VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration -between- **STATE OF OHIO, DEPARTMENT OF TRANSPORTATION** -and- **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO**	**ARBITRATOR'S OPINION** Grievant: **Mark A. Landacre**

FOR THE STATE:

G. DEWAYNE SLACK
Labor Relations Officer
Ohio Department of Transportation
Thornville, Ohio 43076

FOR THE UNION:

BUTCH WYLIE,
Staff Representative
Ohio Civil Service Employees Association, Local 11, AFSCME AFL-CIO
1680 Watermark Drive
Columbus, Ohio 43215

DATE OF THE HEARING: **March 16, 1990**

PLACE OF THE HEARING:

Ohio Department of Administrative Services
Office of Collective Bargaining
65 E. State Street
Columbus, Ohio 43215

ARBITRATOR:

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Impartial Arbitrator
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The hearing was held on March 16, 1990 at the Office of Collective Bargaining, State of Ohio, Columbus, Ohio before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 10:00 a.m. and was concluded at 6:30 p.m.

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On or about April 13, 1989 **MARK A. LANDACRE** filed a grievance with the **STATE OF OHIO, DEPARTMENT OF TRANSPORTATION**, the "**State**", in which he protested his removal from employment because he was absent from work without authorization from February 15, 1989 through February 22, 1989.

The denial of the grievance by the State was appealed to the various steps provided in the Grievance Procedure contained in the Agreement between the State and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO**, the "**Union**". Since the grievance could not be resolved by the parties, it was carried to arbitration.

FACTUAL DISCUSSION

The State removed the Grievant from employment as a Highway Worker 2 on April 7, 1989. The Grievant was hired by the Ohio Department of Transportation on January 27, 1981. He was employed until June 26, 1982 and rehired on September 3, 1985. He continued his employment until April 7, 1989. During the period of his employment he worked in District No. 6 in Delaware County.

There is very little dispute between the parties over the facts giving rise to the Grievant's removal from employment. On February 13, 1989 the Grievant was required to appear in court because he was charged with the criminal offense of "criminal damaging". The Grievant was found guilty of the crime and sentenced to jail for ten (10) days. Immediately after being sentenced the Grievant called Joan Westscott, the Delaware County Superintendent, and told her that he had been incarcerated for ten (10) days and would return to work on February 23, 1989. In his undisputed testimony, the Grievant related that she told him that "you know, I could UA you", to which the Grievant said, "yes, but please don't I do not want any discipline on my record". The letters "UA" mean unauthorized absence. According to the Grievant, he contacted his grandmother, Lillian Landacre and told her to call Westscott and the personnel office. He requested her to call in every day because he was afraid that Westscott "would pull a fast one". It should be noted that Lillian Landacre had worked for the Ohio Department for Transportation for many years and had retired in 1986. Lillian Landacre called "Emil Margenian" in personnel and told him what had happened. By Lillian Landacre's account, "Margenian" told her that he would talk to Jack Kirby a Supervisor and Westscott and he would let her know what could be done. Lillian Landacre called the Department each day that the Grievant was incarcerated. She also told her son to call "Margenian" on February 16

so as to avoid the three (3) consecutive days of absence. When the Grievant left jail at the conclusion of his confinement on February 23 at 6:30 a.m., he went to his grandmother's home where he changed his clothes, after which he went to his job unit at the District Office. At the District Office, Westscott informed him that "she put me up for removal". After asking for permission to do so, he went to see "Margenian" who told him "not to worry" and that Kirby said that he "would not have to worry". At Margenian's suggestion the Grievant saw Kirby. The Grievant related that Kirby told him to see his Union Steward, David Zerby. The Grievant did so and asked Zerby for his help. He also indicated that Zerby provided him with a telephone number for the Emergency Assistance Plan (EAP). The Grievant contacted the counseling service of EAP and after making an appointment he received counseling on February 25.

Westscott said that she "wrote up" the Grievant for being incarcerated and not having time to cover for confinement. Westscott went on to state that the Grievant called from court on February 13 and said that they were taking him to jail. Westscott continued her testimony by stating that he told her that he "was going to jail and would be off--I think he said seven (7) days. I told him that he would not have enough time to carry that time". The "write up" that she referred to set forth the explanation of the offense as a violation of No. 16 b. which is contained in Directive A-301. She indicated that

between February 15 through 22, 1989, the Grievant accumulated forty-eight (48) hours of unauthorized absence; and that the employee had been incarcerated February 13 through February 22, 1989. In the "write up" which was dated February 21, 1989 she recommended removal of the Grievant.

