ARBITRATION DECISION NO.:
208

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

EMPLOYER:
Department of Rehabilitation
and Correction
Ross Correctional Institute

DATE OF ARBITRATION:
August 31, 1989

DATE OF DECISION:
November 6, 1989

GRIEVANT:
Jamie Remy

OCB GRIEVANCE NO.:
27-23-(88-12-14)-0055-01-03

ARBITRATOR:
David M. Pincus

FOR THE UNION:
Donald M. Sargent

FOR THE EMPLOYER:
Ted Durkee
Lou Kitchen

KEY WORDS:
Last Chance Agreement
Absenteeism
Employee Assistance Program

ARTICLES:
Article 9-Employee Assistance
Program
Article 11-Health and Safety
§11.03-Unsafe Conditions
§11.10-Concern for
Pregnancy Hazards
Article 24-Discipline

§24.01-Standard
§24.02-Progressive Discipline
§24.04-Pre-Discipline
§24.05-Imposition of Discipline
§24.08-Employee Assistance Program
Article 34-Service Connected Injury and Illness
§34.02-Coverage for Workers' Compensation Waiting Period

FACTS:

The grievant was a Corrections Officer II. Grievant has been disciplined for attendance problems by both employers. Grievant had exhausted her sick leave balance and had to deal with pregnancy problems and a molestation attempt on her daughter. Employer granted her three days administrative leave to attend the Employee Assistance Program (EAP). Because of grievant's problems with attendance, the employer and grievant entered into a last chance agreement which stated that the employee would:

a. provide a physician's statement for all absences related to illness or injury;
b. requirement "a" will be in effect until the employee is credited with additional sick leave, but, may be reinstated if an attendance or pattern abuse reoccurs; and
c. employee will have no unexcused absences for a one year period from the date of the suspension.

Grievant went on disability leave for her pregnancy and upon returning to work was allegedly injured while carrying books from a prison cell to a lock up area. There is dispute over whether the physician's excuse that grievant turned in is valid and fulfills the condition of the last chance agreement.

EMPLOYER'S POSITION:

Removal was based on three separate incidents of violations of the Standards of Employee Conduct. Grievant was on notice of the possible consequences of future violations and had signed a last chance agreement that outlined the employment requirements. Grievant's absences were contrived; grievant did not fill out an injury report for the work injury until seven days after the alleged injury. The injury was also suspect because she did not follow the proper procedures for moving items from a cell into another area. The time of the injury is not supported by the unit log book. The physician's excuses which the grievant submitted were vague, undated, and signed by office personnel and not by grievant's physician. Grievant had run out of leave time. She was counseled on her low amount of leave time left.

Grievant also violated another provision of her last chance agreement by being absent in a pattern which would indicate sick leave abuse in that she combined holidays with absences. Grievant was absent fifteen percent of the time over the last three month period. Grievant was also progressively disciplined. She was first counseled, then given a written reprimand, followed by a one day suspension, and then later a three day suspension and finally the last chance agreement.

UNION'S POSITION:

The Union argues that employer did not have proper justification to remove grievant. Although grievant did experience past absenteeism difficulties, she showed marked improvement after her three day suspension. It was only during and after her pregnancy that she encountered additional problems. Grievant injured her back carrying property from a prisoner's cell to the lock up area. The medical bills for this injury were compensated, but employer did not compensate grievant for three days she missed as a result of this injury, thus violating Section 34.02. Later the grievant was ill at work and vomited. She was allowed to go home two hours early. Grievant submitted a doctor's statement for each absence.

Grievant was also not treated the same as other employees. Another employee who experienced similar attendance problems was only given a five day suspension for a similar violation. This other employee was only removed after five separate incidents of absenteeism. The arbitrator should also consider mitigating factors such as Employee Assistance Program (EAP) attendance, an improvement in grievant's record after the three day suspension, and the problems that are associated with pregnancy.

