ARBITRATION DECISION NO.:
162

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

EMPLOYER:
Department of Transportation,
District 9

DATE OF ARBITRATION:
September 29, 1988

DATE OF DECISION:
December 16, 1988

GRIEVANT:
Eugene Strausbaugh

OCB GRIEVANCE NO.:
31-09-(88-04-01)-0007-01-06

ARBITRATOR:
David M. Pincus

FOR THE UNION:
John Porter

FOR THE EMPLOYER:
Jack Burgess

KEY WORDS:
Just Cause
Standard of Discipline
Progressive Discipline
Employee Assistance Program

ARTICLES:
Article 9 - Employee
Assistance Program
Article 11 - Health
and Safety
§11.15-Water and
Restroom Facilities
Article 23 - Personnel
Records

Article 24 - Discipline
§24.01-Standard
§24.02-Progressive Discipline
§24.08-Employee Assistance Program

FACTS:

Grievant has been employed by District Nine of the Ohio Department of Transportation for approximately ten years. Eight of those years he was a Highway Worker II performing highway maintenance activities. Grievant's removal was triggered by a series of incidents which occurred during January of 1988, and Grievant's past disciplinary conduct was also offered as further justification for the removal.

First, Grievant and three (3) co-workers left their work site at 11:35 a.m. to acquire a guardrail located at a garage fifteen (15) miles from the work site. They stopped at a restaurant to eat lunch and then picked up the guardrail and returned to the work site at 1:35 p.m. All of the employees involved were reprimanded.

Second, Grievant called in sick to work and failed to provide a doctors excuse for two (2) days straight. These actions violated work rules and violated a prior settlement agreement requiring the Grievant to present a physicians statement prior to formal approval of any sick leave request. Third, Grievant failed to properly prepare his truck for ice or snow removal after maintenance work on his truck was completed. A pre-disciplinary meeting was held on February 2, 1988, and the Grievant was removed on March 8, 1988.

EMPLOYER'S POSITION:

Employer had just cause to discharge the Grievant. The reprimand for leaving the work site was justified because Grievant: failed to follow a written policy, left the work area without a supervisor's permission, took a unexcused lunch and an extended lunch hour, and misused a state vehicle for personal use. The Grievant's disparate treatment argument is unsubstantiated because all workers involved received written warnings.

Grievant's absence on January 14 and 15 from work also violated work rules and violated a settlement agreement which required the Grievant to provide a physicians statement with sick leave requests. This absence merely continued a pattern of absence behavior engaged in by the Grievant.

Grievant claims he was not notified that his truck was serviced until 3:45 p.m. Other witnesses refute this and claim he was notified at 3:00 p.m. Even if he was notified at 3:45 it would have been his duty to inform his supervisor he didn't have enough time to complete the assignment, and he did not do this.

The Employer did not pyramid these Incidents for discipline. All events occurred within five (5) days, and there was not enough time to impose discipline separately. The employer's actions were not a result of the Grievant's political orientation.

UNION'S POSITION:

Employer did not have just cause to discharge the Grievant. The Union contends the employer stacked the charges against the Grievant. As to the first charge, none of the work rules used to discipline the Grievant exceeded a written reprimand. Furthermore, Grievant did not violate the work rules as specified. Union also alleged the Grievant was treated differently when compared to similarly situated employees.

The Employer's request for a physician's statement was unreasonable because a termination date for the requirement in the settlement agreement was never set. If discipline were warranted, it should have been a suspension rather than a removal.

The truck readiness charge was not the Grievant's fault as he was not told the truck was ready until 3:45. No one was available to authorize overtime for the Grievant, so he was unable to complete his duties. Grievant was discriminated against because of his political orientation.

ARBITRATOR'S OPINION:

Employer did have just cause to discharge the Grievant. The entire series of events is extremely troublesome, but the absenteeism infraction alone provides sufficient justification for the removal. Grievant failed to abide by the conditions contained in the "last chance" agreement, and he failed to provide any rationale for his absence.

