ARBITRATION DECISION NO.
684

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

EMPLOYER:
State of Ohio

DATE OF ARBITRATION:
August 4, 1998

DATE OF DECISION:
September 4, 1998

OCB GRIEVANCE NO.:
Not Assigned
Arb Decisions 682parks and 683kestn are attached

GRIEVANT:
OCSEA and the State of Ohio disputed interpretation of Section 37.02

FOR THE UNION:
Ronald C. Alexander

FOR THE EMPLOYER:
Steve Gulyassy, Deputy Director, OCB

KEY WORDS:
Work Force Development Fund

ARTICLES:
Article 37 – Work Force Development
§37.02 – Work Force Development fund

FACTS:

This Arbitration considered a request for interpretation of Article 37.02 (C) of the Collective Bargaining Agreement. The issue was whether the Article 37.02 (C) employee contribution should be treated as a deduction or a reduction in pay tables.

EMPLOYER'S POSITION:

The Employer argued that the employee's contribution of $.05 per hour should be achieved by reducing the pay tables beginning the second year of the Collective Bargaining Agreement.

UNION'S POSITION:

The Union argued that an employee's base rate of pay is not impacted by the contributions, but that the contribution shall be treated as a deduction from pay just as any other deduction, such as the employee's

share of insurance premiums or union dues.

ARBITRATOR'S OPINION:

The Arbitrator held that the Employer interpreted the contribution in question in the proper manner. Starting with the pay period which includes July 1, 1998, the employee's contribution shall be achieved by reducing the pay tables by $.05/hour. This method of fund contribution shall be continued in accordance with the terms negotiated by the parties.

AWARD:

The Employer did not violate Section 37.02 (C) when it achieved the employee's contribution commencing July 1, 1998 by reducing the pay table $.05/hour.

TEXT OF THE OPINION: *** * ***

LABOR ARBITRATION PROCEEDING
STATE OF OHIO AND OHIO CIVIL
SERVICE EMPLOYEES ASSOCIATION
LOCAL11, AFSCME

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO

AND

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

GRIEVANCE: SECTION 37.02(C)

GRIEVANCE NO.: NOT ASSIGNED

THE ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: SEPTEMBER 4,1998

APPEARANCES: *

For the State of Ohio

Stephen V. Gulyassy Deputy Director

For the Union

Ronald C. Alexander President

* Both the request for an Opinion and Award dealing with the disputed interpretation and the parties' arguments were contained in a letter sent to the Arbitrator on August 4, 1998. The letter was jointly authored by those individuals designated in the appearance heading. **1**

ISSUE

Has the State of Ohio abided by Section 37.02(c) requirements by reducing the pay tables beginning the second year of the Agreement by $.05 per hour? If not, what shall the remedy be?

PERTINENT CONTRACT LANGUAGE

ARTICLE 37 WORK FORCE DEVELOPMENT

* * *

Section 37.02 C. Funding

The Employer shall contribute five ($.05) cents per hour in active pay status by each bargaining unit employee to the fund commencing with the pay period which includes July 1, 1997. Commencing with the pay period which includes July 1, 1998, five ($.05) cents for each hour in active payroll status, including sick leave, shall also be contributed to the fund from the general wage increase to be received by bargaining unit employees. Commencing with the pay period which includes July 1, 1999, an additional five ($.05) cents for each hour in active payroll status, including sick leave, for each bargaining unit employee, shall be contributed to the fund by the Employer, for a total of ten ($10) cents per hour being contributed by the Employer. The parties agree that the current assets of the fund shall not be greater than twelve million ($12,000,000) dollars at any time during the life of this Agreement and that should the fund reach twelve million ($12,000,000) dollars all contributions, including the employee share, shall cease until reinstated by a majority vote of the Steering Committee. Fund balances unexpended or encumbered in one (1) fiscal year shall be carried forward and be available in subsequent fiscal years, within the limit of the twelve million ($12,000,000) dollars cap set forth above. The DAS Human Resources Division shall administer the programs developed by the Committee.

* * *

(Joint Exhibit 1, Pg. 167 168)

2

THE MERITS OF THE CASE

The Union's Position

The Union argues that an employee's base rate of pay is not impacted by the contributions, but that the contribution shall be treated as a deduction from pay just as any other deduction, such as the employee's share of insurance premiums or union dues.

The State's Position

It is the State's opinion that the Employee's contribution of $.05 per hour should be achieved by reducing the pay tables beginning the second year of the Collective Bargaining Agreement (Joint Exhibit 1).

