ARBITRATION DECISION NO.:
375

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

EMPLOYER:
Department of Mental Retardation
and Developmental Disabilities

DATE OF ARBITRATION:
July 25, 1991

DATE OF DECISION:
September 10, 1991

GRIEVANT:
Steven A. Holt

OCB GRIEVANCE NO.:
24-06-(91-03-14)-0273-01-04

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Butch Wylie
Dennis Williams

FOR THE EMPLOYER:
Michael P. Duco
Paul Kirschner

KEY WORDS:
Arbitrability
Disability Separation
Remedy
Payment of Medical Bills
and Holiday Pay
Preservation and Benefits

ARTICLES:
Article 23 - Personnel
Records
§23.03-Employee
Notification
Article 24 - Discipline
§24.08-Employee
Assistance Program
Article 25 - Grievance

Procedure
§25.01-Process
§25.02-Grievance Steps
§25.03-Arbitration
Procedures
Article 35 - Benefits
§35.03-Disability Leave
Article 43 - Duration
§43.01-Agreement
§43.02-Preservation
of Benefits

FACTS:

Grievant had been employed as a Hospital Aide with the Department of Mental Retardation and Developmental Disabilities since October 29, 1979. Evidence presented at the hearing indicated that his employment was satisfactory. Grievant was given a disability separation from his position as a Hospital Aide on October 21, 1989 for being unable to perform his duties. The grievant requested reinstatement during his period of disability separation and was not reinstated by management.

UNION'S POSITION:

The Union asserted that the contract is silent with respect to the disability separation procedure and process, and that OAC Rule 123:1-33:03 provides state employees with benefits related to reinstatement from disability separation. The Union asserts that section 43.02 of the contract protects such Code benefits and that the Arbitrator has the ability to review the actions of the Employer with respect to the employee's reinstatement rights. The right to reinstatement is a benefit specifically incorporated into the contract by Section 43.02. The Union argued that this dispute falls squarely within the definition of a grievance which appears in Section 25.01.

The Union also asserted that in determining procedural arbitrability (timeliness of filing the grievance), the Arbitrator must look at the totality of the circumstances surrounding Grievant's placement on disability separation for reinstatement. The Union stated that the Grievant should not be caused to forfeit all claims he had to reinstatement since the Employer's actions are what caused the employee to react as he did. Based on the course of events, it was impossible to determine exactly when the finite act occurred which would trigger the filing of a grievance. Also, the union was not included in the reinstatement process, and received no copies of any documentation related to the disability or reinstatement process. The Union asserted that based upon the Employer's conduct in processing Grievant's request for reinstatement, the Employer was equitably estopped from asserting that this grievance has not been filed in accordance with the contract.

EMPLOYER'S POSITION:

The Employer argued that reinstatement rights flowing from a disability separation are governed by the Ohio Administrative Code section 123:1-33 and are not incorporated into the four corners of the Collective Bargaining Agreement, thus the grievance is not arbitrable. The Employer asserted that the proper way for an employee to appeal a disability separation would be the State Personnel Board of Review pursuant to the Ohio Revised Code.

The Employer further asserted that even if the matter was incorporated into the contract and was arbitrable, the grievance was not filed within the time frame established by the parties in section 25.02 of the Agreement, and that this procedural defect rendered the issue non-arbitrable.

The employer also stated that even if the Grievant had reinstatement rights, he did not provide the Employer with documentation "establishing that the disabling illness no longer exists" or that he has recovered sufficiently from the disabling illness, injury or condition so as to be able to perform the substantial and material duties of the position to which reinstatement was sought."

ARBITRATOR'S OPINION:

The Arbitrator found that the "benefit" of reinstatement after a disability separation was preserved by section 43.02 of the contract and is part of the Agreement and subject to final and binding Arbitration. On the issue of timeliness, the Arbitrator found that because the Employer did not communicate a final and clear statement to the Grievant of the denial of reinstatement, and because the Union had no formal notice of these events, the evidence leads to an assumption that the Union acted promptly in filing a grievance when it had reason to know of a probable contract violation. On the issue of timeliness regarding reinstatement, the Arbitrator found that the employee's request need be made within 3 years of separation, but the reinstatement need not be complete within 3 years. Because the State selected a doctor who determined that the Grievant could have gone back to work and done his job, the Grievant had a right to reinstatement.

AWARD:

Grievance granted. Grievant is to be reinstated and awarded full back pay less any remuneration earned during that period. Full pay to include holiday pay. Grievant reinstated with leave balances which he had as of his last day of work. Seniority and service credit restored, any provable medical costs which would have been paid by state insurance shall be reimbursed, and PERS contribution appropriate for this period shall be paid. Because Grievant's job had undergone some change, Grievant to be given an appropriate orientation and training.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO
Union

and

State of Ohio
Employer.

Grievance No.:
24-06-(3-14-91)-273-01-04
Grievant:
(Holt, Steven A.)
Hearing Date:
July 25, 1991
Closing Date:
August 9, 1991
Award Date:
September 10, 1991
Arbitrator:
R. Rivera

For the Union:
Butch Wylie
Dennis Williams

For the Employer:

Michael P. Duco
Paul Kirschner

Present at the hearing in addition to the Grievant and Advocates were Mrs. Vinson, Employment Special - Columbus Area Mental Health (witness), Leonard Coles, Union President (witness), Kim Allen, Ms. Holt, Grievant's mother (witness), Stephen Gulyassy, CDC Personnel Administrator (witness), Carol Webb, CDC Personnel Officer (witness), and John DiCarlantonio (observer).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. All witnesses were sworn.

Joint Exhibits

1. Contract
2. Grievance Trail

   a) Grievance (3/11/91)
   b) Step 3 Response
   c) Arbitration Request

3. Chapter 123:1-33 OAC

123:1-33-02 - Disability Separation
123:1-33-03 - Reinstatement from disability separation, disability retirement, or leave of absence without pay

(A) Leave of Absence Without Pay
(B) Reinstatement rights.

