ARBITRATION DECISION NO.:
445

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

EMPLOYER:
Department of Taxation,
Estate Tax Division

DATE OF ARBITRATION:
March 20, 1992

DATE OF DECISION:
June 12, 1992

GRIEVANT:
Franco Iulianelli

OCB GRIEVANCE NO.:
30-10-(91-02-25)-0242-01-14

ARBITRATOR:
Hyman Cohen

FOR THE UNION:
Dane Braddy

FOR THE EMPLOYER:
Timothy D. Stauffer, Esq.

KEY WORDS:
Resignation
Job Abandonment
Constructive Discharge
Acceptance of Resignation
by Employer
Arbitrability

ARTICLES:
Article 25 - Grievance
Procedure
§25.02-Grievance Steps
§25.07-Advance
Grievance Step Filing

FACTS:

The grievant was employed as a Tax Commissioner Agent 5 when the Employer determined that he had voluntarily resigned. During this time, the grievant was going through a divorce, and he asked his supervisor and the administrator about a leave of absence. He had expressed a desire to leave the country to avoid

paying alimony and child support. On February 4, the grievant called in sick and asked how to go about resigning. His supervisor informed him he would need to do it in writing. He stated that his resignation would be dropped off by a friend later in the week. He did not report to work the remainder of the week nor did he call in and indicate that he wouldn't be reporting to work. On February 7, 1991, a friend of the grievant dropped off the grievant's handwritten resignation, which stated, “I ... hereby resign my position with the State of Ohio Department of Taxation. I'm sorry I could not give 2 weeks notice.” On February 10, the grievant called his supervisor and asked her if he could rescind his resignation. She referred him to Human Resources, which informed him that his resignation had already been processed.

UNION'S POSITION:

The Union asserted that the grievant was constructively discharged, that he was forced to resign because of an unpleasant working environment. The Union also argued that the resignation failed because it was vague and lacked an effective date. Even if the resignation were accepted, the Union asked that the state of mind of the grievant at the time of tendering his resignation be considered, that the grievant was too emotionally distressed to understand what he was doing when he resigned, and that it is incumbent upon the Employer to ascertain the grievant's true intention. The Union also asserted that the grievant's rescission of his resignation should be accepted since the Employer had accepted rescissions in the past.

EMPLOYER'S POSITION:

The Employer asserted that this issue is not arbitrable because the grievant was no longer an employee upon his resignation, and further, that the grievance was not filed within 10 working days as required under Step 1 of Article 25.02. The Employer argued that the grievant resigned voluntarily upon tender of his resignation. His working environment was supportive and congenial, and hence, he could not have been constructively discharged. Finally, the Employer argues that prior arbitrations support a finding that accepting retractions of voluntary resignations is at the discretion of the Employer and that not accepting such a retraction is not a violation of the Agreement.

ARBITRATOR'S OPINION:

Regarding the initial arbitrability issues raised by the Employer, whether the grievant was an employee at the time of the grievance, depends on the outcome of the key issue in this dispute, if the grievant resigned or was constructively discharged. In addition, Step 1 of Article 25.02 is to be contrasted with Article 25.07 which provides for advance grievance filing within 14 days of notification of suspension or discharge, which should be read to mean 14 working days. To sustain the Employer's claim that the instant grievance is not arbitrable because the grievance was not filed within 10 days as provided in Article 25.02 would dispose of the same central issue, whether the grievant voluntarily quit or was constructively discharged.

The grievant tendered his written resignation on February 7, 1991, and hence, voluntarily quit his employment with the state. To be constructively discharged, the employer must have forced the employee to quit by making his work situation unbearable. The grievant's working conditions were friendly, supportive and congenial. The evidence shows that the grievant's supervisor was a friend and confidante. When the grievant talked about his marital problems, she suggested he get counseling through EAP. When the grievant said he wanted to know what it took to resign, she suggested that he take some vacation time and think about resigning before doing so. He did not submit a request to take leave.

The grievant's resignation was clear and unequivocal. There is nothing ambiguous about the statement. The grievant resigned upon the tender (actual physical presentation) of the resignation. His intention to resign at that point is indicated by his apology that he could not give two weeks notice.

