#1865

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF REHABILITATION & CORRECTION

AND

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

Grievant: Gary Hall

Case No. 27-20-(20050512)-6731-01-04

Date of Hearing: November 30, 2005

Place of Hearing: Mansfield, Ohio

APPEARANCES:

For the Union:

Advocate: James McElvain
2nd Chair: Doug Mosier

Witnesses:

Billy Stephens
Shelley Shaum
Douglass Danner
Doug Mosier
Gary Hall

For the Employer:

Advocate: Rick Shutek
2nd Chair: Chris Lambert

Witnesses:

Janet Tobin
Jeff Wolford
Scott Basquin

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: January 31, 2006

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2003 through February 28, 2006, between the State of Ohio Department of Rehabilitation and Corrections ("DR&C") 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 removal of the Grievant, Gary Hall ("Hall"), for violating his Last Chance Agreement ("LCA") dated November 29, 2004 when he was tardy for work on March 4, 2005 and March 7, 2005?

The discipline was issued because the Grievant was late for work, and as a result violated his Last Chance Agreement which was related to previous attendance incidents.

The removal of the Grievant occurred on May 12, 2005 and was appealed in accordance with Article 24 of the CBA. This matter was heard on November 30, 2005 and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were submitted by both parties on or about December 23, 2005.

BACKGROUND

The Grievant worked for over three and one half (3 1/2) years as a correctional food service coordinator for DR&C, at the Mansfield Correctional Institution ("Manci"). The Grievant was removed from his position effective May 12, 2005 for violation of Employer's Standards of Employee Conduct, Rule ("Rules") 2, and a violation of a LCA executed on November 29, 2004 (Joint Exhibit ["JX"] 2, p.19).

On March 4, 2005 the Grievant arrived fifty-eight (58) minutes late, and on March 7, 2005 he arrived fifty-two (52) minutes late for work. The Grievant admits that he was tardy, but states a medical problem contributed to his tardiness.

The disciplinary record of the Grievant at the time of his removal included:

March 22, 2004 – Oral Reprimand	Rule 2(B) Tardiness
April 16, 2004 – Written Reprimand	Rule 3(B) No call off
June 21, 2004 - 2-Day Fine	Rule 2(C) Tardiness
October 4, 2004 - 5-Day Fine	Rule 3(A) Mandatory Overtime
November 10, 2004 – Removal	Rule 2(C) Last Chance Agreement

As a result of the above, on November 29, 2004 the parties agreed to mitigate the November 10, 2004 removal by entering into a LCA which provides, in part:

> "The Department of Rehabilitation and Corrections agrees to:
>
> 1. Hold the removal in abeyance upon completion of this Agreement.
>
> The Employee agrees:
>
> 1. Specifically agrees and understands that they must strictly adhere to the DR&C policies and work rules in order to retain their position; and
>
> All parties agrees hereto that if the employee violates this LCA, and/or if there is any violation of the SOEC Rules 2, 3, the appropriate discipline shall be termination from their position. Any grievance arising out of this discipline shall have the scope of the Arbitration of the grievance limited to the question of whether or not the grievant did indeed violate said policy." (JX 2, p. 19)

The LCA was executed on November 29, 2004 by the Grievant, and his local Union Representative, Mick Bradshaw. On January 12, 2005 the LCA was executed by James McElvain, OCSEA Staff Representative.

As a result of his tardiness, the Grievant was removed from his position for violation of Rule 2 - failure to report for duty at scheduled starting time and violation of the LCA. The DR& C indicates that the Grievant had a history of attendance related violations and removal was appropriate in light of the LCA. The Union, on the other hand, contends that the Grievant was treated differently than other employees and that

'just cause' is absent under these circumstances, and reinstatement with appropriate damages should occur.

ISSUE

Was the removal of the Grievant in violation of the Last Chance Agreement dated November 29, 2004? If not, was the Grievant's removal for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA, ORC AND OHIO ADMINISTRATIVE CODE

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).

STANDARDS OF EMPLOYEE CONDUCT (2004 Ed.)

	OFFENSE				
Rule 2. TARDINESS	1st	2nd	3rd	4th	5th
Failure to report for duty at scheduled starting time.	WR	1	2	5	R

POSITION OF THE PARTIES

POSITION OF THE EMPLOYER

The Grievant violated his LCA on March 4 and 7, 2005, and per the agreed terms of the LCA the removal order cannot be modified. Within four (4) months of the execution, the Grievant admitted at the hearing that he was fifty-eight (58) minutes late

on March 4, 2005 and fifty-two (52) minutes late on March 7, 2005. The LCA was instituted to allow the Grievant a final opportunity to comply with DR&C policies and work rules for a two (2) year period. Moreover, specific language in the LCA provides in part: "…. if the employee violates this Last Chance Agreement and/or if there is any violation of the SOEC Rules 2, 3, the appropriate discipline shall be termination…." (JX 2, p.19). Simply, the Grievant understood what was expected when he entered into the LCA.