(1) An employee given a disability separation shall have the right to reinstatement within three years after having been given a disability separation to a position in the classification the employee held at time of separation. If the classification the employee held at time of separation no longer exists or no longer is utilized by the employee's appointing authority the employee shall be placed in a similar classification. If no similar classification exists the employee may be laid off.
(2) An employee receiving disability leave benefits unable to return to work at the time his disability benefits are exhausted shall retain the right to reinstatement to a position as provided in this rule for a period of up to three years from the time the employee became eligible to receive disability leave benefits.
(3) An employee given a disability separation subsequent to a leave of absence without pay for the same disabling injury or illness shall retain the right to reinstatement for a period of up to three years from the time the employee began a leave of absence without pay.

(C) Request for reinstatement. Any request for reinstatement following a disability separation must not be later than three years following: a disability separation, a leave of absence followed by a disability separation, or the period the employee received disability leave benefits followed by a disability separation. The request must be in writing.
(D) Medical examination. The employee requesting reinstatement from a disability separation shall be

eligible for reinstatement after a medical examination, conducted by a physician to be designated by the director, or upon the submission of other appropriate medical documentation establishing that the disabling illness, injury, or condition no longer exists. Designations of a physician shall be made from lists provided to the director from the public employee's retirement board. The examination must show that the employee has recovered sufficiently from the disabling illness, injury or condition so as to be able to perform the substantial and material duties of the position to which reinstatement is sought. The cost of such examination shall be paid by the employee. The appointing authority may require the employee to submit as an additional examination under the provisions of rule 123:1-33-04 of the Administrative Code prior to return to services to determine whether the disabling illness or injury continues to exist.

(D)[1] Failure to be reinstated. An employee who fails to apply for reinstatement or is not found to be fit for reinstatement after proper application and examination shall be ineligible for reinstatement and shall be deemed as permanently separated from service as of the date which the employee was given a disability separation.

(E) Early reinstatement. An employee who applies for reinstatement and is found unfit for early reinstatement from a disability separation shall remain eligible for reinstatement at the completion of the appropriate three-year period.

(F) Notice of return date. The appointing authority shall notify the employee, at the time disability separation is given, of the required procedures for proper reinstatement.

(G) Abuse of disability separation. An act of an employee, who has been given a disability separation, which is determined by the director to be inconsistent with the employee's disabling illness or injury may render the employee ineligible for reinstatement.

(H) Disability retirement. If the employee has been granted a disability retirement, the requirements of this rule shall apply for up to five years, except that the physician shall be appointed by the public employee's retirement board and application for reinstatement shall not be filed after the date of service eligibility retirement.

4. ORC section 124.03: Powers and duties of state personnel board of review.

Employer's Exhibits

1. July 10, 1989 letter from DAS to Grievant.
2. March 19, 1991, chronology written by Carol Webb to Donna Adams (3 pages)
   Attachments:

(1) (a) October 23 1989 letter from Stephen Gulyassy to Grievant
    (b) October 10, 1989, letter from Stephen Gulyassy to Grievant
(2) Typed notes on May 2, 1990, by Carol Webb
(3) June 4, 1990 letter by Dr. Garus
(4) July 23, 1990 letter by Dr. Altman to Supt. James Morrey (4 pages)
(5) (a) July 31, 1990 typed notes by Carol Webb
    (b) July 25, 1990 letter to Ms. Holt from Stephen Gulyassy
(6) August 21, 1990 Evaluation memo (2 pages)
(7) August 31, 1990 letter to Dr. Altman from Stephen Gulyassy
(8) September 4, 1990, notation of conversation with Dr. Altman and Carol Webb
(9) September 5, 1990 letter from Dr. Altman to Stephen Gulyassy
(10) September 17, 1990 Medical Release form
(11) September 6, 1990 letter to Dr. Holzhauser from Dr. Garus
(12) January 10, 1991 letter from James Morrey to Grievant
(13) January 30, 1991 letter from Dr. Garus to Dr. Holzhauser

Union's Exhibits

1. Grievant's Annual Performance Evaluation dated 10/29/87
2. Grievant's Annual Performance Evaluation dated 10/29/86
3. Letter of Commendation to Grievant dated 4/22/87; Letter of Commendation dated 7/21/86; Letter of Commendation dated 3/23/82
4. Letter dated 6/4/90 re Grievant from Dr. S. Garus (Columbus Area Community Mental Health Center)
5. Letter dated 12/6/90 re Grievant from Dr. S. Garus (CACMHC) to Dr. Holzhauser.
6. Letter dated 1/30/91 re Grievant from Dr. Garus (CACMHC) to Dr. Holzhauser.
7. Daytimer pages from Daytimer of Witness Vinson, Employment Specialist.
8. Personnel Action - Disability Separation of Grievant dated 10/23/89.

Stipulated Facts

1. Grievant has been employed as a Hospital Aide with the Department of Mental Retardation and Developmental Disabilities since October 29, 1979.
2. Grievant received Disability benefits from June 30, 1988 to July 9, 1988 and June 12, 1989 to October 21, 1989, which exhausted his two years of disability leave benefits.
3. Grievant was "disability separated" from his position as a Hospital Aide on October 21, 1989.
4. Grievant was employed at the Columbus Developmental Center, which cares for mentally retarded and developmentally disabled.

Union's Statement of the Issue

1. Is the Employer's failure to reinstate an employee from a disability separation arbitrable under the collective bargaining agreement?
2. If so, was the grievance timely filed?
3. If the matter is arbitrable, did the Employer violate the contract, and the Ohio Administrative Code, when it did not reinstate the Grievant pursuant to his request for reinstatement during his disability separation? If so, what shall the remedy be?

Employer's State of the Issue

1. Is the Employer's failure to reinstate an employee from a disability separation arbitrable under the Collective Bargaining Agreement?
2. If so, was the grievance filed within the time frames specified by the parties in Section 25.02? If not, is the matter arbitrable?
3. If the matter is arbitrable, did the Employee comply with the requirements set forth in Administrative Code, Sections 123:1-33-03(D) and 123:1-33-02(B)(2)?

Contract Sections

Preamble (cited by Union in Grievance)

This Agreement, entered into by the State of Ohio, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union or the Exclusive Bargaining Agent, has as its purpose the promotion of harmonious relations between the Employer and the Union; the establishment of an equitable and peaceful procedure for the resolution of differences; and the establishment of wages, hours, and other terms and conditions of employment.

