ARBITRATION DECISION NO.:
383

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

EMPLOYER:
Department of Mental Health,
Oakwood Forensic Center

DATE OF ARBITRATION:
August 14, 1991

DATE OF DECISION:
October 14, 1991

GRIEVANT:
Sandros Boddie

OCB GRIEVANCE NO.:
23-12-(91-03-13)-0251-01-03

ARBITRATOR:
Hyman Cohen

FOR THE UNION:
Bob J. Rowland

FOR THE EMPLOYER:
Teri Decker

KEY WORDS:
Removal
Absenteeism
Procedural Error,
    Failure to Hold
    Pre-Disciplinary Meeting
Waiver

ARTICLES:
Article 24 - Discipline
    §24.04-Pre-Discipline
    §24.08-Employee
Assistance Program
Article 25 - Grievance
Procedure
    §25.01-Process

FACTS:
The grievant had been employed as a Psychiatric Attendant since July 1978. The grievant had received a

pre-disciplinary meeting notice for absenteeism which occurred on 8/27/90, 9/1/90,9/2/90, and 9/10/90 to 9/17/90. Removal was recommended for the incidents, however discipline was to be deferred if the grievant entered an EAP, and the penalty was to be reduced if he completed it. The grievant entered a 90 day EAP program but failed to complete it. He failed to report to work from 12/28/90 until 2/11/91 or provide requested documentation. The employer held a meeting with the grievant to discuss his most recent absences and noncompliance with his EAP. He was advised to have his union representative attend. The grievant was removed on 3/1/91 for absenteeism.

EMPLOYER'S POSITION:

There was just cause for the grievant's removal. The grievant had been excessively absent or tardy from 8/27/90 through 9/17/90. A pre-disciplinary meeting was held and the recommended removal for these violations was held in abeyance pending the grievant's successful completion of an EAP. The grievant failed to complete his EAP and failed to provide proper documentation to explain his absence from 12/28/90 through 2/11/91. The documentation provided by the grievant from his physician was a release for 12/8/90 not 1/23/90. The discipline imposed was progressive as this was the grievant's fourth offense. The fact that a prior six day suspension had been reduced at arbitration does not effect the disciplinary grid. Therefore, the employer properly reinstated the recommended removal.

UNION'S POSITION:

There was no just cause for the grievant's removal. He was excessively absent from 8/27/90 through 9/17/90. However, his recommended removal was deferred pending successful completion of an EAP. The grievant was absent from 12/28/90, however, he was in compliance with his EAP. His physician had not released him to work until 1/23/91. Also, procedural errors exist which warrant a reduced penalty. First, the employer failed to hold a pre-disciplinary meeting for the discipline imposed. Second, the penalty was not progressive. The grievant had a prior six day suspension which had been reduced at arbitration. Thus, removal is too severe a penalty to follow the reduced suspension.

ARBITRATOR'S OPINION:

The grievant was guilty of the violations alleged. He was absent or tardy on 8/27/90, 9/1/90, 9/2/90, and 9/10 through 9/17/90. The employer held a proper pre-disciplinary meeting and recommended removal. The removal was deferred pending the grievant's successful completion of an EAP. He failed to complete the program as required. The grievant was absent from 12/28/90 through 2/11/91. The physician's statement provided to the employer was a release for 12/8/90, despite the fact that it indicated an appointment on 1/22/91. The grievant had prior discipline up to a six day suspension for similar offenses. That the suspension had been reduced at arbitration is irrelevant. This was the grievant's fourth offense which may carry a penalty of removal.

However, the employer committed a procedural error which justified a reduced penalty. A pre-disciplinary meeting was held 9/90 and removal was recommended, but not implemented pursuant to the EAP agreement. The employer held a meeting on 2/11/91 with the grievant and his union representative. This meeting was to discuss the grievant's EAP participation and did not constitute a proper pre-disciplinary meeting. The parties did not agree in writing and there was no clear evidence of a waiver of the pre-disciplinary meeting. Therefore, section 24.04 was violated by the removal order resulting from this meeting and a reduced penalty was warranted.

AWARD:

The grievant was reinstated without back pay.