There is no affirmative burden on the Employer to inquire into the grievant's state of mind. Nevertheless, the grievant communicated his true intention to his supervisor when he asked about how to go about resigning and again with the submission of his resignation. In Cedar Coal, 79 LA 1028 (Dworkin, 1982), it was determined that in such a situation, the key issue was whether the grievant understood what he was doing, despite his emotional distress. Here, the evidence demonstrates that the grievant knew that he was resigning, in spite of his emotional state.

Finally, after reviewing the published decisions on the retraction of voluntary resignations, it is clear that it is at the discretion of the Employer whether or not to accept a retraction, and that it is not a violation of the Agreement for the Employer to refuse to accept the retraction under these circumstances.

In conclusion, the grievance is not arbitrable because the grievant was not employed by the State when he filed the instant grievance. He voluntarily resigned on February 7, 1991.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration

-between-

STATE OF OHIO, DEPARTMENT OF TAXATION, ESTATE TAX DIVISION

-and-

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

ARBITRATOR'S OPINION

Grievant:
Franco Iulianelli

30-10-910225-0242-01-14

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DATES OF THE HEARING:
March 20, 1992

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

ARBITRATOR:
HYMAN COHEN, Esq.
Impartial Arbitrator
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*** * * ***

The hearing was held on March 20, 1992 at the State of Ohio, Office of Collective Bargaining, Columbus, Ohio, before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:45 a.m. and was concluded at 4:00 p.m. Post-hearing briefs were submitted on April 7, 1992.

*** * * * ***

On February 25, 1991 **FRANCO IULIANELLI** filed a grievance with the **STATE OF OHIO, DEPARTMENT OF TAXATION, ESTATE TAX DIVISION**, the "**State**" protesting the State's decision that he had resigned from employment. Since the State and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO**, the "**Union**" were unable to resolve their dispute, under their Labor Agreement it was carried to arbitration.

FACTUAL DISCUSSION

a. BACKGROUND

The Grievant was employed by the State from March, 1985 until February 7, 1991. When he was first employed by the State he filled the position of Tax Commissioner Agent 2. He was a Tax Commissioner Agent 5 when the State determined that he had voluntarily resigned from his employment on February 7,1,991

As a Tax Commissioner Agent, the Grievant audited closely held corporations, and all estates, both small and large. The Grievant characterized himself as a "lead agent" who reported to Tax Commissioner Agent Supervisor Linda Barton. He said that “all agents reported" to him. The Grievant indicated that in performing his work, he had close contact with attorneys and corporation representatives.

When he was separated from employment with the State in February, 1991 the Grievant had been married for approximately sixteen (16) years. There were four (4) children from the marriage, which began to unravel in 1990. A decisive stage in his relationship his wife was reached in late January, 1991 when he was evicted from his home. As the Grievant related, he came home on or about January 23, 1991 and was told that he was required to pack up and leave in five (5) minutes.

Due to the stress and emotions that he was experiencing, along with his inability to sleep, the Grievant began to receive counseling on January 30,1991 in "crisis management". The Grievant was divorced on June 10, 1991. In September, 1991 he was remarried.

The Grievant said that he enjoyed a good working relationship with Barton, who had been his supervisor since 1986. The Grievant had talked with Barton about his marital problems, beginning in 1990. Barton occasionally recommended that he enroll in the Employee Assistance Program (EAP). However, according to Barton, he felt that he could work out his problems. Barton said that at one point in early 1991 the Grievant told her that he would seek counseling and again, she mentioned EAP to him.

It is undisputed that the Grievant first approached Barton in mid January and requested information about

a leave of absence. Barton told him that she was not familiar with the criteria for a leave of absence. But, she added that "if the work load permits" she thought that leave would be authorized. Barton then suggested to the Grievant that he should talk to Estate Tax Administrator Virginia Macali.

According, to Barton, the Grievant did not tell her why he wanted information about taking a leave of absence. He talked to her about his "marital crisis" and he referred to leaving the country to avoid alimony and child support.