ARBITRATOR'S OPINION:

Employer had just cause to discharge grievant based primarily on the terms of the last chance agreement between grievant and employer. Last chance agreements are supported by consideration and give an employee an opportunity to rehabilitate themselves. The arbitrator must follow the terms of the last chance agreement. Grievant violated the agreement by not being able to provide a bona fide physician's statement. The note provided by grievant was not specific enough to serve the purpose of an excuse. The doctor never saw the grievant and her condition can not be validated by his diagnosis based on past medical history. There was also some evidence of pattern abuse; the linking of holidays with absences is suspicious. The difference between the treatment of grievant and others is reasonable based on the different circumstances of the employees and not evidence of disparate treatment.

AWARD:

The 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, OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS, ROSS CORRECTIONAL INSTITUTION

-and-

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

GRIEVANCE:
Jamie Remy (Discharge)

CASE NUMBERS:
27-23-(88-12-14)-0055-01-03

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: November 6, 1989

APPEARANCES

For the Employer
Gary C. Mohr, Appointing Authority
Sandra Price, Personnel Officer
Gerald Clay, Case Manager
Greg McCorkle, Captain
Lou Kitchen, Second Chair
Ted Durkee, Advocate

For the Union
Jamie Remy, Grievant
David Porter, Correction Officer II
Donald M. Sargent, Staff Representative/Advocate

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, Ohio Department of Rehabilitation and Correction, Ross Correctional Institution, 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 August 31, 1989 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.

ISSUE

Was the removal of Jamie Remy, the Grievant,
on December 5, 1988, for just cause?

If not, what should the remedy be?

PERTINENT CONTRACT PROVISIONS

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 11.03 - Unsafe Conditions

. . .

An employee shall not be disciplined for a good faith refusal to engage in an alleged unsafe or dangerous act or practice which is abnormal to the place of employment and/or position description of the employee. Such a refusal shall be immediately reported to an Agency safety designee for evaluation. An employee confronted with an alleged unsafe situation must assure the health and safety of a person entrusted to his/her care or for whom he/she is responsible and the general public by performing his/her duties according to Agency policies and procedures before refusing to perform an alleged unsafe or dangerous act or practice pursuant to this Section.

Nothing in this section shall be construed as preventing an employee from grieving the safety designee's decision.

(Joint Exhibit 1, Pg. 12)

. . .

Section 11.10 - Concern for Pregnancy Hazards

The Employer will make a good faith effort to provide alternative, comparable work and equal pay to a pregnant employee upon a doctor's recommendation.

. . .

(Joint Exhibit 1, Pg. 14)

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.

. . .

Section 24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

Section 24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-disciplinary meeting. At the discretion of the Employer, the forty-five (45) days requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

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

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if be/she agrees to the reassignment.

(Joint Exhibit 11, Pgs. 34-36)

. . .

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 34 - SERVICE CONNECTED INJURY AND ILLNESS

. . .

Section 34.02 - Coverage for Worker's Compensation Waiting Period

An employee shall be allowed full pay during the first seven (7) working days of absence when he/she suffers a work-related injury or contracts a service-related illness. If an employee receives a Worker's Compensation award for the first seven (7) days, the employee will reimburse the Employer for the payment received under this Article.

. . .

(Joint Exhibit 1, Pgs. 53-54)

Stipulated Facts

1. Grievant was appointed April 13, 1987, as a Correction Officer 2 at Chillicothe Correctional Institution and transferred to Ross Correctional Institution January 3, 1988.

2. Grievant's prior disciplinary record consists of:

11/16/87 - Unauthorized Absence (Rule #1a) Written Reprimand
- Failure to follow post orders, administrative regulations, and/or written policies or procedures (Rule #6c)

12/29/87 - Unauthorized Absence (Rule #1a) 1-day suspension
- Failure to follow post orders, administrative regulations, and/or written policies or procedures (Rule #6c)

6/6/88 - Unauthorized Absence (Rule #1a) 3-day suspension
- Excessive Absenteeism (Rule #3)
- Failure to follow post orders, administrative regulations, and/or written policies or procedures (Rule #6c)
- Willfully falsifying, altering, or removing an official document arising out of employment with DR&C (Rule #21)
- Other actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee (Rule #35)

3. Grievant and OCSEA/AFSCME signed a last chance agreement May 9, 1988.

4. Grievant received a copy of the revised Standards of Employee Conduct January 4, 1988.

5. Grievant was discharged December 5, 1988, for allegedly violating the Standards of Employee Conduct Rules:

#1a - Unauthorized absence including habitual absenteeism, pattern abuse, tardiness, and early departure.

