work the day shift and no mandatory overtime. (JX 4-F). On June 21, 2001, R.G. Bower ("Bower"), Superintendent, responded by stating in part..."[A]gain, if you are now saying that you were not released to full duty you **must apply** for other benefits such as workers compensation..." (Union ("UN") F).

Between April 17th and June 21st, the Grievant was ordered to work mandatory overtime on May 12th, May 18th, May 26th and June 2nd of 2001. The Grievant refused to work the overtime on May 18th, May 26th and June 2nd of 2001.

On June 3, 2001, the Grievant was late for roll-call and his normal post, i.e., control room, was selected by another employee. Upon arrival at work Fehrenbacher was offered another assignment to the "A" dorm, a unit which youths were housed. The Grievant refused that assignment and left the facility.

As a result of the Grievant's conduct, he received a fifteen (15) day suspension for neglect of duty, insubordination, leaving the work area without permission and failure to report for duty as scheduled effective August 24, 2001.

The grievance was filed on August 28, 2001 and according to the Office of Collective Bargaining ("OCB"), this grievance wasn't received in their offices in violation of Article 25.02 of the CBA to advance this matter to Step 4. As a result, this matter is not properly before the Arbitrator due to this procedural defect. On the other hand, the union argues that in accord with past practice this grievance, as well as two others, was sent as a package to OCB. OCB doesn't contest the receipt of the other grievances argues the union. This grievance was heard at the third step, went to mediation and could only have been mediated due to the proper procedures being followed.

Finally, in accordance with Appendix M of Article of the CBA Fehrenbacher's "post" was classified as a pull and move ("P/M") officer which enabled him to be assigned to various posts, i.e., control room, transport, metal detector, etc. Other JCOs who were also classified as P/M officers, would allow the JCO, Warren Norris ("Norris") as an example, to work in the control room, transport or metal detector. The Grievant's classification allowed the employer to assign him to any post consistent with the P/M classification.

ISSUE

Was the Grievant, Lawrence Fehrenbacher, disciplined for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA AND DYS WORK RULES
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).

DYS Directive B-19 Work Rules:

RULE 1 – NEGLECT OF DUTY

a. Failure to follow procedures and/or instructions and/or perform the duties assigned tasks of the position which the employee holds.

RULE 6 – INSUBORDINATION

c. Failure to work mandatory overtime.

RULE 11 – LEAVING WORK AREA WITHOUT PERMISSION

Leaving work area during work hours without permission of the supervisor.

RULE 22 – FAILURE TO REPORT FOR DUTY AS SCHEDULED

b. Tardiness
c. Unauthorized absence (AWOL)

POSITION OF THE PARTIES

POSITION OF THE EMPLOYER

DYS serves as the corrections system in the State of Ohio for youth from age ten (10) to twenty-one (21). Juvenile offenders reside in eight (8) different facilities in the state after being convicted of a felony I, II, III or IV charge(s). JCOs are primarily assigned to carry out procedures to ensure that the youths are protected and the facility is secure at all times.

JCO's duties as outlined in the position description (JX-7) and classification (JX 6-A) includes the requirement of availability twenty-four (24) hours a day, seven (7) days a week for mandatory overtime. DYS has promulgated work rules which includes progressive discipline for violations that all DYS employees are required to review and certify that they are aware of the content of the work rules. The Grievant signed the work rules on June 12, 2000. (JX-5).

Witness Darlene Schmidt ("Schmidt"), personnel officer, testified that the Grievant was aware of the mandatory overtime requirements. The position description and job classification of a JCO includes the mandatory overtime requirement. Schmidt indicated that the Grievant's personnel file contained his certification that he understood the work rules and what was expected of him. Additional areas of responsibility for Schmidt includes the monitoring and implementation of the TWP.

Regarding the Grievant's return to regular duties from the TWP, Schmidt indicated that the medical statement provided did provide a full medical release dated April 17, 2001 which included a "recommendation" that Fehrenbacher only work day shifts and no overtime. To rectify any uncertainty, Schmidt contacted the Labor Relations Officer ("LRO") in Columbus, Ohio for supportive guidance since the release contained a "recommendation." The release was acceptable to DYS since Fehrenbacher was able to return to work with no restriction and the recommendation was viewed as advisory, only.

The Grievant was mandated for overtime on May 12th, May 18th, May 26th and June 2nd in 2001. The Grievant only worked the overtime hours on May 12, 2001 in direct violation of working mandatory overtime as assigned. The Grievant's conduct violated DYS Rules 1 – Neglect of Duty, 6 – Insubordination and , 22 – Failure to Report to Duty as Scheduled according to the employer.