Turning to Macali's testimony she said that a few weeks before February 4 she recalled the Grievant standing in the doorway of her office where they "talked about several things". Macali said that he "was feeling me out about the possibility of taking a leave of absence". Macali then went on to testify that the Grievant "said that he was thinking about taking a leave of absence". She testified that one (1) consideration in approving a leave of absence was the "workload in the office at the time". Macali testified that the Grievant told her about his marital difficulties and that "part of his plan" was to leave the country and go to Canada to avoid paying alimony and support. Macali said that after the Grievant talked to her, she heard nothing from the Grievant about his leave request.

During the week preceding February 4, Barton said that the Grievant reported to work for the entire week and did not request leave. Immediately before February 4 Barton said that the Grievant told her that he was "elated" to obtain a divorce and get out of his "bad marriage". He told Barton that he wanted to date again. She indicated that his attitude was good and that "a weight had been lifted" from the Grievant.

The Grievant said that about one and one-half (1 1/2) weeks before February 4, in response to his request for information about a leave of absence, Barton told him that she "could obtain" such information. He believed that Barton would obtain information on the leave of absence from Personnel but such information was never given to him. The Grievant said that he also talked to Macali in her office and "needed information to know what to do", but he never received the information.

b. FEBRUARY 4, 1991

On February 4, 1991, Barton related that the Grievant called her in the morning and reported off sick. Barton further testified that he told her that he "had to get away"--he said that he had to get out of the country and that he would not pay support and alimony.

The Grievant called Barton a second time on February 4. According to Barton, he asked her questions about resigning to which she responded by telling him that he "did not want to do anything hasty". She said that she suggested to him that he take one week of vacation in light of the personal and vacation leave that he had accumulated. Parenthetically, during the week of January 25, the Grievant had accumulated 33.3 hours of vacation leave, 5.3 hours of personal leave, and 15.4 hours of sick leave. When the Grievant replied "no", to Barton's suggestion that he take a vacation, and that he wanted to resign, Barton testified that she told him that he could not do it (resign) by phone" and that he "must do it in writing". Barton went on to state that the Grievant told her that he was leaving that day and that he would do it in writing. She continued with her testimony by indicating that the Grievant told her that the resignation would be dropped off, "by a friend later that week", at which time the friend would also pick up his pay check. Barton explained to the Grievant that written authorization was required for a person to obtain the paycheck of an employee.

Turning to February 4, after awakening early in the morning and not sleeping well, the Grievant said that he called Barton to indicate that he was sick and would not be at work that day. Afterwards, he called Barton again and asked her if he could take some kind of vacation, personal or "administrative leave or anything just to think and rest". According to the Grievant, Barton told him that he "would have to come in and fill out a card if he wanted to take vacation * *." The Grievant said that he told Barton that he "was too stressed out to come in" and that he "could not come in to fill out the request for a vacation". The Grievant went on to state that Barton said that "there is nothing she could do for me if I did not come in". In answer to the Grievant's query as to what he could do, the Grievant said that Barton replied that the "other option was resigning". Elaborating on the second telephone discussion with Barton, the Grievant related that Barton told him that he had to "physically come through the doors to request a vacation". Moreover, when he asked Barton "what other options [he] had, "according to the Grievant, she said "either come to work or resign". The Grievant went on to indicate that Barton told him that they were busy at the office and it was a bad time" to request a

vacation. He continued with his testimony by stating that he "could not request a vacation by telephone and that the only option was to come to work or resign". He "recalled her saying that you have to come in", after which he said that he "would resign". The Grievant also indicated that he believed that he asked Barton whether his "future sister-in-law" could pick up his pay check, but he could not recall Barton's response.

EVENTS AFTER FEBRUARY 4,1991

The Grievant did not report to work for the remainder of the week beginning Monday, February 4, 1991; nor did he call in and indicate that he would not report to work.

On February 7, 1991 Barton said that the Grievant's friend whom the Grievant had identified in their February 4 telephone discussion, dropped off the Grievant's signed handwritten resignation which states:

"I, FRANCO M. IULIANELLI SS# 281 58-1089, hereby resign my position with the State of Ohio Department of Taxation. I'm sorry I could not give 2 weeks notice."

