ARBITRATION DECISION NO.:
183

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Mental Health,
Fallsview Psychiatric Hospital

DATE OF ARBITRATION:
March 16, 1989

DATE OF DECISION:
June 7, 1989

GRIEVANT:
John Rucker

OCB GRIEVANCE NO.:
G-87-2701

ARBITRATOR:
Jonathan Dworkin

FOR THE UNION:
Timothy L. Miller

FOR THE EMPLOYER:
Rodney D. Sampson

KEY WORDS:
Altered Leave Form
Removal
Occupational Injury Leave
Falsification

ARTICLES:
Article 24 - Discipline
  §24.01-Standard
Article 34 - Service
Connected Injury
  §34.04-Occupational
Injury Leave

FACTS:

The Grievant was a Hospital Aide at Fallsview Psychiatric Hospital. He worked at the hospital from December 9, 1977 until his discharge on November 16, 1987. The issue which gave rise to the discharge of the Grievant was whether or not the Grievant had altered a return-to-work release date on an Occupational Injury Leave Application. The Grievant's supervisors found that the Grievant had altered the form. After consulting the disciplinary grid, it was determined the offense was punishable by either a 6 day suspension or by removal. The Grievant in this case was terminated because he had a prior record of disciplines.

EMPLOYER'S POSITION:

The state argued that the grievant made the alteration on the Occupational Injury Leave Application. The purpose behind the grievant's action was to secure an additional month off with full pay. Therefore, the Grievant was removed for just cause.

UNION'S POSITION:

The Union argued that the grievance should be sustained because when the grievant was examined by a physician it was determined that he could only return to work on light duty because he was still suffering from chronic back-pain. The Union further pointed out that at the psychiatric facility there is no light duty and therefore, the Grievant would not have been able to perform any duties at the facility. The Union also stated that the termination of the grievant was a harsh response to an unfounded suspicion. More particularly, it was shown that the alteration of the work release form was based on circumstantial evidence and that the Grievant was unaware of the alteration.

ARBITRATOR'S OPINION

The arbitrator felt that the medical testimony presented by the Union was not relevant to the central issue of whether the Grievant altered the work release form. The arbitrator then stated that under section 24.01 of the contract, the state must establish both the cause and the justification for discipline. In this case the arbitrator determined that there was no basis for a firm conviction that the grievant committed the offense. The alteration of the return to work dates was in a different color than the original. The arbitrator declared that the state failed to meet its contractual burden of proof and, therefore, the grievance was sustained.

The arbitrator felt that the State had failed to present evidence of the grievant's conversation with his doctor, what the grievant's doctor meant by placing grievant on light duty status, why the doctor's secretary was so sure of what the grievant's return to work date was when it was not in the grievant's file, and how the apparent forgery managed to get through so many levels of management before it was discovered, especially since it was such a crude forgery. While the arbitrator had great suspicion that the grievant had committed the forgery, the state had not proved it sufficiently to show just cause. The grievant was reinstated to employment status and was made whole for losses he suffered as a direct result of his removal, not including back pay. Back pay was not part of the remedy because the grievant had been off on occupational injury leave and workers compensation since his removal.

TEXT OF THE OPINION:

CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration

Between:

THE STATE OF OHIO
Department of Mental Health

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
OCSEA/AFSCME Local 11

Grievance No.:
G87-2701

Decision Issued
June 7, 1989

APPEARANCES

FOR THE STATE
Rodney D. Sampson,
Assistant Chief of Arbitration
Ed Morales,
Labor Relations Specialist
Thomas M. Cheek,
Operations Chief, Fallsview
Janet Conkey,
Employee Benefits Coordinator
Carole Weckerly,
Personnel Officer, Fallsview

FOR THE UNION
Timothy L. Miller, Advocate
John T. Porter,
Associate General Counsel
Ron Stevenson,
Staff Representative
John Rucker, Grievant

ISSUE: Article 24, §24.01: Discharge for altering medical statement on Occupational Injury Pay Application form.