The arbitrator is bound to the terms agreed to in the last chance agreement between the parties. He cannot examine this as a fresh case because the agreement put certain conditions on the employees continued employment. Grievant violated these conditions, and the employer's actions were justified. Because of the last chance agreement, the employer was not similarly situated to other employees and could be treated differently from other employees. Furthermore, nothing in the record indicates the employer was aware of the Grievant's political orientation at the time of the disciplinary actions.

AWARD:

Grievance is denied and dismissed.

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, THE OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 9

-and-

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

GRIEVANCE:
Eugene Strausbaugh (Discharge)

CASE NUMBER:
31-09-040188-0007-01-06

ARBITRATOR'S OPINION AND AWARD

Arbitrator:
David M. Pincus

Date:
December 16, 1988

APPEARANCES

For the Employer
Jack O. Snyder, Superintendent II
Matt Leach, Witness
Richard Noel,
Labor Relations Officer
Jack Burgess,
Chief, Arbitration Services

For the Union
Eugene Strausbaugh, Grievant
Robert Rhoades, Witness
Alonzo Lawhorn, Witness
Donald Sargent,
Field Representative
John Porter,
Associate General Counsel

INTRODUCTION

This is a proceeding under Article 25, Section 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, the Ohio Department of Transportation, District 5, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit #1).

The arbitration hearing was held on September 29, 1988 at the Office of Collective Bargaining, Columbus, Ohio. 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 not submit briefs.

STIPULATED ISSUE

Was the Grievant, Eugene Strausbaugh, removed for just cause? 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."

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, Pgs. 34-35)

. . .

Section 24.08 - Employee Assistance Program

"In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program, the Employer will give serious consideration to modifying the contemplated disciplinary action."

(Joint Exhibit 1, Pg. 37)

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, Pg. 10)

ARTICLE 11 - HEALTH AND SAFETY

. . .

Section 11.15 - Water and Restroom Facilities

"Safe, chilled drinking water will be provided to all employees. Employees shall have access to restroom facilities in close proximity to their place of employment except for road or field crews. Road or field crews working at a fixed location such as a construction site shall have access to a port-a-john. Whenever restroom facilities are not available, the Employer will make a good faith effort to provide transportation for employees to travel to a restroom upon request. In institutions, employees' restrooms shall be separate from those used by residents or inmates whenever practical."

(Joint Exhibit 1, Pg. 16)

JOINT STIPULATIONS

1. The grievant has been an ODOT employee since September, 1978.
2. The grievant has received the following previous discipline:

- April 10, 1985 - Verbal Reprimand for violation of safety rules
- June 3, 1985 - Verbal Reprimand for leaving work early.
- November 18, 1985 - Three-Day Suspension for neglect of duty.
- February 18, 1986 - Written Reprimand for unauthorized absence.
- June 10, 1986 - Written Reprimand for excessive absenteeism and unauthorized absence.
- July 21, 1986 - One-Day Suspension for neglect of duty.
- January 12, 1987 - Ten-Day Suspension for failure of good behavior and neglect of duty.

3. The grievance is properly before the arbitrator on its merits with no threshold issues.

CASE HISTORY

District Nine of the Ohio Department of Transportation, the Employer, services a number of counties within its geographic area. Eugene Strausbaugh, the Grievant, has been employed by the State of Ohio for approximately ten (10) years. For the last eight (8) years, the Grievant served as a Highway Worker II. This particular job classification requires employees to perform various highway maintenance activities which vary depending on the season of the year. For example, during the fall and spring these employees may be engaged in mowing and pothole patching activities, while snow and ice removal responsibilities may require most of their attention in the winter months.

The Grievant was removed for a series of incidents which took place during January of 1988. These incidents triggered the removal but the Grievant's past disciplinary conduct was also offered as further justification for the removal. Each of these incidents will be discussed below in chronological order.

