ARBITRATION DECISION NO.:
575

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

EMPLOYER:
Department of Youth Services,
Buckeye Youth Center

DATE OF ARBITRATION:
February 8, 1995

DATE OF DECISION:
May 8, 1995

GRIEVANT:
O'Dell Boyd

OCB GRIEVANCE NO.
35-18-(93-12-28)-0011-01-03

ARBITRATOR:
David M. Pincus

FOR THE UNION:
Ann Light Hoke

FOR THE EMPLOYER:
Bradley Rahr, Advocate
Georgia Brokaw, Second Chair

KEY WORDS:
Removal
Insubordination
Arbitrability
Effect of Arbitrability on Remedy

ARTICLES:
Article 24 - Discipline
§24.02 - Progressive Discipline
§24.05 - Imposition of Discipline
Article 25 - Grievance Procedure
§25.02 - Grievance Steps
§25.03 - Arbitration Procedures

FACTS:
The grievant was hired on March 27, 1989 as a Youth Leader 2 at the Buckeye Youth Center. He then displaced to Circleville Youth Center on November 14, 1993. On July 8, 1993, at the conclusion of a pre-disciplinary hearing, the grievant indicated that he needed to use 6. 8 hours of sick leave because he was

not feeling well. The grievant was receiving counseling for a psychological problem.

July 8, 1993 was the last day worked by the grievant at the facility. The grievant testified that he personally delivered and/or faxed material which he alleged was either lost or misplaced by the employer. The grievant received two letters from his supervisors informing him that he had to submit proper documentation to support his absence.

On November 1, 1993, the Grievant was advised of a Pre-disciplinary meeting to be held. The grievant neither contacted his Union Steward nor a management representative to reschedule the meeting.

On December 14, 1993, the grievant was removed from his position as a Youth Leader.

EMPLOYER'S POSITION:

The employer alleged that they had just cause to remove the grievant for violating Rule 6-B Insubordination, by failing to report to work on or before October 10, 1993. The letters sent by the grievant's supervisors were clear and unambiguous as to what the grievant needed to do to avoid discipline. The grievant complied with the first letter, but did not comply with the second because he was confused. The Employer argued that this distinction was contrived and was unpersuasive. Further, the grievant never requested clarification.

UNION'S POSITION:

The Union argued that the Employer did not have just cause to remove the grievant for insubordination. Several critically necessary elements in support of the insubordination charge were not proven by the Employer, nor supported by the record.

Instructions in the letters from the grievant's supervisors were clearly conflicting and ambiguous. The grievant's actions clearly indicate he never willfully defied the Employer's authority regarding the matter. The grievant also substantially complied with instructions contained in both of the letters.

The discipline imposed violated several due process considerations. Section 24.05 requires progressive discipline, and that discipline should be reasonable and commensurate with the alleged offense. The insubordination charge does not require summary removal since the Grievant's discipline history only indicates prior verbal and written reprimands.

ARBITRATOR'S OPINION:

The Arbitrator held that the Employer had just cause to remove the grievant. He failed to comply with a clear and unambiguous direct order to report to work on October 10, 1993. His partial compliance in no way mitigated his obligation to report when the order was reasonably based on his previous absence history.

Two elements must be supported when an insubordination charge is imposed: A refusal to follow a direct order and proof that the employee was given clear prior warning of the consequences. In the Arbitrator's judgment, the order of instruction was clear and specific enough to let the grievant know exactly what was expected.

The grievant's alleged confusion appeared suspect based on his response to the Employer's requests and his prior behavior. A confused person could not have written the document submitted by the grievant in compliance with the first letter.

The second letter properly placed the grievant on notice regarding the negative consequences attached if he refused to comply with the return to work order.