§23.03 - Employee Notification (cited by Union in Grievance)

A copy of any material to be placed in an employee's personnel file that might lead to disciplinary action or negatively affect an employee's job security or advancement shall be provided to the employee. If material is placed in an employee's personnel file without following this procedure, the material will be removed from the file and returned to the employee at his/her request. Such material cannot be used in any disciplinary proceeding. An employee can place documents relevant to his/her work performance in his/her personnel file.

§25.02 - Grievance Steps (Step 1 - Immediate Supervisor)

The grievant and/or the Union shall orally raise the grievance with the grievant's supervisor who is outside of the bargaining unit. The supervisor shall be informed that this discussion constitutes the first step of the grievance procedure. All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event. If being on approved paid leave prevents a grievant from having knowledge of an occurrence, then the time lines shall be extended by the number of days the employee was on such leave except that in no case will the extension exceed sixty (60) days after the event. The immediate supervisor shall render an oral response to the grievance within three (3) working days after the grievance is presented. If the oral grievance is not resolved at Step One, the immediate supervisor shall prepare and sign a written statement acknowledging discussion of the grievance, and provide a copy to the Union and the grievant.

§24.08 - Employee Assistance Program (cited by Union in Grievance)

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 meet and give serious consideration to modifying the contemplated disciplinary action.

§25.03 - Arbitration Procedures

Both parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. Each party shall bear the expense of its own witnesses who are not employees of the Employer.

Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

The expenses and fees of the arbitrator shall be shared equally by the parties.

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than thirty (30) days after the conclusion of the hearing, unless the parties agree otherwise.

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

If either party desires a verbatim record of the proceeding, it may cause such a record to be made provided it pays for the record. If the other party desires a copy, the cost shall be shared.

§35.03 - Disability Leave

Eligibility

Eligibility shall be pursuant to current Ohio law and the Administrative Rules of the Department of Administrative Services in effect as of the effective date of this Agreement.

Minimum Benefit Level

The minimum level of approved disability leave benefits, pursuant to this Article, shall be no less than seventy percent (70%) of the eligible employee's regular rate of pay.

Other Leave Usage to Supplement Disability

Employees may utilize sick leave, personal leave or vacation to supplement disability leave up to one hundred percent (100%) of the employee's rate of pay.

Disability Review

The Employer shares the concern of the Union and the employees over the need to expeditiously and confidentially process disability leave claims.

The Employer and the Department of Administrative Services shall undertake to review such concerns as: time frames, the appointment of an ombudsperson, paper flow, the issue of light duty, and possible refinement of procedural mechanisms for disability claim approval or disapproval, inviting maximum input from the Union to this review.

Information Dissemination

The Employer recognizes the need to standardize the communication of information regarding disability benefits and application procedures. To that end, the Employer and the Department of Administrative Services shall produce explanatory materials which shall be made available to union representatives, stewards or individual employees upon request.

Orientation

The Employer shall develop a disability orientation program for union representatives so that they may train stewards as part of the information dissemination effort.

§43.01 - Agreement

To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for Ohio Revised Code Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

§43.02 - Preservation of Benefits

To the extent that State statutes, regulations or rules promulgated pursuant to Ohio Revised Code Chapter 119 or Appointing Authority directives provide benefits to state employees in areas where this Agreement is silent, such benefits shall continue and be determined by those statutes, regulations, rules or directives.

Facts

The Grievant's date of hire with the Department of Mental Retardation and Developmental Disability (DMRDD) was October 29, 1979. He was employed as a Hospital Aide (Stipulated facts). Evidence presented at the hearing (See Union Exhibits 1-3) indicated that his employment was satisfactory. No evidence of prior discipline was introduced. From June 30, 1988 to July 9, 1988 and from June 12, 1989 to October 21, 1989, the Grievant received Disability benefits (Stipulated Fact). On July 10, 1989, the Department of Administrative Services (DAS) notified the Grievant that his Disability benefits would be exhausted October 21, 1989 (Employer’s Exhibit 1).

On October 10, 1989, CDC sent the Grievant a letter which stated (in full) (Employer's Exhibit 3). “This is to inform you that your 2-year Disability Leave Benefit Program will expire effective October 21, 1989.

We will need a doctor's statement from you stating you are not able to return to work by the above date. You will be placed on a 3-year Disability Separation and you may return to duty anytime during this period giving us a 30-day notice with a doctor's statement stating you are able to return to your position of Hospital Aide.”

On October 23, 1989, the Grievant was sent a letter by Stephen V. Gulyassy, Human Resources Director of CDC, which stated (in full) (Employer's Exhibit 2).

“This is to advise you that your Disability Separation has been approved. Under your Disability Separation, you may be reinstated through 10/21/92. If you should choose to apply for reinstatement, you must apply through written application to the Columbus Developmental Center. Reinstatement is, of course, contingent upon a Physician's examination. The physician's report must indicate that you have recovered and are able to perform all the duties of a Hospital Aide.

If you have questions regarding this action, please feel free to contact the personnel office.”

A Personnel Action was completed for a Disability Separation for Grievant and approved by the Appointing Authority, dated October 23, 1989. Under remarks, the Personnel Action form contained these words: (in full) (Union Exhibit 8).

S12 - Disability Separation from 10/21/89 to 10/21/92
Copy of doctor's statement attached.

On May 2, 1990, the Grievant telephoned the Personnel Department of Columbus Developmental Center (CDC) and informed the Department that he would not be back to work for a "couple of months more" because "his doctor did not want him" to return as yet. He was asked if he had documentation from his doctor. He replied that he did not; he was on a 3 year separation. Carol Webb, who took the call and wrote up a record of the call, indicated that the Grievant's statement about the three year leave was correct ("that is correct"). That same record indicated that the Grievant has been in the office "recently" and had at time date (unknown) requested to go back to work. Ms. Webb wrote

“I explained to the Grievant that at this point we will do nothing more t get his position back until we hear from again and then need the Dr.'s statement.”

