#765

In The Matter of the Arbitration

-between-

Ohio Civil Service Employees Association/AFSCME, Local 11

-and-

The State of Ohio, Ohio Department of Rehabilitation and Corrections, Orient Correctional Institution

OPINION AND AWARD

The John W. Mathews Matter
Case No. 27-21-(00-11-09)-2105-01-03

ARBITRATION HEARING DATES:

May 7, and May 29, 2001

ARBITRATOR:

John J. Murphy
Cincinnati, Ohio

APPEARANCES:

For the Employer:

Bradley A. Nielsen
Labor Relations Officer
Orient Correctional Institution
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Also present:

Robert Beightler
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Magdalena Miller
Deputy Warden of Administration

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Also present:

John W. Mathews
Grievant

Neal Nolan
Former Local President

Gordon Jewell
Correction Officer

Sheila Taylor Jewell
Payroll Officer

Michael Goree
President, Growth Strategies
Consulting

BACKGROUND:

The Grievant, a correction officer for twenty-one years, was removed from his position on October 26, 2000 for the violation of three rules set forth in the Standard of Employee Conduct. The rules were quoted in the removal letter as follows:

> #3b-Absenteeism: Failure to notify a supervisor of an absence or follow call-in procedures
> #3h-Absenteeism: Being absent without authorization (AWOL) &
> #3j-Absenteeism: Misuse of Sick Leave

The removal letter also contained the factual allegations underpinning each rule violation. The allegations were:

> On August 4, 2000, you scheduled the day off vacation; however, when you submitted you request for leave for this date, you only possessed six (6) hours of leave. Therefore, you were absent without leave for two (2) hours on the aforementioned date. (Rule 3h)
>
> On August 4, 2000. You called off from your shifts for August 7 thru 11, 2000, for FMLA reasons. During the aforementioned time, you were on a prepaid vacation to Canada. Thus, yo fraudulently used FMLA hours to cover your absence and have misused sick leave. (Rule 3j)
>
> On August 15, 2000, you called off from your 6:00 AM shift at 5:50 AM. Departmental policy requires a ninety (90) minute notice if you cannot report for your scheduled shift. (Rule 3b)

It is apparent from the discussion of the issues below that the conflict in this case extends beyond the substantive analysis of whether these rules were violated. Conflict also deals with the process by which the Employer reached its decision to remove Grievant. While there were some antecedent disciplinary actions against the Grievant, major documents displaying the disciplinary process begin with a notice of a disciplinary conference directed

to the Grievant dated August 28, 2000 and scheduling the conference for September 5, 2000 before Hearing Officer, Magdalena Miller, Deputy Warden of Administration.

The notice contained a list of three rules contained in the Standard of Employee Conduct that the Grievant was alleged to have violated. The rules were:

> #3h-Absenteeism: Being absent without authorization (AWOL)
> #7-Failure to follow post orders, administrative regulations, policies, procedures and directives
> &
> #12-Making obscene gestures or statement or false or abusive statements toward or concerning another employee, supervisor, or member of the general public

The notice also contained factual allegations relating to the alleged rule violations and the actual allegations in part are:

> On July 31, 2000, you called off sick and did not possess enough leave to cover your absence. Therefore, you are AWOL for 6 hours and 15 minutes on the aforementioned date.
>
> On August 4, 2000, you called off from your shifts on August 4 & 7-11, 2000, for FMLA reasons. The institution received information that you were subsequently vacationing in Canada during the timeframe stated in the aforementioned call off. OCI verified the fact that you were in Canada upon your return. Therefore, you called off from your shift for six (6) days under the pretense of a valid FMLA; however, you went vacationing in Canada. Therefore, your leave request was subsequently denied making you AWOL on the dates mentioned above.

The notice of the predisciplinary conference concluded by attaching some documents as a disciplinary packet. The documents included an investigation report prepared by Bradley A. Nielsen, Labor Relations Officer, dated August 23, 2000. While the Report is a 3-page document, a pertinent paragraph refers to the

Grievant's FMLA condition and his trip to Canada. The paragraph states as follows:

> Officer Mathews readily admits to vacationing in Canada during the week he called off for a FMLA condition. At the time of the FMLA absence, Officer Mathews possessed approximately twelve (12) hours of leave and possessed approximately twenty-four (24) active disciplines. Officer Mathews last discipline came in the form of a ten (10) day suspension for tardiness in February 2000. Since Officer Mathews already paid for his vacation, but did not possess enough leave to cover his absence, it appears that he called off under the false pretense of FMLA during the week of August 4-11, 2000, in an attempt to receive approved leave without pay and avoid future discipline. Since Officer Mathews called off FMLA, but instead went on vacation in Canada, his leave requests for the week of August 4-11, 2000, shall be denied causing his absence to be without leave and approval.

The Hearing Officer did convene the conference on September 5, and considerable controversy arose at the arbitration hearing as to what transpired. There is one fact about which there is no dispute--the Hearing Officer did not issue a report.

The Hearing Officer did issue a Memorandum dated September 18, 2000 to the Labor Relations Officer. The Memorandum is set forth below in its entirety.