#3 - Excessive Absenteeism.

#6c - Failure to follow post orders, administrative regulations and/or written policies or procedures.
6. A grievance was filed December 14, 1988, directly to Step 3. The Step 3 hearing was held January 3, 1989, to resolve the dispute with a written response issued January 19, 1989. After a written denial at Step 4 on February 7, 1989, OCSEA/AFSCME, Local 11, requested arbitration on February 15, 1989.

7. The grievance is properly before the Arbitrator to make a determination on the merits.

8. There are no procedural matter still at issue.

9. Grievant had no accrued balance of sick, personal leave, or compensatory leave as of August 27, 1988. By pay period ending November 19, 1988, grievant had accrued 17.3 hours vacation, used 16 hours vacation leaving ending balance of 2.5 hours.

10. Grievant was on disability leave for pregnancy from June 13, 1988 to August 22, 1988.

11. Grievant supplied doctor's statements for absences of September 3, 4 and 5, 1988; October 9 and 10, 1988, and November 12, 13 and 14, 1988.

12. Grievant filed a workers' compensation claim for a work-related injury of September 1, 1988.

13. Grievant completed an incident report on September 8, 1988, and workers' compensation forms; C-3, Application for Medical Benefits, and ADM 4303, Accident and Illness Report on September 12 and 15, 1988 respectively.

14. Correction Officers David Porter and Jamie Remy were assigned to Housing Unit 7 on October 9, 1988.

15. Correction Officers Gerald Clay and Jamie Remy were assigned to Housing Unit 8 on September 1, 1988.

Thomas E. Durkee,
Labor Relations Officer
Department of Rehabilitation
and Correction

Don Sargent, Staff Representative
OCSEA/AFSCME, Local 11

CASE HISTORY

Ross Correctional Institution, the Employer, is a medium security facility which approximately houses 1700 inmates. These inmates, moreover, are supervised by 36 corrections officers on the second shift.

Jamie Remy, the Grievant, was originally hired by the Chillicothe Correctional Institution as a Corrections Officer II on April 13, 1987. It should be noted that at the time of the Grievant's removal she had realized one and one-half years of seniority. During her brief tenure at the above mentioned facility the Grievant experienced a number of attendance related problems. On November 16, 1987, the Grievant received a written reprimand for violating Rule #1a and Rule #6c of the Standards of Employees Conduct (Joint Exhibit 4). In a like fashion, the Grievant received a one (1) day suspension on December 29, 1987 for similar acts of misconduct.

On January 3, 1988, the Grievant transferred to the Ross Correctional Institution, but retained her job classification. The Grievant, moreover, performed her duties on second shift which required her attendance from 4:00 p.m. to 12:00 p.m. Her record of service, however, while employed at the new facility, reflected a series of absenteeism related incidents. Each of the incidents will be discussed in terms of its potential impact on the ultimate removal decision.

Shortly after the transfer, the Grievant once again experienced certain problems. Some of these sick leave related problems dealt with pregnancy difficulties while others concerned a molestation attempt on her daughter. These problems engendered a number of absences which in turn caused difficulties because the Grievant had exhausted her sick leave balances. Upon returning to the facility a pre-disciplinary hearing was held. Gary Mohr, the Appointing Authority, granted the Grievant three (3) days administrative leave with pay to seek an Employee Assistance Program. The Grievant took this leave on March 23, 1988 and March 24, 1988 while the investigation continued (Employer Exhibit 4). It should be noted that the Grievant received outpatient services at Shawnee Mental Health Center from May 11, 1988 to July 19, 1989 (Union

Exhibit 1).

