VOLUNTARY LABOR ARBITRATION TRIBUNAL

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| In the Matter of Arbitration | * | |
| Between | * | |
| | * | OPINION AND AWARD |
| OHIO CIVIL SERVICE | * | |
| EMPLOYEES ASSOCIATION | * | Anna DuVal Smith, Arbitrator |
| LOCAL 11, AFSCME, AFL/CIO | * | |
| | * | Case No. 27-16-021112-3680-01-03 |
| and | * | |
| | * | |
| OHIO DEPARTMENT OF | * | Kurt Wolfe, Grievant |
| REHABILITATION AND | * | Removal |
| CORRECTION | * | |

## APPEARANCES

For the Ohio Civil Service Employees Association:

Lynn Belcher, Staff Representative
Bobbie-Jo Heinlen
Ohio Civil Service Employees Association

For the Ohio Department of Rehabilitation and Correction:

Kevin Shafer, Labor Relations Officer
Ohio Department of Rehabilitation and Correction

Ray Mussio
Ohio Office of Collective Bargaining

## I. HEARING

A hearing on this matter was held at 9:15 a.m. on August 6, 2003, at the Marion Correctional Institution in Marion, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed, and to argue their respective positions. Testifying for the Ohio Department of Rehabilitation and Correction (the "State") was Jean Zeller, Personnel Officer 2. Testifying for the Ohio Civil Service Employees Association (the "Union") were Chapter President Darrell Starcher, Steward Bobbie-Jo Heinlen and the Grievant, Kurt Wolfe. A number of documents were entered into evidence: Joint Exhibits 1-15, State Exhibits 1-7 and Union Exhibits 1-6. The oral hearing was concluded at 1:45 p.m. following oral argument whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

## II. BACKGROUND

The Grievant was hired by the Ohio Department of Rehabilitation and Correction on May 6, 1991. At the time of his removal for job abandonment on October 30, 2002, he was a Maintenance Repair Worker 3 at the Marion Correctional Institution ("MCI") where, from the time of his hire, he consistently met or exceeded his employer's expectations on every performance dimension. He had one active discipline on his record, a one-day fine for being absent without proper authorization.

The events leading to the Grievant's removal began on July 11, 2002, when the Grievant began calling off work. He testified that during this period he felt like the world was closing in on him. He did not care about anything including work and the things he enjoyed. He just spent the day in seclusion, lying around the house, not answering the door or opening bills. He had had an episode like this once before for about 1½ months which he handled with his medical doctor.

He knew things were not right with him so eventually he made a phone call and got an appointment. He saw his personal physician, Dr. Garner, on July 25, who prescribed medication for major depression and fatigue and took him off work from July 11-August 5. He also went to United Behavioral Health ("UBH") which certified outpatient therapy and referred him to a counselor. This counselor was unable to provide him with a statement for his disability benefits application because she lacked the necessary credentials, but she did treat him. The first appointment the Grievant could get with a psychiatrist who could perform the required disability assessment and provide such a statement, was not until October 8. He would have been entitled to an appointment within 72 hours for his disability claim but the Grievant was unaware of this, he said. No one at UBH or anywhere else said anything to him about it nor do any of the disability application documents given to him or available online mention it. While he waited to see the psychiatrist, he picked up and completed a disability application for a mental health claim and submitted it with Dr. Garner's disability statement, on July 30 to Jean Zeller, a personnel officer at MCI, who forwarded it to Nellie Haynes, Claims Administrator at the Department of Administrative Services ("DAS"). This claim gives a return to work date of August 5. On August 2, FMLA leave for the July 11-August 5 period was certified. However, the Grievant did not report to work on this date. On August 8, DAS sent him a letter saying it intended to deny his claim. It advised him that he had until September 7 to file an appeal and that he should contact UBH for an assessment. The Grievant testified he thought he had complied because he had already called UBH and gotten the necessary appointment with the psychiatrist. The denial, he thought, was about benefits, not about leave, so he thought this appointment would cover his absence after his other leave balances ran out. Hence, he did not appeal the denial even after Ms. Zeller sent him a reminder on August 27. During all this time no one tried to reach him by telephone because he does not have one, but he did call off again, on the evening of September 8, for the period September 9 through October 7.

Two days after the appeal deadline, Ms. Zeller and Ms. Haynes exchanged e-mails wherein Ms. Haynes conveyed that the Grievant was not under UBH, had not filed an appeal and that a person named Linn at UBH had told her that the Grievant did not want to file. At this point a letter was drafted from Warden Christine Money to the Grievant stating that DAS had notified her office that he was not receiving medical treatment from UBH, that he did not want to file for disability benefits, and that his claim was going to be closed. It continues:

> Since you have not submitted creditable medical documentation since July 30, 2002 regarding your medical condition, you are hereby given a direct order to report to work on September 24, 2002 at 7:30 a.m.. Upon your arrival you are to report to the Personnel Office. Failure to report to work as directed can result in disciplinary action, up to and including removal. (Joint Ex. 11, p.l)

This letter was sent certified and regular mail. The certified mail came back to the institution October 7 and the Grievant did not report on September 24 as ordered. Meanwhile his FMLA leave continued to run until exhausted on September 24.

