ARBITRATION DECISION NO.:
23

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

EMPLOYER:
Department of Mental Health,
Fallsview Psychiatric Hospital

DATE OF ARBITRATION:
April 24, 1987

DATE OF DECISION:
June 3, 1987

GRIEVANT:
Osburn Lee

OCB GRIEVANCE NO.:
G-86-0977

ARBITRATOR:
David M. Pincus

FOR THE UNION:
John T. Porter

FOR THE EMPLOYER:
Jennifer Dworkin

KEY WORDS:
Progressive Discipline
Absenteeism
Removal
Substance Abuse
EAP

ARTICLES:
Article 9 - Employee
Assistance Program
Article 24 - Discipline
    §24.01-Standard
    §24.02-Progressive
Discipline
Article 25 - Grievance

Procedure
§25.03-Arbitration
Procedures
§25.04-Arbitration
Panel

FACTS:

The Grievant was employed at the Fallsview Psychiatric Hospital as a Hospital Aide for approximately ten (10) years. The grievant, and other witnesses, testified that he was a recovering alcoholic, and that his alcoholism problem had been in existence for a considerable period of time. Evidence and testimony introduced by the parties support their contention that the Grievant's tardiness and absenteeism record was a consequence of this debilitating disorder. In response to the Grievant's negligent behavior, the Employer initiated several disciplinary actions, including two (2) written reprimands, a three-day suspension, a six (6) day suspension, and a removal order, which is the subject of this grievance. In addition, the Employer recommended three (3) separate suspensions on which no action was taken. Prior to the grievant's removal order, he attended an Employee Assistance Program, however, he experienced additional disciplinary problems upon his return.

EMPLOYER'S POSITION:

It is the position of the Employer that it had just cause to remove the Grievant based on his tardiness and excessive absenteeism record. The Employer emphasized the number of second chances the Grievant received prior to his removal, as evidenced by the number of disciplinary actions that were initiated but never implemented and by the Grievant's enrollment in the Employee Assistance Program. The Employer stated that the written reprimands and suspensions placed the Grievant on notice that his job was in jeopardy long before his ultimate discharge. In addition, the Employer asserted that Article 24, Section 2 of the Agreement should have placed the Grievant on notice of the probable consequences of his actions.

UNION'S POSITION:

It is the position of the Union that the Employer did not have just cause to discharge the Grievant. The Union asserted the penalty was too severe in light of the behavior engaged in by the Grievant, that the Employer failed to consistently deal with the Grievant's alcohol problem, that Grievant had taken several positive steps toward confronting his alcohol problem and that the Grievant's work performance and positive evaluations should result in one additional last chance.

ARBITRATOR'S OPINION:

From the testimony presented and the evidence introduced at the hearing, it was the opinion of the Arbitrator that the Grievant was discharged for just cause. In making his determination the Arbitrator used a modification of a corrective discipline model used to decide substance abuse cases. Under this approach, the Employee is viewed as suffering from an illness induced by some form of substance abuse. Often times termination penalties are thought to be just under this approach after an Employee has been given one "second chance". Use of this approach allows for some opportunity for recovery and places responsibility on the Employer to help the troubled Employee in addition to placing responsibility on the Employee by insisting that he/she remains substantially accountable for his/her behavior. In the present case the Arbitrator viewed the prospects for improvement as relatively slim. The Grievant was given an opportunity to rehabilitate himself and failed to take full advantage of the opportunity.

Additionally, the Arbitrator did not agree with the Union's inconsistency theory. The Employer's failure to formally issue reprimands on several occasions did not imply bad faith or negligence on their part. What it did indicate was a patience and willingness to help the Grievant. Any progressive Disciplinary Action Notices given to the Grievant only served the Grievant with additional notice that he has to modify his behavior. As such the progressive discipline attempts engaged in by the Employer adequately notified the Grievant of the consequences associated with his negligent behavior.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

STATE OF OHIO
AND OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION LABOR
ARBITRATION PROCEEDING

IN THE MATTER OF THE
ARBITRATION BETWEEN

THE STATE OF OHIO,
OHIO DEPARTMENT OF
MENTAL HEALTH, FALLSVIEW
PSYCHIATRIC HOSPITAL
(Cuyahoga Falls, Ohio)