> Date: September 18, 2000
>
> To: Brad Nielsen, Labor Relations Officer
>
> From: M.R. Miller, Deputy Warden of Administration
>
> Subject: Predisciplinary Hearing: John Mathews - September 5, 2000
>
> It is my recommendation to reschedule a predisciplinary hearing for Officer Mathews based on the following:
>
> 1. Officer Mathews has received a written reprimand for #3b - Absenteeism: Failure to notify a supervisor of an absence or follow call-in procedures for 8-15-2000; and

2. An investigatory conference was conducted on 8-21-2000 to address no leave balances.

It is reasonable to merge these allegations with the current predisciplinary hearing.

Furthermore, please note that there is also an alleged rule violation change. The revised alleged rules are as follows:

1. #3b - Absenteeism: Failure to notify a supervisor of an absence or follow call-in procedure
2. #3c - Failure to submit a complete Request for Leave form within a specified time
3. #3h - Absenteeism: Being absent without authorization (AWOL)
4. #3j - Misuse of sick leave

I will retype the notice and convene the hearing on Friday, September 22, 2000, 8:00 a.m.

The Hearing Officer did as she stated in the Memorandum to the Labor Relations Officer. She retyped the Notice of Predisciplinary Hearing and convened a second conference on Friday, September 22, 2000. This Notice alleged violations of the following standards of employee conduct.

#3b - Absenteeism: Failure to notify a supervisor of an absence or follow call-in procedure
#3c - Failure to submit a completed Request for Leave form within a specified time
#3h - Absenteeism: Being absent without authorization (AWOL)
#3j - Misuse of Sick Leave

The Notice also set forth the factual allegations underpinning the rule violations. They were:

1. On July 31, 2000, you called off sick and did not possess enough leave to cover your absence. Therefore, you are AWOL for 2 hours and 33 minutes.

2. On August 4, 2000, you submitted a Request for Leave for vacation, but only had 6 hours of leave. Therefore, you are AWOL for 2 hours.

3. On august 4, 2000, you called off from your shifts for August 7-11, 2000, for FMLA reasons. During this time

you were on a pre-paid fishing trip in Canada. Therefore, you fraudulently used FMLA hours to cover this absence. You have misused sick leave.

4. On August 15, 2000, you called-off ill at 5:50 a.m. You are required to call in 90 minutes ahead of the start of your shift. Therefore you failed to follow call-in procedures.

5. On August 18, 2000, you submitted a Request for Leave to cover your absence for August 7-11, 2000. Therefore, you failed to submit a completed Request for Leave form within specified time.

The Hearing Officer convened this conference on September 22, 2000, and there was no controversy at the arbitration hearing as to what transpired at the conference. The Hearing Officer issued her report on September 26. While the report is a 6-page document, it will be sufficient at this point to set forth certain portions. The report refers to the "disciplinary conference conducted on September 5, 2000" in the following two paragraphs:

> *Please note that during the predisciplinary conference conducted on September 5, 2000, it was confirmed that Officer Mathews had received a Written Reprimand on August 30, 2000, for #3b - Absenteeism: Failure to notify a supervisor of an absence or follow call-in procedures. It was also confirmed that an investigatory conference was conducted on August 21, 2000. With Officer John Mathews concerning negative leave balances.
>
> All of these events occur chronologically: July 31; August 4; August 7 thru 11; August 15 and August 18, and the decision to merge all the alleged rule violations is a reasonable one. Furthermore, the written reprimand received for a late call-in on August 15, 2000, is removed and addressed in this hearing.

In the discussion portion of the report, the report notes that the then local president Neal Nolan made certain "procedural arguments." One of the 5 listed in the report states as follows:

1. It is procedurally incorrect to have an investigatory on August 25, 2000, with consequent discipline on August 30,

2000, on an incident occurring on August 15, 2000, and then conducting an investigatory on August 25, 2000, with a predisciplinary hearing scheduled on September 5, 2000, on an alleged infraction on August 7 thru 11, 2000.

The report concluded there was no just cause to discipline the Grievant for Rule 3c--Failure to submit a complete Request for Leave form within a specified time. On the other hand, the report did find just cause for disciplining the Grievant for the violation of Rules 3b, 3h, and 3j.

As a result, the warden began the removal process on October 3, 2000. The director of the Department of Rehabilitation and Correction concurred on October 20, 2000, and the Grievant was removed on October 26, 2000.

ISSUE:

Whether the Grievant was removed from his position as Correction Officer for just cause; if not, what should the remedy be?

POSITIONS OF THE PARTIES:

A) Union Position

The Union made what it calls four procedural arguments. First, the Union argues that the Grievant should be reinstated with full benefits because of the willful and malicious withholding of material information from the Union after a proper request pursuant to Article 25.08 had been made. The Union's concern centered on a written reprimand to the Grievant received on August 30, 2000 for the violation of Rule 3b on August 15, 2000--the failure of the Grievant to call off from his 6:00 AM by ninety minute notice. The

Union claimed that this document was among those included in a general request for documents from the Grievant's file and then a specific request once the Union discovered that the document was missing from those previously supplied to the Union. The Union considered the withholding of this document to be willful and malicious because of the following: "The conduct of the State's advocate in 1) initially lying about the actual existence of documents; 2) when cornered lying, about destroying the documents; and then 3) when discovered, finally producing the document on the date of the arbitration, is reprehensible." (Union post-hearing brief at 11). The Union concluded that the best way to deter future conduct as in this case is to inform the Employer that it will lose any grievance where there is proof of willful and malicious conduct on the part of its agents. (Id. at 13).

