

#1653

OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN

OHIO CIVIL RIGHTS COMMISSION
-AND-
OCSEA AFSCME Local 11

Appearing for Civil Rights Commission

Beth A. Lewis, Labor Council-OCB
Nancy Stir, Manager Labor Relations-Quality
John F. Kinkela, Labor Council/Specialist-OCB
Cheryl L. Jackson, Retiree
Marguerite, Walker, Regional Director

Appearing for OCSEA

Michael D. Muenchen, Staff Representative-OCSEA
George S. Motley, Jr., Grievant
Raquel V. Brower, Union Steward

CASE-SPECIFIC DATA

Grievance No.

Grievance No. 06-02 (90602)-01-01-14

Hearings Held

May 5, 2003

Case Decided

May 14, 2003

Subject

Removal for Falsification/Insubordination

The Award

Grievance Denied

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

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I. The Facts

The Parties to this dispute are the Ohio Civil Rights Commission ("Commission") and OCSEA ("Union"), which is the exclusive representative of Mr. George S. Motley Jr. ("Grievant"). The instant dispute arose on August 26, 2002, when the Grievant received a ten-day suspension for insubordination and falsification of request for leave forms ("RFLs").¹ At that time the Grievant (1) was classified as a Civil Rights Investigator I with the Commission; (2) had accumulated approximately twenty-two years of seniority and service with the State of Ohio—Seventeen years with the Commission and four years with the Ohio Department of Mental Health; and (3) had two active episodes of discipline—written reprimands—when this dispute began.² At all times relevant to the instant dispute, Ms. Marguerite Walker was the Grievant's immediate supervisor and Regional Director of the Dayton, Ohio Civil Rights Commission office.

The facts triggering the ten-day suspension are largely undisputed and are chronicled below. On Monday, May 13, 2002, the Grievant submitted a RFL to Ms. Walker, requesting eight hours of leave for a dental appointment on Friday, May 17, 2002. Ms. Walker signed the RFL on Wednesday, May 15, 2002.

The Grievant took eight hours leave on May 17, 2002 as scheduled and returned on Monday, May 20, 2002 but did not obtain a statement from his dentist. Instead, he got a written statement from his cardiologist. When asked why he failed to produce a statement from his dentist, the Grievant offered two explanations. First, he claimed that his dentist would not give him a statement, thereby obliging him to obtain one from his cardiologist. Subsequently, the Grievant asserted that he actually had appointments with both his dentist and his cardiologist on May 17, 2002.

Understandably suspicious of these responses, Ms. Walker decided to explore the matter. She learned from the receptionist at the cardiologist's office that the Grievant had last visited the cardiologist on March 15, 2001 and that no one from that office had given the Grievant any type of statement on May 17, 2002. Next, Ms. Walker contacted the Grievant's dental office and learned that contrary to the Grievant's representation in the RFL, he had no appointment with his dentist on May 17, 2002. He did, however, visit

¹ Joint Exhibit No. 3A, at 3.

² Joint Exhibits No. 8A & 8B.

representation in the RFL, he had no appointment with his dentist on May 17, 2002. He did, however, visit the dentist's office at the end the day on May 17, 2002 and scheduled an appointment to have his teeth cleaned. Nevertheless, he did not see the dentist on May 17 because he had no appointment for that day. Nor did the dentist give the Grievant any type of written statement for May 17, 2002.

The Grievant submitted a second RFL on May 20, 2002, allegedly to keep another eight-hour dental appointment on May 21, 2002, this time for a toothache. According to the Grievant, the appointment required eight hours because the dentist had to perform a number of procedures. When granting the Grievant's request, Ms. Walker notified him in writing of the need to obtain a statement from the dentist verifying the appointment.¹³ She issued the notice because of the Grievant's history of attendance-related problems. On Wednesday, May 29, 2002 the Grievant gave Ms. Walker a statement from the dentist that required a follow-up appointment for May 31, 2002, at 11:45 A.M.¹⁴ Again, Ms. Walker gave the Grievant written notification to submit a physician's statement to verify his visit.¹⁵ When Ms. Walker contacted the dentist's office about the May 21 appointment, she was advised that the appointment had taken no more than two hours and that the May 31 appointment would require no more than fifteen to thirty minutes.