On June 26, 1990, the Personnel Department of CDC received the June 4, 1990 letter of Dr. Garus (Union Exhibit 4) which said "he (the Grievant) is ready to go back to his job." The words "full duties" were indicated at the end of the body of the letter. Ms. Webb testified that after receipt of the June 4, 1990 letter that CDC arranged to have the Grievant examined by a state-selected doctor. On July 19, 1990, Dr. Jerold Altman examined the Grievant. He wrote his report July 23, 1990 and it was received by the CDC Personnel Department on July 23, 1990. In that 4 page report by Dr. Altman (the state selected doctor), Dr. Altman first stated that he had reviewed the Grievant's job description. His conclusions were as follows: (in full)

“DISCUSSION:

It is difficult for me to denote a definitive diagnosis at this time. The history that the Grievant gives would indicate drug and alcohol toxic states with toxic psychosis. From this examination I certainly cannot determine that he had schizophrenia. If this in fact is an accurate diagnosis, he is certainly well compensated and is currently clear of any underlying psychotic symptomatology.

RECOMMENDATIONS:

I can find no reason why the Grievant cannot be re-employed by the Columbus Development Center should you wish to re-employ him.

It is my opinion that it would not be detrimental for the Grievant to read this report.

Thank you for referring the Grievant to me."

This report by Dr. Altman was submitted to Mr. Gulyassy.

On July 25, 1990, Mr. Gulyassy wrote to the Grievant's mother, Joan Holt. That letter stated as follows (in full) (Employer's Exhibit 2):

"Ms. Carol Webb, of our Personnel office, has related to me, your previous telephone conversation with her concerning your son Steven's return to duty at Columbus Developmental Center. She stated that, in your opinion, Steven is not able to return to work at this time and that you would like to be contacted if Steve indicates to us that he would like to return.

During the latter part of June, 1990, Steven did contact CDC concerning his return. He also presented medical documentation indicating that he was able to come back to his full duties. In accordance with our procedures, Steven was scheduled for an independent Psychiatric Evaluation with a state doctor. The appointment was scheduled for July 19th and Steve did attend. The result of this examination has been received and the doctor indicated that Steven still has problems but that he could find no reason why CDC should not re-employ him.

In view of your previous conversation with Ms. Webb and the concerns you expressed, we are requesting that you contact the Personnel office upon receipt of this letter. We would appreciate any information which substantiates your position, including information relative to your appointment as guardian for your son. We will proceed no further until we hear from you."

On July 31, 1991, Mrs. Holt called the institution and spoke to Carol Webb who made a written note of the conversation. That note read as follows (in full) (Employer's Exhibit 2):

"Mrs. Holt called this morning.

Said she thinks Steve is doing much better and if the Dr. thinks he is able to return to work, she agrees. She also stated that the Dr. from COPH also thought he was able to return.

She is not his legal guardian, but has his power of attorney.

Where to from here?

Carol"

On August 31, 1990, Mr. Gulyassy wrote to Dr. Altman. That letter in pertinent part stated as follows (Employer's Exhibit 2):

"Following Mr. Holt's examination, you provided us a 4-page summary of your findings; however, we are concerned with these results. I refer specifically to the last paragraph of page 3 stating "it is difficult for me to denote a definitive diagnosis at this time". (Please refer to attached copy). As this diagnosis is inconclusive of the extent of Mr. Holt's recovery, we are unable to render a decision for his return. Although you have recommended his re-employment, due to the nature of a TPW's responsibilities in caring for our residents, it is imperative that a specific diagnosis be provided in order for us to comply with reinstatement procedures.

On September 4, 1991, Dr. Altman called the facility and spoke with Carol Webb. Ms. Webb made a note summarizing the conversation which read as follows (Employer's Exhibit 2):

“Reviewed his 4-page summary with him, especially page 3/last paragraph.
Basically, he stated that he made his comments based on what he saw and he saw no signs of schizophrenia. He said he didn't have much to go on, however, Greta stated later to me that she sent him Disability Papers (copies) etc. He said he did have a P.D.

He remarked that Steve did have a history of alcohol and drug abuse and that he is certain that is part of his problems.

I explained the importance of a diagnosis for his reinstatement due to the responsibility of caring for MR/DD persons.

Dr. Altman stated that he understands our reluctance but he has to base his diagnosis on what he observed. He did state that "I wouldn't hire him!". I reminded him that in his letter he indicated that Steve could be re-employed. He said based on what he observed, and that was all he really had to go on, he had no choice but to recommend it as he couldn't find anything wrong other than the history of drug and alcohol abuse. He indicated that he did not have much confidence in mental health clinics.

I requested that Dr. Altman follow-up our conversation with another letter basically stating what he just told me by phone.

He said he would be happy to do that. (Very pleasant gentleman)”

On September 5, 1990, Dr. Altman wrote Mr. Gulyassy as follows (Employer's Exhibit 2):

“I am in receipt of your letter in request for a definitive diagnosis. Again please refer to the last paragraph of page three of my report dated July 23, 1990. "I am unable to give you a definitive diagnosis." I was given no information, no records were sent to me. The best I can do is to make a diagnosis of status post drug and alcohol addiction with periods of drug toxicity.

As stated in my report I seriously doubt that Mr. Holt has schizophrenia.

Regarding employment: At the time I saw Mr. Holt I saw no specific on-going psycho-pathology thus, no current diagnosis. Whether or not Columbus Developmental Center wishes to re-employ Mr. Holt is their responsibility. They can make that decision based on their own evaluation of Mr. Holt's past record. I have no ability to predict Mr. Holt's future concerning drug and alcohol abuse.”

On September 17, 1990, at Grievant's request and with his written permission, all information held by CDC was released to Dr. Garus (Employer's Exhibit 2). At some point subsequent to this release, Dr. Holzhauser, CDC Medical Director, spoke to Dr. Garus. Dr. Holzhauser did not testify at the hearing; no evidence was presented as to the nature or content of these conversations.

On December 6, 1990, Dr. Garus wrote Dr. Holzhauser. This letter was received on January 8, 1991 and stated as follows:

“As agreed per our conversation Steven Holt will return to work with the following conditions:

Steven Holt must be in compliance with scheduled medical appointments and medication intake daily.

Steven Holt will return on twenty hours work (part-time) schedule until these conditions have been followed through.”

On January 10, 1991, Dr. James E. Morrey, Superintendent of CDC wrote the Grievant and said (in

pertinent part):

“In this letter, Dr. Garus states that you could return to employment at Columbus Developmental Center, but that you be restricted to part-time employment at twenty hours per week.