DISCUSSION

The parties stipulated to the issue to be resolved by this arbitration. The issue is: "Was the Grievant removed from employment with the Ohio Department of Transportation for "just cause"? If not, what shall the remedy be?

The Grievant was discharged under Directive No. A-301 which provides "disciplinary guidelines". Guideline 16 b. sets forth "removal" for the offense of "Unauthorized absence" for "3 days or more (consecutive)". It is undisputed that before February 13, 1989, the Grievant had exhausted his available vacation leave except to cover two (2) days of his confinement. Furthermore, in his letter to the Grievant dated June 13, 1989, on the subject of "Step 4 Grievance Review" Dick Daubenmire, Contract Compliance Officer, indicated that the State had exceeded its contractual obligations by granting him two (2) days of available vacation leave. Daubenmire further indicated that "[I]ncarceration is not an appropriate use of vacation leave".

To consider the Union's challenge to the State's application of Guideline 16 b. of Directive A 301, it is necessary to provide some background information. Before December 1988 Willis Adams, Labor Relations Officer of District No. 6 indicated that there was a great deal of "abuse" of the State's unpaid leave policy. The unpaid leave policy was applied inconsistently. Indeed the parties stipulated that until December 1988 there was disparate treatment in the manner in which employees were disciplined for having violated Guideline 16 b. In early 1988, Adams discussed the problem with supervisors about the "change in the unpaid leave policy". The "change" in the policy included the application of Article 31, Section 31.01 which, in relevant part, provides:

> "The Employer may grant unpaid leaves of absence to employees upon request for a period not to exceed one (1) year. Appropriate reasons for such leaves may include, but are not limited to, education; parenting (if greater than ten (10) days); family responsibilities; or holding elective office (where holding such office is legal.)"

Adams indicated that unpaid leave would be for "family and educational" purposes. Adams added that there would be no more authorized absence when leave time has been exhausted unless the

employees complies with Article 31, Section 31.01 of the Agreement. Adams discussed the concerns about disparate treatment with Dave Zerby, the Chief Steward, in March or April, 1988. He went on to state that he informed Zerby of the "abuse" by the employees of the policy and that "some employees had exhausted their available leave time". He indicated to Zerby that "no more" would they be able to receive "AA" or authorized absence. According to Adams, Zerby told him to wait until December 1988 before implementing the policy because "some of the employees are out of time" and "we should wait until December, 1988 when they would have no time available". As Adams explained, every December, an employee is given eighty (80) available hours which are to be used for authorized absence. Adams testified that both he and Westscott agreed to hold off the implementation of the change in the policy until December, 1988.

The Union contends that the State did not properly inform the employees of its change in the unpaid leave policy. It is fairly well established that "[A]lthough having been lax an employer can turn to strict enforcement [of a policy] after giving clear notice of the intent to do so". Elkouri and Elkouri, *How Arbitration Works*, Fourth Edition, (BNA, 1985) at page 684.

Based upon the evidentiary record, it should be noted that there was no change in the policy; rather there was a change in the

application of the State's policy on unpaid leaves absence. The unpaid leave policy has been in Article 31 of the Agreement since 1986. Directive A-301, containing Guideline 16 b. has been posted, according to Adams, throughout the District. He and the Safety Supervisor posted the directives on the Union's bulletin board in every Department facility within the District.

Adams indicated that after he talked with supervisors about compliance with the change in the policy, the supervisors held meetings with the bargaining unit employes and informed them of the change in the policy.

Westscott testified that she held a meeting in November, 1988 and discussed the "change" with the employes at the Berkshire outpost in The Delaware County Garage. She told the employees that there would not be any "AA" approved unless doctor's excuses are submitted or employees were hospitalized and they were out of available time. She testified that she met with employees in two (2) groups--one (1) at the outpost and one (1) in Delaware County to discuss the "change". Westscott said that "as far as [she] knows", the Grievant was present at one (1) of the meetings.

The Union submitted a document which was handwritten by Westscott indicating the date of "12-7-89" and setting forth the following:

"No AA Leave Approved without Jack Kirby's Approval First."