BACKGROUND AND ISSUE

The grievance protests the disciplinary removal of a ten-year Employee of the Ohio Department of Mental Health. Grievant was a Hospital Aide at Fallsview Psychiatric Hospital in Cuyahoga Falls, Ohio. He was hired on December 9, 1977; he was discharged on November 16, 1987.

The State alleges that Grievant fraudulently altered his Occupational Injury Pay Application by changing the physician's return-to-work release date. The completed application was submitted to the Employer by Grievant on August 12, 1987. Ostensibly, it covered the period of July 1 to September 30. Later, the State found out the actual release date was September 1. That date was written in ink on the back of the form. Someone (the State contends it was Grievant) changed the date in pencil, writing "30" over "1," so that it appeared to extend the disability period through September, 1987.

The alteration was discovered by the Employee Benefits Coordinator in Columbus. She notified the Personnel Officer at Fallsview Hospital who telephoned the Employee's physician. The physician's secretary told her that the work-release date was September 1. The doctor scheduled Grievant for further treatment and a follow-up examination by a specialist, but did not authorize any disability leave beyond September 1.

After gathering the information on the forgery, the Fallsview Superintendent convened a disciplinary conference. The meeting was on October 6, 1987; it was attended by Grievant and his Union Representative(s). When confronted with the facts, the Employee conceded that the form appeared to be altered, but stated, "I did not alter it." Management disbelieved him and, on October 26, the Hospital Superintendent formally recommended his removal. The primary charge was, "Dishonesty through abuse of occupational injury leave."

According to the Employer, Grievant violated contractual requirements and specific work rules. Special emphasis was placed on Article 34, §34.04 and Appendix K of the Collective Bargaining Agreement. Section 34.04 establishes that occupational injury leave is a benefit of employment capped at nine hundred sixty hours per year. But the provision does not crystallize the scope and limitations of the allowance; it leaves those matters to the Office of Collective Bargaining (OCB). It states in part:

Employees of the Department of Mental Health . . . shall be entitled to a total of nine hundred sixty (960) hours of occupational injury leave a year. <u>The Office of Collective Bargaining shall issue guidelines (see Appendix K)</u>. [Underscoring added.]

Appendix K contains seven paragraphs of OCB guidelines. Paragraph 5 has direct bearing on this case. It states:

5. The employee shall be obligated to receive necessary medical treatment <u>and to return to active work status at the earliest time permitted by his/her attending physician</u>. [Underscoring added.]

The work rules Grievant allegedly violated are set forth in an internal Management document designed as a disciplinary guide for supervisors. The document has never been distributed or posted, but copies are in every department and accessible to all employees. There is little doubt that Grievant, a former Union Steward, was well aware of the rules and their accompanying penalties.

One of the rules prohibits "DISHONESTY" and defines the offense as "Falsification of hospital or other official records; making false application for sick leave." The prescribed penalty for a first offense is, "6 Day Suspension or Removal." Removal is the only stated penalty for a second offense. The Employer contends that although Grievant's falsification of his Occupational Injury Pay Application was a first offense under the rule, it warranted discharge because the Employee had a poor record of prior discipline. On January 3, 1986, he received a verbal warning for neglect of duty. Another verbal warning for a similar offense was issued four and one-half months later, on May 27, 1986; and on October 14 of the same year, he was placed on a two-day disciplinary suspension for, "Failure of good behavior - Abusive language to a fellow employee."

A second allegation in support of Grievant's discharge stems from the fact that he did not return to work on September 1, the date he was medically released for duty. The charge is that he was continually absent without leave. The Hospital work rules call for progressive discipline for this offense, beginning with a written reprimand and ending with termination for a fourth incident.

The grievance was reviewed at the preliminary levels of the contractual dispute-resolution procedures and was appealed to arbitration. It was heard in Columbus, Ohio on March 16, 1989. At the outset, the Employer conceded that the dispute was procedurally arbitrable and the Arbitrator was authorized to issue a conclusive award on its merits. The parties then stipulated to the following issue:

Was the Grievant . . . removed for just cause; and if not what should the remedy be?