The second procedural claim was a restatement of the Union's objection to the admissibility of a last chance agreement concerning the Grievant's testing positive for cocaine. The document was admitted by the arbitrator. The third procedural objection was the renewal by the Union of its Motion to Dismiss Charges 3b and 3j. The arbitrator refused to respond to the Motion at the arbitration hearing, and the Union now insists that it is entitled to a response.

The fourth and final procedural argument centers on an argument presented by the then chapter president Nolan at both of the predisciplinary hearings. The Union claimed that Nolan argued the application of the merger and bar rule found in Section 124-3-

05(A) of the Ohio Administrative Code. Essentially, the Union argued that the issuance of a written reprimand on August 30th to the Grievant for infraction occurring August 15, merged all incidents prior to August 15, of which the Employer had knowledge. This would include the AWOL charge on August 4 as a violation of rule 3h, and the August 7 through 11 period in Canada claimed to be fraudulent use of FMLA hours under rule 3j. Since these other incidents are merged with the incident for which the Grievant received the written reprimand, the Employer is barred from now raising the incidents preceding August 15, 2000.

The Union turned then to substantive arguments. The rule 3b violation alleged to have occurred on August 15, 2000 is one for which the Grievant had already suffered a written reprimand. Section 25.04 of the contract precludes increasing a penalty once issued.

With respect to the rule 3h violation for being AWOL for two hours on August 4, the Union made two claims. First, the Labor Relations Officer denied donated leave under 29.06 of the contract. If this had not occurred, the Grievant would have had sufficient hours in the leave bank. Furthermore, no language in any policy of the agency restricts requests for leave to hours in the bank on specific days.

Lastly, the Grievant did not misuse a sick leave on August 7-11 while on a trip to Canada. The Employer's FMLA Officer approved the request for this leave; the agency captured the hours of August 7-11 in the Grievant's FMLA leave balance; and finally,

the Employer did not seek recertification by medical authority of the Grievant's medical condition. The Union presented an expert witness to support the proposition that if the Employer has reason to doubt the validity of a medical condition, the Employer can require that the employee submit to a second medical examination. No such request was made in this case.

The Union then turned to other aspects of the just cause principle. First, the Union claimed that the Grievant "was treated disparately because of his strong Union activity." (Union post-hearing brief at 24). In addition, the Employer denied the Grievant due process in the manner by which it conducted two predisciplinary conferences. After conducting the first conference on September 5, taking testimony, listening to Union arguments, the Hearing Officer and the Labor Relations Officer modified charges, withdrew the written reprimand of August 30, and issued a second notice of a predisciplinary conference. The Union argued that the Employer's process used to reach its decision to remove illustrated this principle: "Let's hear all your evidence and then change the rules to make sure we win. It is simply unfair and circumvents and undermines the entire process." (Union post-hearing brief at 29).

Finally, the Union turned to its requested remedy. It sought remedy beyond reinstatement and make whole of the Grievant. The Union sought what it called "punitive damages." Punitive damages were to take two forms for separate reasons. The first form was reimbursement to the Union of its staff time in attempting to secure the written reprimand of August 30th that had been willfully

and maliciously withheld by the Labor Relations Officer. In addition, the Union sought reimbursement of all expenses incurred by the Union securing the expert on FMLA. The reason: "There was NEVER any legitimate basis for the Employer to continue to pursue the improper and unsubstantiated charge of Misuse of Sick Leave." (Emphasis in text; Union post-hearing brief at 31).

B) Employer Position

The facts surrounding the charge of the violation of Rule 3h--AWOL for two hours on August 4, 2000--are not in dispute. The Grievant scheduled off eight hours of vacation leave for August 4, 2000, submitting his leave request on August 3. The Employer approved the leave on August 4, but the Grievant did not subsequently possess enough leave to cover the absence, thereby being AWOL for two hours on August 4.

During his cross examination, the Grievant admitted he did not possess enough vacation leave to cover the absence of two hours. This is the Grievant's fifth violation of Rule 3h, and the Standards of Employee Conduct call for removal at the fourth offense. This violation associated with the fact that the Grievant possessed twenty-five active disciplines since 1993 and a positive test for cocaine in 1998 justify his removal.

In a similar fashion, the facts underlying the Rule 3b violation are undisputed. The Grievant called off at 5:50 a.m. for his 6:00 a.m. shift on August 15, 2000. This is in violation of Department policy requiring correction officers to call off no later than ninety minutes prior to the start of their shift. This

constitutes the Grievant's tenth violation of Rule 3b and the Standards of Employee Conduct call for removal at the fifth offense.

