ARBITRATION DECISION NO.:
391

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

EMPLOYER:
Bureau of Workers' Compensation

DATE OF ARBITRATION:
October 22, 1991

DATE OF DECISION:
November 14, 1991

GRIEVANT:
Ronald D. Adams

OCB GRIEVANCE NO.:
34-00-(90-12-13)-0170-01-07

ARBITRATOR:
Hyman Cohen

FOR THE UNION:
John Fisher

FOR THE EMPLOYER:
Rodney Sampson

KEY WORDS:
Removal
Absenteeism
Mitigating Circumstances
EAP

ARTICLES:
Article 9 - Employee Assistance Program
Article 24 - Discipline
§24.07-Polygraph/ Drug Tests
§24.08-Employee Assistance Program
Article 29 - Sick Leave
§29.03-Notification

FACTS:

The grievant had been employed for nine years as an Industrial Safety Consultant 3 by the Bureau of Workers' Compensation. He began to experience attendance problems in 1990. The grievant, as a field

employee, must sign in and out to make management aware of his whereabouts. The grievant received discipline twice in 1990 for failing to sign in and out properly when he had taken leave time. From August to October, the grievant worked 107 hours of the 480 for which he was scheduled. The grievant entered treatment for drug abuse from July 16th until July 19th and again from August 7th until September 8th. The grievant had notified management of his treatment programs. The grievant was absent from October 2nd until October 10th. He did not call in on October 2nd or 4th. He called in on October 3rd, 5th, and 9th, but did not speak with a supervisor, although he was encouraged to do so. He did not call in on October 6th, 7th, and 8th which were a weekend and holiday. The grievant failed to provide medical documentation for the period. He was absent again from October 26th through October 30th, which included a weekend. He called again October 30th but did not speak with a supervisor. The grievant was removed for absenteeism based on the October 2nd through the 10th absences.

EMPLOYER'S POSITION:

There was just cause for removal of the grievant. He was absent three days or more from October 2nd to the 10th and again from October 26th to the 30th. The grievant had been advised by his supervisors and through prior discipline of the employer's absenteeism rules. The grievant was absent on the days in question and, although he called in on some of the days, he did not talk to his supervisor as instructed. The contract does not obligate the employer to enter into last chance agreements or suspend discipline until the grievant completes an EAP program.

UNION'S POSITION:

There was no just cause for removal of the grievant. The grievant's removal was based on absences from October 2nd to the 10th and October 26 to the 30th. However, the second incident was not considered at the pre-disciplinary meeting and the union was informed that it would not be considered at arbitration. The grievant was thus prejudiced by the employer's acts. The grievant did miss work without contacting his supervisors, however mitigating circumstances exist which justify a lesser penalty. The grievant had been in drug treatment programs which the employer knew of and he had been a good employee from 1981 until 1990 when his drug problem began. Discipline should have been suspended until the grievant had completed an EAP program.

ARBITRATOR'S OPINION:

The grievant did violate the employer's rules on absenteeism and call in procedure. He had notice of the rules through his supervisor's counseling and prior discipline. The grievant was absent from October 2nd until the 10th and October 26th until the 30th and failed to contact his supervisor either time. The employer was not obligated to enter into a last chance agreement with the grievant or suspend discipline until he completed an EAP program. However, valid mitigating circumstances exist which warrant a lesser penalty than removal. The grievant had been a good employee from 1981 until he developed drug problems in 1990 and he had sought help through hospitalization. Therefore, a reduction in penalty was warranted.

AWARD:

The grievant was reinstated pursuant to a last chance agreement. He received no back pay, and was to be reinstated after undergoing a physical examination and obtaining a release from the physician stating that the grievant is free of drugs.

TEXT OF THE OPINION:

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration
-between-

STATE OF OHIO, BUREAU OF

WORKERS COMPENSATION

-and-

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

ARBITRATOR'S OPINION

GRIEVANT:
RONALD D. ADAMS

No.:
34-00-(90-12-13)-0170-01-07

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DATE OF THE HEARING:
October 22, 1991

PLACE OF THE HEARING:
Office of Collective Bargaining
Columbus, Ohio

ARBITRATOR:
HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P.O. Address:
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*** * * ***

The hearing was held on October 22, 1991 at the Office of Collective Bargaining, before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:00 a.m. and was concluded at 5:55 p.m.

