IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF REHABILITATION & CORRECTION

AND

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

Grievant: Fred Peterson

Case No. 27-03-(20051013)-1520-01-03

Date of Hearing: April 13, 2006

Place of Hearing: Chillicothe, Ohio

#931

APPEARANCES:

For the Union:

Advocate: Dave Justice
2nd Chair: Dave Park

Witnesses:

Grievant
Dave Park

For the Employer:

Advocate: Dave Burris
2nd Chair: Joe Trejo

Witnesses:

Bobby Johnson
Timothy Brunsman
Christopher Lambert

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: June 21, 2006

INTRODUCTION

The matter before the Arbitrator is a Grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2003 through February 28, 2006, between the State of Ohio Department of Rehabilitation and Corrections ("DR&C") and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Fred Peterson ("Peterson"), for violating his Last Chance Agreement ("LCA") dated February 20, 2004 when he did not clock in for work on August 10, 2005 and August 11, 2005?

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

The removal of the Grievant occurred on September 20, 2005 and was appealed in accordance with Article 24 of the CBA. This matter was heard on April 13, 2006 and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were submitted by both parties on or about May 10, 2006.

BACKGROUND

Peterson was employed as a Corrections Officer ("CO") and worked for over nine years for the DR&C prior to his removal on September 20, 2005. CO Peterson was removed for violations of the Employees Standards of Conduct ("Standards") Rule 2 – Tardiness and a Last Chance Agreement ("LCA") executed on February 20, 2004. (Joint Exhibit (JX) 2, p. 6)

On August 10th and 11th 2005 CO Peterson was observed reporting late to work and did not clock in on either date. On August 17, 2005, during the investigatory

interview, Peterson admitted that he intentionally did not clock in on both days, because he was on a LCA and did not want to get into more trouble.

On August 31, 2005, during the pre-disciplinary conference meeting, CO Peterson indicated that he understood the provision of Rule 2 – failure to report for duty at scheduled starting time but stated as a defense he was forced to sign the LCA on February 20, 2004. (JX, 2) Cheryl Rhoades ("Rhoades"), Union Representative misled him regarding the LCA content and its effect. CO Peterson also indicated that he was wrongfully placed on a LCA because his disciplinary record was incorrect based upon a reduction of previous discipline that was not properly credited on his record.

The LCA was executed on February 20, 2004 by CO Peterson and Rhoades. Chris Lambert ("Lambert") Labor Relation Officer executed the LCA on behalf of the Chillicothe Correctional Institution ("CCI"). The LCA held in abeyance a pending removal of CO Peterson for a period of two (2) years if no intervening discipline occurred regarding a violation of the absenteeism Rules covered by Rules 1, 2, 3 and 4 in the Standards. (JX 2, p.6)

Due to CO Peterson's tardiness his removal was in accord with the LCA and the DR&C seeks that his removal be upheld. The Union contends that Article 24.01, just cause and Article 24.02, progressive discipline were violated.

ISSUE

Was the removal of the Grievant in violation of the LCA dated February 20, 2004? If not, was the Grievant's removal for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA, ORC AND OHIO ADMINISTRATIVE CODE
ARTICLE 24 – DISCIPLINE

24.01 – Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(i).

24.02 – Standard

The Employer will follow the principles of progressive discipline. Disciplinary action shall commensurate with the offense.

24.05 – Standard

Disciplinary measures shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

STANDARDS OF EMPLOYEE CONDUCT (2004 Ed.)

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

POSITION OF THE PARTIES

POSITION OF THE EMPLOYER

CO Peterson and the Union accepted the terms of a LCA to avoid removal as the result of prior attendance problems. The pending removal was held in abeyance for two (2) years if CO Peterson had no further attendance infractions involving Rules 1, 2, 3, or 4.

At the time the LCA was executed Lambert and Rhoades met privately for an hour and discussed whether to execute the LCA.

The DR&C contends that the language of the LCA is clear and that if the evidence supports a finding that the LCA was violated on August 10th and 11th, then removal is appropriate discipline. As such, the LCA restricts an Arbitrator from modifying the discipline imposed.