On or about May 9, 1988, the Parties and the Grievant entered into a last chance agreement. This Agreement resolved the above disciplinary action but a number of pertinent particulars were mutually agreed to:

". . .
There is just cause for discipline for violation of Rules #1a, unauthorized absence; #3, pattern abuse; #6c, failure to follow call-off procedures; #21 falsification of a physician's statement; and #35, actions that compromise the ability of employee to carry out her duties.

NOW THEREFORE, all parties hereto, in consideration of the mutual covenants and agreements to be performed, as hereinafter set forth, agree as follows:

1. The disciplinary action is mitigated to a three-day suspension on a "last chance" basis under the following leave requested.

a. Employee will provide a physician statement for all absences related to illness/injury, regardless of leave requested.

b. The requirement for a physician's statement shall be in effect until the employee is credited with additional accrued sick leave and may be reinstated if an attendance or pattern abuse reoccurs.

c. Employee will have no unexcused absences for a one-year period from the date of suspension.

d. In the event of a violation of one of the above rules under similar circumstances, the employee waives the right to appeal the severity of discipline up to and including removal; however, the employee maintains the right to grieve whether or not there was just cause for discipline.

2. The employee agrees not to grieve the three-day suspension.
. . ."

(Joint Exhibit 5, Pg. 1)

The Grievant served her three (3) day suspension on June 6, 1988 to June 10, 1988. Shortly thereafter the Grievant went on a disability leave for pregnancy purposes. The Grievant, more specifically, went on disability leave from June 13, 1988 through August 21, 1988 (Employer Exhibit 4).

On September 1, 1988, the Grievant testified that she received a call which indicated that isolation needed a pack-up in an inmate's cell. She allegedly conducted an itemized inventory. The inmate purportedly possessed an excessive number of hard-covered texts which she packed in some garbage bags. The Grievant, moreover, maintained that as she picked up one of the bags to move it out of the way she hurt her back. She felt a burning sensation which went away when she straightened her posture.

The Grievant reported to work on September 2, 1988. It should be noted that she did so without notifying her supervisor about her injury. She did, however, contend that she spend most of the day running up and down stairs, and as a result started feeling back pains.

When the Grievant arose on September 3, 1988 she realized that she could not straighten up; and that she was bleeding. Records indicate that the Grievant contacted the facility on two (2) occasions on September 3, 1988 (Joint Exhibit 2, Pg. 19). She initially told the Employer that she would not be able to report on September 3, 1988. The second call emphasized the seriousness

of her condition and conveyed that the hospital had told her not to return until September 5, 1988. Since the Grievant's "good days" were September 6, 1988 and September 7, 1988, she told the facility that she would not return until September 8, 1988. Even though the Grievant called in to report her absence and returned with a medical statement (Joint Exhibit 2, Pg. 19), the Grievant had no sick leave to cover these absence occurrences.

A second absence related occurrence took place on October 9, 1988. The Grievant alleged that she vomited several times that evening. A fellow officer, David Porter, testified that he was aware of the Grievant's condition and that several management representatives were equally aware of the situation. The Employer gave the Grievant a day pass and instructed her to obtain and submit a physician's verification. Although the Grievant called off and submitted a physician's statement (Joint Exhibit 2, Pg. 11), the Employer had some questions concerning its contents.

The final incident took place on November 12, 1988. The Grievant maintained that she had a high fever, sore throat, and an ear infection. The Employer admitted that the Grievant did call in on a timely basis. The Grievant alleged that the first available doctor's appointment could only be arranged for November 15, 1988. Again, the Grievant was absent for a number of days (November 12, 1988 - November 14, 1988) which were proximate to his good days. She once again submitted a leave form and a physician's statement. Yet she only had eight (8) hours of vacation time to cover the entire absence episode.

On November 22, 1988, the Grievant received a Pre-disciplinary Conference Notice. It contained the following particulars:

". . .
It is alleged you violated the Standards of Employee Conduct
Rule #(s)

1a, 1d, 3 and 6c

This allegation is supported by the following incident/facts:

You have been charged with violation of Employee Standard of Conduct rules 1a, 1d, 3 and 6c. Specifically since your return to work on August 22, 1988 you have missed 7 days of work. In every case these leaves have been before or after your good days. Your actions are in violation of the Departmental Sick Leave Policy - Pattern Abuse. You have failed to comply with the mutually agreed upon Last Chance - Labor Relations Agreement signed May 9, 1988.
. . ."