On January 12, 1988 the Grievant and several co-workers were repairing a guardrail that bad been damaged as a result of a truck accident. The Grievant and three (3) other co-workers left the worksite at approximately 11:35 a.m. with the purported goal of acquiring a guardrail for repair purposes. Union witnesses noted that the guardrail was located at the Ross County Garage which is located approximately fifteen (15) miles from the worksite. Jack Snyder, Superintendent, and other witnesses stated that the above mentioned individuals never directly traveled to the Garage but instead stopped at a restaurant in Frankford, Ohio. This detour was allegedly undertaken to allow a female worker an opportunity to use a restroom facility. Union witnesses also maintained that the restaurant provided them with shelter from the extreme temperatures existing that day, and that they also enjoyed lunch while on the premises.

Snyder testified that he followed the truck into Frankford and observed the employees eating their lunch. At approximately 12:05 p.m. the crew left the restaurant and continued their journey toward the Garage. They eventually returned to the worksite at approximately 1:35 p.m., and completed their road maintenance responsibilities.

It should be noted that all of the employees involved in the above incident were reprimanded. The Grievant's co-workers, more specifically, received written reprimands, while the Grievant's participation served as one of the primary justifications resulting in his eventual removal. A number of charges were levied in support of this portion of the removal decision, these include in particular part: failure to follow a written policy, leaving the work area without the permission of a supervisor, unexcused tardiness and extended lunch hour, and misuse of a State vehicle for personal use.

On January 14, 1988 the timekeeper contacted Snyder and stated that the Grievant's wife contacted the Garage and maintained that the Grievant would be unavailable because of an illness. A similar circumstance took place on January 15, 1988. The Grievant contacted the Garage and had a conversation with Snyder, where he again confirmed that an illness prevented his attendance. A written statement (Employer Exhibit 8) provided by Jessica Leach, the Timekeeper, indicated that the Grievant came into the office on January 15, 1988 to pick up his check. Leach allegedly remarked that she had the Grievant's leave slips at her disposal and asked if he had a doctor's excuse documenting his illness. The Grievant allegedly noted that he would present appropriate documentation on January 19, 1988, the following Tuesday. Employer witnesses maintained that the Grievant never presented the documentation.

Again, the Employer considered the above incident as a violation of work rules dealing with failing to follow a written policy or directive and unauthorized absences. This incident, moreover, was viewed as a direct violation of a prior settlement agreement (Employer Exhibit 9) which required the Grievant to present a physician's statement prior to formal approval of any sick leave request.

The third and final incident allegedly took place on January 19, 1988. Snyder testified that at

approximately 3:30 p.m. he entered the garage area adjacent to the parking lot and noticed that a truck was parked at the end of the garage door without an attached plow or tailgate. Snyder allegedly engaged in an investigation concerning the readiness of the truck by discussing the situation with Mike Elliott, a mechanic on duty. Elliott allegedly remarked that the truck was ready, and that a hydraulic hose had been repaired earlier in the afternoon. Snyder claimed that he asked Elliott whether anyone had informed the Grievant about his truck's working status. Elliott purportedly stated that he had instructed Matt Leach, a temporary employee, to move the truck and inform the Grievant that the maintenance work had been completed.

Further investigation of the incident indicated that the Grievant had violated another policy. The policy dealt with the Grievant's failure to follow a written policy by not properly preparing his truck for ice or snow removal prior to the end of the shift.

The above series of events resulted in a pre-disciplinary conference on February 2, 1988. The following removal order was issued on March 8, 1988; it contained the following relevant particulars:

". . .
After reviewing the recommendation of the impartial administrator and others, and taking into consideration your past disciplinary record, it has been determined that just cause exists for this action.

The charges you have been found in violation of include:

Directive A-301, #34 - Violation of Section 124.34 of the Ohio Revised Code (Neglect of Duty, Failure of Good Behavior, Inefficiency).

Directive A-301, #20 - Failure to follow written policies of the Director, District, or offices.

Directive A-301, #13 - Leaving the work area without the permission of the Supervisor.