Ms. Cheryl Jackson, Human Resources Director of the Commission, launched an investigation after the Grievant submitted the May 29 RFL. Inconsistencies in the Grievant's last three RFLs prompted Ms. Jackson to examine RFLs that he submitted prior to the three discussed above. Ms. Jackson discovered that the Grievant had submitted RFL's for dental appointments on January 30, 2002, February 11, 2002, March 7, 2002, and April 30, 2002. However, the dentist's office had no record of the Grievant's visitations on those dates.¹⁶

Finally, the Grievant submitted RFLs for doctors' appointments on June 12, 2002 and June 13, 2002. The Commission's investigators discovered that the Grievant had not seen his doctor on June 12, but he did see his doctor on June 13, 2002 and received a return-to-work statement from his doctor for both of those

¹³ Joint Exhibit No. 5A.

¹⁴ Joint Exhibit No. 5B.

¹⁵ *Id.*

¹⁶ Union Exhibit No. 2.

dates.

On June 14, 2002, during an investigatory interview, Ms. Jackson ordered the Grievant either to obtain statements from his dentist and cardiologist to demonstrate that he in fact visited them as set forth in his RFLs, or to authorize the Commission to obtain that information. Ms. Jackson clearly defined the scope of the information she sought to include only the dates that the Grievant had visited the cardiologist and dentist, rather than any information about the Grievant's medical or dental records or history.

The Grievant initially complied with the order, authorizing the Commission to obtain the requested information.¹⁷ Subsequently, however, he rescinded that authorization for essentially two reasons. First, he was told that the information that the Commission requested was confidential. Second, the Grievant asserted that the Commission's request for statements from the cardiologist and dentist violated Section 29.04A of the Collective-Bargaining Agreement because the Commission had failed to reduce its request to writing in a written "Physician's Verification" form.¹⁸

On or about June 25, 2002, Ms. Jackson again ordered the Grievant to authorize the Commission to obtain information solely about the existence of his appointments to the cardiologist and the dentist. The Grievant repeatedly refused to obey Ms. Jackson's direct order. Based on the discrepancies that Ms. Jackson had discovered in the Grievant's earlier RFLs and his refusal to release the narrowly defined commission about his visitations, the Commission inferred that the Grievant had attended none of the unsubstantiated appointments and therefore had falsified his RFLs.

On July 12, 2002, the Commission placed the Grievant on a Performance Improvement Plan ("PIP") to encourage him to comply with applicable performance standards and to submit proper medical verification for medical leave¹⁹. When placing the Grievant on the PIP, the Commission warned him that further violations of the type mentioned in the PIP would trigger discipline.

The record does not reveal that the Grievant engaged in any misconduct after July 12, 2002. Nevertheless, on August 8, 2002, the Commission held a pre-disciplinary hearing, after which it suspended

¹⁷ Joint Exhibit No. 6A.

¹⁸ Joint Exhibit No. 1, at 81.

¹⁹ Union Exhibit No. 1.

the Grievant for ten working days, beginning on August 26, 2002 and ending on September 6, 2002.¹⁰