-and-

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

GRIEVANCE:
Osburn Lee (Discharge)

CASE NUMBER:
G-86-0977

ARBITRATOR'S OPINION AND AWARD

Arbitrator:
David M. Pincus

Date:
June 3, 1987

APPEARANCES

For the Union

Osburn Lee, Grievant
Brenda St. Claire,
Union President
John A. Rucker, Steward
Gerald Burlingame,
Staff Representative
John T. Porter,
Associate General Counsel

For the Employer

Thomas M. Cheek,
Assistant Superintendent
Patricia Justice,
Assistant Director of Nursing
Ed Morales,
Labor Relations Specialist
Jennifer Dworkin,
Labor Relations Specialist

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Mental Health, Fallsview Psychiatric Hospital (Cuyahoga Falls, Ohio), hereinafter referred to as the Employer, and the Ohio Civil Service Employee Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union/Association for July 1, 1986-July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on April 24, 1987 at the Office of Collective Bargaining. The parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both parties indicated that they would submit briefs.

ISSUE

Was Grievant removed for just cause and if not, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 24 - DISCIPLINE

Section 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" (Joint Exhibit 1, pages 34-35)

Section 24.02 - Progressive Discipline

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

A. Verbal reprimand (with appropriate notation in employee's file)
B. Written reprimand;
C. Suspension;
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process." ... (Joint Exhibit 1, page 35)

ARTICLE 9 - EMPLOYEE ASSISTANCE PROGRAM

The Employer and the Union recognize the value of counseling and assistance programs to those employees who have personal problems which interfere with their job duties and responsibilities. The Union and the Employer, therefore, agree to continue the existing E.A.P. and to work jointly to promote the program.

The parties agree that there will be a committee composed of nine (9) union representatives that will meet with and advise the Director of the E.A.P. This committee will review the program and discuss specific strategies for improving access for employees. Additional meetings will be held to follow up and evaluate the strategies. The E.A.P. shall also be an appropriate topic for Labor-Management Committees.

The Employer agrees to provide orientation and training about the E.A.P. to union stewards. Such training shall deal with the central office operation and community referral procedures. Such training will be held during regular working hours. Whenever possible, training will be held for stewards working second and third shifts during their working time.

Records regarding treatment and participation in the E.A.P. shall be confidential. No records shall be maintained in the employee's personnel file except those that relate to the job or are provided for in Article 23.

If an employee has exhausted all available leave and requests time off to have an initial appointment with a community agency, the Agency shall provide such time off.

The Employer or its representative shall not direct an employee to participate in the E.A.P. Such participation shall be strictly voluntary.

Seeking and/or accepting assistance to alleviate an alcohol, other drug, behavioral or emotional problem will not in and of itself jeopardize an employee's job security or consideration for advancement. (Joint Exhibit 1, page 10)

CASE HISTORY

Fallsview Psychiatric Hospital, the Employer, is located in Cuyahoga Falls, Ohio. It provides adults with acute care psychiatric services and consists of one-hundred-and-thirty-one (131) beds. Osburn Lee, the Grievant, has been employed at the facility as a Hospital Aide for approximately ten (10) years. This position includes the following patient care activities: escorting patients to therapy; patient restraint; patient observation; and general care and hygiene responsibilities.

The Grievant, and other witnesses, testified that he was a recovering alcoholic, and that his alcoholism problem had been in existence for a considerable period of time. In fact, the Grievant noted that he began drinking at the tender age of ten (10).

Evidence and testimony introduced by the parties support their contention that the Grievant's tardiness and absenteeism record was a consequence of this debilitating disorder. The Grievant's record for the period July 19, 1985. to November 13, 1986 evidenced a severe problem in the above-mentioned performance areas. In response to the Grievant's negligent behavior, the Employer initiated a number of Disciplinary Actions. These incidents will be reviewed below in chronological order.

On July 19, 1985 the Employer issued a First Written Reprimand (Employer Exhibit 15). The reprimand was based on an incident which took place on June 17, 1985. The Grievant abused the Employer's Leave Procedures (Employer Exhibit 5) by failing to report for work on his assigned shift, and neglecting to call-off within the time frame specified in the procedure. These violations and the Grievant's work record as of January, 1985 were used to substantiate the reprimand.