THE ARBITRATOR'S OPINION AND AWARD

After reviewing my bargaining notes regarding this matter, recollections dealing with the parties positions when negotiating the provision in dispute and the contract language contained in Section 37.02(c), it is this Arbitrator's opinion that the State has interpreted the contribution in question in the proper manner. Starting with the pay period which includes July 1, 1998, the employee's contribution shall be achieved by reducing the pay tables by $.05/hour. It is my understanding that the Employer has initiated the employee's contribution to the fund in the manner specified. This method of fund contribution shall be continued in accordance with the terms negotiated by the parties.

The Union initially proposed the Work Force Development Program, and the concept of joint leadership of a newly promulgated Steering Committee. The State

agreed in principle, but countered with a funding proposition. Since the Work Force Development Program and Steering Committee were going to be a "joint" program, then the Union should bear some of the funding responsibilities. The Union agreed that its bargaining unit members would also contribute and the State did not care how the contribution would be handled. A number of funding alternatives were discussed and the Union was basically allowed to choose the method or process it favored, as long as it was willing to contribute to the fund. The contribution process presently employed by the State was the contribution process selected by the Union during bargaining.

Nothing in my review of the record leads me to a possible alternative interpretation. The provision in question reinforces my recollections because it does not discuss, specify nor imply that the contributions in question shall be treated as deduction from pay.

An Award in the Union's favor would not only nullify the bargaining history surrounding this matter, but would deviate from clear contract language which reflects the parties' intent. Regardless of some unanticipated outcomes resulting from the State's proper interpretation, I am unwilling to grant the Union a benefit through the arbitration process which it was unable to attain during bargaining.

AWARD

The Employer did not violate Section 37.02(c) when it achieved the employee's contribution commencing July 1, 1998 by reducing the pay tables $.05/hour. This Opinion and Award was authorized by the parties and relevant portions of the

Collective Bargaining Agreement (Joint Exhibit 1). It represents a final and binding

resolution of the present dispute.

September 4, 1998
Moreland Hills, Ohio

Dr. David M. Pincus
Arbitrator

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In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

The State of Ohio, Department of Mental Health

Case Number:
23 18 961127 1358 01 04

Before: Harry Graham

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APPEARANCES: For OCSEA/AFSCME Local 11:

Robert Robinson
Staff Representative
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For Department of Mental Health:

Linda Thernes
Labor Relations Officer Ohio
Department of Mental Health
30 East Broad St., Room 1180
Columbus, OH. 43266 0414

INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this case was closed at the conclusion of oral argument.
ISSUE: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Was the Grievant disciplined for just cause? If not, what shall the remedy be?

* * *

BACKGROUND: There is no agreement on the parties upon the events which prompt this proceeding. The little they do agree upon may be presented succinctly. The Grievant, John Kestner, has been employed by the State of Ohio Department of Mental Health for the past 16 years as Therapeutic Program Worker. He works at the South Campus of the Northcoast Healthcare Behavioral Systems Facility. On June 28, 1996 he was allegedly involved in an incident with his supervisor, Debbie Mathys. As is set forth more fully below, he allegedly became abusive towards her. Following the appropriate predisciplinary meeting the Grievant received a six day suspension on September 18, 1996. That suspension was protested in the grievance procedure of the parties without resolution. They agree it is properly before the Arbitrator for determination on its merits.

POSITION OF THE EMPLOYER: The Grievant, who is a veteran of many years of service with the State, compiled a record of discipline prior to this incident. Thus, he had received the following:

A written reprimand, Insubordination, Failure to accept supervision, 9/4/94:

A two day suspension, Neglect of Duty, Insubordination, 11/22/94:

A six day suspension, Failure of Good Behavior, Insubordination, 8/8/95.

It is against this background that the incident of June

2

28, 1996 should be viewed according to the State. On that date the Grievant was on duty at the Nursing Station of Unit 22 F. He became verbally abusive towards his supervisor, Debbie Mathys. He allegedly yelled at her and pointed his finger at her. He allegedly accused her of "playing favorites" He was highly agitated at this time, trembling with rage. According to the State when a co worker, Nurse Cheema arrived on the scene, he told her to leave. When she did not do so, he yelled at her. Nurse Cheema subsequently asked the supervisor, Ms. Mathys, to write up the Grievant for his abusive behavior.

As the State urges this incident be viewed, there is no doubt that the Grievant acted as claimed. He has a prior history of discipline for similar outbursts. Given that background the State contends the discipline under review in this proceeding was appropriate. As that is the case, it urges the grievance be denied in full.

POSITION OF THE UNION: The Union disputes the account of the incident set forth above. It points out that Ms. Mathys did not write up the Grievant. That was done by John Gerbetz, Psychiatric Nurse Supervisor. At the time of the incident Mr. Gerbetz was romantically involved with Ms. Mathys. They have subsequently married. He initiated discipline at her request. Given the nature of their relationship that is at best

3

questionable in the Union's view.