As you are aware, one of the conditions of re-employment at CDC is that the employee return to the full duties of his/her former position. As your status at the time of your separation was that of full-time Hospital Aide, we are unable to approve your reinstatement from Disability Separation at this time.”

On January 30., 1991, Dr. Garus wrote Dr. Holzhauser and stated in full:

“As agreed per our conversation Steven Holt will return to work with the following conditions:

Steven Holt must be in compliance with scheduled medical appointments and medication intake daily.

Steven Holt will return on 40 hours full duty schedule until these conditions have been followed through.”

At the bottom of the January 30, 1991 letter received by the Personnel Department the following handwritten note appears:

“Don't do anything with Steven even w/new letter indicating 40 hrs. instead of 20.

Do not return.”

Ms. Webb testified that this order not to reinstate the Grievant was made by Mr. Gulyassy. Mr. Gulyassy called Ms. Webb several times and reiterated this point. Ms. Webb testified that Mr. Gulyassy told her and others in the department to tell the Grievant when he called that "we had to go by the December 6, 1990 letter from Dr. Garus which said "part-time." The Grievant asked that this CDC position be put in writing and sent to him. Ms. Webb said she would do so if given permission by Mr. Gulyassy. The record indicates no evidence of such a written reply made by the CDC Personnel Department.

Ms.. Webb testified that on March 11, 1991 the Grievant called and asked for copies of the last three doctor's statements and other documentation from the file. Ms. Webb told him the information was unavailable then because of payroll processing and said that he would have to call back on Wednesday after 10:00 a.m. Ms. Webb recorded that the Grievant did not call back to ask for documents.

Mr. Gulyassy testified. He said that the date by which disability reinstatement had to occur under state law was October 21, 1990. He said that the date stated in his letter to the Grievant (Employer’s Exhibit 2) namely October 21, 1992 was an error. This same error was repeated in the Personnel Action (Union Exhibit 8). He stated that the error involved no intent to mislead in the documents; however, he also stated that no written notice of the error was given to the Grievant after the discovery of the error. Mr. Gulyassy said that he believed he had "asked Ms. Webb to tell the Grievant."

Mr. Gulyassy admitted that the Grievant had requested reinstatement on June 4, 1990 which was before the correct date (10/21/90) had passed. Mr. Gulyassy basically testified that the decision not to reinstate the Grievant was his decision. He said that he found the letters from various doctors were "insufficient." He testified that the January 30, 1991 letter from Dr. Garus was "insufficient," as was Dr. Altman's letter. Dr. Altman's letter lacked a "proper diagnosis." Mr. Gulyassy said to meet "CDC’s concern" the Grievant must present a doctor's statement saying that he (the Grievant) was "capable of returning to full duties."

The Grievant testified. He said that after being in a group home, he had obtained part-time employment at Sears. He then realized he could handle full time work and wanted his job back. He said he went to CDC personnel and told Carol Webb he was ready to return to work. As a consequence, he obtained the June 4, 1990 letter to CDC from Dr. Garus. He told Garus that the letter had to indicate that he was ready to return to full duties and hence Garus added "full duties" to statement. Subsequent to that letter, the Grievant said he called Ms. Webb about twice a week, and she said to be patient that the "process" takes a while. Then

she told him he needed to get another doctor's exam, so following her instructions he was examined by Dr. Altman. At that examination, Dr. Altman reviewed his position description with him. The Grievant said he kept calling back and was told that after Altman's report was received he still needed another doctor's report. He said he was working with Ms. Vinson, the Employment Counselor. Ms. Vinson told him that Dr. Holzhauser from CDC was talking with Dr. Garus. Dr. Garus wrote another letter (January 30, 1991) which he (the Grievant) gave to Ms. Webb. The Grievant kept calling and was told sometime in late February or early March that he would not be reinstated. The Grievant called back and asked that this last position be sent to him in writing. According to the Grievant, this request was refused. The Grievant said that when he realized he was getting the run around he contacted the Union for the first time.

Ms. Vinson, the Employment Specialist from Columbus Area Central Mental Health, testified that the Grievant had been successfully placed at Sears. When he was ready to go full time, she said he attempted to facilitate his return to CDC. She said she made many phone calls to the CDC Personnel Department but was unsuccessful in obtaining helpful information or direction. She said that she did work with Dr. Garus to get the letters to Personnel which apparently had been requested by Dr. Holzhauser.

Mrs. Holt, the Grievant's mother, testified that Carol Webb had called her and that she had told Ms. Webb that it was up to her son's doctor when he went back to work. Mrs. Holt said that she had talked to Ms. Webb a number of times around the time her son was examined by the state doctor but refrained from other calls because she was afraid that "they would claim her son was not responsible if she talked with them."

Mr. Leonard Coles, President of the Union local, testified that he wrote up and filed the Grievance on the Grievant's behalf on March 11, 1991. He said that the Grievant had come to the Union a few days before March 11, 1991, and complained that he was "being given the run around." Mr. Coles said that before the Grievant came to them that the Union had received no copies of any of the notices or letters to the Grievant and was unaware of the situation.

Employer's Position

1. Reinstatement rights flowing from a disability separation are governed by the Ohio Administrative Code section 123:1-33 and are not incorporated into the four corners of the Collective Bargaining Agreement rendering the matter as substantively non-arbitrable.

The case involves a disability separation and subsequent reinstatement rights set forth in Administrative Code section 123:1-33. In cases previously arbitrated, the arbitrators have found that involuntary disability separations were not arbitrable under the Collective Bargaining Agreement. Under the 1199 Collective Bargaining Agreement, which is silent like OCSEA's Agreement, Arbitrator Sharp found disability separations not to be Arbitrable (see Robert Dirk v. RSC, award #191, G87-0677). In the Constance Leedy (award #272, 02-04-880721-0037-01-14) case, Arbitrator Drotning found that 4117.10(A) precluded the arbitrator from examining the merits of a disability separation under 123:1-33, because it states in part "if there is no specification, the parties are subject to applicable state laws" and those state laws are not part of this Collective Bargaining Agreement. An employee who has been involuntarily disability separated under section 123:1-33 has reinstatement rights under that section of the code. Thus, the reinstatement rights flow from the Administrative Code which has previously been found not to have been part of the Collective Bargaining Agreement. The proper forum for an employee's appeal of a disability separation or reinstatement rights flowing from such a separation would be the State Personnel Board of Review pursuant to section 134.03 of the Ohio Revised Code. Under section 25.03 of the Collective Bargaining Agreement "Only disputes involving the interpretation, application or alleged violation of a provision of the agreement shall be subject to arbitration." Section 123:1-33 is not part of the Agreement thus it is not arbitrable.