II. Summaries of Parties' Arguments

A. Summary of Commission's Arguments

1. The Grievant was insubordinate because he disobeyed a clear, legitimate, and specific order.
2. The principle of obey and then grieve governs here.
3. The Grievant's failure to comply with Ms. Jackson's direct order compelled and justified the adverse inference that he had falsified his RFLs by claiming that he had medical and dental appointments.
4. The Grievant waived any privacy rights he might have had regarding his medical or dental appointments when he used those reasons to request medical leave.
5. Article 29.04A is irrelevant to the instant case because the sole issue is whether the Grievant falsified documents to obtain unentitled leave, and whether he was insubordinate.
6. Even if Article 29 is relevant, the Commission observed the spirit and purpose of that Article by issuing the Grievant several written notices to supply physicians' verifications for his medical leave. The thrust of Article 29 is to notify employees of the need to submit physicians' verifications.
7. The procedure used to notify the Grievant in this case is and has been the Parties' past practice, about which the Union has never complained until the instant dispute.
8. The Grievant was not subjected to double jeopardy, and the doctrine of merger and bar is inapplicable under the Collective-Bargaining Agreement.

B. Summary of Union's Arguments

1. The ten-day suspension violated Article 24 of the Collective-Bargaining Agreement.
2. The Commission's conclusion that the Grievant falsified an official document was based upon unreliable secondhand sources.
3. The Grievant was subjected to double jeopardy because he was suspended on August 26, 2002 for the same misconduct that triggered the PIP on July 12, 2002.
4. The Grievant was suspended before he had a reasonable opportunity to demonstrate his rehabilitation under the PIP.
5. The Commission violated Article 29.04A of the Collective-Bargaining Agreement by failing to provide the Grievant with a Physician's Verification Form.
6. The Commission violated Article 29.04, Sections B of the Collective-Bargaining Agreement by failing either to counsel the Grievant or to offer to place him on an Employee Assistance Program (EAP) after the first suspension.

III. The Issue

The Commission articulated the issue as follows: "Was the Grievant, George Motley, Jr. suspended for ten days for just cause?" "If not, what shall the remedy be?"

The Union embraced the following issue: "Was the Commission in violation of Article 29.04 by suspending the Grievant, George Motley, Jr. for ten (10) days?" "If so, what shall the remedy be?"

One must address the Union's issue en route to resolving the Commission's issue. In other words, the Union's issue is a subset of the Commission's issue. Therefore, the Arbitrator adopts the Commission's version of the issue and articulates it as: Whether the Grievant's ten-day suspension was for just cause. If not, what shall the remedy be?

¹⁰ Joint Exhibit No. 2B.

IV. Relevant Contractual and Regulatory Provisions

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.

Article 29.04—Sick Leave Policy

A. Physicians Verification

At the Agency Head or designee's discretion, in consultation with the Labor Relations Officer, the employee may be required to provide a statement, from a physician, who has examined the employee . . . for all future illness.

* * * *

Should the Agency Head or designee find it necessary to require the employee to provide the physician's verification for future illnesses, the order will be made in writing using the "Physician's Verification" form with a copy to the employee's personnel file.

B. Unauthorized Use or Abuse of Sick Leave

When progressive discipline reaches the first suspension, under this policy, a corrective counseling session will be conducted with the employee. The Agency Head or designee and Labor Relations Officer will jointly explain the serious consequences of continued unauthorized use or abuse of sick leave. The Agency Head or designee shall be available and receptive to a *request* for an Employee Assistance Program in accordance with article 9 (EAP). If the above does not produce the desired positive change in performance, the Agency Head or designee will proceed with Progressive discipline up to and including termination.

V. Analysis and Discussion

A. Evidentiary Standards

To establish the charges of falsification and insubordination, the Commission must establish each element in those charges by preponderant evidence in the record as a whole. Failure to establish any element of either charge leaves that particular charge unsubstantiated and, hence, inappropriate as a basis for disciplining the Grievant.

B. Proof of Insubordination

For the reasons discussed below, the Arbitrator holds that preponderant evidence in the record establishes the Commission's charge of insubordination against the Grievant.