The Grievant did initially receive a written reprimand of this violation on August 30, 2000. "In an attempt to merely document the late call-off, management issued the written reprimand to the Grievant." (Employer post-hearing brief at 3). This earlier discipline has no effect, however, on the current consideration for removal of the Grievant for the violation of Rule 3b on August 15, 2000. "Testimony from Deputy Warden Miller, Ex-President Nolan, and the Grievant, all support the fact that the Union, not management is the moving party that requested the retraction of the written reprimand and the modification of the initial predisciplinary conference that eventually led to the second conference with different charges stemming from the same time period." (Employer post-hearing brief at 4).

In addition, the Union did not undertake any affirmative action to fight the retraction of the reprimand or the modification of the charges and the second predisciplinary conference. The Union did not object to the second predisciplinary hearing from the date of its notice (September 18) to the day of the removal (October 26)--a period of thirty-nine days. "The Union cannot 'have their cake and eat it too' by requesting management to retract discipline and add/remove charges to the conference and then argue against the outcome of granting that request at arbitration." (Employer post-hearing brief at 5).

With respect to the merger and bar argument that the Union raised concerning the second disciplinary hearing, the Employer had two arguments. The merger and bar argument of the Union suggests that all incidents occurring prior to the written reprimand of the late call-off on August 15 were merged. The difficulty, of course, is that the Union, as the moving party, requested the retraction of the written reprimand. The Employer merely consented to the removal during the September 5, 2000 predisciplinary conference. The second argument was based on a decision by Arbitrator Pinkus concerning the Union with a different state agency that held that this doctrine cannot be used by the Union as a defense.

The misuse of sick leave was factually shown in the record to have occurred during August 7-11, 2000. The Grievant planned a fishing trip in Canada for these dates, but did not possess forty hours of vacation leave to cover the fishing trip. "Since he did not possess enough vacation hours to cover his vacation, he subsequently called off under the pretense of FMLA and went fishing in Canada for the week in question." (Employer post-hearing brief at 7).

The Employer did not question the validity of his FMLA leave when he submitted his forms to the FMLA officer on August 2, 2000. "Thus the Grievant possessed an active FMLA for his back condition." The Employer, however, is under no obligation to send the Grievant to a second physician when the Grievant fraudulently attempts to utilize FMLA to cover a vacation.

The Employer questions why the Grievant waited to submit FMLA certification papers until August 2, 2000 for a back injury occurring five years ago. The Employer also questioned that the FMLA certification noted Grievant will "occasionally" be required to miss work when the condition is present. Why did the condition last for a week?

Finally, the Employer submitted two court decisions for the following proposition: If the Employer honestly believes the Grievant did not use FMLA for its intended purpose, the Grievant cannot argue a viable FMLA claim. Since this is the proposition upon which the Employer is relying, the Employer then agreed that: "Management should not have captured the Grievant's leave during August 7-11, 2000 pursuant to the FMLA four hundred and eighty (480) hour allotment." (Employer post-hearing brief at 12).

The Employer specifically attacked the Grievant's credibility on what the Grievant testified transpired during the trip to Canada. The Employer noted that the Grievant did not submit his leave request to cover his absence on August 15 as required by Department policy. Instead, the Grievant waited until August 18 explaining the delay due to difficulties in obtaining a release from his physician. On the other hand, employees are not required to bring in a physician's statement to support their absence at the end of their leave.

This is dubious testimony because the Grievant had used FMLA leave before for his wife in July 2000. Upon inspection of the

leave request, none of the requests possessed an attached physician release.

Lastly, the Employer denied that the Grievant was treated in a disparate fashion as compared to other employees, and also argued that there is no evidence of anti-Union animus against the Grievant.

OPINION:

There is a number of issues in this case and they are logically divided into four categories. The first concerns issues emanating from the predisciplinary process. They include the matter of the written reprimand of August 30; concern for due process; and, whether merger and bar doctrine was applicable.

The second category deals with issues that arose during the course of the arbitration hearing itself. They include Union's Motion to Dismiss Charges 3b and 3j; the evidentiary issue concerning the last chance agreement; and issue of the production by the Employer during the hearing of the written reprimand dated August 30.

The third category centers on the three substantive issues concerning the 3b, 3h, and 3j charges. The final category concerns issues under the topic of remedy. They include the Union's request for punitive damages and the view that the Grievant was treated disparately.

A) Issues Emanating from the Predisciplinary Process

1) Due Process and the Question of the Written Reprimand

We begin with a key question in this case: Did the Union request the withdrawal of the written reprimand of August 30th for the infraction that occurred August 15? Deputy Warden Miller was the Hearing Officer who convened the conference on September 5. She testified at the arbitration hearing that, "the Union agreed to get rid of the written reprimand." The then Local President Neal, who appeared at the September 5 conference on behalf of the Grievant and the Union, testified that "I did not want nor did I agree to take back the written reprimand." This conflict in the testimony is resolved by references in documents to the written reprimand--documents issued by the Hearing Officer Miller shortly after the September 5 conference.