The pivotal issue, whether or not the discipline was for just cause, requires arbitral examination of Article 24, §24.01 of the Agreement. That provision mandates that just cause attend every disciplinary action and places a strict burden of proof on the Employer whenever discipline is grieved. It states in pertinent part:

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.

The other Sections of Article 24 mainly address due-process rights which must be observed by the Employer, but they are not in issue here. The Union does not challenge the process leading to Grievant's removal. Nor does the Union strenuously argue that the discipline was an unduly harsh response to the charges. Its position rests basically on two defenses: 1) That Grievant did not alter the document -- someone else did it; 2) That the State's allegations are entirely conjectural and not supported by the proof required under Article 24, §24.01.

During the course of the hearing, the Arbitrator requested a better copy of a critical item of evidence introduced by the State. The Advocate for the State agreed to comply, but needed additional time. Accordingly, the hearing remained open until April 12, 1989.

ADDITIONAL FACTS AND CONTENTIONS

The State does not doubt the legitimacy of Grievant's initial claim for occupational injury leave. As a Hospital Aide in an intermediate- and acute-care psychiatric facility, the Employee faced certain risks. He worked directly with patients, assisting in daily living skills, providing escort for off-ward appointments, and supervising leisure-time activities. He also restrained patients when necessary. On February 24, 1987, Grievant had to physically wrestle an out-of-control patient into submission. He was pushed against a steel bed and suffered low back strain superimposed on chronic low back syndrome. He sought immediate medical care and was placed on injury leave to March 9. After he returned to work, his condition worsened and he obtained several successive terms of injury leave.

Employees seeking occupational injury leave must fill out and submit a prescribed form to the Employer. The form is in two parts. The front is the Employee Report requesting leave and giving reasons. The back is reserved for the attending physician. It asks for dates of examinations and treatments, verification that disability is due to State employment, general diagnosis, and the date(s) when the affected employee will be able to resume light or regular duty. Employees on

long-term disability must submit new applications every ninety days.

Grievant fulfilled all the requirements until July 1, 1987, when he failed to submit a new application. He did not see his attending physician in July because she was on maternity leave. In August, he tried to catch up on his obligation to apply for extensions by seeing an associate of his personal physician, Dr. Joseph Wojcik. His appointment with Dr. Wojcik was August 12, 1987. Grievant filled out the front of his extension request in advance, indicating that the extension would run from July 1 to September 30, 1987.

According to the Employee, he consulted with Dr. Wojcik for a medical condition unrelated to his injury. He asked the physician to complete the medical portion of the extension application "as a favor," and the doctor complied. Dr. Wojcik gave sparse information on the back of the form. He stated that the first date of treatment was May 29, 1987 (actually it was February 25, 1987), that the diagnosis was chronic back pain, that the condition was due to injury arising out of employment with the State of Ohio, and that Grievant's estimated return to work for light duty was September 1, 1987. The Employee submitted the form to Fallsview Hospital the same day.

Applications for occupational injury pay go through several departments before they are granted. The normal processing chain is as follows:

1. The application goes first to the Personnel Office where it is logged.
2. Next, it is forwarded to the Superintendent for signature.
3. Then it is returned to the Personnel Office and forwarded to the Employee Benefits Section of the Department of Mental Health in Columbus.
4. Once approved by the Benefits Officer, the form is sent to the payroll office of the Department of Administrative Services.
5. Finally, it is returned to the employment location [Fallsview Hospital].

There might have been a departure from the normal chain of possession in this case. On August 12, Grievant took his application to the Personnel Office, but no one was there. According to his testimony, he left it with the Superintendent's secretary. In any event, it reached the Hospital Personnel Officer the same day. She filled in blanks and calculated the number of hours encompassed by the application, then returned it to the Superintendent. It seems that in calculating hours, she should have observed that Grievant's maximum allowance of nine hundred sixty hours occupational injury pay would soon be exhausted. Actually, the benefit terminated August 18, six days after the application was submitted. Curiously, the Personnel Officer did not see the "forgery" which eventually led to Grievant's dismissal. As she explained, "I didn't notice it. It was late and I wanted to rush it through so [Grievant's] pay wouldn't be delayed."