Here, the behavior engaged in by the grievant is viewed as a gross act of insubordination justifying the propriety of summary discharge. By failing to report as ordered, the grievant was willfully absent from work.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

VOLUNTARY LABOR ARBITRATION
PROCEEDING UNDER THE AUSPICES OF

THE FEDERAL MEDIATION AND CONCILIATION SERVICE

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, DEPARTMENT OF YOUTH SERVICES

-AND-

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

GRIEVANT: O'DELL BOYD (REMOVAL)
GRIEVANCE NO.: 35-18-931228-0011-01-03

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: May 8. 1995

Appearances

For the Employer
Robert L. Pritchett, Unit Administrator
Brian Walton, Observer
Dion A. Norman, Security Administrator
Georgia Brokaw, Second Chair
Bradley Rahr, Advocate

For the Union
O'Dell Boyd, Grievant
Ann Light Hoke, Advocate

INTRODUCTION

This is a proceeding under Article 25, entitled Grievance Procedure, of the Agreement between The State of Ohio, the Department of Youth Services, hereinafter referred to as the "Employer," and Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO, hereinafter referred to as the "Union," for the period of January 1, 1992 through January 3, 1994.

The Arbitration hearing was held on February 8, 1995 at the Office of Collective Bargaining in Columbus, Ohio. The parties had selected David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both parties indicated they would submit written closing statements.

STIPULATED ISSUES

Is the grievance arbitrable?

If so, did the Employer have just cause to remove the grievant? If it did not, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 24

DISCIPLINE

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. One or more oral reprimand(s) (with appropriate notation in employee's file);
B. One or more written reprimand(s);
C. One or more suspension(s);
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

XXX

(Joint Exhibit 1, Pgs. 47-48)

24.05 - Imposition of Discipline

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

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

If a final decision is made to impose disciple, the employee and Union shall be notified in writing. The OCSEA Chapter President shall notify the agency head in writing of the name and address of the Union representative to receive such notice. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

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

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

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

XXX

(Joint Exhibit 1, Pgs. 49-50)

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 occurrences 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 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 grievant.

Step 2 - Intermediate Administrator

In the event the grievance is not resolved at Step One, a legible copy of the grievance form shall be presented in writing by the Union to the intermediate administrator or his/her designee within five (5) days of the receipt of the answer or the date such answer was due, whichever is earlier. The written grievances shall contain a statement of the grievant's complaint, the section(s) of the Agreement allegedly violated, if applicable, the date of the alleged violation and relief sought. The form shall be signed and dated by the grievant. Within seven (7) days after the grievance is presented at Step Two, the intermediate administrator shall discuss the grievance with the Union and the grievant. The intermediate administrator shall render a written answer to the grievance within eight (8) days after such a discussion is held and provide a copy of such answer and return a legible copy of the grievance form to the grievant and a copy to one representative designated by the Union.

XXX
(Joint Exhibit 1, Pg. 53)

JOINTLY STIPULATED FACTS

1) O'Dell Boyd was hired on March 27, 1989 as a Youth leader II.

1a) O'Dell Boyd was displaced to Circleville Youth Center on November 14, 1993 due to Buckeye Youth Center closing.

2) O'Dell Boyd was removed on December 12, 1993, violation of DYS work rule 6- B, "willful disobedience of direct order by a supervisor" and Rule 27, absent three (3) or more consecutive working days without notice."

2a) Management agrees that Rule 27 (above) is an inappropriate charge in this case.

3) Mr. Boyd received an oral reprimand on February 11, 1993, for tardiness. Mr. Boyd received a written reprimand on February 26, 1993, for tardiness. Mr. Boyd placed comment on the reprimand disagreeing with it.

4) Mr. Boyd left work on July 8, due to illness, requesting sick leave, which was subsequently approved.

5) Mr. Boyd did receive two (2) separate letters from Superintendent Wagner dated September 28, 1993.

6) In the investigation package completed by Dion Norman, that report indicates that Mr. Boyd completed request for leave forms for July 8 through October 28, 1993.

7) Mr. Boyd filed a grievance on this removal on December 28, 1993.

THE PARTIES' ARBITRABILITY ARGUMENTS

The Position of the Employer

Initially, the Employer raised two (2) procedural objections regarding the arbitrability of the present dispute. The first objection deals with the Union's attempt to amend the disputed grievance (Joint Exhibit 2) by adding certain contractual violations not contained on the face of the original document. This objection was withdrawn at the hearing once the parties agreed that Article 24 violations constitute the major focus of their various disputed theories.