Directive A-301, #15 - Extended lunch hour.

Directive A-301, #16A - Unauthorized absence.

Directive A-301, #18 - Misuse of state vehicle (personal use).
(Joint Exhibit 2)

As a consequence of the above decision, the Grievant filed a formal grievance (Joint Exhibit 3). The grievance (Joint Exhibit 3) specified a number of contract violations and requested an appeal under the provisions contained in the Collective Bargaining Agreement (Joint Exhibit 1).

The Parties were unable to resolve the grievance (Joint Exhibit 3) at the various stages of the grievance procedure. The grievance (Joint Exhibit 3) 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 discharge the Grievant. The Employer noted that the totality of the Grievant's conduct for the period January 12, 1988 to January 19, 1988

constituted appropriate reasons for discharge. It was also alleged that the absenteeism charge constituted such an onerous violation that the removal decision should be upheld on this basis alone.

The Employer alleged that when the Grievant left the worksite with his co-workers for an extended period of time on January 12, 1988 he engaged in a number of work rule violations. Three violations were contained in Directive No. A-301 (Employer Exhibit 10). First, the Grievant failed to follow written policies of the Director, Districts, or offices (Employer Exhibit 10, pg. 4). The policy concerning breaks, lunch periods, and prohibitions involving leaving the worksite were purportedly contained in an agenda authored by Jack Snyder, the Grievant's Superintendent. Snyder testified that all employees were advised of this policy and that the Grievant acknowledged the discussion by signing a list provided by the Employer (Employer Exhibit 1). Further support concerning proper notification was provided in the form of a written statement authored by Carl Eder, Assistant Superintendent, on January 29, 1988 (Employer Exhibit 2). Second, the Grievant's departure also allegedly violated two additional work rules dealing with leaving the work area without the permission of the supervisor and unexcused tardiness, leaving early, or extended for an extended lunch hour (Employer Exhibit 10, Pg. 6). Last, by leaving the worksite in a State vehicle, the Grievant purportedly misused a State vehicle because he utilized it for his own personal use.

The Employer maintained that the facts surrounding the above incident are relatively uncontested. These facts, moreover, were supported by Employer and Union witnesses and a series of witness statements gathered after the incident (Employer Exhibit 3).

The Employer contested the rationale provided by the Union dealing with the departure from the worksite. With respect to the restroom facility matter, the Employer acknowledged that the Agreement requires the Employer to make a good fair effort to provide transportation to restroom facilities, upon request, when they are unavailable. In this particular instance, however, only the female employee requested the use of restroom facilities. The remaining employees never voiced their request prior to the departure. A rebuttal of the Union's temperature contention was also offered by the Employer. Documented temperature readings introduced as evidence (Employer Exhibit 14) clearly indicated the temperature on the date of this incident to be 43º rather than the alleged 10º. Thus, the Employer did not view the temperature argument as a viable mitigating factor; if anything, it served to discredit the Grievant's credibility.

The Employer contested the Union's disparate treatment argument. All of the employees involved in the altercation were reprimanded via written warnings. Justification for Grievant's removal was based on this particular incident, the incidents which followed, and the Grievant's previous work record.

The Grievant also purportedly violated several other work rules when he failed to appear for work on January 14, 1988 and January 15, 1988. Again, the Grievant allegedly violated the work rule dealing with failure to follow written policies of the Director, Districts, or offices (Employer Exhibit 10, Pg. 4). The directive referred to dealt with a "last chance" settlement agreement negotiated by the Parties on September 3, 1987 (Employer Exhibit 9). It was fashioned as a consequence of the Grievant's existing absenteeism problem and required that any future sick leave requests be accompanied with a Physician's Statement within the same pay period. The Grievant's absence on the above-mentioned dates, moreover, violated an additional work rule dealing with unauthorized absences (Employer Exhibit 10, Pg. 6).