The form was reviewed by the Benefits Coordinator on August 16. She was the first to observe the discrepancy in the return-to-duty date. She telephoned the Fallsview Personnel Officer, informing her of the discovery and instructing her to contact the physician who executed the form. The Personnel Officer called Dr. Wojcik's office and spoke with his secretary. The secretary verified the suspicions which were beginning to form; she stated that the doctor absolutely had released Grievant for duty as of September 1. Following the conversation, Dr. Wojcik provided the Employer with a brief, handwritten and personally signed note on a prescription blank. It stated that the Employee "was released to return to work 9/1/87."

After receiving that information, the Benefits Coordinator advised the Hospital Administration to consider disciplining Grievant. Her recommendation was contained in an August 25 memorandum to the Fallsview Superintendent. It stated:

Upon receipt of the attached Employee and Attending Physician Report for [Grievant], I noticed that the physician's estimated return to work date had been changed from September 1 to

September 30, 1987. As the physician had not initialed this change, I asked Carole Weckerly [the Fallsview Personnel Officer] to contact Dr. Wojcik to confirm the estimated return to work date. Ms. Weckerly informed me that the Doctor's office indicated that the estimated return to work date was September 1, 1987 and had not been changed by that office.

Accordingly, I am returning this form to you for possible disciplinary action as you see fit. A copy of this form will be submitted to the Department of Administrative Services for consideration of further injury pay benefits upon receipt of a statement from Ms. Weckerly concerning her conversation with Dr. Wojcik's office.

The fundamental question in this controversy is whether or not Grievant made the alteration. The State argues that he did. It contends that he had motive even though his entitlement to injury pay was going to expire on August 18. It is possible, according to the State, that Grievant did not know he was about to exhaust the benefit and believed the forgery would provide him an additional month off with full pay. He might have had other motives as well. Whatever his reasons; his request for leave to September 30 on the front of the form conflicted with Dr. Wojcik's release on the back.

No one saw Grievant tamper with the medical report. The charges are premised only on circumstantial evidence. The State maintains, nevertheless, that its evidence is more than adequate to fulfill the contractual burden of proof. It argues that the facts lead to but one logical conclusion -- Grievant fraudulently tried to secure an unauthorized extension of leave by altering his physician's return-to-duty release.

The fact that the alteration occurred is beyond debate, and no one else had motive for doing it. In the State's view, it is absurd to speculate that the Hospital Superintendent, the Personnel Officer, or the Department of Mental Health Benefits Coordinator changed the date. They were the only individuals who had possession of the form between the time it was turned in by Grievant and the time the alteration was discovered. None of them had any reason to forge the document.

The State regards the fact that Grievant did not report for work on September 1 as absolute proof of his culpability. The Employee had filed six or seven leave-extension forms in the past. He was thoroughly familiar with them. He knew that the attending physician determined the length of disability and whatever return-to-work date s/he placed on the back of the form was the date his leave would end. The physician wrote "Sept. 1" on the back of the form and Grievant must have known that his disability leave would terminate on September 1. The State discounts the Employee's assertion that he did not look at the doctor's statement, characterizing it as, "incredible."'

In conclusion, the Employer asks the Arbitrator to examine every possible explanation for the alteration, weighing each to determine if it is rational. Upon doing so, it is argued, he will find conclusively that Grievant committed the misconduct charged against him and his removal was fully justified.

* * *

Neither Grievant nor the Union spent much time speculating on how the alteration might have come about. The Union did hypothesize that someone in the chain of possession might have changed it innocently because s/he thought the front and back of the form should be the same. But the focus of Grievant's testimony was his unequivocal denial that he had anything to do with the alteration. He testified that he placed the September 30 date on the front of the extension form to cover a full ninety days, not for any condemnable purpose. When he turned the form in to the Hospital, he had no cause to doubt that the back and front conformed. He was unaware that Dr.

Wojcik had placed an earlier return-to-work date on the back; no one in the physician's office told him of the discrepancy and he did not study the back of the form himself. He submitted the form confident that it covered his leave through September 30.