A Second Written Reprimand was issued on August 21, 1985 (Employer Exhibit 14). The incidents surrounding this reprimand reflected behaviors similar to those which gave rise to the First Written Reprimand (Employer Exhibit 15). On a number of occasions, the Grievant failed to call-in in a fashion commensurate with the Employer's policy (Employer Exhibit 5); or the Grievant called the facility and failed to report for work; or the Grievant reported for work but departed after working a portion of the shift. The Employer relied on six (6) specific incidents which took place between July 19, 1985 and August 18, 1985 to support this reprimand. The Employer, moreover, noted that the Grievant had failed to provide doctors' excuses to substantiate the nature of his illness. He also did not internalize the contents of a number of counseling sessions, nor take advantage of commendations regarding Employee Assistant Program interventions.

On October 23, 1985 the Grievant's supervisor recommended that a suspension should be levied as a result of the Grievant's behavior for the period September 10, 1985 to October 15, 1985. The Disciplinary Action form indicates that the Grievant reported late for work on five (5) occasions, while he had been off without pay on three (3) occasions (Employer Exhibit 13). It should be noted that the Employer did not introduce any documentation which would indicate that this recommendation was formally acted upon by upper management.

An additional suspension was recommended on November 21, 1985 via a Disciplinary Action form (Employer Exhibit 12). Several incidents took place in November, 1985 which generated the suspension recommendation. On November 19, 1985 the Grievant called the facility on several occasions and notified Employer representatives that he would be late for work because he had to take a bus. Even though the Grievant made these calls, he never showed up for work. On November 21, 1985, the Grievant failed to call-in in a timely manner and was tardy. Again, it appears that this recommendation was not formally implemented by upper management.

On January 3, 1986, Mozelle R. Meacham, Superintendent, suspended the Grievant for three (3) working days. The Order of Suspension contained the following reason for this action: "The reason for this action is that you have been guilty of Neglect of Duty in the following particulars, to wit: You have repeatedly been absent from your assigned scheduled work days and you have repeatedly been tardy when reporting to work. These abuses of the time policy are

reflected in numerous previous reprimands.

You are hereby suspended for three (3) working days beginning January 6, 1986, and to extend through January 10, 1986, to include January 6, 9, and 10, 1986, for Neglect of Duty. You are to return to work on January 11, 1986, for your regularly assigned shift." ... (Employer Exhibit 11)

Pearl Myers, the Grievant's supervisor, issued a Progressive Disciplinary Action Notice on February 26, 1986 (Employer Exhibit 10). She recommended a suspension based upon four (4) incidents which took place during February, 1986. On each of these occasions, the Grievant violated the Employer's Leave Procedures (Employer Exhibit 5) by calling in after the appropriate call-in time. Once again the record indicates that formal action was not initiated by the Employer.

Patricia Justice, Assistant Director of Nursing, instituted a Progressive Disciplinary Action Notice in which she recommended removal for three (3) incidents occurring during May, 1986 (Employer Exhibit 2). The first incident dealt with the Grievant's premature departure from work because he was ill. The second incident involved a number of call-ins and the Grievant's failure to report for work. The last incident concerned the Grievant calling-off. Removal was recommended because the Grievant did not have any authorized leave to cover his time; the counseling sessions that were previously engaged in regarding his absenteeism problems; and the Employer's previous recommendations dealing with the Employee Assistance Program.

The May, 1986 incidents precipitated the scheduling of a Personal Conference on May 23, 1986 to discuss the charge of Neglect of Duty (Employer Exhibit 8). The Personal Conference was postponed by the parties and the following last chance agreement was mutually agreed to by the parties and the Grievant:

"May 23, 1986
The Personal Conference scheduled for 5/23/86 was postponed for 30-days pending Osborn Lee's enrollment in an Employee Assistant Program. The Personal Conference citation will be removed completely if, after 30-days, Osborn Lee has successfully began a program sponsored by Employee Assistance Program and exhibits a good attendance record.