(Joint Exhibit 2, Pg. 3)

An investigation led to the conclusion that removal was the only appropriate disciplinary outcome. A Notice of Disciplinary Action was issued on November 29, 1988. This notice, moreover, specified that December 5, 1988 was the effective date of the removal. The decision was based upon the following infractions:

". . .
You have been found guilty of violation of Employee Standard of Conduct rules 1a, 3 and 6c and the Last Chance Agreement signed May 9, 1988. In accordance with the AFSCME contract you have received progressive discipline for your excessive absenteeism and your pattern of abuse. In May of this year the Department of Rehabilitation and Corrections entered into a Last Chance Agreement with you in an attempt to give you a chance to alter your behavior. It is evident

to this writer that your inappropriate behavior has not been deterred by these methods.
. . ."

(Joint Exhibit 2, Pg. 1)

On December 6, 1988, the Grievant challenged the above decision by filing a grievance. The Grievance Form contained the following statement of fact:

". . .
Statement of Facts (for example, who? what? when? where? etc.):

On 12-5-88 - C.O. Jamie Remy recieved (sic) notification of her discharge from employment as a Corr. Off. II at the Ross Corr. Institution. For missing 7 days work since Sept. 1988. Management contends also a violation of a settlement agreement previously negociated (sic) in the grievants behalf for and by the grievant. The Union is grieving under Art. 25, Section 25.07.
. . ."

(Joint Exhibit 3)

On January 19, 1989, Nicholas Menedis, Chief of Labor Relations, issued the Employer's Third Step response. The grievance was denied because of the Grievant's continual and consistent pattern of absenteeism. Also, Menedis contended that the Grievant violated the conditions contained in the last chance agreements.

The Parties were unable to resolve the grievance at the subsequent stages of the grievance procedure. Since the Parties failed to raise any objections on either substantive or procedural grounds, 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 discharge the Grievant. This managerial decision was based upon three (3) separate incidents which took place during 1988, which involved various violations of Employee Standards of Conduct Rules 1A, 3, and 6C. These incidents, moreover, additionally resulted in violations of particulars contained in a Last Chance Agreement (Joint Exhibit 5, Pg. 1) mutually negotiated by the Parties and the Grievant.

The Employer alleged that the Grievant was adequately forewarned of the possible consequences of her disciplinary conduct. Captain Greg McCorkle testified that the Grievant was warned via a number of sources. He acknowledged through testimony and documentation (Employer Exhibit 1) that the Grievant was counseled a number of times about her sick leave balances. These counseling interventions reflected a long-standing multi-stage practice. The Grievant was initially counseled when her sick leave balance reacted the sixteen hour level. She was again counseled when the balance was totally depleted. Feedback or notice was additionally provided via a series of performance evaluations (Joint Exhibit 7). Comments on these documents indicated that the Grievant was forewarned of her excessive use of sick leave.

The Employer claimed that each of the instances in question independently and jointly supported the removal decision. Each of the incidents, more specifically, reflected certain work rule violations, violations of the Last Chance Agreement (Joint Exhibit 5), and an overall pattern of incorrigible behavior.

The Employer viewed the absences engendered by the September 1, 1988 pack-up as totally

contrived. As such, the absences were viewed as unauthorized; in violation of Rule 1A (Joint Exhibit 4); and terms of the Last Chance Agreement (Joint Exhibit 5) dealing with unexcused absences.

The Employer raised a number of concerns which questioned the veracity of the Grievant's injury incident summary. These queries, moreover, tainted the accuracy of the doctor's excuse submitted as justification for the September 3 through 5, 1988 absences.