At the hearing the following undisputed evidence was offered to support its finding that CO Peterson was late reporting:

1. Incident reports from Lt. Bob Byers and Deputy Warden Brian Wittrup who observed CO Peterson failing to clock in. (JX 2, pp. 12, 13)
2. Investigatory report dated August 17, 2005 where CO Peterson admitted he intentionally did not clock in. (JX 2, p.10)
3. CO Peterson submitted a false time clock adjustment form for August 10, 2005. (JX 2, p.8)

Rhoades, the Union Representative for over four (4) years had been involved with executing other LCA's and no time prior to executing the current LCA has there been an issue raised over its content. (JX 2, p. 6)

POSITION OF THE UNION

The Union contends that mitigating factors exist surrounding the execution of the LCA and/or the implementation of the LCA.

The Union presented evidence that the discipline trail prior to the execution of the LCA was flawed. In August 2003, a ten (10) day suspension was reduced to a five (5) day suspension by Arbitrator Anna Smith ("Smith"). The attendance grid next discipline was a ten (10) day suspension as opposed to the removal initiated by DR&C which led to the February 20, 2004 LCA. (Union Exhibit (Un Ex) 2) The NTA (Non Traditional

Arbitration) Award by Smith was dated November 12, 2003. By failing to correct CO Peterson's disciplinary history after the NTA Award, DR&C issued a defective LCA by failure to follow Article 24.02 – progressive discipline.

On December 11, 2003 CO Peterson overslept due to medication prescribed for help in addressing problems that were causing his attendance issues. However, CO Peterson's December 11, 2003 late call in time should not have been charged against him but captioned under FMLA. As of December 11, 2003, CO Peterson had a valid FMLA form on file.

CO Peterson further argues that Rhoades forced him to sign the LCA without full understanding that instead of being rule specific the LCA was intended to cover all absenteeism within the attendance grid.

The Union finally contends that Warden Timothy Brunsman ("Brunsman") in 2004 agreed to review and consider ending the LCA if CO Peterson remained in good standing for six (6) months.

CO Peterson did enter and complete an EAP Program as part of the LCA requirement. Simply, based upon some or all of the above mitigating circumstances exist to apply other disciplinary measures lesser than removal.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances, the employer bear the evidentiary burden of proof. See, Elkouri & Elkouri – "How Arbitration Works" (6th ed., 2003).

The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. beyond reasonable doubt, preponderance of evidence, clear and convincing, etc.) commonly used in the non-arbitable proceedings. See, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984).

The evidence in this matter will be weighed and analyzed in light of the DR&C burden to prove that the Grievant was guilty of wrongdoing in violating the LCA. Due to the seriousness of the matter and Article 24 requirement of 'just cause', the evidence must be sufficient to convince this Arbitrator of guilt by the Grievant. See, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984). With a LCA at issue, the agreed upon discipline is termination if the Grievant violated the agreement.

DISCUSSIONS AND CONCLUSIONS

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

The LCA provides in part:

"The Department agrees to the following:

1) Hold the REMOVAL order signed 2/18/04, in abeyance for a period of two (2) years given no intervening discipline as specified below.

The Employee agrees to the following:

1) There will be no further violations of the Standards of Employee Conduct; **specifically any absenteeism track rules (#1 through #4).**

2) Enter into an EAP Participation Agreement and successfully complete a treatment program designed to address the specific issues discussed during the pre-disciplinary conference. This includes all the factors that contributed to the situation giving rise factors that contributed to the situation giving rise to this discipline, i.e., medication."