The second procedural objection, however, was not resolved, and thus, serves as the Employer's primary charge to preclude a determination on the merits in dispute. In the Employer's opinion, a Section 25.02 procedural defect causes the disputed grievance to become not arbitrable. The grievance (Joint Exhibit 2) does not specify "the sections of the Agreement allegedly violated.....and the relief sought."

The previously specified contractual requirements are clear and unambiguous, and should be enforced pursuant to their plain or regular meaning. An alternative ruling is outside the scope of the Arbitrator's authority because it would render this provision meaningless; an outcome unanticipated by the parties.

Various mitigating arguments proposed by the Union are viewed as unpersuasive. First, the Grievant's standing as "lay person" unfamiliar with grievance handling experience should not cause the Arbitrator to ignore the provision in dispute. The Grievant testified he knew his Steward and staff representative, and yet, he could not recall whether he initiated any attempts to contact them prior to filing his grievance (Joint Exhibit 2). Also, he admitted he had seen the Agreement (Joint Exhibit 1), but failed to read the particular in dispute or any other related provisions dealing with grievance handling.

Second, the Union's attempt (Joint Exhibits 6 & 7) to amend the grievance (Joint Exhibit 2) only took place once the Employer placed the Union on notice regarding its intent on raising the procedural defect claim at the arbitration hearing. If one allowed the Union this amending privilege, it would reduce the integrity of mutually agreed to contract language. Substantial compliance, moreover, is not attainable in this instance because of the language negotiated by the parties and the underlying intent. This language was negotiated so the Employer could properly evaluate the merits of each grievance in light of alleged violations and desired remedies. Without sufficient detail on any given grievance form, a proper and judicious analysis becomes virtually impossible.

An alternative outcome was tendered by the Employer. In the event the Arbitrator finds the grievance (Joint Exhibit 2) arbitrable, and determines the Employer did not have just cause to remove the Grievant, the procedural defect needs to be considered in crafting any remedial order.

The Position of the Union

The Union opines that the presently disputed matter is arbitrable. It offers theories dealing with substantial compliance and the nature of the defect in support of its position.

The Union admits the Employer notified the Union of a forthcoming procedural defect claim. As a consequence, the Union attempted to rectify the defect by providing the Employer with two clarifying documents (Joint Exhibits 6 & 7). These documents specified the requested remedy and the contract provisions in dispute. By forwarding the information, the Union substantially compiled with Section 25.02 requirements and placed the Employer on notice with sufficient time to prepare its defense regarding the disputed matter.

A ruling in the Employer's favor would place too much emphasis on the technical mistake made by a lay person unenlightened in the workings of a grievance handling mechanism. A mistake of this sort should not lead to the non-arbitrability of the pending dispute, nor result in some remedy limitation. Also, the arbitration process has as its primary goal the resolution of disputes. Giving credence to the Employer's arguments would tend to elevate form over substance.

THE ARBITRATOR'S OPINION AND AWARD ON THE ARBITRABILITY ISSUE

The grievance form (Joint Exhibit 2) in terms of necessary content clearly violates the protocols

negotiated by the parties as codified in Section 25.02. A clear contractual breach exists because the grievance form fails to properly detail "the section(s) of the Agreement allegedly violated....and the relief sought."

For a number of reasons, I do not view this as a mere technical violation requiring a de minims finding without any negative consequences attached. At the same time, a procedural defect of this sort does not render the grievance non-arbitrable. It requires, as proposed by the Employer, some consideration in the event I determine, once I analyze the merits, that the Employer did not have just cause to remove the Grievant. An alterative ruling, without a proper sanction, would render meaningless requirements negotiated by the parties and force the Arbitrator to disregard a clear contractual breach. It would, moreover, cause the Arbitrator to engage in efforts outside the scope of his authority in violation of Section 25.03. I am unwilling to subtract from or modify the terms of this Agreement (Joint Exhibit 1) by disregarding Section 25.02 requirements.