Miller did not issue a report after the September 5 conference for reasons that are discussed below. She did issue a memorandum to the Labor Relations Officer concerning the conference of September 5. She testified at the arbitration hearing that the first sentence which has two indented subparts and the second sentence summarized the discussion with the Union at the September 5 conference. Written reprimand is mentioned in the first subpart of the first sentence and there is no reference to any agreement with the Union to withdraw the written reprimand.[1/]

[1/] The entire text of the September 18, 2000 memorandum to the Labor Relations Officer by Deputy Warden Miller is set forth in the material under the topic "Background."

Indeed, the text of her reference to the written reprimand implies that it is still extant.

More telling is a statement by Miller that appears in her report as Hearing Officer after the predisciplinary conference conducted on September 22, 2000. First, Miller quotes procedural argument by Nolan as follows:

> It is procedurally incorrect to have an investigatory on August 25, 2000, with consequent discipline on August 30, 2000, on an incident occurring on August 15, 2000 . . . with a predisciplinary hearing scheduled on September 5, 2000 on an alleged infraction on August 7 thru 11, 2000.

This argument seeks to challenge the abuse of sick leave charge centering on August 7 through 11. The argument, however, is predicated upon the continued existence and viability of discipline issued to the Grievant on August 30. This is a part of a report by Deputy Miller of, presumably, what transpired at the conference on September 22. Therefore, the Union was using--as of the September 5 and 22 predisciplinary hearing--the written reprimand as a basis to object to the abuse of sick leave charge.

Lastly, there is another one sentence to the written reprimand in Deputy Miller's report of the September 22 predisciplinary conference.

> Furthermore, the written reprimand received for a late call-in on August 15, 2000 is removed and addressed in this hearing.

There are two loud implications from this sentence. First, the written reprimand was extant on September 22 and had not been

removed on September 5. Second, the sentence makes no reference to an agreement by the Union but is a straight, simple declaration by the Hearing Officer on behalf the Employer that the written reprimand is removed.

The conflict in the testimony of the Deputy Warden and the then Local President Nolan is resolved. The Union never agreed to the removal of the written reprimand of August 30. This was done unilaterally by the Employer.

The above discussion about the written reprimand touches the broader question of whether the disciplinary process by the Employer prior to the issuance of its decision to remove the Grievant was fair. We begin first with the question of whether or not a predisciplinary meeting took place on September 5. The parties acknowledge that a predisciplinary notice of 3h, 7, and 12 charges was given to the Grievant with factual allegations. The parties agree that Miller convened the conference as Hearing Officer. Miller testified at the arbitration hearing that she did not issue a report after this conference "because no conference was held--no hearing." Nolan was presented with testimony by Miller at the arbitration hearing, and he called Miller's comment "wrong." Did a predisciplinary conference take place on September 5, 2000?

The contract requires such an event in Section 24.04. The event is described in the second paragraph of Section 24.04, but it is never referred to as a "hearing." This paragraph refers to the event five times as a "meeting." The paragraph poses several duties upon the Employer in the form of notice and information to

the employee prior to the meeting. Very little in the paragraph states how the meeting is to be conducted except for this sentence:

> The Union and/or the employee shall be given the opportunity to ask questions, comment, refute, or rebut.

Former president Nolan and the Grievant testified about their comments, questions and rebutting arguments at the September 5 meeting. Indeed, Nolan testified that the Union called two witnesses and questioned them. The conclusion is that the meeting envisioned by the contract between the parties did take place on September 5, 2000.

This brings us to the due process claim of the Union. The Union points out that instead of issuing a report after the September 5 meeting, the Employer dropped two charges, changed one charge, and issued a notice to the Grievant of a second predisciplinary meeting. This, according to the Union, violates the due process rights of the Grievant.

The arbitrator is not prepared to adopt the proposition that the Employer's error stating charges on a factual allegation in a predisciplinary meeting notice is fatal. On the other hand, where this occurs in a case, and is coupled with the removal of a prior reprimand on one of the charges, this is a serious violation of due process rights. The Employer removed, unilaterally, the written reprimand for the August 15 violation of Rule 3b. Then, in the midst of dropping two charges and restating the other charge, the Employer restated the 3b violation on August 15 in a second predisciplinary notice. Restatement of the 3b violation on

August 15 and increasing the penalty to removal is a clear violation of Section 24.05 of the contract. However, when this occurs in the midst of dropping charges and stating other charges, the total consequence is a very serious denial to the Grievant of his right to a minimally fair process used by the Employer to reach its decision to remove the Grievant. The seriousness of this violation will clearly impugn any other violations found against the Grievant that arise out of this tainted process.

2) Merger and Bar

The State Personnel Board of Review adopted the following rule:

> All incidents, which occurred prior to the incident for which a non-oral disciplinary action is being opposed of which an appointing authority has knowledge for which an employee could be disciplined, are merged into the non-oral discipline imposed by the appointing authority. (Ohio Administrative Code Section 124-3-05 West June 30, 1999)

The Union argued that the doctrine of "merger and bar" is contained in the just cause provision of the collective bargaining contract based upon a decision by Arbitrator Pinkus in State of Ohio, Ohio Student Loan Commission and OCSEA/AFSCME Local 11 (Case No. G86-10076). Consequently, after the Grievant had received his written reprimand on August 30, 2000 the 3j incident of misuse of sick leave on August 7 to 11 and the 3h incident of AWOL on August 4 were merged into the written reprimand of August 30. Therefore, the Employer is barred from pursuing the 3j and 3h charges.