The Union contends that Management's unquestioning reliance on Dr. Wojcik's statements and assertions was misplaced; it constituted an inadequate and manifestly unjust basis for discipline. The Union makes the following observations:

1. Appendix K of the Agreement requires employees to return from injury leave "at the earliest time permitted by his/her attending physician." Dr. Wojcik was not Grievant's attending physician. He served only as a stand-in for Dr. Karen Monheim. Dr. Monheim was the attending physician, and the State knew it. The documents of the Department of Administrative Services granting the Employee's initial injury pay application and each extension all contained the same comment, "THE ATTENDING PHYSICIAN IS KAREN MONHEIM, M.D." it follows, according to the Union, that Grievant was not released by his attending physician.

2. Dr. Monheim's medical opinion regarding Grievant's capacity to return to work was directly opposed to Dr. Wojcik's. Dr. Wojcik had referred Grievant to Dr. Greenberg, an orthopedic specialist. Dr. Greenberg examined the Employee and sent his findings to the attending physician. Based on those findings and her own examination and treatment, Dr. Monheim informed the State that Dr. Wojcik had been incorrect -- that Grievant was not ready to return to work on September 1. Her letter of August 11, 1988 (nine months after the discharge, but seven months before the arbitration) was furnished to set the record straight. It stated:

To Whom It May Concern:

This letter is in reference to [Grievant's] request dated August 8, 1988.

On chart review, [Grievant] was seen by Dr. Wojcik on August 12, 1987. His note states "the patient continues to complain of right buttock low back pain with radiation down the back of his leg. He continues to complain of severe headaches. MRI of the spine revealed no abnormalities. He is using a TENS machine. He is scheduled to see Dr. Greenberg on September 4, 1987."

He was told to follow-up with Dr. Greenberg and also with me.

A physical therapy note was written on August 26, 1987. It stated that [Grievant] had received the TENS unit again on August 6, 1987 and they expected him to do well with it, as he had before. (They had not seen him since August 6, 1987.)

[Grievant] saw Dr. Greenberg on September 4, 1987. His letter is attached. I saw [Grievant] on September 22, 1987 and found him still to be complaining of subjective pain.

Dr. Greenberg's letter seems to imply that [Grievant] was disabled from the pain he stated he was experiencing on September 4, 1987. There is no mention that [Grievant] improved from August 12 to September 4, so I would assume that he was still in pain on September 1, 1987.

The problem with this case is that the objective findings on physical exam are minimal. The pain complaint is a subjective one and difficult for anyone to document/evaluate.

[Grievant] had been kept off work because of pain prior to September 1, 1987 and shortly after that

date; therefore, I don't think September 1, 1987 should be viewed any differently than August 12, or September 4, 1987. [Underscoring added.]

3. Dr. Wojcik's work release was illusory. It stated that Grievant could return to "light duty." It did not specify any restrictions, however, and it is unlikely that Dr. Wojcik understood, considered, or even cared about the physical components of Hospital Aide duties in an acute-care psychiatric facility. Moreover, the Union contends that no light duty is or ever has been available at Fallsview Hospital. Therefore, no job existed on September 1, 1987 which Grievant could have performed as a light-duty employee.

The Union urges that the grievance be sustained. It regards the termination of Grievant's employment as a harsh response to unfounded suspicions.

OPINION

The Union's presentation concentrated on the conflicting medical opinions of Dr. Monheim and Dr. Wojcik. It emphasized that Grievant actually was not fit to return to work on September 1, and Dr. Wojcik's contrary opinion did not constitute a recommendation by the attending physician.

The arguments and testimony on Grievant's medical condition are interesting and tangentially material; but they are not relevant to the determinant issue in this dispute. They would have been exculpatory if Grievant had admitted altering the document -- if he had said, "I changed the date, not to fool anyone but to correct an error I thought Dr. Wojcik had made." That, however, was not Grievant's defense and the Arbitrator has no business changing the defense to improve on probabilities. The pivotal question is whether or not the State proved that Grievant made the alteration, and the award hinges on that question alone.