Norm Bailey, a Highway Worker and Shop Steward in Delaware County, testified that "nothing was said" to him about a change in the leave policy. He denied that he attended a "group meeting" on the subject. He did not know if he "was off" during the latter part of 1988. Grant Tobias, Chief Steward, said that if there is a new policy or new rule "normally" it is set forth in an "inter-office communication" (IOC). The Supervisor, he said, carries the IOC around and it is signed by the employees. Tobias added that the time keeper "sometimes" makes a copy of the new or changed policy and also makes a copy for the employees. He was "not familiar" with the handwritten posting by Westscott.

Based upon the entire evidentiary record, I have concluded that the State adequately informed the Union and its employees of the change in the application of the unpaid leave policy. The Grievant did not deny having knowledge of the change in the unpaid leave policy. Moreover, there need not be any writing or written documentation by the State on the change in the application of its policy. In the absence at the hearing of Zerby, as a witness for the Union, I have inferred that he was aware of the change in the application of the unpaid leave policy in April, 1988. Moreover, I have inferred that he requested

Adams and Westscott to delay implementation of the change in the application of the policy until December 1988 when the bargaining unit employees would be given eighty (80) hours of leave time. The handwritten posting by Westscott on December 7, 1988 confirms a change in the policy. Had there been no change there would be no reason for the handwritten posting at all. Thus, there would be "No AA leave" without Kirby's approval. I am inclined to believe that the bargaining unit employees were given adequate notice by Westscott of the State's change in the application of the policy. Furthermore, it is of great weight as I have already established that the Grievant did not deny that he had knowledge of the change in the unpaid leave policy. In the absence of such denial I have inferred that he was aware of the change in the application of the policy.

APPLICATION OF GUIDELINE 16 b.

The State unilaterally promulgated Guideline 16 b. which calls for "removal" of an employee for "unauthorized absence" of three (3) or more days. Having established the penalty of "removal" for the offense does not mean that it is imposed in each and every case against an employee who, in fact, has committed the offense. Were that so, the grievance procedure culminating in arbitration, which is part of the parties' bargain would be meaningless. Furthermore, it is the test of "just cause" which the parties have stipulated; and which is

set forth in their agreement that governs the propriety of the penalty imposed by the State. The State's unilateral policies and guidelines, if they impact upon employees must yield to the bargained for terms of the Agreement. Thus, the test by which discipline, including discharge is measured is "just cause", which the State is required to prove by clear and convincing evidence.

Furthermore, Guideline 16 b. is a reasonable rule. The rule serves the State's goal of efficiency and its right "to manage and operate its facilities and programs". These goals cannot be satisfied if employees, are absent without proper authority. To be absent merely one (1) day without authority is serious enough; to be absent for three (3) consecutive days without authority compounds the gravity of the offense. It is in defiance of the authority of the employer to be absent without authority for three (3) consecutive days. The reasonableness of the rule is underscored because a "1st occurrence" of unauthorized absence warrants a full progression of discipline beginning with written reprimand for a "1st" occurrence and concluding with "removal" for a 4th occurrence.

"JUST CAUSE"

The State supports its decision of removal based upon several factors. The parties stipulated that until the Grievant was incarcerated in February 1989 he had used 205 approved hours of

leave, including vacation leave, time off for his birthday, "comp time", and seven (7) approved hours for the time that he was incarcerated.

A short period of time before the Grievant was incarcerated, he took 49 hours of leave, which consisted of his birthday and time off for illness. He admitted that he exhausted his accumulated sick leave before he was incarcerated. The Grievant indicated that he has had pneumonia five (5) times and although he was sick while he was in jail he was not permitted to take medicine for his illness. No medical documentation was submitted by the Union to corroborate the Grievant's testimony of his illness within several weeks of his incarceration.

Besides exhausting his leave time shortly before his incarceration in February, the evidence warrants the conclusion that on February 3, 1989 he became aware that he was required to be in court on February 13, 1989. Approximately a week before his appearance in court, the Grievant had Westscott sign certain unidentified documents which were then submitted to the court.

I have concluded that the Grievant was aware or should have been aware that he would be incarcerated on February 13, 1989. The conviction of "criminal damaging" for which he was incarcerated on February 13, 1989 was his second conviction for having committed a misdemeanor within a period of three (3) months. On or about

December 14, 1988 a judgment was entered in the Delaware Municipal Court for "recklessly or by force resisting or interfering with the lawful arrest of himself" when he was observed by police officers fighting with another person. He was sentenced to thirty (30) days in jail. The Grievant actually served one (1) day in jail and the balance of the thirty (30) days was suspended. I find it highly unlikely that the Grievant believed that he would be placed on "work release", on February 13, 1989 in light of his previous conviction. I have concluded that at least by February 3, 1989 when the Grievant said that he knew that he was required to be in court on February 13, he knew or should have known that he would be incarcerated. Despite this knowledge, the Grievant continued to take off time, realizing his leave time would be exhausted by February 13, 1989.