The Employer read the opinion by Arbitrator Pinkus and reached an opposite conclusion. The Employer argued that observations by the arbitrator meant that the merger and bar doctrine cannot be used by the Union as a defense. "Therefore, based upon the aforementioned 1987 case (the case decided by Arbitrator Pinkus), the union's argument of 'merger and bar' must fail." (Employer post-hearing brief at 6).

Leaving it to others to divine the meaning of the 1987 opinion, this arbitrator concludes that the just cause provision of this contract does not incorporate the text of the merger and bar rule as found in the Ohio Administrative Code. "Just cause" is probably the most important and certainly the most frequently interpreted phrase in private and public labor relations. It is an extraordinarily broad and elastic standard and attempts to compress its meaning into inelastic rules should be rejected. The arbitrator does believe, however, that the principles behind this doctrine have a place in the standard of just cause. It appears that the root of the merger and bar doctrine is to avoid unfair surprise or unfair prejudice to the employee who has received a nonverbal discipline and is then faced with another discipline for an incident that occurred prior to the nonverbal discipline. The facts in this record simply do not establish that the Grievant was

unduly surprised about being charged with either the 3j or 3h violations after receiving the written reprimand of August 30.[2/]

The second principle of considering unfair prejudice to the Grievant has traditionally been encompassed in the elastic standard of just cause. For the reasons stated above, the Grievant was unfairly prejudiced in the process used by the Employer to reach its decision to remove the Grievant. Once again, this finding of unfair prejudice is based upon the considerations set forth above and not upon the technical elements of the merger and bar rule found in the Ohio Administrative Code.

B) Issues Arising From the Arbitration Hearing Itself

1) The Union's Motion to Dismiss Charges 3b and 3j

Prior to opening statements at the first day of hearing in arbitration, the Union presented this motion in writing. The document consisted of five pages of facts and argument and 37 pages of attached exhibits. Essentially, the Motion claimed that there

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[2/] In this manner, the facts are clearly distinguishable from those of Franklin County Sheriff's Office and FOP, Capitol City Lodge 114 LA 958 (2000). In this case, the Sheriff issued a notice of discipline to the Grievant on May 24, 1999 for failure to report that she had been arrested two years previously--May 15, 1997. Arbitrator Skulina sustained the grievance in part for the following reason. After the Grievant had been arrested on May 15, 1997, and while still at the jail, the Grievant was served with a notice of a 2-day suspension for failing to report that she had been charged with passing bad checks in April of 1996. On these facts, the Sheriff unfairly surprised the Grievant, and the Grievant should have reasonably assumed that the 2-day suspension received on May 15, 1997 had subsumed the arrest on the same day. There was no explanation as to why the Sheriff delayed for two years before taking the action rejected by Arbitrator Skulina.

was no merit to the Employer's 3b and 3j charges against the Grievant. The arbitrator responded by noting that in contrast to courtroom litigation, arbitrators in most labor matters do not have any idea about the case prior to appearing at the arbitration. Since the Union acknowledged that the 37 exhibits attached to the Motion would be presented in the case on the merits, the arbitrator noted that response to the Motion at this time would necessarily embark the arbitrator and the parties into an analysis of the case on the merits. The arbitrator then decided not to respond to the Motion but make the Motion a part of the record.

In its post-hearing brief, the Union stated that it "would also like to move to incorporate and renew its Motion to Dismiss Charges 3b and 3j." (Union post-hearing brief at 13). The Union then restated its argument in the brief and incorporated by reference further arguments located in other sections of the brief that deal with the case on the merits.

Again, the arbitrator will consider the substance and merits of the case, and in the course of doing so, will decide whether the Employer did indeed have a meritorious claim for the violation of either 3b or 3j. It should be noted, however, the fact that substantive arguments are encased in a Motion to Dismiss does not enhance the arguments.

2) <u>The Evidentiary Issue of the Last Chance Agreement</u>

During the arbitration hearing, the Employer sought to have admitted into the record a last chance agreement with the Grievant concerning a positive test for cocaine in 1998. Arguments were

heard from both sides on whether the document was relevant, and the arbitrator ruled that the document was admissible.

Again, the Union restated its objections to the admissibility of this agreement in its post-hearing brief. Nothing was noted in the brief that overcomes the expansive scope of admissibility of prior disciplinary records and good performance for persons who have been disciplined. The decision of the arbitrator announced at the arbitration hearing stands.

3) The Production of the Document Containing the Written Reprimand of the Grievant on August 30, 2000

The Union in its brief reported that it had difficulty obtaining documents from the Employer that it had requested. When the Union discovered that the written reprimand of August 30 was missing, the Union reported in its brief that it made a specific request for this document. The Union then reported that the Labor Relations Officer of the Employer denied that the document existed. The Union then reported various meetings taking place between the parties and that the Labor Relations Officer represented that the document could not be produced because it did not exist. The Union, again in its brief, then reported that "the Union advocates were informed that the document had existed but that it had been **destroyed.**" (Emphasis in text; Union post-hearing brief at 8 and 9).