TEXT OF THE OPINION:

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration

-between-

STATE OF OHIO, DEPARTMENT OF MENTAL HEALTH, OAKWOOD FORENSIC CENTER, LIMA, OHIO

-and-

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

ARBITRATOR'S OPINION

GRIEVANT:
Sandros Boddie

No.:
23-12-910313-0251-01-03

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DATE OF THE HEARING:
August 14, 1991
PLACE OF THE HEARING:
State of Ohio, Office of
Collective Bargaining
Columbus, Ohio

ARBITRATOR:
HYMAN COHEN, Esq.
Impartial Arbitrator
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* * * *

The hearing was held on August 14, 1991 at the State of Ohio, Office of Collective Bargaining, Columbus, Ohio before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:30 a.m. and was concluded at 12:40 p.m.

* * * * *

On March 18, 1991 **SANDROS BODDIE** filed a grievance with the **OHIO DEPARTMENT OF MENTAL HEALTH, OAKWOOD FORENSIC CENTER,** Lima, Ohio, the **"State"** in which he protested his removal from the position of Psychiatric Attendant. The grievance was processed at the applicable steps of the grievance procedure contained in the Agreement between the State and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO,** the **"Union".** Since the parties were unable to resolve the grievance, it was carried to arbitration.

FACTUAL OVERVIEW

The Grievant was first employed at the Oakwood Forensic Center on July 31,1978 as a Psychiatric Attendant. When the Grievant was removed by the State effective March 1, 1991 he was working the third shift.

The Oakwood Forensic Center is a maximum security hospital maintained and operated by the State. Its primary responsibility is to provide short term, acute care for patients transferred from the Department of Rehabilitation and Correction. The patients have been adjudicated "through the Probate Court and have been diagnosed to constitute a danger to society and are mentally ill".

The Psychiatric Attendant's duties include the primary care for a specific number of patients. They maintain documents and notes on patients and transport patients to treatment activities identified in their ITP's [Individual Treatment Program].

On September 18, 1990 Ann Henry, Personnel Director, sent a notice of Pre-disciplinary conference to the Grievant in which she advised him that the conference was scheduled to be held on September 25, 1990. In the notice the Grievant was further advised that he had been charged with "neglect of duty and/for failure of good behavior" on the basis of the following information.

"On or about 8/27/90, you were 39 minutes AWOL (late in reporting for duty); on or about 9/1/90, 8 hours AWOL (no call in; and did not report for duty); on or about 9/2/90-8 hours AWOL (did not follow call-in policy); and did not report for duty: and continuously AWOL - with no call in beginning 9/10/9/11, 9/12, 9/14, 9/15, 9/16, 9/17 (regular days off 9/9 and 9/13). *NOTE: If employee continues, additional AWOL dates will be added, up to the time of the hearing. This is considered AWOL and job abandonment in violation of OFC policies #204-Sign-In/Sign-Out/Call-In Procedure; #507 -Corrective Action; and #622 -Employee Absenteeism."

As a result of the Pre-disciplinary conference which was held on September 25 the Grievant was removed from the position of Psychiatric Attendant at the Oakwood Forensic Center on October 29, 1990.

On November 5, 1990 John S. Allen, Chief Executive Officer, sent a memorandum to the Grievant notifying him that the Director of the Department of Mental Health had agreed to defer the removal action for ninety (90) days if he voluntarily agreed to enter an Employee Assistance Program Participation Agreement. The Grievant was further advised by Allen that if he successfully completed the "agreed--to plan" and there were no further violations of OFC (Oakwood Forensic Center) policy Allen would consider recommending to the Director that the proposed discipline of removal be modified. Allen also indicated that if the Grievant failed to comply with the EAP Participation Agreement in its entirety or there were further violations of AWOL "it may result in immediate implementation of the order of removal". A copy of this memorandum went to the Union.

On November 6, 1990 the Grievant entered into an "Employee Assistance Program Participation Agreement" which was also signed by Allen, Gary Hobbs the Union President and Alexander G. Thiry, EAP Coordinator. The general outline of the Plan is as follows: The Grievant voluntarily agreed to seek assistance from a health care provider under the Ohio EAP to deal with the problem of AWOL; the Grievant agreed to participate in a plan for a period of 90 days; the State agreed that so long as the Agreement was complied with in its entirety, the discipline recommended for the Grievant pursuant to the removal letter dated October 29, 1990 would be held in abeyance; should the Grievant violate the Agreement in any part, the recommended disciplinary procedure would be implemented; and finally that the Grievant understands and agrees that further occurrences of the problem of AWOL may result in the immediate implementation of the proposed discipline.