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On or about December 13, 1990 **RONALD D. ADAMS** filed a grievance with the **STATE OF OHIO, BUREAU OF WORKERS COMPENSATION,** the **"State"**, in which he protested his removal for violating Policy and Procedure Memo 6.02 13b "Unexcused Leave-- 3 or more consecutive days without contact." The grievance was denied by the State at step 3 of the grievance procedure contained in the Agreement between the State and the **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFL-CIO,** the "**Union".** Since the parties were unable to resolve the grievance, it was carried to arbitration.

FACTUAL OVERVIEW

When the Grievant was discharged at the close of business, Friday, December 7, 1990 he was an Industrial Safety Consultant 3 in the Division of Safety and Hygiene of the Bureau of Workers Compensation. The Grievant was also characterized as a "Training Center Coordinator" within the Division of Safety and Hygiene. It should be pointed out that the function of the Division of Safety and Hygiene is to educate employers and their employees in preventing occupational injury and illness; to provide educational seminars and workshops around the State of Ohio; and, to help employees and employers to identify hazards and to reduce injuries and illness.

As a Training Center Coordinator the Grievant performed various duties, including determining the locations for training classes, securing audio visual equipment, setting up equipment in the classrooms, clearing the area at the end of the classes and returning the equipment. He also communicated with course participants, acknowledged receipt of applicants and provided the location, maps and dates of classes to applicants who participated in the training classes. In carrying out his duties, the Grievant met with instructors and with committees. As Gregory A. Hopkins, Chief, Training Support, indicated the Grievant's "presence" was felt during the training classes and seminars. Hopkins added that the Grievant filled a "support" function.

The "worksite" of the Division is located in Columbus, Ohio. However, the Grievant traveled outside of Columbus to various locations. He did so because the Coordinator's job "is not an 8:00 a.m. to 4:45 p.m. job" inasmuch as they work "out in the field setting up classrooms".

It is undisputed that from March 1981 to June or July of 1990 the Grievant was a "good" employee. During the summer of 1990 the Grievant began having difficulties signing in and signing out. As I have previously indicated, the Training Coordinator's job requires travel. It is important that the Supervisors know where the Coordinators are located in the "field" and what they are doing. Thus, when a Coordinator leaves for the "field" the Coordinators must sign out and indicate where they will be performing their work. In April and May the State issued Interoffice Communications on the procedure for signing in and signing out. Training Center Administrator Richard E. Wynn indicated that he had a meeting with the Grievant and two (2) other Coordinators around May 7, 1990 over the proper signing in and signing out procedures. At first the Grievant was not the only employee in the Training Center having difficulties with signing in and signing out. However towards the end of July and early August, the Grievant was involved in two (2) episodes in which he neglected to follow proper procedure which led to discipline. The first episode occurred on July 27, 1990 when the Grievant took leave after lunch and did not sign out on the time sheet. He failed to return that afternoon. Indeed, he failed to notify the office by telephone that he would not be returning. Furthermore, on August 3 the Grievant took two (2) hours leave with authorization but did not sign out or in until Hopkins reminded him at 3:40 p.m. that he had failed to do so. The Grievant explained the August 3 situation by indicating that when he returned to the office on August 3 he took a telephone call related to his duties as a Training Coordinator. After he "scheduled" the caller Hopkins told him that he did not sign in. According to the Grievant, he said that he was just about to sign in and he did so. The Grievant went on to state that no one ever signed the sheet in

his section. However, on August 6 as a result of a discussion with Hopkins he received a verbal reprimand concerning the incidents of July 27 and August 3, 1990.

During the summer of 1990, the Grievant began using vacation and personal leave in lieu of sick leave. He was also exhausting his available sick leave and his absence was becoming a matter of concern to both Hopkins and Wynn. In July 1990, of 190 hours that the Grievant could have worked, he actually worked a total of 90 hours. From August to October the Grievant would have been scheduled to work a total of 480 hours but in fact he worked approximately 107 hours. However, between August 7 to September 8, 1990 the Grievant was a patient at Parkside Hospital where he underwent medical treatment. He was also on disability leave during this period of time for approximately eighty (80) hours. It should be noted that the Grievant was not disciplined for "sick leave abuse" or excessive absenteeism.