2. Even if this matter is incorporated into the Collective Bargaining Agreement and substantively arbitrable, the grievance was not filed within the time frame established by the parties in section 25.02 of the Agreement. This procedural defect renders the issue non-arbitrable.

On January 10, 1991, the Employer made it quite clear to the employee that he would not be reinstated due to the restrictions that his doctor had placed upon him. The employee thus had ten working days under section 25.02 of the Agreement in which to grieve that matter. He did not grieve nor did he even contact the

Employer, thus he waived his rights to pursue any claim.

3. The Grievant's right to reinstatement had expired when he last produced a Doctor's statement releasing him for full duty on January 30, 1991.

Under section 123:1-33-03 (B)(2) "An employee receiving disability leave benefits unable to return to work at the time his disability leave benefits are exhausted shall retain the right to reinstatement to a position provided in this rule for a period of up to three year from the time the employee became eligible to receive disability benefits." Mr. Holt's two years of benefits were exhausted on October 21, 1989. He thus had an additional year in which he had reinstatement rights. However, the three year period ended on October 21, 1990. No reinstatement rights to his position existed on January 10, 1991 or on January 30, 1991 when his doctor stated he could work forty hours per week. The Employer cannot exceed the three year time limit set forth in the Administrative Code. If it did the employer would be violating the posting and bidding procedures set forth in Article 17.

4. Even if the Employer were to assume that the Grievant had reinstatement rights on January 30, 1991, he did not provide the Employer with documentation "establishing that the disabling illness no longer exists" or that he has recovered sufficiently from the disabling illness, injury or condition so as to be able to perform the substantial and material duties of the position to which reinstatement was sought" pursuant to section 123:1-33-03(D) and pursuant to sub-section (D)1 is "deemed permanently separated from service."

5. Should the Arbitrator determine that she has both substantive and procedural jurisdiction to hear the merits of the case and then decide the merits against the Employer, then the proper remedy would be to re-instate Grievant after an appointed physician determines that he is able to perform the substantial and material duties of his position.

Union's Position

The Union asserts that the contract is silent with respect to the disability separation procedure and process. OAC Rule 123:1-33:03 provides state employees with benefits related to reinstatement from disability separation. The parties' agreement at Section 43.02 provides:

[t]o the extent that State statutes, regulations or rules promulgated pursuant to Ohio Revised Code Chapter 119 or Appointing Authority directives provide benefits to State employees in areas where this Agreement is silent, such benefits shall continue and be determined by those statutes, regulations, rules or directives. (emphasis added).

The Union argues that this Arbitrator has the ability to review the actions of the Employer with respect to the employee's reinstatement rights because this reinstatement right is a benefit specifically incorporated into the contract by Section 43.02.

Section 25.01 defines a grievance:

. . . as any difference, complaint or dispute between the Employer and the Union affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

This dispute falls squarely within that definition.

Section 25.03 provides that "[t]he decision and award of the arbitrator shall be final and binding on the parties."

Ohio Revised Code Section 4117.10(A) provides in pertinent part:

[i]f the agreement provides for a final and binding arbitration of grievances, public employers, employees, and public and public organizations . . . are subject solely to that grievance procedure and the State Personnel Board of Review or Civil Service Commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure.

Clearly, the grievance procedure including arbitration in this instance, is the appropriate mechanism for resolving the instant dispute between the parties.

The State has raised the Leedy award as precedent in support of its position that the dispute is not substantively arbitrable. However, that case is not applicable to this Grievance. In the Leedy case, the Union attempted to bar the Employer's imposition of an involuntary disability separation. The Union was asserting that the Employer did not have the right to impose such a separation. The Union was attempting to block what the Employer perceived to be a management right; not enforce an employee right. However, in this case, the Union is asserting an employee benefit. OAC 123:1-33:03 provides for an employee right or benefit. Since the Code establishes a right not specifically provided for in the contract, Section 43.02 is applicable and incorporates the provisions of the Code. In fact, in a case between the State of Ohio and 1199, Grievance No. G-87-0067, Arbitrator Sharpe recognized this distinction at page 21.

In Case No. 27-21-880923-0017-01-03 (Grievant: Brenda Dilley), Arbitrator Linda DiLeone Klein found that the administrative rules promulgated by the Employer with respect to probationary removals were incorporated by reference in Article 43.02 of the parties' agreement. Additionally, two (2) arbitrators in the area of abolishments and layoffs have used Section 43.02 of the contract to incorporate benefits and rights.

Doubts concerning arbitrability must be resolved in favor of permitting the subject to be arbitrated. United Steelworkers v. Warrior and Gulf Navigation Co., 363 US 574, 80 S. Ct. 13476, 46 LRRM 2416 (1960).

PROCEDURAL ARBITRABILITY -- If the Grievance is substantively arbitrable, was the Grievance timely filed?

In this instance, in evaluating procedural arbitrability, the arbitrator must look at the totality of the circumstances surrounding Grievant's placement on disability separation for reinstatement. Primarily the arbitrator must consider the Employer's errors and actions with respect to the period of time the Employer informed Grievant his reinstatement rights would be in effect and the way his request for reinstatement was handled. Grievant should not be caused to forfeit all claims he had to reinstatement since the Employer's actions are what caused the employee to react as he did. Based on the course of events, it is impossible to determine exactly when the finite act occurred which would trigger the filing of a grievance. The Employer's records do not indicate when the last telephone contact (when Grievant indicated he would be contacting his attorney) took place. Moreover, the Employer dragged out the request for reinstatement process.