It was on the basis of these representations in its brief, that the Union claimed that the Employer had willfully and maliciously withheld the document containing the written reprimand

of August 30. It was on this basis that the Union "requests that the arbitrator specifically address the following issue":

> **When the State, directly or through its agents, willfully and maliciously withholds material information from the Union when a proper request pursuant to Article 23.08 has been made, is this act alone sufficient grounds to reinstate the Grievant with full benefits?** (Emphasis in text; Union post-hearing brief at 11).

This issue cannot be addressed in this record, and if it were, this entire opinion would be of questionable validity. The issue as stated carries a necessary predicate; and, that is, that the State had willfully and maliciously withheld the document. The meetings and representations recited above as appearing in the brief of the Union were not in the record in this case. There was no adjudicatory hearing held as part of this arbitration concerning the withholding of the document.

The totality of the record on the matter of the production of this document consists of Deputy Warden Miller testifying on cross examination that she attached the written reprimand to her report and gave it to the Labor Relations Officer. She also testified that the last time that she saw the document was in the Labor Relations Officer's box or in his office. Shortly thereafter, there was a recess in the hearing, and the document was made a part of the record by agreement between the parties as a joint exhibit.

These matters on the record simply do not support the necessary predicate in the Union's statement of the issue above. They do not support the claim that the Employer willfully and maliciously withheld the document. On the other hand, these

matters on the record are sufficient for the following observations.

The contract in both Sections 25.03 and 25.08 creates duty on both parties to disclose documents, books, papers and witnesses requested by the other party. Failure by the parties to recognize their duties under these sections has enormous consequences to both parties.

First, arbitration is a process that is in many commercial as well as labor contracts. However, the labor contract is unique in that there is a grievance process as a predicate to arbitration. This is not generally found in commercial contracts. The purpose of the grievance process is to enable the parties to settle the matter without turning to a third party in arbitration. Failure to disclose and exchange papers, documents and witnesses will frustrate the purpose of the grievance process--settlement.

Failure by the parties to recognize their duties to disclose information to each other delays hearing on the merits causing frustration to both parties. It is also inconsistent with the emphasis in arbitration on an informal procedure. The arbitration process becomes unnecessarily cluttered with lengthy acrimonious debates about the production of documents and witnesses.

Lastly, the analysis in this section does not belittle the importance of the document containing the written reprimand of August 30. It was, indeed, a critical document in this case. The above analysis was written with the understanding of the significance of this document.

C) Substantive Issues

1) The 3b Charge for a Late Call-off on August 15, 2000

As is painfully clear from the above discussion, the Grievant did receive a written reprimand for this violation on August 30, 2000. Since the Union did not agree or request the withdrawal of this written reprimand, it stands and the Employer is barred from the contract from basing the removal on this violation.

It is not correct, however, to assume that the 3b charge could have been disposed of at the beginning of the arbitration process. The record had to be made on the Employer's claim that the Union requested the withdrawal of this reprimand. The record also needed additional information to evaluate this claim. Only after all of this was accomplished could the validity of the 3b charge be considered.

2) The 3h Charge of Being AWOL for Two Hours On August 4, 2000

It is evident from the record that the Grievant did not subsequently gain sufficient vacation time to cover the eight hours taken on August 4 as vacation leave. The Employer's policy on Employee Requests for Leave states that the employee shall be responsible for their leave banks including the vacation leave bank. Subsection G of this policy states:

> If an employee checks a designated leave on their leave request form and subsequently does not possess enough leave to cover the absence, the employee shall be considered AWOL . . .

The Union argued that the disallowance by the Employer of donated leave hours to the Grievant, the Grievant would have had

more than enough to cover the requested eight hours. This argument, however, is inconsistent with the contract provision governing the Leave Donation Program, Section 29.06. It is obvious the text of this provision applies the donated leave to employees who are ill or suffer from injuries to themselves or to their family. As the Payroll Officer testified--a witness for the Union--if the Grievant had some donated leave hours, he could not use these hours for the two hours that he was AWOL on the August 4 vacation. Consequently, there is a finding that the Grievant did violate Rule 3h in that he was AWOL for two hours on August 4, 2000.

3) The 3j Charge of Misuse of Sick Leave

The core of this part of the case lies in the fact that the Employer's FMLA Officer approved the Grievant's request for an FMLA leave from May 7 through 11 and counted the forty hours against the Grievant's annual FMLA leave entitlement. In a memorandum from the FMLA Officer to the Grievant regarding the dates of absence from August 7 through 11, the Officer stated:

> Your request for leave qualifies as leave under the Family and Medical Leave Act (FMLA) and is being counted against your annual FMLA leave entitlement.

The Union's position is that the case ends at this point, and that the only option available to the Employer questioning the validity of the medical condition justifying the leave was to seek a second opinion by a physician. Indeed, the act does permit such an option, as does the Employer's policy on the subject of the Family and Medical Leave Act.