THE ARBITRABILITY AWARD

Even though the grievance form (Joint Exhibit 2) is procedurally defective in terms of content requirements, the presently disputed grievance is arbitrable. In the event the Arbitrator determines the Grievant has been improperly removed, sanctions will be applied in terms of the remedy requested. This ruling seems proper in terms of the determined contractual breach, and the fact that the parties have never negotiated a per se arbitrable standard limiting an arbitrator's authority in matters dealing with procedural defects of this type. Resolving the matter in dispute in this manner retains the integrity of the contract language negotiated by the parties, but also distinguishes procedural defects of this type from those involving timeliness and other substantive concerns. Potential sanctions in drafting a remedy finding will limit the re-occurrence of similar contractual breaches in the future.

CASE HISTORY

O'Dell Boyd, the Grievant, was hired on March 27, 1989 as a Youth leader II at the Buckeye Youth Center. He was displaced to Circleville Youth Center on November 14, 1993 due to the closing of the Buckeye Youth Center. The Department of Youth Services, the Employer, is statutorily mandated to confine felony offenders, ages 12 through 21. The Employer's mission requires it to develop programs for the successful return of juvenile offenders back into the community as productive and law abiding individuals.

The present dispute initially arose on July 8, 1993. At the conclusion of a pre-disciplinary hearing, the Grievant indicated he needed to utilize 6.8 hours of sick leave to complete his shift because he was not feeling well. The Grievant alleged his illness on July 8, 1993 was a consequence of a series of depression related episodes. He was in the process of receiving counseling for this condition. It should be noted the Grievant received his supervisor's approval prior to his departure on July 8, 1993, and eventually submitted an appropriate doctor's verification.

The record indicates July 8. 1993 was the last day worked by the Grievant at the facility. Other than the Grievant's actual absence activity, the record appears to be somewhat unclear regarding proper submission of requests for leave and doctors' verifications. The Grievant testified that he personally delivered and/or faxed material which he alleged was either lost or misplaced by the Employer. He made every attempt to provide proper documentation even though he was undergoing anxiety and depression therapy. The Employer's view of the situation differs dramatically as evidenced by two (2) letters sent by R.F. Wagner, Superintendent, to the Grievant on September 28, 1993. The first letter dealt with submission of request for leave forms, along with physician's verification by October 7, 1993. It contains the following relevant particulars:

XXX

“According to Directive BYC A-195, a physician's statement is required by an employee who is absent from work more than seven or more consecutive days. Timekeeping records indicate that your last day worked was JULY 8, 1993. As of the date of this letter no request for leave forms have been received from you to

cover your dates of absence, nor is this institution in receipt of documentation from a physician verifying the reason for said absence.

In compliance to institutional policy and DYS Directives you are required to submit request for leave forms to Cindy Edwards, Personnel Administrator, along with a physician's verification by OCTOBER 7, 1993. Failure to adhere to this request will be subject to disciplinary action.

Request for leave forms have been included with this correspondence to be returned by the date mentioned above. Use one form for each pay period you have and will not work. Pay periods cannot overlap on the forms and you can only use one type of leave time on each form.

If you have any questions or require further information please contact Cindy Edwards, Personnel Administrator 466-0973, ext. 359."

XXX
(Joint Exhibit 5(a))

The second letter was sent the very same day and contained some additional requirements. It states the following:

XXX

"Our records indicate that you have not submitted proper documentation to support your absence from July 8, 1993 to present.

Considering the above information, I am hereby **"ORDERING YOU TO REPORT TO WORK"** on October 10, 1993, at the beginning of your normal shift. Upon your return, please provide me with verification from your Physician as outlined in DYS Directive B-7 and completed request for leave forms from the period stated above to the day of your return.
Failure to comply with this order could result in further disciplinary action."