Importantly, the Union was not included in this process. The Union was not copied on any documentation related to the disability or reinstatement process. Section 25.01(A) of the contract defines a grievance as "any difference, complaint, or dispute between the Employer and the Union or any employee." Section 25.01(B) provides that "(g)rievances may be processed by the Union on behalf of a grievant or on behalf of a group of grievants or itself setting forth the names(s) or group(s) of the grievant(s)". Since the contract specifically provides that the Union can process the grievance "itself setting forth the name of the grievant" and grievances must be filed within the date there is knowledge of the grievance, the time within which the grievance is to be filed should be calculated from the date the Union had knowledge. The Employer did not notify the Union of its decision. The Union filed the grievance one (1) day after it had knowledge of the circumstances. The time periods for filing the grievance for the employee and union run independently under these circumstances.

Based upon the Employer's conduct in processing the Grievant's request for reinstatement, the Employer in this case is equitably estopped from asserting that this grievance has not been filed in accordance with the contract.

The Columbus Developmental Center sent the Grievant to a State appointed Doctor, Dr. J. Altman of Columbus pursuant to Ohio Administrative Code 123:1-33-03(D). The Code requires that a prognosis

related to ability to do a job is required not a diagnosis as the Employer was seeking. In fact, a diagnosis should not be relevant to the Employer in anyway. Further, it would be illegal to rely on a diagnosis rather than ability to perform the job. Because a person is diagnosed as schizophrenic, alcoholic, diabetic, or epileptic is irrelevant to the reinstatement process. If it is determinative of reinstatement as is the case here, then the employer has tread on shaky ground. The letter provided sufficient information to establish that Grievant was able to return to work. The Employer just did not like that result and continued to seek a way to achieve the result of permanently separating Grievant.

Under OAC 123:1-33-03(D), upon the submission of other appropriate medical documentation establishing that the disabling illness, injury, or condition no longer exists, the employee may return to work. The Union believes the Employer had that documentation on July 23, 1990 when Dr. Garus opined that Grievant ". . . is, stable at present time and he is ready to go back to his job". The examination must show that the employee has recovered sufficiently from the disabling illness, injury, or condition so as to be able to perform the substantial and material duties of the position to which reinstatement is sought.

Clearly, the merits of this grievance establish that Grievant properly requested reinstatement. Appropriate medical documentation in support of the request was provided to the Employer in accordance with the Code. The Employer failed to properly reinstate Grievant to his position.

REMEDY - If the Employer did violate the Grievance, what is the remedy?

The Union respectfully requests that Grievant be reinstated with full back pay, including holiday pay and all other compensatory benefits, reinstatement of all leave, reinstatement of seniority and service credits, payment of medical or insurance costs and that the Employer's PERS contribution be paid by the Employer. We are requesting that all benefits be calculated from June 26, 1990, the date when medical documentation was first supplied to the Employer.

Discussion - Arbitrability

Section 25.03 states the Arbitrator's jurisdiction. "Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration." Both the Employer and the Union agree that the Agreement is silent on the specific matter of disability separation. Moreover, both parties agree that the standards governing reinstatement from a disability separation are found in the Ohio Administrative Code §122:1-33. The Employer maintains that the Code is not incorporated in the Agreement and that the issue raised by the Grievant is solely within the jurisdiction of the State Personnel Board of Review pursuant to ORC 124.03 (Joint Exhibit 4). However, §43.02 of the Agreement specifically provides that where the Agreement is silent with regard to benefits to state employees provided by State Statutes, regulations, or rules promulgated pursuant to Ohio Revised Code Chapter 119, "such benefits shall continue and be determined by those statutes, regulations, rules or directives." The Employer claims that other arbitrators have found cases similar to this Grievance not arbitrable because OAC 123:1-33 was not incorporated. For this proposition, the Employer cites the Dirk decision (Award #191 G-87-0677) by Arbitrator Sharpe. While Arbitrator Sharpe did indeed find that a challenge to a disability separation which had been initiated and imposed by the Employer was not arbitrable, he did not rule on the specific question raised by this Grievance. In fact, a full and fair report of his decision would lead to the opposite conclusion. In the facts of the Dirk decision, Arbitrator Sharpe specifically noted (p. 14) "The Grievant has not yet . . . applied for reinstatement under the disability separation rules." Then, in the body of his decision, after specifying that "separation does not involve an employee right . . .," the Arbitrator expressly noted that "[a] different case would be presented, if the Grievant had applied for a disability separation or reinstatement after a disability separation and had been denied." "In such a case, the employee right would be preserved . . ." The Employer also cites the Leedy case (#272 G02-04-880721-0037-01-014). Leedy, like Dirk, represented a challenge to an employer initiated and/or imposed disability separation. Leedy did not seek the benefit of reinstatement. Arbitrator Drotning came to the same end result as Arbitrator Sharpe and appeared to rely on Sharpe's analysis. However, the Drotning decision, unlike the Sharpe decision, does not step by step explicate the relationship between the Agreement and the Code and in the last two pages only partially addresses the issues. Thus, this Arbitrator declines to rely on statements in Leedy which are only partially

explained.

In the case at hand, the Employer also claims that "the Administrative Code . . . has previously been found not to have been part of the Collective Bargaining Agreement." No authority was stated for the proposition. However, Arbitrator Sharpe in the Dirk decision also spoke specifically to that point. On page 19 in his decision, Sharpe takes judicial notice that the OAC section in question was promulgated pursuant to the Ohio Revised Code §124.385. Hence, the Code is within the scope of §43.02 as having the force of a state statute, etc. The Employer also claimed that the State Personnel Board of Review was the proper forum. However, ORC 4117.10(A) specifically and explicitly ousts SPBR with regard to matters that are the subject of a final and binding grievance procedure. I find that the "benefit" of reinstatement after a disability separation was preserved by §43.02 of the contract and as such is part of the Agreement and subject to final and binding Arbitration.