The State had a heavy evidentiary obligation. When just cause is the issue, the ordinary presumption is that the employer must establish both the cause and the ethical justification for discipline. The parties to this dispute have taken the presumption a step further, turning it into a contractual mandate. In Article 24, §24.01, they specified that "The Employer has the burden of proof to establish just cause for any disciplinary action."

The State's evidence created a strong implication that Grievant did commit the offense for which he was discharged. The logic of its arguments was provocative. It does seem that no one other than Grievant had motive for altering Dr. Wojcik's return-to-duty date. At the same time, Grievant's simple statement that he did not change the date had a believable quality. The Employer rested its position on inferences logically derived from the facts. It did not, however, present all of the facts; when the hearing closed, some unanswered questions persisted:

1. Did Dr. Wojcik tell Grievant that he was returning him to light duty on September 1? Grievant's testimony was that he did not discuss the date with Dr. Wojcik, and that testimony remained unchallenged and unrebutted. It appears to the Arbitrator that in a dispute as important as this one, it would have been appropriate for the Employer to cover this item at least with Dr. Wojcik's affidavit if not his direct testimony.

2. What did Dr. Wojcik mean by "light duty?" Was he aware of Grievant's job functions? Did he know that a Hospital Aide sometimes has to physically battle with patients? Did Dr. Wojcik even know that Grievant was a Hospital Aide in an acute-care psychiatric facility?

3. Where did Dr. Wojcik's secretary obtain the information for her absolute assurance that the original return-to-work date was September 1? The doctor's notes of the August 12 examination contained no indication of a return-to-work date. Again, direct testimony might have answered this question.

4. Why was the forgery not discovered sooner? Before it was observed by the Benefits Coordinator, the form passed inspection of the Fallsview Superintendent and the Personnel Officer. How could both of them have failed to notice the alteration? Dr. Wojcik's return date was written in blue ink; the strike-over was in pencil. If forgery was intended, it was carried out with remarkable clumsiness. No one glancing at the document could fail to detect it. The fact that it was not noticed earlier lends support to Grievant's insistence that he did not make the alteration.

Ultimately, the evidence provides the Arbitrator no basis for a firm conviction that Grievant committed the offense. The best the Arbitrator can say in view of the evidence is, "I suspect that Grievant altered the document." A suspicion is not a proven fact. The State failed to meet its contractually prescribed burden of proof and, therefore, the grievance will be sustained.

The Arbitrator recognizes that Article 24, §24.01 casts an evidentiary responsibility on the Employer which sometimes will be impossible to meet. Many incidents of employee misconduct are committed in secrecy and designed to escape detection. Often, the Employer's "proof" consists only of circumstantial evidence. Cir-cumstantial evidence is not "bad" evidence. More often than not, it is enough to establish requisite proof. But sometimes (as in this dispute) it may not be enough, particularly when direct evidence is available to supplement circumstantial. It is foreseeable that the Employer's burden will occasionally permit a guilty employee to escape justice. That risk is inherent in Article 24, §24.01.

REMEDY

Grievant will be reinstated to employment status with full seniority and restoration of any losses he suffered as a result of his discharge. Such losses shall not include wages; indeed, the Union demanded none. Throughout the processing of this grievance, including the arbitration hearing, Grievant maintained that he was not yet fit to return to work. It follows that his removal did not cause him loss of pay.

AWARD

The grievance is sustained. The Employer is directed to reinstate Grievant to his employment status with unbroken seniority. Grievant shall be made whole for losses he suffered as a direct result of his removal, but such losses shall not include back pay. According to the evidence, the Employee continues to be disabled and, therefore, did not lose wages.

The Arbitrator hereby retains jurisdiction solely on the remedy portion of the award. In the event the parties are unable to determine what if any recovery is due under the make-whole requirement, they may submit that issue together with relevant evidence for arbitral resolution. Either party may invoke the retained jurisdiction by providing appropriate notice to the Arbitrator and the other party.

Decision Issued:
June 7, 1989

Jonathan Dworkin, Arbitrator