The events of June 28, 1996 did not transpire as related by the State in any manner according to the Union. On that date the Grievant spoke to Ms. Mathys about a co worker, LPN Estelle Denson. He was concerned that she had a double assignment. At this point, Ms. Mathys responded that his concern over Ms.

Denson was misplaced as Ms. Denson was an "old black lady" and "a spook." Mr. Kestner was affronted by her remarks. She subsequently apologized to him.

The Grievant did not ask Nurse Cheema to leave the Unit on June 28, 1996. Included among the various documents in Joint Exhibit 2 in this proceeding is a statement of Nurse Cheema. Dated July 10, 1996 it indicates she was ordered to provide it. She wrote in reference to the alleged incident of June 28, 1996 "1 did not hear or saw (sic) anything." Another person on the scene, Joyce Cipriani, wrote on July 10, 1996 that June 28, 1996 was "uneventful." She supplemented her statement on July 18, 1996 with the notation "I did not see or hear anything." At the arbitration hearing Ms. Cipriani testified that nothing unusual occurred on June 28, 1996. The Grievant did not engage in loud conversation with Ms. Mathys. He did not point at her. She never felt threatened nor did she leave the scene at any time. Given the consistent denial of the events as recounted by the Employer by the Grievant

4

and others on the scene, the Union insists the discipline administered by the State cannot stand. It seeks an award striking it from Mr. Kestner's record and restoration of pay.

DISCUSSION: Truth is an elusive concept. In this situation the account of events is so divergent it is difficult to believe the parties are speaking of the same incident. In essence, the only witness against the Grievant is Ms. Mathys. No particular reason exists to disbelieve her account of events. It was not shown by the Union that she and the Grievant disliked each other or had a history of acrimonious relations. On the other hand, her account is directly contradicted by not only the Grievant, but his co workers who were present on the day in question. Ms. Cheema did not testify at the hearing. Her contemporaneous statement is on the record. (Joint Ex. 2). In it, she flatly contradicts the account of events given by Ms. Mathys. So too does Ms. Cipriani. She testified at the hearing forthrightly that the Grievant was not abusive or out of control on June 28, 1996. She was present at all time relevant to this controversy. Had anything out of the ordinary occurred she would have seen and heard it. Nothing of the nature as alleged by the State transpired according to Ms. Cipriani. The same testimony was provided by the Grievant. It might be argued by the Employer that his testimony should be discounted as self serving. Of

5

course, it is. That does not necessarily mean it is untruthful. In this situation, it is supported by testimony from co workers who were on the scene.

Over the years and in countless arbitration decisions there has been a torrent of discussion about the "burden of proof" in discipline cases. Arcane and erudite prose has been written to throw light upon the concept and to place in proper context the responsibility of the Employer to prove its case to the arbitrator. Those discussions are, in the final analysis, sterile. The Employer must convince the arbitrator that the event that prompted it to act occurred as claimed and that the discipline is proportionate to the offense. In this situation the Employer cannot do that. The record, including the statement of Ms. Cheema and the testimony of Ms. Cipriani, does not prompt the conclusion that the Grievant acted as claimed. He may have, but convincing evidence to that fact was not presented by the State. The most that can be concluded is that the Employer has not proved its case.

AWARD: The grievance is sustained. All record of this discipline is to be expunged from the personnel file of the Grievant. He is to paid straight time pay for all hours lost as a result of this incident.

Signed and dated this 8th day of September, 1998 at

6

Solon, OH.

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Harry Graham
Arbitrator **7**

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In the Matter of Arbitration	*	
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Between	*	Case Number:
	*	
OCSEA/AFSCME Local 11	*	27-26-970117-0762-01-03-S
	*	
and	*	Before: Harry Graham
	*	
The State of Ohio, Department of Rehabilitation and Correction	*	

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Appearances: For OCSEA/AFSCME Local 11:

Bob Jones
Field Representative
OCSEA/AFSCME Local 11
2269 Sunny Land Blvd.
Springfield, OH. 45506

For State of Ohio:

Rhonda Bell
Office of Collective Bargaining
106 North High St., 7th Floor
Columbus, OH. 43215

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing statements were filed in this dispute. They were exchanged by the Arbitrator on August 9, 1998 and the record in this case was closed.
Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

> Was the Grievant, Richard Parks, disciplined for just cause? If not, what shall the remedy be? **1**

Background: The parties do not agree upon the events prompting this proceeding. The areas of their disagreement will be set out more fully below. The little they agree upon may be succintly presented. The Grievant, Richard Parks, has been employed by the Department since 1993. He is stationed at Warren Correctional Institution near Lebanon, OH. On December 31, 1996 he was issued a ten day suspension. There had occured in the Fall, 1996 several incidents which prompted the Employer to issue this discipline. On September 28, 1996 the Grievant had called the institution to request several hours of emergency personal leave. His residence was being flooded. The leave was granted. A subsequent request was made for additional leave on that date. As is set forth below, a dispute exists over the circumstances of that leave request.