Discussion - Timeliness

Section 25.02 provides that ". . . all grievances must be presented not later than ten (10) working days from the date the Grievant became aware or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event." The Employer claims that the event which triggered the Grievance clock was the letter of January 10, 1991 wherein Dr. Morrey said "we are unable to approve your reinstatement from Disability Separation at this time." This letter was not a final decision clearly communicated by the Employer to the Grievant. First of all, Dr. Morrey modified his statement with the words "at this time," arguably indicating the process would continue. Moreover, the context of these events were such that the Grievant reasonably could believe that he could do more to obtain his reinstatement. He first notified CDC in June of 1990 of his desire for reinstatement. Between June 1990 and the January 10, 1991 letter, the Grievant was continually trying to satisfy the unclear and inconsistent demands of CDC. In fact, after the January 10, 1991 letter, the process did continue. The Grievant talked numerous times with Carol Webb, and Dr. Holzhauser apparently talked to Dr. Garus. In response, Dr. Garus wrote the January 30, 1991 letter. Apparently on or about January 31, 1991 (after the January 10, 1991 letter), Mr. Gulyassy reached some type of negative decision. However, that decision to this day has never been formally communicated to the Grievant. At one point, Ms. Webb said she would send the decision, if Mr. Gulyassy permitted. Apparently, Mr. Gulyassy did not so permit. The Employer did not communicate a final clear statement to the Grievant of the denial of reinstatement. Evidence adduced at the hearing produced no fixed date from which to measure the grievance time. Since that lack of fixed date is a direct result of the Employer's continuing failure to deal clearly with the Grievant, the Employer cannot be heard (is estopped) to assert §25.02 as a defense. In addition, the Union had no formal notice of these events and the evidence leads to an assumption that the Union acted promptly when it had reason to know of a probable contract violation.

Discussion - Timeliness re: Reinstatement

The Employer claims that under 123:1-33-03(C) the Grievant's time to be reinstated had already passed. The Grievant has a strong reliance argument based on the State error found in the July 10, 1989 letter. However, that argument is unnecessary. ORC 123:1-33-03(C) requires that "Any request for reinstatement following a disability separation must not be later than three years following: a disability separation . . ." Three years expired October 21, 1990. Mr. Gulyassy admitted in open testimony that Grievant's request came before October 21, 1990 and within the three year period. 123:1-33-03(C) does not require that the reinstatement be complete within 3 years only that the "request" be within 3 years.

The Employer claims also that the right to reinstatement has "expired" prior to the letter of January 30, 1991 which the Employer characterized as "releasing him for full duty on January 30, 1991." Aside from failing to be consistent with 123:1-33-03 as stated above, this argument ignores that the State's selected doctor had previously certified the Grievant as ready to work on August 31, 1990. If that doctor's statement met the standards of 123:1-33-03, the Grievant had a "right to reinstatement" well within the 3 year period.

Discussion - Merits

123:1-33-03(D) states that employee "requesting reinstatement from a disability separation shall be eligible for reinstatement after a medical examination, conducted by a physician to be designated by the director OR upon the submission of other appropriate medical documentation establishing that the disabling illness, injury, or condition no longer exists."

The Grievant's first attempt to satisfy 123:1-33-03(D) was to use the "other appropriate medical documentation route." On June 4, 1990, Dr. Garus said that the Grievant is "ready to go back to his job." He defined "his job" as "full duties." However, this letter did not satisfy CDC. So, the Employer utilized its right under 123:1-33-03(D) to choose a second doctor to examine the Grievant. The state chose Dr. Altman. Under 123:1-33-03(D) "The examination must show that the employee has recovered sufficiently from the disabling illness, injury or condition so as to be able to perform the substantial and material duties of the position to which reinstatement is sought." Not only did the State select Dr. Altman, but they sent him the Grievant's job description which Dr. Altman reviewed with the Grievant. Dr. Altman's conclusion was "I can find no reason why the Grievant cannot be re-employed." This statement, while not elegantly phrased, means to this interpreter that the Grievant can perform the duties of his job. The OAC standard does not require a diagnosis. However, Dr. Altman stated that the applicant is "currently clear of any underlying psychotic symptomotogy", so no "diagnosis" was possible.

Mr. Gulyassy chose to find Dr. Altman's report "insufficient." Perhaps, if he had written back to Dr. Altman and asked "do you mean that whatever illness he (the Grievant) had or may have had, is he now able to perform the substantial and material duties of his position?" this Arbitrator would have found a well-intentioned search for clarification. However, the actions which followed instead showed bad faith. The request for a current diagnosis was specious. The letter and discussion with Grievant's mother was irrelevant and inappropriate. We have no evidence of the content of the discussions between Dr. Holzhauser and Dr. Garus; consequently, I will assume that CDC was asking for more information (whether CDC was entitled to that information is problematic) and that Dr. Garus was attempting to meet their requests. During this period, the Grievant was entitled to rely on a belief that the process was ongoing and that no final decision had been reached. Apparently around January 31, 1991, Mr. Gulyassy decided that none of the information was by his personal standards "sufficient" and made a decision. However, the Employer never formally communicated this "decision" and its basis to the Grievant.

At the hearing, the Employer attempted to show how the job had changed and attempted to introduce evidence about the Grievant's work conduct pre-disability. This evidence was irrelevant. Moreover, Mr. Gulyassy's personal need for a diagnosis or whatever he was seeking is also irrelevant. Section 123:1-33-03(D) sets the standard and gives the State the right to use its own doctors. The State selected a doctor using the job description provided by the State and with the apparent full cooperation of the Grievant determined the Grievant could have gone back to work and done his job. Under 123:1-33-03, the Grievant had a right to reinstatement.

Award

The Grievance is granted. The Grievant is reinstated as of August 7, 1990 (two weeks from July 23, 1990 the day of receipt of Dr. Altman's report). The Grievant shall be awarded full back pay less any remuneration earned during that period. Full pay shall include holiday pay. However, the Grievant shall be reinstated with the leave balances which he had as of his last day of work, and new leave accumulation shall start to accrue when he actually returns to work. His seniority and service credit shall be restored. Any provable medical costs which would have been paid by his state insurance had he been insured will be reimbursed, and the PERS contribution appropriate for this period shall be paid. The Employer introduced evidence that the Grievant's job had undergone some change. The Arbitrator orders that when the Grievant returns to work that the Grievant be given an appropriate orientation and training to re-orient him to his duties as well as the various rules and regulations of the institution.

Rhonda R. Rivera
Arbitrator

September 10, 1991
Date

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[1] Ranking appears as in original.