1. Standard for Insubordination

The Commission's penalty table defines insubordination as "Disobedience/failure to carry out a direct order by a supervisor."¹¹ However, arbitrators traditionally apply a more rigorous definition that involves

¹¹ Joint Exhibit No. 3C, at 6.

at least four criteria.¹² The order must be clear, specific, and legitimate. In addition, the employee must have been properly warned that failure to obey the order could trigger discipline. Finally, the employee must be shown to have deliberately or intentionally disobeyed the order.¹³

a. Clarity and Specificity

Evidence in the record reveals that on June 25, 2002, Ms. Jackson clearly, directly, and specifically ordered the Grievant either to produce information about his visitations to his dentist and cardiologist, or to authorize the Commission to obtain such information. The Grievant's initial response to Ms. Jackson's order was to provide a written statement to wit: "I provide authorization for the agency to inquire into my visitation."¹⁴ The foregoing statement conclusively establishes that the Grievant clearly understood that Ms. Jackson's order pertained only to his visitation and not to any of his medical information. Consequently, the Arbitrator holds that Ms. Jackson's order was indeed clear and specific.

b. Legitimacy

Since Ms. Jackson was Director of Human Resources for the Commission, she undoubtedly had the authority to issue the order in question.

c. Prospective Discipline

During the arbitral hearing before the Undersigned, Ms. Jackson credibly testified that in addition to giving the Grievant a clear and specific order, she also clearly and specifically warned him that his persistent refusal to release the information about his visitations could lead to discipline. Furthermore, during the hearing, the Grievant neither denied nor attempted to contradict Ms. Jackson's testimony on this point. The Arbitrator therefore finds that Ms. Jackson adequately warned the Grievant that he could be disciplined for his continued refusal to release the information desired.

¹² Many arbitrators also apply a higher measure of persuasion such as clear and convincing evidence rather than preponderant evidence.

¹³ See, e.g., *In re Consolidation Coal Co.*, 77 LA 927 (Nelson, 1987); *In re Prismo-William Armstrong Smith Co.*, 73 LA 581 (Jedel, Arb. 1979); *In re Stone Container Co.*, 106 BNA LA 475 (Gentile, Arb. 1996); *In re Cheltenham Nursing Center*, 89 LA 361 (DiLauro, Arb. 1987); *In re Brotherhood of Railway Carmen*, 77 LA 694 (Thornell, Arb. 1981); *In re Georgia Power Co.*, 87 LA 800 (Byars, Arb. 1986); *In re North Electric Co.*, 46 LA 813 (Klein, Arb. 1966); *In re Bliss & Laughlin Co.*, 49 LA 231 (Larken, Arb. 1967).

¹⁴ Joint Exhibit No. 3C, at 26.

d. Intentional Disobedience

The Grievant admitted, during cross-examination, that he retracted his original authorization and thereafter refused to grant the Commission the authority to obtain information about his visitations to his dentist and cardiologist. As a result, the Arbitrator finds that the Grievant intentionally and deliberately disobeyed Ms. Jackson's order. Moreover, the defense that the Grievant simply followed the advice of his union representative(s) is a "fig leaf." Even absent such advice, the Grievant is charged with constructive knowledge of the doctrine of obey first and grieve later. That is, an employee must obey a questionable order from a superior unless that order poses a reasonable risk to the employee's health and well being.¹⁵

C. Proof of Falsification

1. Factual Proof of Falsification

An actionable charge of falsification rests entirely on proof of intentional misrepresentation of a material fact. In other words, to establish falsification, the Commission has to establish by preponderant evidence in the record as a whole that the Grievant intentionally and purposefully misrepresented a material fact.

Preponderant evidence in this case clearly demonstrates that the Grievant misrepresented material facts in several RFLs. On May 13, 2002, the Grievant submitted a RFL for eight hours of sick leave to visit his dentist on May 17, 2002. However, the dentist's receptionist informed Ms. Walker that, even though the Grievant did visit the dentist's office on that day, the dentist did not treat the Grievant because he had no appointment with the dentist that day. Furthermore, the Grievant presented a statement falsely claiming that he had visited his cardiologist on May 17, 2002. The receptionist in the cardiologist's office told Ms. Walker that the Grievant was last seen in that office on March 15, 2001, and that no one from the cardiologist's office had provided the Grievant with a statement to return to work. On May 20, 2002, the Grievant submitted a second RFL for eight hours of medical leave due to a toothache. Ms. Walker subsequently discovered that although the Grievant did visit his dentist on May 21, the visitation lasted two hours at most.