On June 3, 2001 the Grievant arrived to work late and the post that he ordinarily worked was assigned to another JCO also classified as P/M. According to Stuart Sims ("Sims"), after the Grievant arrived late for roll call around 6:57 a.m. and discovered that JCO Garrett, was assigned to the control room, the Grievant, without permission abandoned his post by refusing to accept another assignment. The Grievant at some point claims that he was ill and returned home. Sims indicated that the Grievant was instructed to assume his assignment and wait **until** another JCO could relieve him. Sims and other witnesses present indicated that the Grievant stated "...if I cannot work the communications center, I'm going home." (JX-4). The Grievant walked out of the facility approximately five (5) minutes after arriving without the consent of his shift manager (Mitchell Thomas) or any other supervisor. Fehrenbacher's conduct was reprehensible and viewed as insubordinate by Sims-Thomas and a violation of work Rule 11. The Grievant had an active one (1) day fine for a rule 6(c) violation (Insubordination) prior to the imposition of the current discipline. The previous discipline involved the Grievant's refusal to work mandatory overtime as well. The Grievant's refusal to work mandatory overtime coupled with his theory that he can either abandon his post or refuse assignments warrants the discipline issued herein **and** no evidence exists for mitigation.

Regarding arbitrability of this matter, Article 25.02 required that OCB within fifty (50) days of the Step 3 meeting be notified by the union that this matter was appealed to Step 4. In other words, OCB should have received notice no later than December 11, 2001. No evidence was offered by the union that this matter was timely appealed and this Arbitrator should treat this grievance as withdrawn in accord with Section 25.05. Moreover, even though the parties

mediated this particular grievance, the burden of advancing this matter to Step 4 remains with the union and a waiver did not occur as a result of the mediation process.

POSITION OF THE UNION

Upon notification to the Grievant that he had exhausted all hours allowed under the TWP the submittal of the medical documentation dated April 17, 2001 was provided in good faith. The employee and the employer were uncertain as to the effect of the release which **recommended** that the Grievant work no overtime requiring Schmidt to contact central office for guidance.

The central reason that the Grievant did not work overtime was based upon his belief that additional stress would occur and he was complying with his doctor's orders not to work overtime.

Despite Fehrenbacher's apprehension about working overtime, he worked overtime on a couple of occasions after his return from the TWP and attempted to seek appropriate leave to account for his inability to work overtime. As an example, on May 18, 2001 the Grievant sought sick leave which was denied by the employer. (JX 4-E). In other words, at least on May 18th if the sick leave was approved then no rule(s) violation would have occurred.

With respect to the roll call incident on June 3, 2001, the Grievant arrived approximately five (5) minutes late that day due to being sick the previous night. Upon arrival Fehrenbacher informed Thomas of his illness where upon Thomas indicated that if you leave return with medical documentation. The Grievant on June 6, 2001 supplied a medical note that indicated he sought medical advice on June 3, 2001. (JX 4-II). The Grievant doesn't deny leaving the facility prior to reporting to the "A" dorm, but believes his conduct was acceptable due to his personal condition (illness) that day.

The Grievant testified that this discipline and his overall treatment by the employer as being retaliatory against because he went outside of the institution seeking redress from the Governor of Ohio among others wrongdoings attributable to the employer.

Regarding the arbitrability issue, the union contends that this grievance and another grievance pertaining to Grievant were heard on October 22, 2001 at the third step. All of the Grievant's grievances were mediated on December 22, 2001, including the one before this Arbitrator, with no indication by the employer of any procedural defect. The facts suggest that OCB relocated its offices that year and it would be highly unusual to receive only one grievance mailed in the same package with others.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances, the employer bear the evidentiary burden of proof. See, Elkouri & Elkouri – "How Arbitration Works" (5th ed., 1997)

The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. beyond reasonable doubt, preponderance of evidence, clear and convincing, etc.) commonly used in the non-arbitable proceedings. See, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984).

The evidence in this matter will be weighed and analyzed in light of the DYS burden to prove that the Grievant was guilty of wrongdoing. Due to the seriousness of the matter and Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of guilt by the Grievant. See, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).