The Union during the disciplinary proceedings and at the Arbitration hearing argued that circumstances beyond the Grievant's control contributed to his lateness on March 4th and 7th, establishing mitigation for the conduct. The Employer contends that the medical condition, i.e., sleep apnea, is irrelevant to a finding that the LCA was violated since the concept of mitigation is inappropriate in a LCA analysis.

However, mitigation would be unacceptable since the Grievant admitted to taking Nyquil on both evenings preceding his lateness. The disconnect results from the Grievant knowingly taking medications which were respiratory depressants contrary to his medical providers advice (Union ("Un") Ex. 2(A), p. 4). The Grievant specifically engage in a conduct which was in direct opposition to his doctor's advice and his decisions to self-medicate are not grounds for mitigation under any circumstances.

Another issue raised by the Union involves whether the Grievant was disciplined comparably to peers who engaged in similar conduct. DR&C contends that the Union's disparate treatment defense, similar to the concept of mitigation, is not appropriate under an LCA analysis. DR&C points out that the Union presented six (6) employees who failed to report on time and were not disciplined by DR&C.

Jeff Wolford ("Wolford"), Food Service Manager, testified that it was not unusual for him or other supervisors not to impose discipline if legitimate reasons were present or if the employee sought, in advance, permission to be late. In addition to fellow co-workers, Wolford testified that the Grievant received no discipline in late 2004 for being

tardy. DR&C argues that no evidence exists to find that Doug Mosier's ("Mosier") investigation of the six (6) food service employees or other allegations of attendance related rules infractions are closely analogous to the Grievant's situation. As examples, DR&C points to Union's witnesses Shelly Shaum ("Shaum") and Doug Danner ("Danner"). Shaum testified that she had been late on several occasions and wasn't disciplined. On cross examination Shaum admitted that she had a flat tire on one occasion and since 2005 was not late without calling in. Danner, on the other hand, testified that he was received discipline on some occasions and was aware of other employees who were tardy but did not possess first-hand information if circumstances existed to mitigate the discipline.

None of the employees were on a LCA, and the Union has failed to offer any evidence for the Arbitrator to conclude that the Grievant treatment, as compared to his co-workers, was not rationally and fairly explained by DR&C. Simply, the LCA differentiates the Grievant from his co-workers.

Finally, DR&C rebuts the Union's procedural argument that certain conduct on September 17 and 18, 2004 should have merged as a part of the original removal Order dated November 10, 2004. DR&C, through Janet Tobin ("Tobin"), Labor Relations Officer testified that combining the five (5) day discipline with the November 10, 2004 removal would not have avoided his current removal. The March 4th and 7th incidents would have been the fifth and sixth attendance related violations under the Rules. DR&C points out that Article 25 of the CBA contains no language that requires the merger of separate acts of misconduct, and the Union grieved the five (5) day fine through the process.

The LCA was executed by the Grievant and the Union thereby accepting the conditions contained therein. The Union's claims of disparate treatment and mitigation are without substance rendering this grievance moot.

POSITION OF THE UNION

The Union argues that on November 29, 2004 the Grievant was summoned to the Warden's Office and given the LCA to signed as oppose to being removed. Billy Stephens ("Stephens"), Union member, was present in the Warden's Office and indicated that the Grievant didn't have time to think about the LCA, but was forced to sign it, in lieu of being removed.

The November 29, 2004 events were preceded by the September 17, 2004 (failure to work overtime) and September 18, 2004 (failure to report to duty on time) disciplines. The Union argues that the incidents should have been combined since they fall under the same attendance grid. If the incidents were combined the Grievant would have received a ten (10) day fine as opposed to removal.

The Union argues that the Grievant's medical condition i.e., sleep apnea, was documented, but DR&C chose to ignore this medical condition as a mitigating factor, regarding the March 4th and 7th incidents.

The Union submits that the Grievant was singled out and treated differently than his peers regarding the application of the attendance policy. Mosier obtained Leave Forms on other food service coordinators to conduct his own investigation regarding if the work rules were administered fairly. (Un Ex. 2) Mosier reviewed Request for Leave Forms of P. Allen, B. Bailey, D. Danner, K. Allen, D. Sheppard and S. Lucas and concluded in each case, examples existed of late call-offs or other violations of the attendance policy without discipline occurring. Mosier admitted on cross-examination that his investigation did not find out if any mitigating circumstances were associated with the violations in Un. Ex. 2; however, Mosier met with all of the employees except K. Allen to ascertain the circumstances regarding the call-offs.

Mosier indicated that P. Allen and D. Sheppard had conditions certified under Family Medical Leave Act ("FMLA"), but no discipline was issued for non-certified dates.