When the Grievant failed to appear on September 24, a pre-disciplinary conference notice was issued on a Rule 4 (Job Abandonment: Three or more consecutive work days without proper notice) violation. The Grievant learned about this conference through another employee sent by the Union. He believes he also got the notice through regular mail. At any rate, he appeared for the conference as scheduled on October 2. Part of his defense was that the psychiatrist, Dr. Misra, refused to sign the disability form until he had seen him, which had not yet happened. Before the hearing officer's report was issued, the Grievant kept his October 8 appointment with the psychiatrist. Dr. Misra diagnosed "Mood Disorder NOS 309.0," prescribed another medication and scheduled a follow-up appointment for November 15, but he would not execute the physician's statement for the disability application until his notes were transcribed. After seeing Dr. Misra, the Grievant called off again, giving a return to work date of November 14. On October 22, Dr. Misra finally signed the physician's statement, but by now both the pre-disciplinary hearing officer's report finding just cause and the removal order had been signed (October 16 and October 17 respectively). MCI received the Grievant's completed forms on

October 24. These were forwarded to DAS along with the information that the Grievant had been removed and its recommendation that the claim be disapproved.

The Grievant's removal, effective October 30, was grieved on November 1 and thereafter fully processed to arbitration. While the grievance was pending, DAS informed the Grievant that, since it did not receive additional medical information until after the September 7 deadline and never got a request for an appeal, it had closed the claim as of September 7, 2002. In arbitration the Grievant testified that after his health benefits were cut off when he was removed he was unable to remain in treatment. However, many of the issues he was facing at the time of his crisis have mitigated and he is better. He wants his job back and would begin seeing his doctor again were he to return to work.

## III. ISSUE

*Was Kurt Wolfe removed for just cause? If not, what is the remedy?*

## IV. ARGUMENTS OF THE PARTIES

### Argument of the State

The State summarizes that this case began on August 5 when the Grievant did not report to work on the date given on his disability application. Management had every right to expect him to come back on that date or provide additional documentation in support of extending his absence. When he did not return, the State made extra efforts to help him through the disability process and it did not take action until his FMLA leave ran out. It thus met all its obligations and then some. However, the Grievant sat on his hands, not contacting DAS or his employer, even though he admittedly received some of their notifications. Yet a Union witness in similar circumstances was able to get disability approval on her appeal when she showed extenuating circumstances. Unlike the Grievant, she did this by staying in touch with her employer.

The State's position is that the issue here is really the September 10 letter ordering the Grievant back to work. Management met its notice requirements but the Grievant did not respond although he admits receiving other documents by mail. He was therefore removed after

being absent three consecutive days following his return-to-work deadline. MCI is a twenty-four hour operation that cannot run efficiently or effectively if employees do not come to work and Management does not know their whereabouts. For these reasons, the State asks that the grievance be denied in it's entirety.

Argument of the Union

The Union says it understands the reasons the State would consider discipline in this case. But upon investigation it learned that the Grievant was attempting to get psychiatric care and to comply with documentation requirements. However, he was impeded in his ability to see a psychiatrist early on who would provide the necessary information and eventually clear him to go back to work. He was impaired by his mental state, did not fully understand what was wanted, and was not informed about expedited psychiatric evaluation for disability claims. DAS and MCI thought he was not being treated by UBH and not seeking disability when, in fact, he was referred to a counselor by UBH and was waiting for his appointment with the psychiatrist whom he thought was his vehicle for legitimizing his absence and returning him to work. He tried from the beginning to follow directions to the best of his ability even though he believed that benefit approval was irrelevant to his employment.

The Union continues that the pre-disciplinary notice (on which the State relies and against which the Union was on notice to defend) states that no creditable medical evidence was supplied to cover the Grievant's absence after August 5. Yet FMLA leave continued well after that date and Dr. Misra's later-supplied statement confirmed the personal physician's statement that qualified him for FMLA in the first place.

The Union contends that the State's order to return to work was not effective because the Grievant was not in a condition to respond having not gotten appropriate treatment for his condition because of the psychiatrist's appointment calendar. The Grievant is a twelve-year employee with excellent evaluations and only one active discipline. His removal is unjust and should be overturned. The Union asks that the grievance be granted, that the Grievant be

reinstated with full back pay and benefits, and that the State be ordered to compensate him for the medical expenses that would have been paid by his insurance had he not been unjustly discharged.

## V. OPINION OF THE ARBITRATOR

This is a case of system failure caused by botched communications complicated by the nature of the Grievant's illness, his lack of a telephone and a dearth of information about the procedure for mental health claims. It appears there were good intentions on both sides, but at some point the outcome became inevitable or very nearly so. This does not, however, mean the outcome was just.