First, if the injury did take place on September 1, 1988 the Grievant should have filled out an incident report and reported the injury to her immediate supervisor. This procedure was discussed by several Employer witnesses who reviewed the procedure; and noted that they received this training at the Police Academy, during in service training sessions, and in their pay stubs on or about April 1, 1988.

Second, the possibility of an injury is also muddied by the Grievant's attendance record (Joint Exhibit 6). This institutional document indicates that the Grievant reported to work the following day, worked the entire shift, and failed to report the injury. She eventually did report the injury on September 8, 1988, seven (7) days after the incident which engendered her alleged condition.

Third, if the Grievant did indeed pack-up the inmate's belongings she should have followed long-standing pack-up procedures. Gerald Clay, a Case Manager and at the time of the incident a Correction Officer II, provided testimony which seemed to contradict the Grievant's assertions. He maintained that pack-ups are never conducted without a back-up officer, and under no circumstance would an officer carry the pack-up by himself.

Fourth, the Grievant seemed to contradict her own version of the incident. At the hearing, the Grievant testified that the pack-up took place shortly after dinner at approximately 5:00 p.m. to 6:00 p.m. Yet, this version conflicted with data contained in the Unit Log Book. (Employer Exhibit 5) and the Isolation Log Book (Employer Exhibit 6). These logs, more specifically, indicated that the pack-up was completed between 9:45 p.m. and 1:25 p.m.

Discrepancies concerning the circumstances which gave rise to the injury were also discussed by the Employer. The Grievant stated in an Accident or Illness Report (Joint Exhibit 8) that she injured herself when she ". . . lifted the bag to place it in 'C' pod of Unit 8. I felt a pain as I straightened up." At the hearing, however, she alleged that she sustained the injury when she picked up Cook's belongings, but that two (2) inmates actually moved them from the cell.

The Employer maintained that the Grievant's absence on October 10, 1988 was also unauthorized because the doctor's verification was contrived (Joint Exhibit 2, Pg. 11). This statement was thought to be deficient because it violated a specific condition contained in the Last Chance Agreement (Joint Exhibit 5). That is, the statement was undated, vague, and initiated by office personnel rather than the Grievant's personal physician. The Employer also emphasized that the Grievant had no leave to cover the absence on October 10, 1988.

The Grievant purportedly engaged in similar activities in November of 1988. Although the Grievant called off in a timely fashion, submitted a leave form and a physician's statement, she did not possess a sufficient amount of leave to cover these absence occurrences. She, more specifically, only enjoyed eight (8) hours of vacation leave, and yet, accumulated twenty-four (24) hours of absence.

In addition to the above authorization violations, the Employer felt that the physician's statement was contrived (Joint Exhibit 2, Pg. 9). It did not specify the nature of the Grievant's illness nor contain any diagnostic related comments. The timing of this particular visitation also seemed a bit peculiar. The Grievant waited for an appointment with her doctor on her "good day," while she did not wait but engaged in proactive attempts to improve her condition when confronted with prior similar incidents.

While the above review surfaced certain data specific violations, the Employer also alleged that

the removal was justified based on a number of more general violations. First, the Employer claimed that the Grievant violated Rule 1A because she exhibited pattern abuse. Mohr defined this concept as incidents that are similar in nature, scope, and time. These features characterized the above series of incidents because each absence occurrence seemed to be coupled with a holiday and/or the Grievant's "good days." This activity not only violated Rule 1A but also the Last Chance Agreement (Joint Exhibit 5).

Excessive absenteeism charges, which represented violations of Rule 3 and the Last Chance Agreement (Joint Exhibit 5) were also raised by the Employer. Price reviewed a Sick Leave Usage Report for the period January 3, 1988 to December 5, 1988 (Employer Exhibit 4). The Grievant's overall attendance record was thought to be abhorrent. Specific attention was placed on the number of days that the Grievant was absent over the three (3) month period in dispute. It was suggested that the Grievant was absent seven (7) days out of an approximate three (3) month period. This data allegedly disclosed that the Grievant was absent for over fifteen percent (15%) of the time.