In addition, a signed handwritten authorization to pick up the Grievant's check for February 8 and 22, 1990 was dropped off by the Grievant's friend and received by Barton on February 7, 1991.

Barton next heard from the Grievant on Sunday, February 10, when he called her at home. After wishing him "Happy Birthday" Barton said that the Grievant asked her whether he could rescind his resignation. She testified that she told him as far as she knew, the resignation had gone to Human Resources. Barton suggested that he call her on Monday morning February 11 after she had talked to the Administrator.

On Monday morning Macali told Barton that in connection with the Grievant's request to rescind his resignation, she should call Human Resources and get back to her. Human Resources informed Barton that "the paper work had been processed" and that the resignation could not be rescinded. Barton conveyed this information to the Grievant. She suggested that he call Human Resources.

The Grievant said that he "tried to rescind his resignation" when he called Barton on February 10. His testimony, essentially, corroborated the testimony of Barton concerning the events of May 11.

In light of this outline of events, the instant grievance was filed with State.

DISCUSSION

The State raises several threshold issues which must be resolved before addressing the merits of the dispute between the parties.

The State contends that since the Grievant was not an employee when he filed the grievance on February 25, 1991, the grievance is not arbitrable. However, whether the Grievant is still an employee is the very issue in dispute. By contending that the grievance is not arbitrable because the Grievant resigned on February 7, 1991, the State has assumed the correctness of its position on the merits, namely that the Grievant quit his job and that he was not constructively discharged. Whether the Grievant quit his employment or was constructively discharged constitutes one (1) of the main issues which must be resolved in considering the merits of the dispute. Thus the question as to whether the Grievant was an employee as of February 25, 1991 can only be resolved after deciding the merits of the dispute. Accordingly, I cannot conclude at this time that the grievance was not arbitrable.

As an alternative argument, the State contends that the grievance is not arbitrable because the grievance was not presented within ten (10) working days from the date the grievant "became or reasonably should have become aware of the occurrence giving rise to the grievance" as required under Step 1 of Article 25.02 of the Agreement.

However, Step 1 of Article 25.02 is to be contrasted with Article 25.07 which provides for "advance grievance filing" to step 3 "within fourteen (14) days of notification" of suspension or discharge. In light of the difference in the filing period between grievances involving suspension or discharge [Article 25.07], and other grievances, [article 25.02 Step 1], to sustain the State's claim that the instant grievance is not arbitrable because it was not filed within ten (10) days as provided in Article 25.02 would dispose of a central issue on the merits, which is whether the Grievant voluntarily quit or was constructively discharged.

Article 25.07 provides for a period of time of "within fourteen (14) days of notification of such action" and omits the operative phrase contained in Step 1 of Article 25.02 which states the ten (10) day time period in terms of "working days". I have concluded that the "fourteen (14) days of notification of such action" set forth in Article 25.07 was intended to mean fourteen (14) "working days" of notification. To omit the phrase "working days" and include weekends, would not indicate, much, if any, of a difference in the period of time for filing a grievance, as the parties intended, under Articles 25.02, Step 1 and 25.07.

By concluding that the instant grievance was timely filed under Article 25.07 does not preclude me from deciding that the Grievant voluntarily quit employment on February 7. Accordingly, by deciding that the instant grievance was timely filed enables me to consider the merits of the instant dispute so that I could decide whether the Grievant's separation from employment was a voluntary quit or constructive discharge. Accordingly, merely for the purpose of considering the instant dispute on the merits, and in light of the Grievant's claim that he was constructively discharged, I have concluded that the grievance was filed within fourteen (14) days of February 7, 1991 as provided in Article 25.07. Thus, the grievance is arbitrable.

DISCUSSION

The central query to be resolved is whether the Grievant tendered a written resignation on February 7, 1991 or was he constructively discharged. A voluntary quit was defined in Kohler & Campbell, Inc., 18 LA 184 (Rosenfarb, 1952) where the Arbitrator stated:

"A voluntary quitting occurs only if the employee manifests by words or actions an intent to terminate and abandon finally his employment accompanied by an overt act carrying out the intent. The element of finality is indispensable as is the one of intent." At page 186."