/signed/5/23/86
Osborn Lee, Employee/Date

/signed/5/23/86
Michelle B. Kruse/Date
Personnel Director

/signed/5/23/86
Nora Casto/Date
AFSCME Representative"

(Employer Exhibit 9)

The Grievant experienced additional disciplinary problems upon his return from his rehabilitative efforts. On July 24, 1986, Justice initiated a Progressive Disciplinary Action Notice for an incident which took place on July 18, 1986 (Employer Exhibit 3). The Grievant called the facility and reported that he would be late for work because he missed his ride. The Grievant never reported for work, nor did he call and report that he would be unavailable for work. Justice recommended that a Personal Conference should take place; and the record indicates that no

additional disciplinary action was initiated.

A similar incident took place on August 7, 1986. Justice authored a Progressive Disciplinary Action Notice on August 8, 1986 which indicates that the Grievant called and stated he would be late for work. A subsequent call by the Grievant confirmed that he was not coming to work (Employer Exhibit 4). Justice viewed this incident and recommended that a suspension should be issued for Neglect of Duty.

On August 29, 1986, Pamela S. Hyde, Director of the Ohio Department of Mental Health, notified the Grievant that he was suspended for six (6) working days. The reason for this action dealt with the Grievant's Neglect of Duty, and the following particulars were specified in the letter:

"... You have repeatedly exhibited a pattern of excessive absenteeism and tardiness." (Employer Exhibit 7, page 2)

On September 8, 1986, Frank D. Fleischer, Acting Superintendent, sent the following letter which advised the Grievant of the dates of his suspension:

"September 8, 1986

Osburn Lee
344 Lease Street
Akron, Ohio 44306

Dear Mr. Lee:

In accordance with the Director's order of August 29, 1986, you are hereby suspended for six (6) working days specifically September 15, 17, 18, 20, 21 and 22, 1986. You are to return to work for your regularly assigned shift on September 23, 1986.

The reason for this action is your repeated absenteeism and tardiness. This is your second suspension for Neglect of Duty. Any further failure of good behavior or neglect of duty will result in your removal as an employee of Fallsview Psychiatric Hospital.

/signed/
Frank D. Fleisch
Acting Superintendent

Attachment: Director's Hyde's Letter of Suspension, August 29, 1986

Certified Mail P-562-573-384"
(Grievant's Exhibit 7, Page 1).

As the above documents indicate, the Grievant was scheduled to return to work on September 23, 1986. The record clearly evidences that the Grievant failed to report to work or call-off, and thus, he was absent without leave. The Grievant did, however, report to work on September 24, 1986.

On September 29, 1986, Justice issued a Progressive Disciplinary Action Notice which recommended Removal because of Neglect of Duty (Joint Exhibit 3, page 2). A Pre-Discipline meeting was allegedly held on October 9, 1986 where the charges were discussed by the parties

(Joint Exhibit 3, page 1). The Grievant was officially removed as a Hospital Aide on November 13, 1986 (Joint Exhibit 3, page 3). The Director's Removal Order contained the following reasons for the termination decision:

"... The reason for this action is that you have been guilty of Neglect of Duty in the following particulars to wit:

You have repeatedly exhibited a pattern of excessive absenteeism and tardiness.

..." (Joint Exhibit 3, Page 4)

On November 17, 1986, the Grievant filed the following grievance in response to the Employer's Action

"... What Happened (state the facts that prompted you to write this grievance)? Osburn Lee grieves management is in violation of Article #2 Section 2.01, 2.03, 3.08 Article #9 and all other pertinent Articles and Sections of the contract, Mr. O. Lee makes claims when on 11/12)86 at approximately 22:45 he was given a written removal for neglect of duty. Mr. Lee asks that said removal be expunged and that he be made whole. ... (Joint Exhibit 3, page 6)

The Employer's Step 3 response denied the allegations contained in the Grievance. The following particulars were documented in a memorandum written by M. W. Musselman, a Hearing Officer:

"Grievant claims that management has violated Section 2.01, 2.03, 3.08, and Article 9 of the labor contract by removing him from State service. Section 2.01 refers to non-discrimination; Section 2.03 refers to affirmative action programs; Section 3.08 refers to information provided to the Union; and Article 9 refers to the Employee Assistance Program (E.A.P.).

No tangible evidence was presented that management discriminated against the Grievant in this removal. Grievant claimed that he is an alcoholic and had completed a formal alcohol abuse program through the State endorsed Employee Assistance Program. Management granted leave time so that the Grievant could attend this program. After completing the program and returning to duty, the Grievant continued to exhibit unacceptable attendance. He was given a 6 day suspension for this offense.