Rule 6C was also purportedly violated which also represented an independent violation of the Last Chance Agreement (Joint Exhibit 5). This violation took place because the Grievant failed to follow the particulars contained in the Last Chance Agreement (Joint Exhibit 5) and other sick leave and tardiness policies.

Finally, the Employer argued that the discipline administered was reasonable because it followed the canons of progressive discipline. Mohr noted that these canons were adhered to in a number of ways. The Grievant was involved in a number of counseling sessions prior to formal disciplinary actions. This was followed by a written reprimand, a one-day suspension, a three-day suspension, and a Last Chance Agreement (Joint Exhibit 5). Mohr decided that removal was in order only after he discerned that he had exhausted all alternative measures and that any additional rehabilitation would indeed be futile.

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, more specifically, argued that none of the incidents referred to by the Employer served as proper justification for the removal. Also, the Union maintained that the Grievant did not violate the Last Chance Agreement (Joint Exhibit 5).

The Union acknowledged that the Grievant experienced previous absenteeism related difficulties. It, however, emphasized that the Grievant showed marked improvement after her three (3) day suspension; and only began to experience additional problems once she acquired pregnancy leave (Joint Exhibit 6).

The Grievant's September absences were thought to be legitimate because they resulted from an injury she experienced during the pack-up on September 1, 1988. The legitimacy of this injury was supported via a number of related arguments. First, David Porter, a Correction Officer II on the second shift, reinforced the Grievant's pack-up procedure testimony. He noted that on occasion officers may be required to carry property from the cell to "C" area. Porter also testified that officers normally have a back-up but not always. Further corroboration was offered in a finding by the Industrial Commission of Ohio. This body ruled that the Grievant sustained a compensable injury; there was no compensable lost time; and the payment of medical bills was authorized (Joint Exhibit 8).

In a related fashion, the Union alleged that the Employer failed to comply with Section 34.02 by failing to compensate the Grievant for the three (3) days she missed as a result of her compensable injury. If the Employer had properly applied this provision, these days should not

have been deducted from any of the Grievant's remaining leave balances. As a consequence, these days would not have been viewed as unauthorized absences but approved leave or leave without pay.

The Union argued that the Employer's interpretation of the October, 1988 incident was similarly defective. It was maintained that testimony adequately supported the Grievant's illness. Porter testified that the Grievant was ill on October 9, 1988 because he was aware that she was vomiting in the restroom. In fact, the Employer had to view her condition as credible because she was allowed to go home approximately two (2) hours before the end of her shift. Also, the Union considered the doctor's statement (Joint Exhibit 2, Pg. 11) as authentic and well within the requirements specified in the Last Chance Agreement (Joint Exhibit 5).

The episode which took place in November, 1988 was viewed as another example of an authorized absence. The Union claimed that the Grievant experienced another virus attack; one quite similar to affliction experienced in October, 1988. She, once again, provided a bona fide doctor's statement (Joint Exhibit 2, pg. 9) when she returned to work.

The Union charged that the Employer's actions also evidenced conflicting and suspicious policies. The November 12, 1988 absence was approved, and yet, November 13, 1988 and November 14, 1988 absences were viewed as unexcused and unauthorized. A consistent policy would have required that the Grievant be granted two (2) additional leave without pay occurrences.

The above summary was offered as proof that the Grievant complied with the spirit and the particulars contained in the Last Chance Agreement (Joint Exhibit 5). All of the absences were justified because the Grievant did, indeed, experience a number of debilitating physical maladies. In addition, all of these maladies were properly validated by a series of physician's statements (Joint Exhibit 2) submitted in support of the Grievant's condition.

An unequal treatment argument was also proposed by the Union. In other words, other employees in similar situations were treated differently. Specific emphasis was placed on the discipline history of Darrin Miller, a Correctional Officer, who purportedly experienced similar absenteeism difficulties. Yet, he received a much more lenient set of penalties ranging from a written reprimand to a five (5) day suspension. Miller was eventually removed but only after he engaged in a fifth absenteeism related offensive (Union Exhibit 2).