By contrast, it has been stated that the term "constructive discharge":

"is better applied to cases in which the employer forces the employee to quit, not by asking for his resignation but rather by making his work situation intolerable * *." Pepsi-Cola Bottling Co., 70 LA 434 (Blackmar, 1978) at page 436, footnote 1."

After carefully examining the evidentiary record, I have concluded that by tendering his written resignation to the State on February 7, 1991, the Grievant voluntarily quit his employment with the State. I have concluded that the working conditions, and, in general the work environment, through February 11, 1991 at the Estate Tax Division was friendly, supportive and congenial towards the Grievant. As early as 1990, when the Grievant disclosed to Barton, that he was experiencing marital problems, she became his confidante. The evidence indicates that she was a patient and concerned friend.

I have concluded that in 1990 Barton suggested that the Grievant enroll in the EAP. I believe that Barton suggested EAP in January, 1991 when the Grievant indicated to her that he would seek counseling for his personal problems. Barton acknowledged that the Grievant was keeping up with his work duties in January 1991 while undergoing marital difficulties. She also said that he interacted well with his co-workers.

Turning to February 4, 1991, the Grievant telephoned Barton the second time on that day, and asked her questions about resigning. I have concluded that Barton suggested that in light of the Grievant's accumulated vacation and personal leave, that he take "a week off" and not do anything hasty. When the Grievant said "no" and that he wanted to resign, Barton told him that he could not do so by telephone and that the resignation must be submitted in writing.

Contrary to the Grievant's testimony, I cannot conclude that Barton told the Grievant during their second telephone discussion on February 4 that he would have to come to the office if he wanted to take a vacation. The Grievant's version of their telephone conversation that Barton told him that there is nothing that she could do for him, after he told her that he was "too stressed out to come in and that he could not do so, in order to fill out the vacation request, is not supported by the evidentiary record. Moreover, I cannot conclude that Barton told the Grievant that his "other option was resigning" when he asked "what could [he] do?"

There are several factors which lead me to conclude that the Grievant's version of the second telephone discussion on February 4 is not supported by the evidentiary record. The Grievant acknowledged on cross-

examination that in the past, whenever he called Barton, by telephone, and requested leave time, she granted leave without requiring him to come in to the office. The Grievant acknowledged that the only exception to Barton granting him leave, by telephone, was on February 4, 1991. It is astonishing that in light of Barton's supportive and friendly relationship with the Grievant, that on February 4, Barton would deviate from her consistent practice of granting leave to the Grievant, pursuant to his request by telephone. Indeed, when the Grievant was asked why Barton would change her policy in light of their friendship, the Grievant replied that he had "no idea". Had Barton changed her policy on granting leave in her telephone discussion with the Grievant, it is nothing less than extraordinary that he accepted the change in her practice by merely asking "what could I do"? In light of the stress that the Grievant indicated that he experienced on February .4, had Barton changed her policy on granting leave by telephone, I believe that the Grievant would have at least questioned Barton about the sudden change in her policy rather than merely state "what could I do?"

The Grievant said that Barton "was lying" in providing testimony about their second February 4 telephone conversation. I have concluded that it was the Grievant, rather than Barton who fabricated what was said during the telephone conversation on February 4. The Grievant was not forthright and open, but was evasive. He was certain about Barton's change of policy, in connection with the failure to grant leave by telephone, but was uncertain as to other crucial matters. On direct examination the Grievant said that he had someone else tender his written resignation on February 7 "because I was too upset to go in myself ". When asked on cross-examination if he recalled writing the resignation letter, the Grievant replied that he had "no idea if he wrote the letter of resignation. He then stated that he wrote the letter of resignation on Monday or Tuesday" [February 4 or 5].