On September 30, 1996 the Grievant and the Deputy Warden of Operations at Warren, Lawrence Mack, had a discussion. The circumstances of that discussion are disputed. The Employer asserts the Grievant was agitated and used profanity towards the Deputy Warden. This is disputed by the Union.

On October 1, 1996 the Grievant again called in. He called at 6:15 am indicating he would be late for the start of his shift. His call in was late. Further, there was allegedly an incident involving the Grievant at the entrance

to the facility when he arrived. Upon his report to work, Officer Parks was directed to vehicle patrol. This was not his customary post. He initially refused to report to vehicle patrol. He reported to his normal work station. He subsequently reported to the patrol vehicle.

On October 7, 1996 the Grievant called in to notify the Employer he would not report to work that day. He was taking his Mother to the hospital with chest pain. The Employer claims it did not receive proper documentation of this event. This is denied by the Grievant. For these reasons the Employee issued the ten day suspension under review in this proceeding. That suspension was protested by the Grievant in the procedure of the parties. They agree it is properly before the Arbitrator for determination on its merits.
Position of the Employer: According to the State when Officer Parks initially requested emergency personal leave on September 28, 1998 it was granted without precondition. When he requested additional leave on that date his shift Captain directed the request be supported by documentation. No documentation was ever received. Hence, the leave was ultimately denied. For failing to document the leave as directed, the Grievant was charged with violating Rule 3E, failure to provide documentation of leave of absence when required.

On September 30, 1996 the Grievant and Deputy Warden Lawrence Mack had a confrontation. The Grievant came to speak to the Deputy Warden about an inmate who had allegedly come into possession of his social security number. Deputy Warden Mack indicated there was nothing he could do about the situation. Thereupon the Grievant threw papers off the Deputy Warden's desk, raised his voice and punctuated his conversation with obscenities. This sort of behavior opens the Grievant to discipline and is a

violation of Rule 12 dealing with making obscene statements the State contends.

The Grievant called in late on October 1, 1996. When he reported to the institution he was directed to the patrol vehicle, rather than his normal post. That directive was conveyed to him by a co worker, Officer Elmer Brewer. Upon receiving the directive from Officer Brewer the Grievant refused to report to the patrol vehicle. When he did so, he was loud and profane. Present in the area were women staff of the Department and contractor's personnel. The behavior manifested by the Grievant was inappropriate the State insists. Further, the Grievant did not report to the vehicle. He reported to his normal post. Only later in the workday did he carry out the directions given to him. These actions provide ample grounds for discipline and constitute violation of various rules. **4**

At 4:56 am on the morning of October 7, 1996 the Grievant telephoned the institution to inform it he would not report. He was taking his Mother to the hospital. She was experiencing chest pain. No record of a request for leave is on file. No proper leave request was ever made. This too provides grounds for discipline in the State's view.

At the time of this discipline the Grievant had a live three day suspension. As the infractions in early Fall, 1996 were serious and occured in proximity to one another the State urges the ten day suspension was appropriate. It seeks denial of the grievance in its entirety.

Position of the Union: The Union points out that when the Grievant called to request emergency personal leave on September 28, 1996 it was because his home was flooding. There is no question about that. The local Fire Department was on the scene. When the Grievant called in later in the day there was no mention by supervison of a need to supply documentation to support a request for additional time off on that date. When the Employer sought supporting documentation for the second request for leave made on September 28, 1996 the Grievant sought documentation from the Fire Department. It declined to provide him with anything. Even so, it was common knowledge in the area that flooding was widespread. Officer Parks' residence had flooded on several previous **5**

occasions. To impose discipline under these circumstances is unreasonable the Union contends.

The Grievant met with Deputy Warden Mack on September 30, 1996 to discuss a Freedom of Information Act request made by an inmate. He had been unaware of it. He was upset to learn of it, the more so because the institution could do nothing to prevent the inmate from gaining information about him. Officer Parks acknowledges that he and Deputy Warden Mack had a heated conversation. He denies central elements of the State's contentions about this incident. He did not use profanity towards the Deputy Warden. To the contrary, the Deputy Warden used profanity towards him. He did not throw papers off the Deputy Warden's desk.