Sometime after December 28, 1990, Allen was informed that the Grievant might not be in compliance with the EAP Participation Agreement. On February 6, 1991 Allen sent the Grievant a memorandum, a copy of which was sent to Hobbs advising him that a meeting had been scheduled for Monday, February 11, 1991. The purpose of the meeting was set forth as follows:

"On November 6, 1990, you signed an E.A.P. Participation Agreement and Oakwood Forensic Center agreed to hold the removal action in abeyance. It has come to my attention that you have not complied with this agreement, in that you have been absent without leave since December 28, 1990. After repeated requests for information (on 1/15/91 and 1/24/91) you have failed to request leave of absence in writing or provide your employer with requested medical documentation certifying you need to be absent from duty from 12/28/90 to the present time.

This meeting is to give you the opportunity to explain or refute your non-compliance with the E.A.P. Participation Agreement.

Gary Hobbs should attend this meeting as your representative."

Evidence at the hearing indicated that the Grievant did not report to work between December 28 and February 11, 1991. According to the State the Grievant did not have a doctor's excuse for his absence from work after December 28, 1990. At the February 11 meeting the Grievant did not submit reasons for being AWOL that were acceptable to the State.

On March 1, 1991 the Grievant received notification that he was removed from the position of Psychiatric Attendant at Oakwood Forensic Center. In light of this factual overview of events the instant grievance was filed.

DISCUSSION

The parties agreed that the following issue is to be resolved by this arbitration. "Was there just cause to remove Mr. Boddie from his position as Psychiatric Attendant. If not, what shall the remedy be?"

The starting point of this discussion is the EAP Participation Agreement. The Grievant acknowledged that he signed the Participation Agreement. He indicated that the terms of the Participation Agreement were explained to him before he signed the Agreement. He further acknowledged that he understood the meaning of the following sentence:

"Sandros Boddie understands and agrees that further occurrences of the problem described in paragraph 1 [which refers to the "problem of A.W.O.L."] may result in the immediate implementation of the proposed discipline."

The Grievant admitted that he did not work after December 28, 1990. He "knew" that he was required to submit a medical excuse after December 28. However. he failed to do so.

Since it had come to Allen's attention that the Grievant had not complied with the EAP Participation Agreement because of his absence without leave since December 28, 1990, Allen sent the Grievant written

notification that a meeting was scheduled to be held in his office on February 11, 1991. In his February 6, 1991 notification to the Grievant, Allen advised him that the purpose of the meeting "was to give [him] the opportunity to explain or refute [his] noncompliance with the EAP Participation Agreement".

The persons in attendance at the February 11 meeting were Allen, the Grievant, Thiry, Ann Henry, Personnel Director and as Allen said "one of the Union representatives". The Grievant had talked to Henry before the meeting and was told "to come in to talk about [his] situation". He acknowledged that the State's Representatives asked him questions about whether he had doctor's slips to cover the time that he was out". The Grievant did not recall his replies to their questions.

DR. MATOUK'S JANUARY 11, 1991 LETTER

Subsequent to signing the EAP Participation Agreement on November 6, the Grievant reported to work on November 19, 1990. The Grievant's return to work on that date was indicated in a letter, dated November 15, 1990 from Dr. Khalid Matouk, the Grievant's attending physician to Thiry. In his letter to Thiry, Dr. Matouk advised Thiry that the Grievant had kept two (2) of the three (3) appointments that were scheduled for him [the Grievant). Moreover, Dr. Matouk stated as follows:
"Mr. Boddie was given a week to adjust to medication and then is to report back to work on Monday Nov. 19, 1990, he will then be followed up on an outpatient basis with the condition of his return to work."

Thus, the Grievant was required to report back to work on November 19, 1990. As Dr. Matouk related in his letter, the Grievant would "be followed up on an outpatient basis with the condition of his return to work".

At Thiry's request Dr. Matouk followed up with a letter dated January 22, 1991. Dr. Matouk stated that the Grievant was "generally compliant with appointments". Dr. Matouk then went on to state, in relevant part:

"* * On Dec. 8, 1990, he was requested to fill out papers regarding his disability to be sent to Columbus and there are copies in his file. He says that he didn't miss any days of work and that he is sleeping well at night and doesn't have any delusional thinking or paranoid ideas or hallucinations. His medication was refilled again and he was dismissed. He was told to be seen again in two (2) months."