On the State's side, it did have a right to expect the Grievant to return to work on August 5 or to provide additional documentation in support of his lengthening absence. It was patient with him, accepting his call-offs without question–not asking him for weeks for further documentation of his illness beyond what he supplied when he submitted his first disability application to MCI's personnel office. It only mailed him a reminder of the approaching appeal deadline and urged him to get his forms to DAS as soon as possible. At this point the State still appears to accept the Grievant's illness as legitimate and to expect that forthcoming appeal paperwork would document it. Not until DAS e-mailed MCI on September 9 with the misinformation that "Mr. Wolfe is not under UBH" does the legitimacy of his absence come into question, for it is on the next day, September 10, that the letter is written complaining of no "creditable medical documentation since July 30" and demanding that he return to work. Even then the State did not leap to fire the Grievant, for it did not require him to report for work until the date his FMLA leave was exhausted. Then, when the case went to pre-discipline, the hearing officer gave the Grievant another chance to document his continued illness and did not issue his report until the statement still had not been supplied a week after the hearing.

The Arbitrator is curious as to why, after having walked with the Grievant (who has a good eleven-plus-year history with the State) this far, the State would not rescind the removal

order after it got the psychiatrist's statement. Perhaps if it had seen the psychiatrist's case notes (Union Ex. 2) which corroborate the Grievant's claim that the psychiatrist was the source of the paperwork delay, the parties would not be in arbitration. Instead, here we are with the State relying on a direct order the Grievant could not obey because, through no fault of his own, he had not yet had the appointment that would assess his fitness for work.

The Arbitrator is also curious as to why, knowing the nature of the Grievant's illness from his personal physician's statement and the fact that the Grievant did not have a telephone and had not responded to letters it and DAS had sent him, the State did not try another channel of communication such as the Union, a co-worker friend, or a visit from a supervisor. The Grievant was not a problem employee. He had more than eleven years of good service which are not so easily replaced. The fact that his was a mental health claim with a diagnosis of major depression and fatigue should have raised the flag of his competence to respond to mail, but it apparently did not.

As for the Union witness who was able to get disability approval on appeal, the Arbitrator does not find her to be situated similarly to the Grievant. For one, she was experiencing entirely different symptoms which did not cause her to isolate as the Grievant did. Second, as a steward, she had experience helping co-workers navigate the system. Yet even she had difficulty because the expedited mental health procedure was poorly communicated and qualified mental health professionals are not readily available in this geographic area. A person of her experience and with her symptoms may have the persistence to press her case, but a person who can barely get out of bed could easily find such a task overwhelming and give up.

Turning now to the Grievant, to his credit he did continue to call off and did follow the disability trail as he thought it to be. He might have kept closer tabs on his leave situation, perhaps requesting extended illness leave on the basis of a second statement from Dr. Garner. He might also have sought assistance from the personnel office, his union or co-workers. More significantly, he might have opened his mail and responded to it, at least with a phone call to

explain why he could not report as ordered. The question is whether, given his situation, he should be held responsible for this failure.

An employee who suffers from an addiction or mental illness that impairs his ability to conduct his behavior acts involuntarily and is thus not responsible for his misconduct that, but for the impairment, would not have occurred. This is an affirmative defense. The burden is on the Union to establish the employee's condition, its relationship to his behavior, and the likelihood of rehabilitation.

The Union met its burden in this case. In mid-September when the direct order was mailed the Grievant had been diagnosed with major depression, but had discontinued his medication because of physical side effects. He was, however, still in counseling and awaiting the appointment that ultimately confirmed a mood disorder which symptoms include "marked distress...or...significant impairment in social or occupational...functioning" (Union Ex. 1). In light of the findings of his doctors and his testimony describing his symptoms the preponderance of the evidence is that the Grievant was non-responsive to the direct order through no fault of his own on account of his mental state. He thus cannot be held responsible for failure to answer the direct order. Both doctors expected marked change in the future and found the disability to be temporary. Because of the Grievant's condition at the time and the likely success of treatment, there is good reason to believe he will once again meet or exceed his employer's performance expectations. He simply was not given an adequate opportunity to be rehabilitated because of the long wait for a psychiatric assessment, mis-communication between DAS and MCI, and the doctor's delay in issuing the result of his examination. His removal for job abandonment without that opportunity was improper. He is therefore to be reinstated and afforded the opportunity to establish his fitness for duty.

## VI. AWARD

The grievance is granted. The Grievant was removed without just cause. He is to be reinstated to his former position forthwith. The State may require reasonable proof of his fitness

for duty within a reasonable period of time. No back pay is awarded since the Grievant was not in pay status or fit to work at the time of his removal. The time since his removal will be designated approved unpaid extended illness leave. The Grievant will be made whole for lost seniority and benefits to include reimbursement for medical expenses incurred because of the loss of insurance while removed. The Arbitrator retains jurisdiction for a period of sixty (60) days on the sole issue of remedy.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
October 15, 2003

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