The policy tracks the Act in that it requires a completed "medical certification form" to be submitted by the Employee. In this case, the Grievant submitted such a form, signed by the physician on July 31, 2000 and by the Grievant on August 2, 2000.

The form set forth "Chronic Lumbar Strain" as the condition that would prevent the employee performing the essential functions of the employee's position. The form also noted that the prescribed treatment was heat, ice, aspirin, and muscle relaxers. As to the schedule of hours that the Grievant would be off work, the physician wrote: "occasionally."

In addition to the medical certification, the Employer's policy and the Act do provide the option to the Employer to obtain a second opinion. "[T]he agency may require . . . a second opinion from a health care provider designated and paid for by the agency . . ." Since the Employer failed to seek the second opinion, the approval of the FMLA leave by the Employer's own FMLA officer and the capturing of the hours within the Grievant's FMLA entitlement preclude the section 3j charge--so argued the Union.

The Employer relied on two judicial decisions interpreting the act to permit an employer to take the procedure that the Employer used in this case. Kariotis v. Navistar, 131 F.3d 672 (7th Cir. 1997); Lebouf v. New York Univ. Med. Ctr., 98 Civ. 0973 (JSM Dec. 20, 2000). Under these cases, employers, based upon competent evidence, believed that the Grievant was not using the FMLA leave for its "intended purpose." As a result, the Employer disciplined the Grievant and raised the matter of its possession of competent

evidence of the misuse of the FMLA leave as a defense in a wrongful termination case by the employee.

While the authority cited by the Employer is reliable, the defense raised by the Employer in this case falls against the shoals of the evidence in the record.

Nothing in the prescribed treatment by the physician required that the Grievant stay at his residence during the period of his leave, and there was no such requirement in either the Employer's policy or in the Act. The evidence shows that the Grievant rode in a reclining seat behind the driver as he proceeded to the Canadian destination. The Grievant did not take any fishing gear with him; nor did the Grievant do any fishing while at the Canadian destination. The Grievant took muscle relaxers prior to his departure, in the middle of this trip and upon his return. The Grievant's testimony was corroborated by another passenger in the van, also a Correction Officer, and by another Correction Officer with supervisory rank.

The Employer argues against itself in seeking to contradict this evidence. With respect to the Employer's recapture of the FMLA hours, the Employer argues that "management should not have captured the Grievant's leave during August 7-11 pursuant to the FMLA 480 hour allotment." (Employer post-hearing brief at 12). The Employer also questioned the physician's statement in the medical certification after an examination that the Grievant was suffering from a chronic back strain and needed prescribed medicines. The facts show that the Grievant suffered a back injury

approximately five years ago and the medical certification signed by his physician noted that he, the physician, was aware of the condition as far back as four years. The Employer also fights with the physician's view that the Grievant would need time away from work "occasionally," but there is no counter evidence on this point.

The finding is that there was no competent evidence in this record upon which the Employer could base a belief that the FMLA approved leave was not being used for its intended purpose. Consequently, there was no basis for a finding of a violation of Rule 3j by the Grievant.

D) Remedy

One claim by the Union could affect the shaping of the remedy in this case. The Union claims that the Grievant was the subject of disparate treatment for his strong Union activity. Actually, this claim has two heads. One is that the Grievant was removed in retaliation for his Union activity; the second centers not on his role as a Union organizer and leader, but his role as an employee. This second claim is that he was treated differently from other employees.

With respect to the first claim, there is insufficient evidence in this record to support a claim that removal of the Grievant was as the result of anti-Union animus by the Employer. On the second claim, the arbitrator records his appreciation to both parties for their extensive analysis in their briefs of the records of other correctional officers with lengthy disciplinary

records. The conclusion is that the Grievant was not treated in a disparate fashion, and the evidence of his testing positive for cocaine in 1998 is weighed in that conclusion.

We now turn to the remedy requested by the Union in this case. The Union requested reinstatement and a make whole remedy with some specification of the make whole remedy. The 3b and 3j charges are without merit. The 3h charge did have merit, but just cause requires that the sanction of any discipline for this violation must be weighed against the serious prejudice to the Grievant suffered during the process by which the Employer decided to discipline the Grievant. There is no doubt the prejudicial process so tainted this charge that no discipline is warranted. Consequently, the Grievant is to be reinstated and made whole. There is no record that admits the shaping of a make whole remedy in any detail, and that is left to the parties.

Lastly, the Union requested punitive damages predicated on two propositions. First, the written reprimand of August 30 was willfully and maliciously withheld by the Employer. The second is that the Employer never had any legitimate basis to pursue the 3j charge of misuse of sick leave. As noted above, the record does not permit any finding whatsoever on the matter of the production of the document. As this opinion indicates, the Employer did not prevail on the merits on the 3j charge. It cannot be said, however, that the charge was specious or pretextual which might invite the Union's claim for punitive damages.

AWARD:

The grievance is granted. The Grievant is to be reinstated and made whole from the date of his discharge to the date of his reinstatement.

Date: June 30, 2001

John J. Murphy
Arbitrator