The Union contends that Dr. Matouk's letter which was received by the State on January 23, 1991 "is sufficient to allow" the Grievant "to return to work". The Union's contention is not supported by Dr. Matouk's letter. The Grievant's last appointment with Dr. Matouk was on December 8, 1990. The Grievant was AWOL beginning on December 28, 1990. As Dr. Matouk indicates in his letter, the Grievant's "medication was refilled again and he was dismissed". Moreover, it was Dr. Matouk's "opinion" that the Grievant "is healthy enough at the present time". He concluded his letter by stating: "If he is not incapacitating himself at the present with drugs he is capable of performing properly on the job."

Dr. Matouk's letter is not a medical excuse. As Dr. Matouk indicated, his letter was at Thiry's "request" and is a follow up on [the Grievant] and his compliance with appointments". If Dr. Matouk's letter, if it can be construed as a medical release of the Grievant to report to work it is applicable as of December 8, 1990, rather than January 22, 1991. Dr. Matouk's letter of January 22, 1991 was sent to Thiry roughly six (6) weeks after he had last examined the Grievant. I cannot conclude that Dr. Matouk's letter is a release for the Grievant to return to work on January 23, 1991; rather it is "a release" to return to work on December 8, 1990. Dr. Matouk's January 22 letter does not constitute medical documentation which requires that the Grievant be absent from duty starting on December 28, 1990 to February, 1991.

ARBITRATION DECISION AND AWARD ISSUED ON MARCH 15, 1991

On November 30,1989 the Grievant was suspended from duty, without pay for six (6) consecutive working days for violations of the following state policies: "#204-Sign-in/Sign-out/Call-in Procedure, #507-Corrective Action; #622-Employee Absenteeism; and #604-Sick Leave". The policy violations by the Grievant occurred between September 1, 1989 through October 20, 1989. The first order of removal of the Grievant, issued by the State was dated October 29, 1990. The State included the Grievant's past offenses in its order of

removal. Among the offenses included was the six (6) day suspension dated November 30,1989 which was applied beginning December 13, 1989. The second order of removal of the Grievant dated March 1, 1990 which "led to the filing of the instant grievance also referred to the six (6) day suspension dated November 30,1989.

On March 15, 1991 an arbitration hearing was held on the six (6) day suspension. In a bench decision and award, Arbitrator James E. Klein reduced the six (6) day suspension to three (3) days. His justification for the decision was that although he found that the Grievant violated the State's policies and procedures, several of the allegations of neglect of duties "were not substantiated".

The Union argues that the first and second orders of removal of the Grievant were based upon a progression of prior discipline. Since the last discipline before the two (2) orders of removal were reduced from six (6) days to three (3) days suspension both of the orders of removal are defective and, in effect, should be vacated. It should be noted that the progression of penalties contained in the State's policy on "Corrective Action" calls for a verbal reprimand, written reprimand, 2 day suspension, 6 day suspension and removal for the first to the fifth offense.

It should be underscored that the arbitration hearing and bench decision by Arbitrator Klein took place on March 15. 1991, roughly two (2) weeks after the second order of removal of the Grievant was issued by the State. There is nothing in the EAP Participation Agreement that any of its terms are subject to the decision of the Arbitrator concerning the November 30,1989 six (6) day suspension. The EAP Agreement was explained to the Grievant who understood its terms. The Union was a signatory to the Agreement. Accordingly, the State placed reasonable reliance upon the terms of the Agreement. In light of such reasonable reliance I have concluded that the Union is estopped from raising Arbitrator Klein's bench decision and award which was issued roughly two (2) weeks subsequent to the March 1, 1991 order of removal. Moreover, it should be underscored that Arbitrator Klein's decision and award sets forth that the Grievant has violated the State's policies and procedures. Thus, he has committed the fourth offense of "neglect of duty". In my judgment, the Union's claim that the State's first and second orders of removal did not follow the progressive discipline set forth in its "Corrective Action" policy cannot be given any weight.

ARTICLE 24.04

The most troublesome aspect of the dispute between the parties is the failure by the State to conduct a pre-discipline meeting in accordance with Article 24.04. The State held a meeting at the end of the period in which the Grievant participated in the plan developed under the EAP Participation Agreement. As I have previously indicated the meeting was held on February 11, 1991. The State's witnesses indicated that the meeting was routine. As Allen said, the employee is requested to attend the meeting to review his involvement in the EAP and the Agreement that he signed.