When, on October 1, 1996 the Grievant called in he did so late. That is acknowledged by the Union. It is not acknowledged that he used profanity at the entryway. He was upset with Officer Brewer for relaying a changed assignment, to the patrol vehicle. In the Union's view, it is not the task of one co worker to provide direction to a co worker of equal rank. Brewer is not a supervisor. He had no authority to give an order or directive to the Grievant. If the Grievant was to be reassigned, it would have been proper for a supervisor to do so. Had that occured, no problem would have developed. Upon his arrival at his regular post, 1A, the **6**

Grievant contacted his supervisor. When told to report to the patrol vehicle by his supervisor the Grievant did so. No grounds for discipline exist in this scenario according to the Union.

When, on October 7, 1996 the Grievant was contacted by his sister to tell him of chest pain being experienced by their Mother he called in. He took his Mother to the hospital. He remained there all day. There is no question about that. To impose discipline for such a situation is simply unreasonable in the Union's view. The Grievant did not act improperly on October 7, 1996. He was taking care of his ill Mother. As that is the case, this incident should not be held against the Grievant. Viewed in their entirety, the Union contends the allegations used against the Grievant are either unfounded or unreasonable. As that is the case, it urges the Grievance be sustained in its entirety.
Discussion: Some of the incidents which prompted the State to administer discipline in this situation are minor in nature. This is the case for the incident of September 28, 1996. There is no question that the Grievant's home was flooded on that date. Testimony on the record is contradictory concerning whether or not Officer Parks was asked on September 28, 1996 to bring in evidence to support his request for additional leave on that date. Subsequently, when **7**

put on notice that documentation was required, the Grievant contacted the Fire Department. It declined to provide documentation to him. No question has been raised concerning the bona fide nature of Officer Parks' absence on September 28, 1996. The State does not doubt that his residence was flooded. To add this event to the litany of charges used to support serious discipline against the Grievant when the State knew of, and does not doubt, the reason for Officer Parks' leave request is insupportable.

The same conclusion is reached with respect to the events of October 7, 1996. Mr. Parks contacted the institution and informed it he would not report as he was taking his Mother to the hospital. This occurred shortly before 5:00 am. He spent the day at the hospital with his Mother. Again, this is not doubted by the Employer. There is a troubling discrepancy between the Grievant's assertion he filed a request for leave form and the absence of any such form in the record. Nonetheless, there is no contest that the Grievant was tending to his Mother who was ill. Under these circumstances including this event among those used to support serious discipline is improper.

More significant is the incident of October 1, 1996. It is the case that the Grievant became loud and profane when he was informed by Officer Brewer to report to the patrol **8**

vehicle rather than his normal post. The defense raised by the Union, that Officer Brewer was in no position to give directives to the Grievant, is unworthy of serious consideration. People who work in organizations receive information and directives from co workers on a daily basis. Officer Brewer was merely passing on a directive to the Grievant from supervision. Officer Parks' reaction to the message received from Officer Brewer was inappropriate and disproportionate. In addition, his language was uttered in front of supervision and outside visitors to Warren. Upon his arrival at 1A the Grievant was directed again to report to the patrol vehicle. He initially refused to report, punctuating his refusal with obsenities. That he ultimately reported as directed does not exculpate his behavior on that day.

Substantial differences exist between the accounts provided concerning the events of September 30, 1996. On the one hand, Deputy Warden Mack testified that the Grievant was agitated and belligerent in

conversation with him on that date. He also indicated that Officer Parks threw papers from Deputy Warden Mack's desk and used profanity towards administrative staff. This account is largely confirmed by Officers Sheets and Bost. It is denied by the Grievant. He is the sole person to differ with the accounts provided by **9**

Deputy Warden Mack and Officers Sheets and Bost. The Union did not show that Messrs. Mack, Sheets or Bost harbored animosity towards the Grievant. It provided no reason to disbelieve their testimony.

The event of September 30, 1996 is very serious. The concerns raised by the Grievant with Deputy Warden Mack were bona fide. That does not serve to excuse his unprofessional and insubordinate behavior towards Deputy Warden Mack on that date. The behavior was well beyond anything that should be accepted or tolerated by this or any other employer. At the time of these incidents the Grievant had active discipline in his file. Even discounting the failure of the Grievant to provide evidence to support his leave requests, his behavior on September 30 and October 1, 1996 was of such significance as to support the action of the Employer in this situation.

Award: The grievance is denied.

Signed and dated this, 20th day of August, 1998 at Solon, OH.

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Harry Graham
Arbitrator **10**