On July 3 Wynn held a meeting with the Grievant with respect to his use of sick leave that was taken in June 1990. Wynn stated that he advised the Grievant at the meeting that he noticed that he was using a good deal of sick leave. He advised the Grievant that if there is a problem where he "could help" he would like to do so. According to Wynn the Grievant stated that he had personal problems which he would be able to take care of. There followed a meeting on July 13, 1990 between Wynn and the Grievant over the Grievant's absenteeism. As Wynn related, the Grievant was absent from work for a number of day up to July 13. He had used vacation leave in lieu of sick leave.

The Grievant's difficulties during the summer of 1990 stemmed from his use of, and addiction to coke and cocaine. Both Wynn and Hopkins "had an idea" at the beginning of the summer that the Grievant's difficulties stemmed from drug use. Wynn actually found out about the Grievant's drug use when he was told by his wife on July 17 that the Grievant had admitted himself to Parkside Hospital. According to Wynn, Ms. Adams said that the Grievant wanted this matter to be confidential. Wynn stated to the Grievant's wife that he would have to talk to Superintendent Lou Gergely about the Grievant's situation. Shortly before July 23 Wynn had talked to Gergely and advised him that he would conduct an investigatory interview on the Grievant's use of excessive leave. However, Gergely stated that he would take full responsibility for the Grievant as long as he was "in a program" and Wynn was to "hold off" on any investigatory meeting or any discipline. As long as the Grievant was seeking professional help, Wynn said that the State would not conduct an investigatory meeting and that no discipline would be imposed against the Grievant. Between July 16 through July 19, 1990 the Grievant was a patient at Parkside Hospital.

Shortly before July 23 Wynn was in contact with Alice Dawson who was the Grievant's counselor while he was in an out-patient program. Since Wynn and Hopkins wanted to make sure that the Grievant was following up with medical treatment, Dawson agreed to let them know the dates of her meetings with the Grievant.

Wynn met with the Grievant on July 23. He indicated to the Grievant that the State had been considering an investigatory meeting due to his excessive absenteeism, but they would "hold off" as long as he was seeking professional help. According to Wynn, the Grievant appreciated what he [Wynn] had stated and that he was "trying to get help".

Subsequent to July 23 the Grievant continued to be absent by taking sick leave and personal leave. As I have previously indicated, between August 7, 1990 to September 8, 1990, the Grievant was a patient at Parkside Hospital. Wynn indicated that during the summer months the State began requesting documentation from the Grievant
as to his whereabouts when he called in. Wynn wanted to know whether he was seeking professional help rather than getting "blasted". Eventually, the State obtained documentation but it was after the Grievant had been terminated. Between August 1 through September 31 there was a great deal of absenteeism by the Grievant. During this period of time, Hopkins requested Sandy Weinberg, who was "in charge of the State Employee Assistance Program" to help the Grievant. There were occasions during August and September when the Grievant "consulted" with Weinberg.

Turning to October 1 a meeting was held between Wynn and the Grievant. At the meeting the Grievant first admitted to Wynn that he was taking cocaine and crack. Because of their concern for the Grievant's safety and the security of the "work area", Hopkins and Wynn revoked his driving privileges which prevented him from using a car from the "State pool". The Grievant also submitted a verification of disability indicating

that he was at Parkside Hospital for treatment between August 7 and September 8. However, on October 1, the Grievant left work at 10:48 a.m. after having arrived at 7:50 am. According to Wynn, the Grievant "vanished" and never signed in or out on October 1.