When the Grievant was asked what reason Barton would have to lie, the Grievant replied without explaining, that she "covers herself" and "does everything by the book". The Grievant then indicated that Barton told him on February 4 that he would have to physically come through the doors" of the office to request a vacation. However, as I have previously established., I have concluded that Barton did not depart from her customary practice of granting leave by telephone. The evidence warrants the conclusion that the Grievant did not request leave in his second telephone discussion with Barton.

Furthermore, the Grievant acknowledges that he telephoned Barton at her residence on Sunday, February 10 and requested to rescind his resignation. If Barton had refused to grant him leave by telephone on February 4, which would have been the only exception to Barton's. practice of granting leave by telephone, it is unusual that he would seek assistance from Barton in requesting to rescind his resignation

Moreover, it is even more astonishing for the Grievant to invite Barton to his wedding in September, 1991, in light of his testimony that Barton insisted that he come in to the office to request a vacation or submit a written letter of resignation. Although he said that he was treated unfairly by Barton, the Grievant explained the wedding invitation which was sent to her by stating "she is still my friend" and that he does not "discard [his] friends". He went on to state that Barton "stabbed [him] in the back but she is still [his] friend". In assessing the Grievant's testimony in an objective manner it is unreasonable to conclude that the evidentiary record supports his account of the telephone discussion with Barton on February 4. This is especially true, given the Grievant's testimony that Barton was a "real close friend" and that he "trusted her" more than anyone else in the office.

The Grievant denied that Barton recommended that he participate in EAP in January, 1991, although he might have done so in 1990: The overall credibility of Barton's testimony as opposed to the "Grievant's testimony, warrants the conclusion that as she indicated, she recommended EAP to the Grievant in January, 1991.

The Grievant admitted that he sought information from Barton about taking a leave of absence about one and one-half (1 1/2) weeks before February 4. The Grievant said that Barton never obtained the "information". He went on to state that he met with Macali at her office because he "needed information" that he sought from Barton and Macali. It is unreasonable to believe that had the Grievant obtained the "information" which he sought, he would have taken the leave. The Grievant, in effect, portrays himself to be helpless in that the "information" which he sought was not forthcoming from Barton and Macali, thus depriving him of the opportunity to take a leave. It is undisputed that the Grievant talked to both Barton and Macali about a leave of absence. However, at no time, did the Grievant specifically request a leave of

absence. Furthermore, it is unreasonable to believe that Barton told the Grievant that she would obtain information about a leave of absence from Personnel and that he never obtained such information from Macali although he met with her because he "needed information to know what to do". There is no evidence that the Grievant followed up on obtaining information on a leave of absence from Barton and Macali. Furthermore, there is nothing in the record to warrant the conclusion that the Grievant requested a leave of absence.

Human Resources Administrator Francie T. Estrada said that her office would not have granted a leave request for an employee who wanted to leave the State in order to avoid payment of alimony and support. The testimony of Estrada does not support the Union's reference in its post-hearing brief that "[M]anagement gave considerable weight to an emotional statement made by the grievant suggesting that he would skip the country rather than let his wife have everything and pay her alimony". As I have previously established, no leave request was submitted by the Grievant. Moreover, Estrada's testimony that her office would not have granted leave, given the purpose set forth by the Grievant, was merely a hypothetical, and not based upon an actual request for leave by the Grievant.

In connection with the events preceding the submission of the handwritten resignation on February 7, 1991, the testimony of Barton and Macali was forthright, detailed and open, as opposed to the Grievant's testimony which I did not find credible.

RESIGNATION

On February 7, 1991 a friend of the Grievant dropped off a handwritten statement signed by the Grievant which indicated that he "hereby" resigned his position. The Union contends that the resignation was vague and lacked an effective date.

In my judgment the Grievant's resignation was clear and unequivocal. By having a friend submit the handwritten resignation to Barton on February 7, 1991, which provides, that he "hereby resign(s)"--in other words "by this means", namely the submission of the signed, handwritten statement, the Grievant resigned. There is nothing ambiguous about the statement. Indeed, with the submission of the handwritten statement to Barton on February 7, the Grievant resigned. By providing in the statement that he was "sorry" that he "could not give 2 weeks notice", the Grievant indicates an intention to resign with the submission of his statement to Barton on February 7.