Moreover, the Grievant's absence from work from February 15 through 22, 1989 is not due to illness or for reasons beyond his control. His incarceration is due to his own actions, which made it impossible to fulfill his obligation to report to work.

The Union indicates that the State did not take into account, the participation by the Grievant in the Emergency Assistance Program immediately after he was released from jail. In this connection, Article 24, Section 24.08 provides as follows:

> "In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program, the Employer will give serious consideration to modifying the contemplated disciplinary action."

It is important to underscore that the terms of Section 24.089 provide that "disciplinary action may be delayed until completion of the program * *." [Emphasis added]. I have concluded that under Section 24.08 it is at the State's discretion to delay disciplinary action until "completion of the program". In this case the State chose not to delay disciplinary action.

There are considerations which mitigate against the penalty of discharge of the Grievant. Before he was removed on April 7, 1989, the Grievant had been employed for roughly five (5) years with the State. The Grievant's past disciplinary record consists of a written reprimand for unexcused tardiness that was issued on November 18, 1988. His evaluations throughout his tenure with the State indicate that he is considered to be a satisfactory employee. The only deficiency which is generally raised by his supervisors, including Westscott is that he uses foul language. Thus, except for the written

reprimand in November, 1988, the Grievant has been a satisfactory employee during his five (5) years of employment with the State.

There is also the Grievant's eagerness in wanting to retain his job when he found out that he was incarcerated and during his confinement in jail. After he was sentenced on February 13, the Grievant "immediately called" Westscott to tell her that he was incarcerated for ten (10) days and that he would return to work. He then contacted his grandmother and told her to call Westscott and the personnel office every day that he was in jail. Lillian Landacre called the Department each day that the Grievant was incarcerated.

When the Grievant's incarceration had ended at 6:30 a.m. on December 23, after changing his clothes, he reported to work at which time he found out that he had been removed from his job. Such actions by the Grievant demonstrate that he considered the job to be of utmost importance to him. Such eagerness and commitment to his job has apparently been demonstrated during his tenure with the State. To be sure, the Grievant did not abandon his work or treat his job in an arbitrary manner.

The Union points out that in effect, Westscott wanted to get rid of him. At the end of the Grievant's probationary period, Westscott requested "his removal". She commented that his use of foul language needs to be changed and that he was "UA" for three (3) hours on

December 2, 1985. Westscott also indicated that when she talks to him "about slowing down, he gets more hyper". She stated that he was a "good worker" and "adapts quickly".

The Union also presented evidence on several episodes involving Westscott's attitude towards the Grievant. The Grievant's grandmother's retirement party was held in April, 1986. Since the luncheon party was planned roughly two (2) months before April, 1986 Westscott knew about it well in advance of the retirement party. The Grievant was "asked" to sit at the family table. During the morning of the retirement party, Westscott assigned the Grievant to a drainage box to clean out sewage. Although the Grievant continually reminded Westscott of his grandmother's party, he was "told" to continue" what [he] was doing". After washing up and changing his clothes, the Grievant was late to the luncheon by approximately thirty (30) to thirty-five (35) minutes. He ate lunch, and "was gone before 12:30 p.m." He spent about twenty-five (25) to thirty (30) minutes at the luncheon.

Another episode occurred around Christmas 1986. The Grievant had arranged with his grandmother to pick up tables and chairs at her church so that they could be brought to the Christmas party at the Berkshire outpost. Just when the Grievant was to pick up the tables and chairs Westscott assigned him "on the road" to pick up a piece of

equipment. A fellow employee, Larry Davenport, picked up the tables and chairs with the assistance of the Grievant's grandmother. He then transported the tables and chairs to the Berkshire outpost.

Grant Tobias, a bargaining unit member, related an episode involving the Grievant and Westscott which occurred "a couple of years ago". As District Mechanic, he was "on break" at the outpost when he observed Westscott "throw a pair of tennis shoes into the trash can". At the time the Grievant was "out on the road". When he returned to the outpost, he found his tennis shoes in the "trash can". The Grievant asked "who was the ignorant ass hole who put this in the ash can?" Unknown to him, Westscott was standing behind him when he made the comment. As a result, "words were exchanged" between Westscott and the Grievant.