Grievant was served a notice of his suspension dates in a letter from Acting Superintendent Frank D. Fleischer dated 9/8/86. This letter clearly stated that the Grievant was to return to duty on 9/23/86. Grievant served the suspension but did not return for duty on 9/23/86, nor did he report off duty. For this offense, the Grievant was removed from State service effective on 11/13/86.

It should be noted that the Grievant had been absent without verification on several other occasions from 9/23/86 until his removal. Also, the Grievant did not return to duty on the first day he was scheduled for duty following his previous 3 day suspension. This indicates a pattern of this type of behavior.

In conclusion, the Grievant was removed for his unacceptable attendance which constitutes just cause. Therefore, management did not discriminate against the Grievant. There is no affirmative

action plan which targets poor attendance and/or alcohol abuse either current or former which should be considered on behalf of the Grievant. The E.A.P. provides an opportunity for an employee to obtain professional assistance to alleviate factors adversely affecting his work performance. It does not provide sanctuary from discipline for just cause. Management has met it's obligation to the Grievant concerning this program.

Therefore, this Grievance is denied and the removal of the Grievant is sustained." (Joint Exhibit 3, page 8)

The parties were unable to resolve the dispute at the various stages of the arbitration procedure (Joint Exhibit 3, pages 9-11).

The grievance is properly before this Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it had just cause to remove the Grievant based on his tardiness and excessive absenteeism record. The Employer acknowledged that the Grievant was an excellent employee when he was in attendance. The Employer noted that the Grievant was given a number of second chances, but that these additional opportunities to modify his behavior did not engender the desired outcomes. After a considerable length of time, and tolerance, the Employer concluded that removal of the Grievant was the only available alternative.

The Employer emphasized that the Grievant was provided with a number of second chances. The Employer contended that the Grievant's supervisors had initiated a number of disciplinary actions over a two (2) year period, but that the majority were not implemented. The Employer alleged that the supervisors failed to take formal action because they admired the Grievant's work habits when he was in attendance. The Employer also contended that the last chance agreement (Employer Exhibit 9) evidenced an additional second chance. The Employer maintained that it provided the Grievant with an additional opportunity to correct his behavior when it suspended the Grievant for six (6) days (Employer Exhibit 7, page 1) rather than discharging him. The Employer argued that the terms of the last chance agreement (Employer Exhibit 9) were violated by the Grievant after his return from Edwin Shaw Hospital. The Employer maintained that it could have discharged the Grievant but decided to suspend him. The Employer stated that the above incidents placed the Grievant on notice that his job was in jeopardy long before his ultimate discharge.

The Employer, moreover, alleged that by following the progressive discipline provisions contained in the Agreement (See Pages 2-3 of this Award for Article 24 - Discipline, Section 24.02 - Progressive Discipline) the Grievant was placed on notice concerning the probable consequences of his actions. The Employer maintained that the following disciplinary actions supported this argument: First Written Reprimand (Employer Exhibit 15), Second Written Reprimand (Employer Exhibit 14), three (3) day suspension (Employer Exhibit 11), the last chance agreement (Employer Exhibit 9), six (6) day suspension (Employer Exhibit 7), and the Removal order (Joint Exhibit 3, page 3).

The rationale provided by the Grievant concerning his relapse, after he returned from the alcoholism program at Edwin Shaw Hospital, was also disputed by the Employer. The Employer, more specifically, maintained that accusations of patient abuse are not unusual in psychiatric hospitals. The Employer also noted that the accusations made by this specific patient should not

have engendered a relapse. The patient had a history of making similar accusations and the staff, and the Grievant, were aware of his attitudinal and behavioral deficiencies.

The Employer argued that even if these patient abuse accusations did, in fact, engender a relapse, then the Grievant's emotional instability made him unfit for Hospital Aide responsibilities. The Employer contended that the Hospital Aide classification required a great deal of emotional stability. The Grievant's response to these alleged accusations, therefore, indicated that his emotions were highly volatile.

The Employer viewed the Grievant's failure to return from the six (6) day suspension (Employer Exhibit 7) in a timely manner as an extremely serious offense. In the opinion of the Employer, this negligent behavior indicated that any additional corrective action would be futile. The Grievant's excuse for his absence, moreover, seemed contrived to the Employer. The Grievant's alleged forgetfulness was viewed by the Employer as unconscionable and invalid justification for his negligence.