As an overview, LCA and its validity is presumed since both parties are required to reach consensus on the conditions that a job is saved for a Union Member. Therefore, "absent a showing of fraud, misrepresentation, etc. regarding the formational elements...," The LCA is presumed valid. (OCB Post Hearing Statement, p.2)

The LCA was executed on February 20, 2004 by CO Peterson, Rhoades and Lambert. The evidence presented by DR&C through witness Lambert, indicates that the Warden, Rhoades, CO Peterson and him had a meeting on February 20th to discuss the

LCA as opposed to implementing a removal order. Lambert, who prepared the LCA, presented the document to CO Peterson and Rhoades. CO Peterson and Rhoades, according to the undisputed testimony of Lambert, met privately for about an hour prior to agreeing to sign the LCA. It is also undisputed that JX 2, p.6 contains the LCA with CO Peterson's signature. The records indicate that CO Peterson did not raise the validity of the LCA until August 31, 2005 during the pre-disciplinary conference. (JX 2, p.3)

CO Peterson argues that Rhoades forced him to sign the LCA and maintained that position at the hearing. Aside from CO Peterson assertions, no other evidence was offered in support of this argument. In contra, Lambert testified that Rhoades had assisted other employees in negotiating LCA's with him. No evidence exists that the validity of the LCA was an issue from February 20, 2004 until August 31, 2005. The validity regarding the execution of the LCA by CO Peterson was only raised when other discipline was imminent due to a violation. The facts do not support CO Peterson's claim that Rhoades an experienced advocate forced him to execute the LCA. I find that CO Peterson had Union representation and involvement in all stages associated with the LCA. If substantive or procedural reasons were present to contest the validity of the LCA, CO Peterson had over nineteen (19) months to do so. CO Peterson inaction is tantamount to a waiver. Simply, no evidence is present to conclude that CO Peterson participation on February 20, 2004 was against his will.

CO Peterson agreed to do two things to save his job: 1) do not violate Rules #1, 2, 3 or 4 of the absenteeism track for two (2) years; and 2) enroll and complete at EAP Program. To remain employed by DR&C CO Peterson agreed to the terms after an hour consultation with Rhoades. The trade-off negotiated by DR&C required CO Peterson to seek EAP intervention and not violate <u>any</u> provision of the absenteeism track for two (2) years. The evidence proffered by the Union indicates that Co Peterson completed the

EAP portion of the agreement, but unfortunately the evidence is also clear he failed to remain free of violating the absenteeism track.

In the LCA, the parties agreed upon the appropriate discipline if DR&C proves a violation of the absenteeism track occurred. My analysis under these facts is restricted in accord with the parties' intent. Simply, did DR&C prove a violation of the LCA occurred?

CO Peterson admitted that he failed to clock in on August 10th and 11th, in recognition of the existing LCA and the impact if he failed to report on time. Moreover, DR&C presented uncontested incident reports of Lt. Byers and Deputy Warden Wittrup who observed CO Peterson failing to clock in is direct evidence of misconduct.

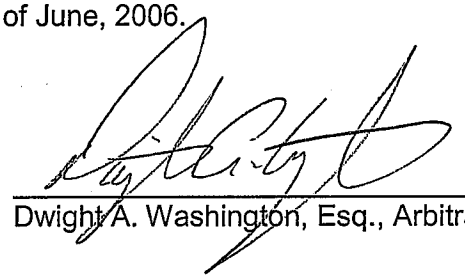
Although not required because the removal complied with the parties negotiated the LCA; a brief comment regarding mitigation one of the issues argued by the Union is appropriate. Prior to the execution of the LCA on February 20, 2004 the Union contends that DR&C failed to correct CO Peterson's disciplinary record to properly reflect the change of the 10 day suspension to 5 days after Arbitrator Smith's NTA Award of November 13, 2003. According to the Union under the Standards of Employee Conduct in effect November 2003, CO Peterson would have progressed to 10 days for his February 2004 violation not an LCA. The Union's initially raising the argument at the pre-disciplinary conference on August 31, 2005 and reasserted at the hearing contains obvious procedural defects. Simply, this defense may have been appropriate if asserted prior to the executing of the LCA. If it was raised in a timely manner, the parties would have revised the impact prior to negotiating the LCA. No retroactive relief is appropriate even if a clerical omission occurred.

DR&C's conduct was consistent with the parties' intent in negotiating the LCA, and no evidence exists to mitigate the removal.

AWARD

Grievance denied.

Respectfully submitted this 21st day of June, 2006.



Dwight A. Washington, Esq., Arbitrator