The Employer remarked that the facts surrounding the above incident were, again, uncontested. The Grievant clearly was absent for two days without authorization. Evidence introduced at the hearing raised some inferences concerning the Grievant's state of health. A written statement authored by the Timekeeper indicated that the Grievant picked up his paycheck on January 15, 1988; the day of his alleged illness (Employer Exhibit 8). It was also emphasized

that the calls made by the Grievant, notifying the Employer of his upcoming absences, failed to provide the Employer with any specific rationale, or the condition which precipitated his illness. In fact, the Employer maintained that the Grievant never submitted any written, or any other rationale for his unauthorized absences.

The Employer contested the Union's Employee Assistance Program arguments in a number of ways. First, the Employer maintained that it complied with the contractual provisions dealing with Employee Assistance Plans (see Pg. 3 of this Award for Article 9 - Employee Assistance Program and Pg. 3 of this Award for Article 24 - Discipline, Section 24.08 - Employee Assistance Program). The Employer, more specifically, asserted that it cooperated and endorsed the action of employee assistance as evidenced by the Grievant's participation in a certified program, and the fact his insurance covered his participation in the program. Second, documents (Union Exhibit 2) provided by the Union evidencing the Grievant's participation in a program took place for the most part after the above incidents occurred. Also, the Grievant's contention that his participation was a consequence of work-related stress was not properly supported.

Labor Relations Officer Richard Noel maintained that this particular absence merely continued a pattern of absence behavior engaged in by the Grievant. He referenced the Grievant's Leave Usage Records (Employer Exhibit 13) to substantiate the extended weekends and holidays enjoyed by the Grievant for the period September 4, 1985 to January 15, 1988.

The Employer also introduced a number of documents evidencing the Grievant's previous reprimands dealing with absenteeism related misconduct. First, a five (5) day suspension issued on July 10, 1986 which was eventually reduced to one (1) day by an arbitrator. Second, a written reprimand for the unauthorized absence on February 18, 1986. Last, a three (3) day suspension issued by the Employer for excessive absenteeism on November 18, 1986 (Employer Exhibit 12).

The truck readiness incident which took place on January 19, 1988 was also viewed as a direct violation of the work rule dealing with failing to follow written policies of the Director, Districts, or offices (Employer Exhibit 10, Pg. 4). The policy concerning truck readiness was allegedly contained in the previously described Agenda and signed by the Grievant indicating that notice had been provided (Employer Exhibit 1).

The Employer maintained that its witnesses provided a more credible version dealing with the events which transpired on January 19, 1988. The Employer, more specifically, asserted that the Grievant had personal knowledge that his truck had been serviced and ready to be equipped with snow and ice removal equipment prior to 3:45 p.m. This conclusion was based on a number of inferences drawn from testimony and internal maintenance documents. Snyder testified that at approximately 3:30 he arrived at the Garage and noticed that the Grievant's truck was not properly prepared. A conversation with the mechanic indicated that a hydraulic hose had been earlier replaced. He, moreover, noted that he directed a temporary employee to pull the truck around and to inform the Grievant that the truck was ready to be equipped for ice and snow removal. This testimony was bolstered by testimony provided by the temporary employee. He asserted that he moved the truck at approximately 3:00 p.m. and that he communicated the information to the Grievant in the smoking lounge shortly thereafter. In support of this testimony, the Employer introduced a work order which indicated that the work had been completed by 3:00 p.m. and so noted by the temporary employee (Employer Exhibit 6).

The Grievant's actions, or lack thereof, allegedly lessened the credibility of his testimony. Snyder claimed that if the Grievant's version was accurate, that he was informed of his truck's readiness at 3:45 p.m., he was obligated to inform his supervisor that he did not have enough time to complete the assignment. A notification of this sort never took place. In addition, the Grievant testified that a number of co-workers were present when he was informed that his truck was ready. Since these individuals were not involved in any other activities, they could have assisted the

Grievant in completion of his task.

The totality of the above incidents was also viewed as a violation of O.R.C. Section 124.34, in particular part: failure of good behavior, neglect of duty, inefficiency, and failure to maintain a work schedule. This O.R.C. Section was thought to be applicable because of its incorporation via a recognized work rule (Employer Exhibit 10, Pg. 8).