The Position of the Union

It is the position of the Union that the Employer did not have just cause to discharge the Grievant. The Union preferred a number of arguments in support of this contention.

First, the Union maintained that the penalty was too severe in light of the behavior engaged in by the Grievant. The Union, more specifically, alleged that the termination was based on the Grievant's mistaken belief that the suspension notice required his return to work on September 24, 1986 (Employer Exhibit 7). This mistake, in the Union's opinion, did not warrant the Grievant's termination. The Union maintained that testimony provided by the Grievant and Rucker supported the above notion. They claimed that the Grievant received the notice toward the end of the second shift, and that reception of the document at this time, engendered the confusion surrounding the return date.

Second, the Union claimed that the record was clear that the Grievant had a long and chronic absenteeism problem which was nurtured by his alcoholism affliction. Yet, the Union alleged that the Employer failed to consistently deal with the Grievant's problem. The Union maintained that the Employer's inconsistent policies were evident when one reviews its actions during January and February, 1986. The Union stated that on January 3, 1986 the Grievant was suspended for three (3) days for tardiness and absenteeism (Employer Exhibit 11). On February 26, 1986, however, the Grievant's supervisor recommended a suspension for similar activity, but no formal action was initiated by the Employer. The Union argued that this inconsistent treatment was unfair to the Grievant and that reinstatement was justified.

Third, the Union emphasized that the Grievant took several positive steps toward confronting his alcoholism problem. The Union noted that he actively engaged in the Employee Assistance Program after the parties, and the Grievant, signed an agreement which postponed the Personal Conference that was scheduled for May 23, 1986 (Employer Exhibit 9). The Union, moreover, maintained that the Grievant participated in the Employee Assistance Program for approximately sixty (60) days. This participation allegedly consisted of two (2) distinct, yet related, stages. The first stage involved the Grievant's stay at Edwin Shaw Hospital on an in-patient basis. This stage took approximately thirty (30) days. The second stage consisted of group therapy sessions which took place on an out-patient basis, and also took approximately thirty (30) days. The Union maintained that the Grievant was unable to continue his formal participation in the Employee Assistance Program because he could no longer afford the services provided by Edwin Shaw Hospital. The Grievant, however, testified that he began attending Alcoholics Anonymous sessions after his termination.

The Union claimed that the Employer should have known that a rehabilitation program would take longer than thirty (30)days. Thus, in the Union's opinion, the conditions contained in the last chance agreement (Employer Exhibit 9) should be critically reviewed by this Arbitrator.

The Union argued that the Grievant's work performance should be weighed heavily by the Arbitrator. A positive evaluation, moreover, should result in one additional last chance, and allow the Grievant to put his life back together.

THE ARBITRATOR'S OPINION AND AWARD

From the testimony presented and the exhibits introduced at the hearing, it is the opinion of this Arbitrator that the Grievant was discharged for just cause by the Employer.

When dealing with substance abuse cases arbitrators have typically employed three (3) basic models in deciding specific cases. The first model has been referred to as the traditional corrective discipline model. This approach reflects the philosophy that discharges should be upheld if an employer adheres to the discipline requirements of the collective bargaining agreement. The second model has been labeled the therapeutic model. Under this approach, repeat offenses and failures are normally viewed as requiring increased treatment rather than increased punishment. Thus, the therapeutic approach does not tend to emphasize the principles underlying corrective discipline procedures. The third, and final approach, is a modification of the first model. Under this approach, the employee is viewed as suffering from an illness induced by some form of substance abuse. An abuse which is deemed to be an illness, but an illness which ultimately may be subject to discharge. Often times termination penalties are thought to be just under this approach after an employee has been given one "second chance."

The third approach, in this Arbitrator's opinion, is the most equitable when one deals with substance abuse cases, it balances the interests of those involved in the dispute. This approach, more specifically, allows for some opportunity for recovery, and thus, places a certain responsibility on the employer to help the troubled employee. This approach also places a burden on the employee by insisting that he/she remains substantially accountable for his/her behavior.