Reinforcing the credibility of Barton's testimony about their telephone conversation on February 4, the Grievant submitted his resignation by having a friend drop it off with the State later in the week. He indicated to Barton on February 4 that he "was resigning". Consistent with Barton's instruction that in order to resign, he "must do it in writing", the signed handwritten resignation was submitted on February 7.

GRIEVANT'S STATE OF MIND

The Union, in effect contends that the Grievant's state of mind should be given great weight in the circumstances surrounding his resignation. Consistent with its contention, the Union claims it is incumbent upon the State to ascertain the Grievant's "true intention" concerning his resignation. No such affirmative burden on the part of the State is required to be satisfied for purpose of inquiring about the Grievant's "true intention". Moreover, the Grievant's "true intention" was communicated to Barton on February 4 and his decision of resignation was implemented on February 7, with the submission of the handwritten resignation.

A case similar to the instant facts is Cedar Coal Co., 79 LA 1028 (Dworkin, 1982). In Cedar Coal, the grievant executed a quit slip but sought reinstatement "two or three days later", which was refused by the employer. At the time that the grievant executed a quit slip he was going through a divorce and he indicated in his grievance that he "was too depressed to know what he was doing".

In Cedar Coal, the Union claimed that the grievant could not have voluntarily quit his job because he lacked the capacity of judgment and was "so mentally" and emotionally unbalanced that he was unable to formulate and execute a voluntary act. As in the instant case, the grievant in Cedar Coal had indicated to Personnel that he wanted to leave West Virginia and go to Florida or Texas in order to avoid alimony. His

treating psychologist attributed the grievant's emotional condition in part to the stress engendered by his domestic problems as well as the consequences of viral hepatitis which had become chronic and the prescribed drugs he was taking to address the consequences of his disease.

The arbitrator held in Cedar Coal that the Union's evidence failed to prove that the grievant's "conduct not only resulted from a deteriorated mental condition but that because of his illness he was literally incapable of even marginally understanding what he was doing and what the consequences of his actions might be". At page 1034. The Arbitrator continued by stating that "the medical evidence established nothing more than [that] the grievant was under heavy emotional strain". At page 1034. The Arbitrator acknowledged that although the grievant "quit his job in a state of mind that approached frenzy he was aware of what he was doing. He knew that the following day he would no longer be an employee of Cedar Coal Company and he also knew that he would have to find a new source of income". At page 1034.

There is no question but that the Grievant was subjected to emotional stress and lost sleep over his marital difficulties. Generally, such difficulties constitute an upheaval in the lives of the spouses as well as the children. The relevant query is whether the Grievant lacked the capacity to understand his act of resignation. In this connection, Barton had cautioned him on February 4 not to act in a hasty manner. She indicated that given his accumulated leave he should take a week off. She had advised him several times in 1990 and in January, 1991 that he should seek assistance from EAP. Furthermore, the evidence establishes that Barton was a supportive, concerned, trusted and sympathetic friend of, and advisor to the Grievant.

In light of these considerations, I cannot conclude that the Union met its burden of proving that the Grievant's conduct resulted from a deteriorated mental condition which caused him to be "literally incapable of even marginally understanding what he was doing and what the consequences might be". It should be pointed out that the facts of Cedar Coal were even more compelling than the facts presented in this case. In Cedar Coal, there was a serious debilitating illness, the taking of prescribed drugs to address the illness as well as testimony from the Grievant's treating psychologist. In the instant case, although the Grievant was being counseled in "crisis management", no testimony was presented by the person or persons treating the Grievant between January 30 and March 18, 1991. As the Arbitrator indicated in Cedar Coal, "Anxiety is a common disease in our society, and its presence, in and of itself, excuse sufferers from responsibility for their voluntary acts". At page 1035. Despite the advice by Barton on February 4 not to be hasty" and to take a week off, the Grievant indicated that he wanted to resign and he did so, several days later on February 7, 1991. Moreover, the Grievant was very much aware of the consequences of his action. Unlike the mere execution of a "quit slip" which was present in Cedar Coal, the Grievant submitted a handwritten statement which he executed and apologized for being unable "to give 2 weeks notice". Pursuant to the instructions of Barton on February 4, the Grievant authorized in writing, "Shelly Groff" to pick up his checks for February 8, 1990 and February 22, 1990 which was also submitted to the State on February 7.