¹⁵ Whirlpool Corp. v. Marshall, 445 U.S. 1, 4 (1980).

The foregoing analysis establishes that the Grievant did falsify official documents. In each of the RFLs in question, the Grievant misrepresented both the existence and duration of appointments. Furthermore, he falsely claimed that his cardiologist wrote a return-to-work statement for him. It requires little analysis to conclude that these misrepresentations were *material* to the Grievant's request for medical leave. But for those misrepresentations he probably would not have received the leave he requested. Certainly he would not have received eight hours of medical leave.

Finally, on May 29, 2002, the Grievant submitted a third RFL for eight hours of medical leave. The Commission neither verified nor refuted this claimed largely because the Grievant refused to authorize the release of information pertaining to the existence of that alleged appointment.

2. Inference of Falsity

The Union claims that the Commission had insufficient evidence to infer that the Grievant falsified his May 29 RFL. The Arbitrator disagrees. In light of the transparent misrepresentations in this case, a reasonable person, under the same or similar circumstances as the Commission, would have been justified in concluding that the Grievant also misrepresented the existence and/or duration of the appointment claimed in his May 29, 2002 RFL. Indeed, even if the Commission's adverse inference about the May 29 incident were unreasonable or fallacious (And it was not.), the outcome would remain unchanged because the Commission had already established falsification without reliance on the May 29 RFL.

D. Grievant's Privacy Rights

The Union argues that the Grievant's right to privacy with respect to his medical information entitled him to rescind and subsequently to deny authorization for the release of that information. The Commission offers two arguments in response. First, the scope of Ms. Jackson's request for information was sufficiently attenuated to fall clearly beyond any zone of privacy that the Grievant reasonably could have expected or claimed regarding his medical information. Specifically, the Commission argues that Ms. Jackson's request focused solely on the veracity of the Grievant's claims about the existence and duration of appointments with his dentist and cardiologist. The Commission adamantly denies any interest in or efforts to secure information about the Grievant's medical history, conditions, or treatment. Second, the Commission maintains that when the Grievant elected to use medical and dental appointments as the basis

for requesting medical leave, he waived any right to privacy he might have had with respect to the existence and duration of those appointments.

1. Functional Scope of Ms. Jackson's Request

The Commission's argument is more persuasive, and the Arbitrator holds that Ms. Jackson's narrowly tailored request posed no reasonable or tangible threat to the Grievant's right to privacy regarding his medical or dental information. Resolution of this issue requires the Arbitrator to balance the Grievant's right to privacy against the Commission's right to know.

At the outset, the arbitrator observes that there can be no *absolute* rights; *All* rights must eventually yield to some extent to competing rights. And so it is *under the particular circumstances* of the instant case, where, as a general proposition, the Grievant has an undoubted and manifest right to assert the shield of privacy against attempts by the Commission to access his *medical information*. On the other hand, the Commission has a patent right to realize its designated mission through efficient and effective operations. The Commission could hardly achieve these goals without the right to monitor employees' medical leave.

Against this backdrop, the evidentiary record establishes that Ms. Jackson sought to monitor only the legitimacy of the Grievant's request for leave on the dates in question. That is, she attempted to authenticate the Grievant's asserted reasons for requesting leave from work. First, Ms. Jackson credibly testified that she requested access only to the dates and duration of the Grievant's appointments. Second, her testimony is corroborated by the Grievant's written authorization, which states that, "I provide authorization for the agency to inquire to my *visitation*."¹⁶ Clearly, Ms. Jackson had, and the Commission must retain, the right to make such *narrowly tailored* requests to authenticate the reasons on which employees premise their leave requests.