XXX
(Joint Exhibit 5(b))

On October 5, 1993, the Grievant formally responded to the letters dated September 28, 1993 by forwarding his own letter (Joint Exhibit 4) to the Superintendent. He emphasizes that proper documentation was either hand delivered, faxed or otherwise provided for the period July 8, 1993 up to and including August 16. 1993. He, moreover notes he is submitting current documentation and request for leave forms for the period August 17, 1993 up to October 14, 1993. The Grievant also attached a physician's verification regarding his upcoming absence in a letter authored by Mark M. Harris, Ph.D on October 5, 1993. This letter sates the following observations:

XXX

"This letter is to confirm that O'Dell Boyd, Jr. (283-70-2374) has been under my treatment for anxiety and depression. I believe that O'Dell's current mental status makes it impossible for him to work at this time. I am recommending that he be off until at least October 14, 1993."

XXX
(Joint Exhibit 4)

On November 1, 1993, the Grievant was advised of a Pre-disciplinary meeting to be held on Wednesday,

November 10, 1993. The Grievant failed to appear and neither contacted his Union Steward nor a management representative to reschedule. The Pre-disciplinary Hearing Officer determined there was just cause for discipline.

On December 14, 1993, the Grievant was removed from his position of Youth Leader effective December 12, 1993. The removal order contains the following relevant particulars:

XXX

"You have been absent from work without leave of absence since July 8, 1993. Further, you have not submitted proper documentation for all the time requested off. On September 28, 1993, you were ordered to report to work no later than October 10, 1993. You have not compiled with that order. You are considered AWOL for this period of time.

Such actions are in violation of DYS Directive, Chapter B-19, Work Rule #6-B, which states "Willful disobedience of direct order by a Supervisor" and #27, which states, "Absent three (3) or more consecutive working days without proper notice."

XXX
(Joint Exhibit 4)

On December 23, 1993, the Grievant formally contested the removal. His grievance contains the following Statement of Facts:

XXX

"Mr. O'Dell Boyd a Youth Leader at CYC was unjustable (sic) removed from his position."

XXX
(Joint Exhibit 2)

A Step 3 meeting was scheduled for January 11, 1994. It appears, as a consequence of mutual agreement, the parties rescheduled the hearing for February 17, 1994. The hearing was held even though the Grievant failed to attend. The parties agreed they were properly constituted and there were no procedural objections (Joint Exhibit 2).

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer it had just cause to remove the Grievant for violating Rule 6-B Insubordination[1] by failing to report to work on or before October 10, 1993. This charge, in accordance with the General Work Rules (Joint Exhibit 3(c)), is viewed as a removable offense on an initial violation.

The various facets necessary to establish an insubordination claim were readily apparent in this instance. The Superintendent's letters (Joint Exhibits 5(a) and (b)) were clear and unambiguous regarding instructions and necessary activities which the Grievant needed to comply with in order to avoid discipline. These documents, expressly provided the Grievant with notice regarding the probable consequences for failing to comply with the specified orders.

There was no reason for the alleged confusion surrounding the information contained in the September 28, 1993 letters. If confusion, indeed, existed then the Grievant's response to the first letter (Joint Exhibit 5(a)) should have been equally misunderstood. Yet, he fully complied with the requirements contained in the first letter (Joint Exhibit 5(a)), while admitting the second letter (Joint Exhibit 5(b)) was so confusing that he was unable to properly respond. This distinction was viewed as contrived and lacking any persuasive

relevance.

It is not the Employer's responsibility to clear up any confusion generated by the letters. The Employer had no way of knowing the Grievant was confused. As such, clarification requests should have been initiated by the Grievant if in fact he was confused. If a clarifying request had been properly communicated, the Employer would have had an affirmative obligation to clarify any potential misunderstanding.

Several exacerbating conditions were raised by the Employer in support of the removal decision. The Grievant neither reported to work on October 10, 1993 as directed by the Employer, nor reported to work on October 14, 1993 per instructions provided by his own physician. Notwithstanding the Grievant's assertions to the contrary, many of the request for leaves submitted by the Grievant were undertaken with zero leave balances available. Also, several requests were never received by the Employer in a timely fashion; but were eventually submitted, after the fact, in an attempt to justify prior absences.