DISCUSSION AND CONCLUSIONS

After a review of the testimony, exhibits and post hearing briefs of both parties, the grievance is denied. My reasons are as follows:

As a threshold inquiry regarding whether or not this grievance was timely appealed to Step 4, the evidence is not conclusive one way or the other. The employer alleges this grievance was not advanced to Step 4, the Union alleges it was mailed with multiple other grievances involving Fehrenbacher. No evidence was offered to infer that the Union's mailing of several grievances in one envelope was unacceptable. If the past practice of the parties practice required that only **one** grievance be mailed per package a verifiable tracking system would occur. In this case, the evidence is insufficient for me to conclude that multiple grievances of the Grievant were **not** mailed by the Union to OCB. Whether the chief steward mailed this grievance with others or whether OCB misplaced this grievance during its relocation are issues that shouldn't be subjected to a quantum of proof analysis, but simply was the process followed? If **every** individual grievance required verification of receipt by OCB (i.e. green card) the burden on the Union in advancing to Step 4 becomes relatively uncomplex to demonstrate or prove.

Therefore, these facts do not allow this Arbitrator to find Article 25.02 was violated by the Union, now to the merits.

The parties stipulated that the Grievant did not work overtime on May 18th, May 26th and June 2, 2001. The evidence is undisputed that all JCOs are required to be on call twenty-four (24) hours a day, seven (7) days a week, and the Grievant was aware of this requirement. In addition to the work rules (i.e. DYS B-19) the classification specification and position description for JCOs contains the requirement of mandatory overtime.

The facts are unrefuted that the Grievant understood that mandatory overtime was required of all JCOs and the record is void of any suggestion that the Grievant was uncertain regarding this requirement. Additionally, Sims and other witness statements (Thomas, Joseph, Behlke, and Patrice) supports the employer's version that the Grievant walked out without proper authorization of the facility when informed that he **could not** work his regular post.

The Grievant advances two positions to explain his conduct: (1) a medical justification for not working the overtime on May 18th, May 26th and June 2nd; and (2) his shift supervisor was aware of his illness on June 3rd and the Grievant received consent to leave early. The facts simply do not support either position of the Grievant.

A plain reading of the April 17, 2001 medical release states in part "...I am releasing Mr. Fehrenbacher to return to work with **no restriction**." (JX 4-F). The release also **recommended** that the Grievant work the day shift and not work overtime. The release in very definitive that the Grievant was to return to work with no restrictions. The medical justification for the Grievant's failure to work overtime was not convincing to this Arbitrator. To support the Grievant's medical theory for failure to work overtime would in essence constitute a job restriction being tantamount to not obtaining a full medical release. A full medical release was provided on April 17, 2001 and failure to work such hours violated DYS Directive B-19 and Work Rules 1(A) – Neglect of duty, 6(c) – Insubordination and 22(b)(c) – Failure to Report to Duty.

The Grievant's conduct on June 3, 2001 is symbolic of his perception of invincibility or unwillingness to comply with what's expected of him as an employee. Thomas's written statement (JX-KK) indicated that Fehrenbacher refused to accept the post ("A" dorm), stated that he was leaving and left the building. No credible evidence is in the record that Fehrenbacher had consent from any supervisor to go home on June 3, 2001. The Grievant's conduct as manifested by his decision to leave the facility without proper authorization was viewed as defiant and conduct warranting discipline. If the Grievant was too sick to stay at work beyond roll call – why show up at all? The only reasonable interpretation is that the Grievant did not like the post he was assigned and decided unilaterally to leave the building.

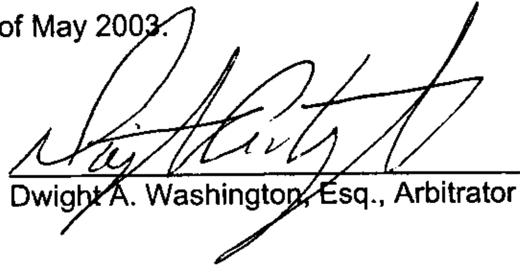
Finally, although only one (1) active prior discipline was on the Grievant's record, however, if the Grievant continues with this patter of behavior, removal will surely occur. The employer met its burden of proof in that the Grievant disobeyed written procedures and was insubordinate, the only remaining inquiry involves the remedy. In reviewing the record as a

whole, the evidence does not support a reduction in the discipline. The facts and evidence taken in the light most favorable to the Grievant fails to support a lesser discipline.

AWARD

The grievance is denied.

Respectfully submitted this 12TH day of May 2003.



Dwight A. Washington, Esq., Arbitrator