2. Waiver of Grievant's Privacy Rights

The Commission also argues that the Grievant implicitly waived his right to privacy with respect to any information he offered to support his request for medical leave. In support of this argument, the Commission points to its undeniable right to authenticate any reasons that employees offer for medical leave.

¹⁶ Joint Exhibit No. 3, at 26 (emphasis added).

The Arbitrator agrees. In the nature of things, the right to privacy does not encompass the reasons offered for requesting medical leave. For example, an employee who requests a six-month medical leave for a heart transplant implicitly waives any privacy right regarding the *existence* of the scheduled heart transplant and of the *six-month* duration of medical leave. Absent such a rule, the Commission would find itself at the mercy of its employees with respect to medical leave, an intolerable situation. In this hypothetical, the employee, of course, would not waive his right to privacy with respect to information about the operation that he did not offer as a basis for the medical leave. Ultimately, then, employees implicitly waive their rights to privacy with respect to the information used to justify their requests for medical leave. This standard fairly balances the rights of the Commission against those of its employees by preserving the Commission's right to investigate requests for leave, while affording employees substantial control of their private information by allowing them to decide how much of that information to use as justification for medical leave.

3. Commission's Right to Require a Physician's Verification
a. Commission's Contractual Right

Article 29.04A provides in relevant part:

[T]he employee may be required to provide a statement, from a physician, who has examined the employee. . . for all future illness. The physician's statement . . . shall be in effect until such time as the employee has approved a reasonable sick leave balance. . . . Should the Agency Head or designee find it necessary to require the employee to provide the physician's verification for future illnesses, the order will be made in writing using the "Physician Verification" form with a copy to the employee's personnel file.

The Union argues that completion of a Physician's Verification Form is a condition precedent to the Commission's right to request a physician's statement from the Grievant. In contrast, the Commission responds with three arguments. First, it claims that Article 29.04A is irrelevant to the present dispute, which focuses solely on the Grievant's falsification and insubordination. Second, the Commission contends that it was not required to use the Physician's Verification Form given the Parties past practice of substituting written requests for Physician's Verification Forms. Third, the Commission contends that, in this particular case, it satisfied the purpose or spirit of Article 29.04A by notifying the Grievant in writing that he was required to produce a physician's statement.

(1) Relevance of Article 29.04A

The Union has the more persuasive argument on this point. Although the substantive issues in this case are falsification and insubordination, the Grievant's failure to produce a physician's statement as requested is a *central* issue in the insubordination charge and a *motivating* factor in the Commission's conclusion that the Grievant falsified official documents. Of course Ms. Jackson at least partially relied on Article 29.04A for the authority to request (and ultimately to demand) a physician's statement in the first instance. Therefore, it is too late in the day for the Commission to challenge the relevance of Article 29.04A, which delineates both the Grievant's duty to produce such a statement and the Commission's right to request it. Furthermore, but for the provisions of Article 29.04A, the outcome on this issue might have been very different.

(2) Existence of the Past Practice

Essentially two reasons persuade the Arbitrator to hold that the Commission fails to establish the existence of the past practice that it alleges in this dispute. First, Section 29.04A explicitly requires the Commission to use a Physician's Verification Form. At best, only the clearest past practice could displace that type of unambiguous contract language. The Commission attempts to establish the past practice through the testimony of Ms. Jackson and Ms. Walker, without tangible documentation of such a practice. Moreover, the Union stoutly denies the existence of that practice.

Therefore, the issue becomes one of credibility. The Union's adamant denial of the past practice raises reasonable doubts about the existence of that practice. And since the Commission has the burden of persuasion on this issue, doubts about the existence of the practice shall be resolved against the Commission. Ultimately, then, the Arbitrator holds that evidence in the arbitral record does not establish a past practice of substituting a written statement for the Physician's Verification Form as Article 29.04A requires.