The Bureau of Workers' Compensation denied the Grievant's claim (Employer Exhibit 5) which further reduces the Grievant's creditability surrounding his depressed condition. As such, the Grievant could have returned to work at some prior date which limits the Employer's back pay liability. If the Grievant was, indeed, unable to return to work as a consequence of his condition, this circumstance also reduces the Employer's potential back pay liability.

The Position of the Union

The Union posits the Employer did not have just cause to remove the Grievant for insubordination. Several critically necessary elements in support of the insubordination charge were not proven by the Employer nor supported by the record.

The Employer never gave the Grievant a direct order because instructions provided in the September 28, 1993 letters (Joint Exhibits 5(a) and (b)) were clearly conflicting and ambiguous. One letter (Joint Exhibit 5(a)) required the Grievant to "bring in" request for leaves and appropriate doctor verifications by October 7, 1993. The Employer never mentioned or required the Grievant to return to work on a specific date. Another letter (Joint Exhibit 5(b)), however, ordered the Grievant to report to work on October 10, 1993; and upon his return to provide physician verifications and completed request for leave forms.

Not only were the instructions conflicting, but the circumstances surrounding these various requests added to the Grievant's confusion. These letters were sent by the same individual on the very same day. Also, the letters indicated the Grievant had never submitted proper documentation to support his absence since July 8, 1993. Yet, the Grievant was quite certain proper documentation was forwarded after July 8, 1993 via a number of alternative processes. The Employer, moreover, never communicated the reasons surrounding the denial of leave without pay requests initiated by the Grievant.

The Grievant's actions clearly indicate he never willfully defied the Employer's authority regarding the disputed matter. In compliance with the requests specified in the letters sent by the Superintendent, the Grievant on October 5, 1993 transmitted via certified mail a letter (Joint Exhibit 4) explaining certain misunderstandings dealing with his prior requests. He also attached leave request forms and appropriate physician verifications.

These activities reflect substantial compliance with instructions contained in both of the letters (Joint Exhibit 5(a) and (b)). Leave requests and supporting documentation were submitted prior to October 10, 1993.

Mitigating circumstances were introduced in response to the Grievant's failure to report to work. The Union alleged the Grievant was too ill to return to work in accordance with the Employer's request. A physician's verification (Joint Exhibit 4) supported the Grievant's legitimate reason for not returning to work. This document did not indicated the Grievant could return to work on October 14, 1993. Rather, it established the specified date as the benchmark when the Grievant could not return to work. It was worded in a peculiar way to reinforce the notion the Grievant might require some additional time-off because of illness.

The Union argued the imposed discipline violated several due process considerations. Section 24.05 requires progressive discipline, and that discipline should be reasonable and commensurate with the alleged

offense. The insubordination charge does not require summary removal since the Grievant's discipline history only indicates prior verbal and written reprimands (Joint Exhibit 4). The imposed penalty, moreover, appears too harsh considering the Grievant was not insubordinate.

The Employer's workers' compensation mitigation argument appears contrived and unpersuasive. On two separate and distinct occasions the Employer has argued mutually exclusive theories dealing with the Grievant's depressed condition.

In terms of a potential back pay award, the Union urges back pay from approximately January 15, 1994. This date is viewed as a critical benchmark since the Bureau denied the Grievant's motion on March 30, 1994. Also, the Grievant submitted proper and sufficient physician verifications "until at least" January 15, 1994.

THE ARBITRATOR'S OPINION AND AWARD DEALING WITH THE GRIEVANT'S REMOVAL

From the evidence and testimony introduced at the hearing, a complete review of the record including pertinent contract provisions, this Arbitrator is convinced the Employer had just cause to remove the Grievant for insubordination. He failed to comply with a clear and unambiguous direct order to report to work on October 10, 1993. His partial compliance dealing with the submission of pertinent leave related documents (Joint Exhibit 4 and Employer Exhibit 3) in no way mitigate his obligation to report when the order is reasonably based on his previous absence history; notwithstanding his doctor's claim that he could not return to work “until at least October 14, 1993 (Employer Exhibit 3)."