There is another factor entitled to some weight in concluding that the Grievant voluntarily quit employment. He was absent from work, without reporting off, on February 5, 6, 7 and 8, 1991. The State reasonably relied on the Grievant's statement of resignation in his conversation with Barton on February 4. Under the Agency's disciplinary guidelines, absence without leave "3 days or more" warrants "removal". In light of the State's reliance upon the Grievant's statement of resignation of February 4, the Grievant was not considered to be absent without leave from February 5 through February 8, 1990.

Summing up the evidence on this aspect of the dispute between the parties, the evidence established nothing more than that the Grievant was under emotional stress, during the critical events of late January, early February, 1990. In and of itself, the anxiety of the Grievant is not sufficient to excuse him from responsibility for his voluntary act of resignation.

RETRACTION OF RESIGNATION

The Grievant's executed resignation which was tendered to the State on February 7, 1990 became effective on that day. On February 7, Macali submitted the resignation, "effective February 7, 1991" to Estrada. After February 7, Estrada considered the Grievant no longer employed by the State. Although the "Personnel Action" form on the Grievant's action was being processed from February 7 to February 13, 1991,

the Grievant had already resigned as of February 7, 1991.

Estrada referred to two (2) “executory resignations" which involved employees, who were permitted to retract their resignations. She indicated that she did not know the "specifics" concerning Richard Abraham, who was one (1) of the two (2) employees. However, she said that the other employee Chris Folio was permitted to rescind his resignation because he had not left the work site and his retraction took place before any administrative action was taken. By contrast, the resignation of the Grievant was tendered on February 7 and he was absent without leave between February 5 through February 8, 1991. I find that the Grievant was not subjected to disparate treatment by the State.

The Union indicates that the State has not filled the vacancy caused by the Grievant's resignation. Thus, according to the Union, the State has not suffered any determent by reason of the Grievant's resignation. In this connection, with an apparent reference to the grievant’s request to reinstate him to the job which he voluntarily quit a few days before he sought reinstatement in Cedar Coal, the Arbitrator stated:

"Grievant as a sick human being was deserving of some compassion. But compassion is something that the Company had the right to grant or withhold. It is not a proper foundation for an arbitral award." At page 1034.

After reviewing the applicable published decisions on the subject of retraction of a voluntary resignation which is executed and tendered, it is not a violation of the Agreement for the State to refuse to accept the retraction of the Grievant's resignation under the circumstances presented in this case. Were I to do so, it would exceed my contractual authority. Perhaps, it might be the "nice thing to do", but this standard is not "a proper foundation for an arbitral award". As Arbitrator Rhonda R. Rivera stated in the case of Ellen Jenkins and Ohio Department of Youth Services, 35-08-890328-0016-01-09, (1-14-91), “The Employer could have allowed a recission but no contract provision so obligates them". At page 14.

CONCLUSION

On February 4, 1991, the Grievant manifested an intent to terminate and abandon finally his employment with the State. The Grievant’s manifestation of intent was implemented by an overt act carrying out the intent, namely, the submission to the State of an executed handwritten statement of resignation on February 7, 1991. The Grievant's actions establish the elements of finality of employment and intent to terminate his employment. See, e.g. Kohler & Campbell, Inc., 18 LA 184 (Rosenfarb, 1952) at page 186. Accordingly, the evidentiary record supports the conclusion that the Grievant voluntarily quit his employment with the State.

AWARD

In light of the aforementioned considerations, the instant grievance is not arbitrable, because the Grievant was not employed by the State on February 25, 1991 when he filed the instant grievance. He had voluntarily resigned on February 7, 1991.

The grievance is denied.

Dated: June 12, 1992
Cuyahoga County
Cleveland, Ohio

HYMAN COHEN
Impartial Arbitrator
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