In addition to Mosier, employees Shaum and Danner testified on occasion they were tardy without being disciplined. Shaum indicated that he was tardy on four (4) occasions since 2003 and Danner indicated approximately ten (10) to twelve (12) times since 2003. In Danner's case, he stated that he was disciplined 3 or 4 times due to attendance misconduct. In any event, both indicated that some food service coordinators were disciplined for being tardy while others were not.

The Grievant was attempting to follow his medical provider's advice, and deserves an opportunity to continue his job at Manci. DR&C failed to mitigate this matter and treated him differently. The Union seeks reinstatement and restoration of all economic benefits.

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" (6th ed., 2003).

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 DR&C burden to prove that the Grievant was guilty of wrongdoing in violating the LCA. 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). With a LCA at issue, the agreed upon discipline is termination if the Grievant violated the agreement.

DISCUSSIONS AND CONCLUSIONS

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

The grievance involves a removal pursuant to violation of a Last Chance Agreement. The LCA was executed on November 29, 2004 by the Grievant, to enable him to continue employment at Manci. It's undisputed that JX, 2 p. 19 contains the signature of the Grievant and is executed on November 29, 2004 by the Local Union Representative and again on January 12, 2005 by the Union's Staff Representative.

The prohibited conduct includes any future violation of DR&C policies and work rules, and specifically provides that any violation of the SOEC Rules 2, 3..." results in termination." Although, the enforcement of a LCA seems harsh when viewed in an isolated context, the quid pro quo allowed the Union another chance to save the Grievant's job, provided the terms of the LCA was followed. Moreover, the validity of a LCA is presumed, absent an showing of fraud, misrepresentation, etc. regarding the formational elements of an agreement. Moreover, if the Agreement was not negotiated in good faith between them, the parties' execution would be problematic by the party contending that a defect exists. In other words, an executed LCA would not exist.

The Union contends that the Grievant was forced to sign the LCA without an understanding of what he was executing. The facts do not support this finding, but if so, who forced the Union to execute this document? See, *Boise Cascade Corporation*, 114 LA 1383 (Crider 2000) (Last chance agreement unilaterally imposed without union involvement or representation is invalid). Moreover, if LCA's once agreed between the parties are later subject to a declaration of unenforceability by an Arbitrator – why would the parties utilize this mechanism? See, *Tosco Refining Company*, 112 LA 306 (Bogue

1999) (Employer had just cause to discharge employee who was notified of potential for discharge if employee violated back to work agreement).

No evidence exists that the Grievant undertook any act to invalidate the LCA. The LCA was in existence from November 2004 and no evidence was offered to conclude the Grievant or the Union had a problem with the LCA prior to March 4, 2005. If the validity or enforceability of the LCA was in dispute, the record is silent as to acts undertaken by the Grievant and/or Union regarding this allege defect.

Arbitrator J. Dworkin stated:

> "It should be inferred that the statement was negotiated in good faith to grant employee something s/he could not otherwise achieve – continued employment. The Arbitrator should require that there was a trade-off for the advantage – relinquishment of certain employment rights... last – chance settlements provide unions an opportunity to save jobs. They stem from legitimate exercises of the common duty to bargain. An employer would have no reason to enter into them if they were illusionary or unenforceable." *Butler Manufacturing Co.*, 93 LA, 441, 445 (Dworkin, 1990)"

In recognizing the trade-off that the parties bargained for in the LCA, my analysis in accordance with the language of the LCA is restricted to the evidence, or lack thereof, that demonstrates a violation of the LCA.

The Grievant failed to report to work at his scheduled time on two (2) occasions within seventy-two (72) hours. The Grievant testified that the medication he took contributed to him oversleeping on both occasions. As a result, it's the Union's position that his tardiness was justified due to his health condition warranting an exception to the LCA. I disagree.

The usual protections under the CBA and Article 24 are superfluous in the LCA context based upon the agreed language within the LCA. The fundamental principle of fairness and compliance with procedural and substantive prerequisites are eliminated or modified, if the parties' language is unambiguous as to what "rights" the Grievant sacrificed to save his job.

The LCA states, in part:

> "...if there is any violation of the SOEC rules 2, 3, the appropriate discipline shall be termination. Any grievance arising out of this discipline shall have the scope of the Arbitration of the grievance limited to the questions of whether or not the grievant did indeed violate said policy..." (JX 2, p.19) (emphasis added.)

DR&C met its burden that the Grievant's conduct on March 4 and 7, 2005 violated the LCA and Rule 2. Therefore, the removal was in accord with the parties' LCA and this grievance must be denied.

Based upon the above ruling, any analysis of the other defenses or reasons advanced by the Union, i.e., disparate treatment and merger of the September 17th and 18th conduct is unnecessary. There is no evidence of mitigating circumstances to conclude that Grievant's removal was not the appropriate discipline.

AWARD

Grievance denied.

Respectfully submitted this 31st day of January, 2006.

Dwight A. Washington, Esq., Arbitrator