It is axiomatic that an employer has the burden of proving insubordination. Two elements must be supported when an insubordination charge is imposed: A refusal to follow a direct order and proof that the employers was given clear prior warning of the consequences.[2] Here, both necessary facets were supported by the record justifying summary removal from employment. In my judgment, the order or instruction, in this instance, was clear and specific enough to let the Grievant know exactly what was expected. The two letters issued on September 28, 1993 were not conflicting and should not have confused the Grievant regarding his obligations. The second letter (Joint Exhibit 5(b)) merely restates concerns dealing with submission of proper documentation to support absences from July 8, 1993. This matter was also addressed on the prior letter (Joint Exhibit 5(a)). The second letter (Joint Exhibit 5(b)), however, does differ in several clear and unambiguous ways from the prior letter (Joint Exhibit 5(a)). The first letter (Joint Exhibit 5(a)) asks for submission of request for leave forms and physician's verification by October 7, 1993. The second letter (Joint Exhibit 5(b)) orders the Grievant to report to work on October 10, 1993, and upon the Grievant's return to provide the appropriate documents in support of prior absences.

Any reasonable person, reading the letters (Joint Exhibits 5(a) and (b)) in tandem, should have surmised that the second letter (Joint Exhibit 5(b)) contained additional non-conflicting requirements.
The first letter (Joint Exhibit 5(a)) merely asked the Grievant to submit appropriate documents, it never required the Grievant to report back to work and submit documents upon his return. These additional requirements were clearly articulated in the second letter (Joint Exhibit 5(b)).

None of these requirements should have confused the Grievant regarding his obligations. Rather, he engaged in self help by complying with the obligations he deemed to be important while disregarding other critical aspects; especially the return to work order.

His alleged confusion also appears suspect based on his response to the Employer's requests and his prior behavior. A confused person could not have written the document (Joint Exhibit 4) submitted by the Grievant in compliance with the first letter (Joint Exhibit 5(a)). The document was clearly articulated in terms of content and relevant arguments. Also, the Grievant never raised any confusion regarding conflicting requirements in the body of his letter (Joint Exhibit 4). If he felt his obligations were in fact conflicting, as a prudent individual, he should have contacted management representatives to clarify the situation.

The Grievant's illness defense also seems contrived. He admitted that during the course of his illness be had made numerous trips to the facility to clarify documentation difficulties. And yet, while dealing with

similar medical conditions he was confused regarding his return to work obligation. If his medical condition did not preclude his prior visits, then the same medical condition should not have engendered his alleged confused state.

The second letter (Joint Exhibits 5(b)) properly placed the Grievant on notice regarding the negative consequences attached if he refused to comply with the return to work order. He was clearly advised that discipline could result if he failed to comply.

The Union's progressive discipline claim is unpersuasive. The imposed penalty was commensurate with the seriousness of the Grievant's proven offense, and the record of the Grievant in his service with the Employer. The existence of a progressive discipline system, such as the one negotiated in Section 24.02, does not mean that the Employer has give up the right to discharge summarily for serious offenses.[3] Here, the behavior engaged in by the Grievant is viewed as a gross act of insubordination justifying the propriety of summary discharge. The prior reprimands dealing with absence related misconduct are tangentially related to the proven offense. By failing to report as ordered, the Grievant was absent from work.

AWARD

The grievance is denied. The Employer had just cause to remove the Grievant for insubordination when he failed to return to work on October 10, 1993.

Dr. David M. Pincus
Arbitrator

May 8. 1995

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[1] Prior to the arbitration hearing the Employer removed the Rule 27-Job Abandonment charge in support of the removal order. It stipulated to the Union that this change was improperly issued, and that the removal would be independently based on the insubordination charge.

[2] Micro Precision Gear & Mach Corp., 31 LA 575 (Young, 1958); International Salt Co., 88-1 ARB ¶8118 (Brannon, 1987).

[3] Inland Steel Products Co., 47 LA 966 (Gilden, 1966).