I have inferred that Westscott, to say the least, was not particularly fond of the Grievant. Her conduct during the morning of the Grievant's grandmother's retirement luncheon, was provocative. In the absence of any testimony by the State concerning this episode, I cannot conclude that the Grievant's assignment of cleaning out sewage out on the road could not wait until the afternoon. To single out the Grievant for such work, and knowing that he would arrive late for his grandmother's luncheon and then require him to leave after thirty (30) minutes is unusually harsh and punitive. Westscott's

assignment of the Grievant to pick up equipment when she was aware that he had arranged to pick up tables and chairs to bring to the 1986 Christmas party indicates another provocative act towards the Grievant. It is true that Westscott's assignment to the Grievant on both occasions (the day of his grandmother's luncheon and the arrangement to pick up tables and chairs for the 1986 Christmas party) were within his job classification. Nevertheless, given the particular timing of the assignments, I have inferred that they were unnecessary and provocative, evincing a hostile attitude towards the Grievant. Moreover, throwing the Grievant's tennis shows in the trash can, is also a provocative hostile act. Bailey said that when Westscott threw the tennis shoes in the trash can, she said "that they were not supposed to by lying around". The State did not show how the tennis shoes impeded the work of the employees or the Department. Nor did Westscott explain why she took the Grievant's personal property and placed them in the trash can. The Grievant's vulgar comment about the identity of the person who placed the tennis shoes in the ash can, is mitigated by Westscott provocative act, which is beyond her proper supervisory responsibilities.

Turning to the events of February 13, 1989, as eager as the Grievant was to retain his job, Westscott seemed just as eager to remove him. Thus, she told the Grievant when he called her after he was sentenced to ten (10) days in jail that "you know I could UA you."

The Grievant pleaded with her not to do so because he did not want any discipline in his record. Bailey was standing about ten (10) feet from Westscott when she received the Grievant's call from court on February 13. In his undisputed testimony, he said that she told him and an employee named "Lusher" that the Grievant "was fined because he was in jail".

It is true that none of these episodes excuse the unauthorized absence of the Grievant during his confinement in jail. However, given the discretion of Westscott in recommending the discipline to be imposed, it may very well be that if another employee with a similar record to the Grievant was incarcerated who, Westscott was more favorably disposed to, she would not have made the same recommendation.

Finally, the Grievant did not serve a long jail sentence. The State considered the period between February 15 through February 22, 1989 to be unauthorized. No hardship was shown by the State due to the Grievant's short unauthorized confinement. In *Ralphs-Pugh Co., Inc*, 79 LA 6, (McKay, 1982) the mitigating factors arbitrators utilize in cases dealing with the discharge of an incarcerated employee because of absenteeism are set forth as follows:

> "Once it has been determined that the employer has been reasonable and even handed, arbitrators will then look to such other mitigating factors as the length of the employee's service, the dependability of the employee, the employee's period of incarceration, the employee's prior disciplinary record, and the difficulty of replacing an employee temporarily, as an indication of whether the punishment was too severe.* *" At page 10.

The Arbitrator in the *Ralphs-Pugh* decision added that "most weight is given to the length of an employee's service". At page 10. Moreover, in *Capitol Mfg. Co*, 48 LA 243 (Klein, 1967) the Arbitrator stated:

> "Whether or not a discharge or a disciplinary suspension for being absent due to a jail confinement will be upheld is a complex question depending upon a multitude of factors * *." Footnote 7, at page 248.

After carefully reviewing the evidentiary record, I have concluded that the State failed to carry its burden of proving by clear and convincing evidence that the Grievant was discharged for "just

cause", as required by Article 24, Section 24.01 of the Agreement. Moreover, the factors mitigating against discharge of the Grievant outweigh the factors which support discharge for "just cause".

In arriving at this conclusion, the offense committed by the Grievant cannot be minimized. Accordingly, he is to be reinstated without back pay with a warning that if he does not capitalize on this last chance to rehabilitate himself, he will no longer be an employee of the State.

AWARD

In light of the aforementioned considerations, the State failed to carry its burden of proving, by clear and convincing evidence that the Grievant was discharged for "just cause" as required by Article 24, Section 24.01.

The Grievant is to be reinstated without back pay with a warning that if he does not capitalize on this last chance to rehabilitate himself he will no longer be employed by the State.

Dated: April 28, 1990
Cuyahoga County
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