OCTOBER 2 -- OCTOBER 10; OCTOBER 26-30, 1990

Between October 2 through October 10, the Grievant was absent from work. On October 2 the Grievant acknowledged that he was "chronically sick" and he did not call in. The following day, on October 3 the Grievant recalled talking to Regina Barnes, a temporary employee. The Grievant testified that he was reluctant to talk to her about his "problems" and about his "relapse". Wynn said that when the Grievant called on October 3, he informed Barnes that he had become ill on October 2 on his way to Sandusky, Ohio. As a result, he went to Toledo where his parents lived and where he grew up. During the phone call with the receptionist the Grievant was given the phone number of Hopkins and was told to call him. The Grievant never called Hopkins. There was no meeting sponsored by the State in Toledo on October 3. On October 4 the Grievant did not call the State and was absent from work. On the following day, on October 5, the Grievant said that he recalled talking to "Jackie" in the office. He said that he called from Toledo and told "Jackie" that he would try to make it back to Columbus. Wynn confirmed that the Grievant called "Jackie". The Grievant indicated to "Jackie" that he would not be at work that day and would be at the office to pick up his check, which he did at 1:50 p.m. Wynn went on to indicate that on October 5 the Grievant did not say that he was sick. In reply to Jackie's request that he talk to Wynn or Hopkins, the Grievant refused to do so. The weekend fell on October 6, 7, and October 8 was a holiday. On October 9 the Grievant did not recall whether he called in. However, Wynn testified that the Grievant called in and spoke to "Jackie". He said to her that he was not coming in and that he did not want to talk to Wynn. However, he told "Jackie" that he would contact Wynn later that day. He failed to do so. On October 10 the Grievant said that there was at least one (1) contact made with the office. He was at Parkside Hospital and he just wanted to get a message to the office. He said that he got the call off which Wynn confirmed. However, although "Jackie" requested that he speak to Hopkins, the Grievant refused to do so.

Hopkins testified that on October 26, 1900, the Grievant did not call in. The following two days consisted of the weekend and October 29 the Grievant did not call in. On October 30 the Grievant called the office at 2:00 p.m. and Hopkins was told by "Gracie Triplett" that the Grievant refused to talk to him.

The Grievant has never provided medical documentation to the State to excuse his absence from October 2 through October 9. Moreover, between October 26 and 30 no such documentation was submitted to the State. Furthermore, between October 2 through October 9, and from October 26 through October 30, on the days that he called the office he did so in excess of one-half hour of his scheduled reporting time. Effective at the close of business Friday, December 7, 1990 the Grievant was removed because of his violation of Policy and Procedure Memo 6.02 13b "Unexcused leave--three or more consecutive days without contact."

DISCUSSION

The parties agreed that the following issue is to be resolved by this arbitration: Whether the Grievant Ronald G. Adams was discharged for just cause; if not, what shall the remedy be?

1. OCTOBER 26, 29 and 30,1990

A threshold issue is raised by the Union concerning the violation of unexcused leave for the dates between October 26 through October 30, 1990. The Union asserts that the late October dates were not considered at the pre-discipline meeting held on November 19, 1990. John Fisher, the Union's staff representative at the arbitration hearing also contends that he was first advised that the State would rely upon the late October dates the night before the arbitration hearing.

The pre-discipline meeting was initially scheduled to take place on October 31, 1990. It was rescheduled

to November 7 and finally, November 19 when the meeting was held. The Grievant was hospitalized on October 31 and November 7 which caused the meeting to be rescheduled.

Hopkins indicated that he submitted an unsigned typewritten statement to Wynn, Chief Steward Robert Blackwell and Hearing Officer Roberta Bavry on October 31 in which he referred to the Grievant being AWOL on October 26, 29 and 30.

Hopkins acknowledged that he "did not believe" that on November 19, the Hearing Officer "brought up" or raised the late October dates at the meeting. Furthermore, after conducting the pre-disciplinary meeting on November 19, Hearing Officer Bavry submitted her findings and recommendation in a memorandum dated November 28, 1990 to Patrick G. Mihm CEO/Administrator and Thomas J. Winters, Human Resources Director in which she indicated that the "dates in issue for the infraction of three or more consecutive dates without contact are October 2, 3, 4, 5, 9, 10 and 11." There is no reference in her findings and recommendation to the late October dates. In his notice of removal letter dated December 7, 1990 to the Grievant, Mihm, in relevant part, stated: "** After reviewing the recommendation of the Hearing Officer, it has been determined that just cause exists for this action". Thus, Mihm relied upon Hearing Officer Bavry's recommendation that the Grievant was removed at the close of business, Friday, December 7, 1990. Since Hearing Officer Bavry's recommendation was based solely on the Grievant's violation of 13.b of Policy and Procedure Memo 6.2, for the dates of October 2 through 11, 1990 which constituted "three or more consecutive dates without contact", I cannot give any weight to the State's claim that the dates of October 26 through October 30, 1990 were included as a second violation of 13.b of the Policy and Procedure Memo. Clearly, the late October dates played no role in the State's removal of the Grievant. The Level III Response by Labor Relations Manager Gretchen Green on February 20, 1991 which includes the late October dates are not entitled to any weight since these dates were not considered by CEO/Administrator Mihm in his decision to remove the Grievant at the close of business, Friday, December 7, 1990.