The Union viewed the entire series of events as partially contrived. The Union noted that the Employer hurriedly compiled this case to avoid the expiration of the Last Chance Agreement (Joint Exhibit 5). It was alleged that the Grievant would have been rid of the physician verification requirement if she had reached the first pay period of December, 1988 with a clear record.

Finally, the Union asked the Arbitrator to consider several mitigating factors. First, the Grievant participated in the Employee Assistance Program under Article 9 and Section 24.08. Second, the Grievant's absenteeism record (Joint Exhibit 6) showed marked improvement which supported the Employer's progressive discipline attempts. Third, some of these absences were directly the consequences of a number of pregnancy related difficulties.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, it is this Arbitrator's opinion that the Employer had just cause to discharge the Grievant. This conclusion was primarily based upon a critical review of each of the incidents as they relate to the particulars contained in the Last Chance Agreement (Joint Exhibit 5).

Typically, arbitrators have upheld the validity of last chance agreements. Several reasons have been given for the enforcement of special agreements of this variety. First, last chance agreements are supported by consideration, and thus, may serve to modify a collective bargaining

agreement or work rules, in their application to special employees. Second, these agreements are generally supported as a matter of public policy. They serve a beneficial social service because they establish a rehabilitative opportunity for errant employees.

Once adopted by the parties, however, it becomes virtually impossible for any arbitrator to modify the terms agreed to by the parties and an individual grievant. The terms may be viewed as unreasonable, inequitable and excessive by an arbitrator. Regardless, an arbitrator must assume that the parties and the Grievant were fully aware and cognizant of the ramifications attached to any signing. In my judgment, the Last Chance Agreement (Joint Exhibit 5) was violated, and thus the removal was indeed justified.

Probably the most glaring violation of the Last Chance Agreement (Joint Exhibit 5) concerns the Grievant's inability to provide a bona fide physician's statement (Joint Exhibit 2, Pg. 9) for the October absences. For a doctor's note, to be valuable, it must reveal when the employee was seen, what the doctor's diagnosis was, and whether the employee was disabled. Without such specificity, the note is not likely to prove that the absence was justified.

The submitted physician's statement (Joint Exhibit 2, Pg. 9) was clearly defective. Testimony clearly established that the Grievant never saw the physician but that a member of the doctor's staff wrote the statement on the Grievant's behalf. Also, Dr. Attrick's January 3, 1989 statement (Union Exhibit 3) further supports this conclusion. He based his diagnosis on the patient's history, although he admitted that he did not see the Grievant on the dates in question. Regardless of the physician's well-meaning intentions such a statement does not adequately validate the condition of the Grievant.

The Union's argument that the Last Chance Agreement (Joint Exhibit 5) did not contain a diagnosis requirement seems misplaced and totally unfounded. The document's particulars and the underlying intent clearly disclose that a statement without these generally accepted characteristics would not serve as a valuable rehabilitative deterrent.

Again, under most circumstances the previous violation might not justify a removal decision. In this instance, however, based on the applicable particulars, the removal decision was justified.

Although other violations exist, the pattern abuse violation, again, supports the removal decision. The Last Chance Agreement (Joint Exhibit 5) specifies pattern abuse as a potential rule violation which could justify removal under similar circumstances. Each of the episodes under consideration involve the linkage of "good days" and/or holidays with the absence occurrence. Such a consistent pattern of behavior seems to defy the possibility of a mere happenstance. Rather, it reflects a particular irresponsible pattern of behavior, over a considerable period of time, engendered by a common motive.

A major factor often raised by unions in absentee cases deals with the consistent application of an employer's attendance policy. As a general principle, all other considerations being equal, employees guilty of the same offense should receive the same treatment. Also, mere variations in terms of discipline do not prove disparate treatment when a reasonable basis exists for the different penalties imposed.

The above principles readily apply to the different, treatment accorded Miller (Union Exhibit 2). A reasonable basis for the disparate treatment does indeed exist. Miller was not operating under the terms agreed to by the Parties and documented in the Last Chance Agreement (Joint Exhibit 2).

AWARD

The grievance is denied and dismissed.

Dr. David M. Pincus
Arbitrator

November 6, 1989