The State's witnesses testified that the February 11, 1991 meeting was not a pre-disciplinary meeting. Indeed, in light of the terms of Article 24.04, there is no question but that the February 11, 1991 meeting was not a pre-disciplinary meeting.

On the basis of the evidentiary record, I have concluded that the State did not comply with Article 24.04 by failing to schedule and conduct a pre-discipline meeting prior to issuing the March 1, 1991 order of removal. Article 24.04 clearly states that: "[A]n employee has the right to a meeting prior to the imposition of a suspension or termination". This procedural right is unequivocal. The right includes the following contractual requirements:

"* * Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's

designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut".

I have to assume that these procedures are of service to the parties. The Union is apprised in writing of the reasons for the contemplated discipline and the possible form of discipline. Such notice enables the Union to prepare its case not only for the pre-discipline meeting but the arbitration hearing which may eventually take place. By requiring the reasons to be furnished by the State to be in writing, guards against surprise. These considerations are also applicable to the requirement that the State must provide the Union with a list of witnesses and documents used to support the discipline. Moreover, the pre-disciplinary meeting provides "the opportunity for the Union and/or the employee to ask questions, comment, refute and rebut". Obviously, settlement of the dispute or modification of the discipline can result from the pre-discipline meeting. The point to underscore is that the procedure relating to the pre-discipline meeting was a bargained for provision of the Agreement. Article 24.04 indicates that "[T]he employee may waive the meeting * *." There is nothing in the evidentiary record to warrant the conclusion that the Grievant has waived the pre -discipline meeting. Only "clear evidence" of a waiver by the Grievant of his procedural rights contained in Article 24.04 will be required. See, e.g. Mosaic Tile Co., 13 LA 949, 950 (Cornsweet, 1950). Such "clear evidence" is lacking in this case.

It is true that the Grievant entered into an EAP Participation Agreement on November 6, 1991. The Agreement, in relevant part, provides that "Should Mr. Boddie violate this contract, this contract, in any part, the recommended disciplinary procedures will be implemented." The following paragraph of the Agreement provides as follows:

"Sandros Boddie understands and agrees that further occurrences of the problem described in paragraph 1 [which refers to the "problem of A.W.O.L."] may result in the immediate implementation of the proposed discipline."

The question of whether the Grievant violated the Agreement, whether mitigating circumstances are present, whether there are special circumstances which should be given weight are just some of the matters that could be considered at a pre-discipline meeting. It is enough to state that the pre-discipline meeting as a prelude to the arbitration hearing is useful to the parties in the strategies to be devised, the formulation of the presentations, the preparation of witnesses, the submission of documents and whatever else is brought to bear based upon the ingenuity and skill of the representatives for the parties.

The State claims that if a pre-discipline meeting is required in the instant case, the EAP Participation Agreement is not a viable option. I do not agree. That an EAP Participation Agreement has been entered into by a grievant concerning the very problem which caused it to come into existence is the kind of evidence that would be given great weight by an Arbitrator when a grievant is found to be in violation of the Agreement. This should be sufficient incentive to enter into an EAP Agreement.

Moreover, I do not understand the relationship between the State giving an employee the opportunity to enter into an EAP Participation Agreement and the pre-discipline meeting which is required under Article 24.04. The Agreement serves to rehabilitate an employee and to support the investment that the State has in the employee who has given years of service to the State. The pre-discipline meeting is a procedural right provided in Article 24.04 prior to the imposition of suspension or termination.

I cannot conclude that the pre-discipline meeting prejudices the State. Indeed, no evidence has been presented by the State in this case to indicate that it would be adversely affected had there been a pre-disciplinary meeting before removing the Grievant. Finally, it should be noted that the State might exact a waiver from the employee to a pre-discipline meeting in the EAP Participation Agreement.

CONCLUSION

The State committed a serious procedural violation when it failed to hold a pre-discipline meeting in compliance with Article 24.04. However, the procedural violation does not excuse the fact that the Grievant's neglect of duty and/or failure of good behavior for being absent without leave starting December 28, 1990. The evidence establishes that the Grievant failed to request a leave of absence in writing or provide the

State with medical documentation which justified his need to be absent from duty from December 28, 1990 to February 1991.

Due to the State's violation of Article 24.04, the Grievant is to be reinstated without back pay.

AWARD

In light of the aforementioned considerations, the State failed to prove just cause for removal of the Grievant.

The Grievant is to be reinstated without back pay.

Dated: October 14, 1991
Cuyahoga County
Cleveland, Ohio

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