The Employer maintained that it did not engage in any effort to pyramid the previously mentioned incidents. These charges, more specifically, occurred within five (5) working days; a period of time that was far too short for the Employer to take any effective action without jeopardizing its investigation responsibilities. The Employer noted that it did not reprimand any of the employees involved in the first incident until the third incident had already taken place.

The disparate treatment claim based upon the Grievant's potential affiliation was also refuted by the Employer. It claimed that the Union failed to establish that the Employer was motivated by any politically based animus. In fact, several Employer witnesses claimed that they were not aware of the Grievant's political orientation until the issue was raised by the Union and they investigated the matter.

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 contested each of the charges on substantive and procedural grounds.

With respect to the first charge, the Union alleged that the Employer stacked the charges against the Grievant. The Union maintained that none of the work rules used to discipline the Grievant exceed a written reprimand for the first offense, and thus, the removal decision based on this incident seemed excessive.

It was also alleged that for a number of reasons, the charges were inappropriately specified. First, the Union claimed that the Grievant never violated Violation Number 13 (Employer Exhibit 10, Pg. 6). The Union, more specifically, maintained that his group leader accompanied him to Frankford and as a consequence he had his immediate supervisor's permission. Second, evidence and testimony clearly indicated that the Grievant was not engaged in an extended lunch hour in violation of Violation Number 15 (Employer Exhibit 10, Pg. 6). Testimony provided by the Grievant and other witnesses accurately accounted for the time spent away from the worksite. The lunch period never exceeded one (1) hour and the remaining time was spent appropriating the guardrail from the Garage. Third, the Grievant did not misuse a State vehicle in violation of Violation Number 18 (Employer Exhibit 10, Pg. 6) on January 12, 1988 because he did not drive the vehicle to the restaurant. Last, the Grievant did not violate Violation Number 2 (c) (Employer Exhibit 10, Pg. 4) because he was not insubordinate. The Grievant, more specifically, never violated the Agenda item dealing with lunch breaks (Employer Exhibit 1) because his actions merely complied with his restroom facility privileges under the Agreement (see Pg. 4 of this Award for Article 11 - Health and Safety, Section 11.15 - Water and Restroom Facilities).

The Union also alleged that the Grievant was treated differently when compared to the similarly situated employees. The Grievant maintained that on a regular basis other employees frequently used State vehicles for lunch purposes. These employees, however, have never been similarly reprimanded.

Similar objections were raised by the Union with respect to the sick leave or absence issue. A significant portion of the Union's arguments dealt with the propriety of the "last chance" agreement (Employer Exhibit 9). The Union viewed the Employer's physician statement request as unreasonable because the document never specified a termination date for the requirement. Since the Grievant abided with the request for approximately six (6) months, the Union considered

the most recent request as unreasonable because no other employee was faced with similar contingencies. Further, the reasonableness of the requirement seemed contrived because the Grievant had seventy (70) hours of available sick leave at the time of the incident.

The Union, moreover, considered the disciplinary action as unreasonable because the Grievant complied with the Employer's sick leave policy. That is, the Grievant called in sick on both dates.

Even if the Employer was justified in assessing a penalty as a consequence of the Grievant's absence activity, the Union alleged that the penalty assessed was in conflict with the Employer's policy. The Union, more specifically, asserted that the Grievant's third offense should have resulted in a five-day suspension rather than removal (Employer Exhibit 10, Pg. 6).

The Union argued that the Grievant's problems were exacerbated by the Employer's refusal to abide by the Employee Assistance Program language negotiated by the Parties (see Pg. 3 of this Award for Article 9 - Employee Assistance Program, see Pg. 3 of this Award for Article 24 - Discipline, Section 24.08 - Employee Assistance Program). The Union alleged that the Employer should have delayed the disciplinary action until the completion of the Grievant's disciplinary program. Participation by the Grievant in such a program was brought to the Employer's attention at the third step of the grievance procedure.