(3) Commission's Right Based on Reasonable Suspicion

The Commission also argues that it has the right to request physicians' statements from employees whose requests for medical leave raise reasonable suspicions about the veracity of those requests. This argument goes to the fundamental right of the Commission to request a physician's verification, a right that

the union does not contest and that is explicitly set forth in Article 29.04A.¹⁷ Consequently, there's no apparent need for further discussion of this issue.

E. Whether the Commission's Written Statement Satisfied the Spirit and Purpose of Article 29.04A

On this point the Arbitrator must agree with the Commission. The ostensible purpose of 29.04A is to notify employees that they are to produce physicians' statements upon returning from medical leave. Evidence in the record clearly shows that Ms. Walker twice afforded the Grievant written, albeit terse, notification of his duty to submit a physician's statement when he returned from medical leave.¹⁸ That written notification was sufficient to inform the Grievant that he was to produce a physician's statement. To the extent that the Commission committed a procedural error by failing to give the Grievant a formal Physician's Verification Form, the error was harmless to the Grievant. Accordingly, the Arbitrator holds that even though the Grievant did not receive a formal Physician's Verification Form, he, nevertheless, received adequate written notice to produce a physician's statement.

F. Double Jeopardy

The Union claims that the Grievant was subjected to double jeopardy because he was placed on a PIP and subsequently suspended for the same infractions. The Commission counters that double jeopardy is nonexistent in this case because the PIP is a nondisciplinary device.

Again, the Arbitrator finds himself in agreement with the Commission. The PIP is a nondisciplinary personnel tool. As a result, the Grievant was disciplined only once for the misconduct in question and was, therefore, not subjected to double jeopardy.

G. Violation of the PIP

The Union also contends that the Commission violated the PIP by suspending the Grievant before he had a full and fair opportunity to correct the misconduct that triggered the PIP. The Grievant was

¹⁷ Specifically, Article 29.04A provides: "At the Agency Head or designee's *discretion*, in consultation with the Labor Relations Officer, the employee *may be required* to provide a statement, from a physician, who has examined the employee . . . for all future illness." (Emphasis added).

¹⁸ Joint Exhibit No. 3, at 19 & 27.

suspended on August 26, 2002, and the PIP was implemented on July 12, 2002.

Any persuasiveness in the Union's argument must turn on the intended duration of the PIP because the Union's argument suggests that the Commission should have waited until the PIP was completed to determine if the Grievant had rehabilitated himself. If, however, the duration of the PIP is indeterminate, then the rule of reasonableness prevails, and the issue becomes whether the Grievant was afforded a *reasonable* time to rehabilitate his conduct. The PIP contains two pieces of evidence related to its duration. First, it states that: "This PIP will remain in effect until further notice."¹⁹ Second, the PIP establishes the following schedule of meetings between the Grievant and management:

- a. Friday, July 19, 2002
- b. Friday, July 26, 2002
- c. Friday, August 2, 2002
- d. Friday, August 16, 2002
- e. Friday, August 30, 2002
- f. Friday, September 13, 2002
- g. Friday, September 27, 2002²⁰

The first statement leaves the PIP open-ended, but the schedule of meetings suggests that the PIP might be terminated on September 27, 2002. These pieces of evidence give two different signals and, therefore, create ambiguity or reasonable doubt as to when the Commission intended to terminate the PIP. This doubt is resolved against the Union, which has the burden of persuasion to establish that the Grievant was prematurely disciplined under the PIP. Moreover, evidence in the record does not establish that a reasonable person in the Grievant's position would have needed more than approximately one and one-half months (July 12, 2002 through August 26, 2002) to start supplying the requested medical and dental statements. Accordingly, the Arbitrator holds that the record does support the contention that the Grievant was prematurely disciplined under the PIP.

H. Violation of Article 29.04B

Finally, the Union contends that the Commission violated Article 29.04B by not properly counseling the Grievant and not offering him an opportunity to be placed on an EAP. The Commission did not

¹⁹ Union Exhibit No. 1, at 3.

²⁰ *Id.*

specifically address this issue.