2. OCTOBER 2, 3, 4, 5 and 9

It is undisputed that Wynn instructed the Grievant in two (2) meetings which took place in late August or early September, 1990 that he was to contact Hopkins or himself if he was calling off sick and unable to report for work. Furthermore, he was to call off within one-half hour of his starting time. Wynn's instructions to the Grievant were consistent with Article 29.03 of the Agreement and State Memo 3.02 D.

Based upon the evidentiary record, I have concluded that the Grievant violated State Memo 6.02 13b. by taking leave which was "unexcused for three or more consecutive days without contact" between October 2 through 9, 1990. On October 2 the Grievant failed to call in. On October 3, the Grievant called in but refused to talk to Hopkins or Wynn. On October 4 the Grievant did not call in. On October 5, he called in and picked up his check. However, he refused to speak to Hopkins or Wynn. On October 9, the Grievant did not call in. Contrary to Article 29.03 of the Agreement and State Memo 3.02, the Grievant did not report to work between October 2 through October 9. Moreover, he failed to notify his immediate supervisor [Hopkins or Wynn] and failed to give notification of his absence on these days "within one-half hour" after he was scheduled to report for work.

3. EMPLOYEE ASSISTANCE PROGRAM

There is no question but that the State was aware of the Grievant's problem with cocaine, coke and "acute stress" since mid July 1990, at which time the Grievant admitted himself to Parkside Hospital for treatment. He was also admitted to Parkside between August 7 to September 8, 1990 for medical treatment due to his dependence on drugs. Moreover, the Grievant was hospitalized again between November 2 and 9, 1990 for his continuing problem with drugs. At the pre-discipline meeting that was held on November 19, 1990 the Grievant requested permission to enter into a formalized EAP last chance agreement but the State opposed his request. In her findings and recommendation, Hearing Officer Bavry stated:

"Given the irresponsibility displayed by Mr. Adams for well over a month from the time of the filing of this request for discipline, and given Mr. Adams' two prior hospitalizations for chemical dependency, I can see no

advantage to an E.A.P. agreement. Accordingly, I recommend a finding that there is just cause for the requested discipline."

As Director of Labor Relations of the Bureau, Green has the authority to enter into an EAP Agreement. At the Level III Step of the Grievance Procedure, the Union requested the State to enter into a "last chance" EAP Agreement but Green "declined to respond". Green said that the Bureau declined to enter into EAP participation because, on his own initiative, the Grievant "had entered into an EAP program and was not successful". Green added that "we were also concerned about security and safety in the work area".

Although the term "State EAP Program" was referred to frequently by the Union, it was explained by Green as a "referral source". She added that the employee contacts the EAP in confidence and obtains the "right person" who provides assistance. The Health Care provider, Green said, administers the EAP.

Although the Union questioned the refusal of the State to enter into an EAP Agreement or to "formalize" such an Agreement in July or August, 1990 there is nothing in the Agreement that has been directed to the Arbitrator's attention which requires the State to enter into an EAP agreement with an employee. The Arbitrator is without authority to compel the State to enter into such an agreement where under the Labor Agreement, it has discretion as to whether or not it wishes to do so.

Thus, under Article 9 of the Agreement, which covers "Employee Assistance Program", there are no terms which require the State to enter into an EAP. Indeed, the employee's participation in an EAP is "strictly voluntary" as provided in Article 9, D. 3. of the Agreement.