The truck readiness charge was also hotly contested by the Union. The Union claimed that the Grievant was not insubordinate, and that he did not impair the Employer's ability to carry out its duty to the public. The Union argued that the Grievant did not intentionally ignore his duty. A number of conditions prevented the Grievant from accomplishing his tasks. The Grievant was not notified until 3:45 p.m. about the completion of the hydraulic hose. As a consequence, this task could not be completed because the necessary equipment was buried among the parked trucks, and the Grievant's loader refused to help. The Grievant could have completed the task if someone would have authorized overtime. Since Management representatives were unavailable for authorization purposes, the Grievant alleged that be could not complete the task.

Finally, the Union claimed that the entire series of events was permeated with a semblance of discriminatory animus. This animus was purportedly based on the Grievant's political orientation.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony presented at the hearing it is this Arbitrator's opinion the Employer did have just cause to discharge the Grievant. This Arbitrator finds the entire series of events as extremely troublesome, and quite incorrigible. The primary focus of the following analysis centers, however, on the absenteeism infraction because this incident, in isolation, provides sufficient justification for the removal.

When parties enter into "last chance" agreements certain obligations and responsibilities ensue. The employer basically decides that the circumstances justify a rehabilitative effort; which results in the conversion of a disciplinary penalty into a conditional reinstatement. The employee, moreover, assumes certain responsibilities when he and the Union agree to such an undertaking. He pledges that the conditions agreed to will be complied with; if he fails to do so then he agrees that he will shoulder all of the attached consequences.

Clearly, the Grievant in this particular instance has failed to abide by the conditions contained in the "last chance" agreement (Employer Exhibit 9). He did not submit a physician's statement to his supervisor within the same pay period. In fact, he never provided any substantial rationale concerning his absence, yet he remarkably recovered in time to pick up a paycheck on January 15, 1988.

This Arbitrator is bound by the terms agreed to by the Parties. These terms, moreover, place the Grievant in a special category because of the conditions attached to his continued

employment. Thus, the Employer did not engage in disparate treatment, even though other employees may not be required to submit physician statements. Other employees, more specifically, are not similarly situated because their continued employment is not conditioned by "last chance" agreements. The Union's duration arguments are also misplaced. This Arbitrator would have closely scrutinized the open-ended status of the conditional reinstatement document if the Grievant's activities had occurred a significant time period beyond the original signing. The incidents in question, however, took place within a time period in close proximity of the signing. Any reasonable person would have anticipated the binding nature of the conditions.

A review of the Employee Assistance Program contract language (see Pg. 3 of this Award for Article 9 - Employee Assistance Program, see Pg. 3 of this Award for Article 24 - Discipline, Section 24.08 - Employee Assistance Program) does not support the Union's arguments. This language does not place an absolute obligation on the Employer to place a discipline action in abeyance as a contemplated or actual participation in an Employee Assistance Program. This language does provide in particular part that " . . . the disciplinary action may be delayed until completion of the program." (See Pg. 3 of this Award for Article 24 - Discipline, Section 24.08 - Employee Assistance Program). In light of the Grievant's absenteeism record (Employer Exhibit 13) and his discipline record (Employer Exhibit 12), the reasons for the Employer's actions seem quite apparent.

The Arbitrator also views the documents submitted by the Grievant in support of his attendance at Scioto Paint Valley Mental Health Center (Union Exhibit 2) as highly self-serving. These documents indicate that he participated in some programming efforts after the incident, yet he maintained that he participated in these programs for approximately two (2) years. The Grievant failed to provide any evidence in support of this premise.

The political animus claims raised by the Union were also unsupported by any testimony or evidence. Nothing on the record indicates that the Employer was aware of the Grievant's political orientation at the time of the disciplinary actions.

AWARD

The grievance is denied and dismissed.

Dr. David M. Pincus
Arbitrator

December 16, 1988