Article 29.04B provides in relevant part:

When progressive discipline *reaches the first* suspension . . . a corrective counseling session will be conducted with the employee. The Agency Head or designee and Labor Relations Officer will jointly explain the serious consequences of continued unauthorized use or abuse of sick leave. The Agency Head or designee shall be available and receptive to a *request* for an Employee Assistance Program in accordance with article 9 (EAP). If the above does not produce the desired positive change in performance, the Agency Head or designee will proceed with Progressive discipline up to and including termination.²¹

Article 29.04B requires the Commission to afford the Grievant a "corrective counseling session, [w]hen progressive discipline reaches the first suspension. . . ."²² The difficulty here is that the language does not specify whether the corrective counseling session should occur before or after discipline is imposed. If the counseling had been given before the suspension but after the misconduct, it would not have assisted the Grievant to rehabilitate himself before he received the imminent suspension. On the other hand, had the counseling been given after this suspension, the counseling would have been too late to have assisted the Grievant in rehabilitating himself before he received the suspension. Based on this line of reasoning and without further enlightenment from the Union on the intended timing of the counseling, the Arbitrator concludes that the counseling session mentioned in Article 29.04B was intended to assist employees in rehabilitating themselves to avoid subsequent discipline for subsequent misconduct. Under this line of reasoning, Article 29.04B seems irrelevant to this case.

Assuming, arguendo, the relevance of Article 29.04B, the reasonable conclusion is that the Commission committed a procedural error by failing to counsel the Grievant either before or after the ten-day suspension. However, given the clarity of proof that the Grievant falsified official documents and was insubordinate, the Arbitrator holds that the procedural error did not hinder the Grievant's efforts to rehabilitate himself and should not shield him from the consequences of such clearly established

²¹ Joint Exhibit No. 1, at 82 (emphasis added).

²² Joint Exhibit No. 1, at 27.

misconduct.²³

With respect to the issue of the EAP, Article 29.04B does not require the Commission to affirmatively offer the Grievant an opportunity to be placed on an EAP. Rather, the Commission is required to be receptive to a *request* for an Employee Assistance Program. The arbitral record does not reveal that such a request was presented to the Commission.

VI. Penalty Decision

Preponderant evidence in the record establishes that the Grievant falsified official documents and was insubordinate. In light of this misconduct, some measure of discipline is indicated. The specific quantum of discipline depends upon the aggravative and mitigative circumstances involved in this dispute. Furthermore, the Arbitrator will not disturb the Commission's penalty, unless assessment of the aggravative and mitigative circumstances reveals that the penalty was unreasonable, arbitrary, or capricious.

A. Aggravative Circumstances

The pivotal aggravative circumstance in this case is proof that the Grievant falsified official documents and was insubordinate. Employers routinely terminate employees the first time they engage in either of these forms of misconduct, not to mention both. In addition, the Grievant had active discipline in his file when he received the ten-day suspension. That discipline comprised a written reprimand on March 12, 2002 for inattention to duties, carelessness with the mail, and insubordination. Also, the Grievant received a written reprimand on May 7, 2002 for failure of the behavior.

B. Mitigative Circumstances

The major mitigative circumstance is the Grievant's 22 years of seniority with the state of Ohio. Any reasonable balance of the foregoing mitigative and aggravative circumstances clearly establishes that the ten-day suspension in this case was not unreasonable, arbitrary, or capricious.

VII. The Award

For all the reasons set forth in this opinion, the Arbitrator holds that the Grievance is

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Nevertheless, the Arbitrator wishes to stress in the strongest possible terms that the Commission is responsible for scrupulously following the clear language of the Collective-Bargaining Agreement and fails to do so at its own risk.

DENIED in its entirety.

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 19 day of May, 2003

Signature of Notary Public: Melinda J. Lucas

Printed Name of Notary Public: Melinda J. Lucas

My commission expires: 6/5/10

County of Residency: Johnson

Robert Brookins
Robert Brookins