Some arbitrators disagree about the employee whose substance abuse problems get him into trouble for the fist time (Armstrong Furnace Co., 63 LA 618 (Stouffer, 1974); Eastern Airlines, Inc. 74 LA 316 (Turkus, 1980); Armstrong Cork Co., 56 LA 527 (Wolf, 1971)). This Arbitrator agrees with other arbitrators that have generally held that where an employee has been offered an opportunity for rehabilitation, and, instead of straightening out, has lapsed back to his former ways, discharge is typically inevitable (International Nickel Co., 68-2 ARB 8593 (Klamon, 1968), Caterpillar Tractor Co., 44 LA 87 (Larkin, 1965)). The premise underlying this view seems obvious because an employee that has failed to take advantage of a rehabilitation decision has proven himself to be a poor prospect for salvage. Arbitrator Kesselman has discussed this point thusly:

"It is unreasonable to expect any company to carry indefinitely an employee whose chronic overindulgence presents a potential danger to himself, fellow employees or plant equipment or who, because of his drinking problem, cannot perform his work duties in a responsible and efficient manner. The time does come when an employer may reasonably conclude that its efforts to encourage rehabilitation have failed and that prospects for substantial improvement are so slim that the employment relationship must be terminated."

(American Synthetic Rubber Corp., 73-1 ARB 8073 (Kesselman, 1973))

In the present case this Arbitrator views the prospects for prospective improvement as

relatively slim. The Grievant was given an opportunity to rehabilitate himself and failed to take full advantage of the opportunity.

Shortly after the Grievant's return from Edwin Shaw Hospital, his previous tardiness and absenteeism problems reemerged. In this Arbitrator's opinion the Employer had potential justification to discharge the Grievant at that point. There is clear and convincing evidence that the Grievant had violated the terms and conditions contained in the last chance agreement (Employer Exhibit 9). It appears that the Grievant's performance record and attitude led the Employer to believe that he deserved one (1) additional chance, and thus, the Employer suspended the Grievant. In effect, the Employer offered the Grievant an additional last chance to rehabilitate himself and he failed to take advantage of it. When companies and unions develop last chance agreements they hope that it will have sufficient shock value to rehabilitate the errant employee (Porcelain Metals Corp., 73 LA 1133 (R. Roberts, 1979). It is evidence to this Arbitrator that the last chance agreement and the suspension did not produce the desired results.

The mitigating evidence provided by the Union failed to persuade this Arbitrator that the Employer's termination decision was inappropriate. The Grievant's patient abuse justification seems totally contrived. Under cross-examination the Grievant acknowledged that he, and other employees, were fully aware of the patient's penchant for fabricating allegations. Thus, the Grievant's behavior was not a result of the patient's accusations, but in consequence of his inability to control his drinking problem.

In a like fashion, this Arbitrator concludes that the Grievant's rationale for failing to report for duty on September 23, 1986 is also highly suspect. The letter received by the Grievant clearly and unequivocally states that the Grievant was to return to work for his regularly assigned shift on September 23, 1986 (Employer Exhibit 7, page 1). The Grievant should not have been confused by the contents contained in the document. The Grievant, moreover, should not be excused for his alleged forgetfulness. Any responsible employee, provided with a second last chance, should have taken advantage of this opportunity and responded in a responsible manner.

The futility of any additional corrective action is evidenced by the Grievant's attendance behavior subsequent to the September 23, 1986 return date. A review of the Grievant's attendance record (Employer Exhibit 6) indicates that the Grievant continued to behave in a similar fashion. The Grievant, more specifically, either came into work in a tardy manner or reported work as scheduled but left work early. These activities were engaged in by the Grievant on five (5) separate occasions. The Union failed to introduce any evidence to distinguish these incidents from the behaviors previously engaged in by the Grievant.

The Arbitrator, moreover, does not concur with the Union's inconsistency hypothesis. The Employer's failure to formally issue reprimands on several occasions does not imply bad faith nor negligence on the part of the Employer. It indicates a patience and willingness to help the Grievant. The record, therefore, clearly indicates that the Progressive Disciplinary Action Notices provided the Grievant with additional notice that he had to modify his behavior. These notices and the formal progressive discipline attempts engaged in by the Employer adequately notified the Grievant of the consequences associated with his negligent behavior.

AWARD

The grievance is denied and dismissed.

Dr. David M. Pincus
Arbitrator

June 3, 1987