Article 24.08 of the Agreement provides as follows:

"§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, the Employer will meet and give serious consideration to modifying the contemplated disciplinary action."

It should be underscored that under the terms of Article 24.08, "the disciplinary action may be delayed until completion of the program". By agreeing to Article 24.08, the parties contemplated that the implementation of its terms is within the discretion of the State. The State considered the Union's request for a "last chance" EAP agreement but declined to enter into such an agreement. As Green indicated the Grievant had entered into an EAP and it was to no avail. Furthermore, the State was concerned about safety and security in connection with the performance of the job duties by the Grievant.

REMEDY

From the Grievant's date of hire on March 3, 1981 until the summer of 1990, as Hopkins and Wynn said, the Grievant was a "good" employee. The exceptional job performed by the Grievant over the years was confirmed by letters written by various employers to the Grievant and to the State. These letters indicated that the Grievant performed his job duties at training sessions and seminars in an outstanding manner. The letters for example refer to the "exceptional amount of enthusiasm" of the Grievant and his "positive attitude towards safety and training"; his "flexibility and amiable personality"; his "poise" and professionalism and his effective communication skills. I have, concluded that the nine (9) or ten (10) letters constitute a representative sampling of the fine work performed by the Grievant until the summer of 1990. The Grievant's yearly evaluation by his supervisors confirmed that he was a "good" employee.

The Grievant's performance began to decline during the summer of 1990 due to his dependence on drugs. During this period of time, the Grievant received a verbal reprimand on August 6, 1990 for his failure to follow proper sign in and sign out procedures after being previously warned about his failure to do so. The August 6 verbal reprimand was the only discipline that the Grievant received during his tenure of almost ten (10) years with the State. The deterioration of the Grievant's job performance culminated with his unexcused leave between October 2 through October 9 which violated Policy and Procedure Memo 6.02, 13 b.

As I have previously established, the State's claim that the Grievant violated Policy and Procedure Memo 6.02, Section 13b in late October, 1990 is of no weight in this case. However, it should be underscored that Section 13.b calls for "removal" as a disciplinary guideline for the first violation of "Unexcused Absence--3 or more consecutive days without contact". This violation occurred between October 2 through 9, 1990.

It should be pointed out that the State exercised extraordinary patience and restraint in dealing with the Grievant when his job performance went into sharp decline. During the 1990 summer through October, 1990 the Grievant was an unreliable employee. Although the Grievant was frequently absent and neglected to follow proper sign in and sign out procedures his immediate supervisors sought to assist him. Their offers of help were rejected by the Grievant. Unknown to the Grievant, both Hopkins and Wynn enlisted the help of "Sandy" Weinberg, who was described as the person "in charge of the State EAP". He consulted with the Grievant in August and September, 1990.

Wynn said that the Grievant had been in a professional organized program as an "in-patient" on three (3) separate occasions and as an out-patient on numerous other occasions. However, it was to no avail.

In light of the Grievant's good employment record from March, 1981, as well as the deterioration of his job performance from June or July 1990 through October, 1990, I turn to the relief to be awarded in this case. The Grievant said at the hearing that he "feels great" and he is "not on drugs". I recognize that in reinstating the Grievant to his job without back pay based on the Grievant's statement that he "feels great" and is not on drugs might still create a risk to his safety and to the security of the work place. I am also mindful of Article 24.07 of the Agreement which provides that random drug testing is prohibited "unless mandated by federal funds/grants". There is no evidence that the Grievant's job is financed with federal funds or grants. In any event, I have concluded that the Grievant is entitled to be given a "last chance" to continue the good work that he performed from March 1981 to May or June, 1990. However, before the Grievant is reinstated without back pay, due to security and safety considerations, he is required to undergo a medical examination by a state appointed doctor and obtain a medical release indicating that he is no longer dependent on drugs.

AWARD

The State failed to prove by clear and convincing evidence that the Grievant was discharged for just cause. He is to be reinstated without back pay provided he undergoes a medical examination by a State appointed doctor and obtains a release that he is no Ionger dependent on drugs.

Dated: November 14, 1991
Cuyahoga County
Cleveland, Ohio

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