ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER 754

OCB GRIEVANCE NUMBER: 29-04-910624-0102-01-09

GRIEVANT NAME: SAMMONS, JEANETTE

UNION: OCSEA

DEPARTMENT REHAB SERVICES

ARBITRATOR: SMITH, ANNA

MANAGEMENT ADVOCATE: BURNS, DARLA

2ND CHAIR: LIVENGOOD, RACHEL

UNION ADVOCATE: LIEBER, STEVEN

ARBITRATION DATE: FEBRUARY 25, 1992

DECISION DATE: APRIL 13,1992

DECISION: GRANTED

CONTRACT SECTION AND/OR ISSUES: GRIEVANT WAS REMOVED FOR UNAPPROVED ABSENCES, CONVICTION OF A DRUG CHARGE AND FAILURE TO REPORT THE CONVICTION.

HOLDING: GRIEVANT HAD 13 YEARS SERVICE, AND WAS CURRENTLY WITH THE BUREAU OF DISABILITY DETERMINATION. GRIEVANT HAD BEEN INVOLVED IN AN EAP AND HAD BEEN HOSPITALIZED FOR DRUG ABUSE. THOUGH THE EMPLOYER'S MISSION STATES A COMMITMENT TO THE DISABLED, IT ENFORCES A POLICY PUNITIVELY RATHER THAN SUPPORTIVELY, IGNORING LEGISLATED AND BARGAINED FLEXIBLITY IN FAVOR OF A RIGID MAXIMUM PENALTY. REMOVAL IS SET ASIDE AND REDUCED TO A 10-DAY SUSPENSION.

COST: $784.84

In the Matter of Arbitration Between STATE OF OHIO, REHABILITATION SERVICES COMMISSION and OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, A.F.S.C.M.E., AFL/CIO	OPINION and AWARD Anna D. Smith, Arbitrator Case 29-04-910624-0101-01-09 Jeanette Sammons, Grievant Removal #754

Appearances

For the State of Ohio:

Darla J. Burns; Assistant Staff Attorney, Ohio Rehabilitation Services Commission; Advocate
Rachel L. Livengood; Ohio Office of Collective Bargaining; Second Chair
Bruce Hicken; Area Manager, Bureau of Disability Determination; Witness
Lori Trinkley; Human Resources Officer; Witness
Bruce Mrofka; Manager, Human Resources/Labor Relations; Witness

For OSCEA Local 11, AFSCME:

Steven Lieber; Staff Representative, OCSEA Local 11, AFSCME, AFL-CIO; Advocate
Robert Robinson; Staff Representative, OCSEA Local 11, AFSCME; Second Chair
Jeanette Sammons; Grievant
Karen Vroman; Steward; Witness
Tina Moody; Chief Steward; Witness
Radene Matheny; Witness

Hearing

Pursuant to the procedures of the parties a hearing was held at 9:15 a.m. on February 25, 1992, at the offices of the Ohio Civil Service Employees Association, Collumbus, Ohio before Anna D. Smith, Arbitrator. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded. The oral hearing concluded at 3:00 p.m., February 25, 1992. The case was argued by briefs which were exchanged through the arbitrator on March 11, 1992, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

Issue

The parties stipulated that the issue to be decided by the Arbitrator is:

> Did management remove the grievant for just cause? If not, what shall the remedy be?

Joint Exhibits

1. 1989-91 Collective Bargaining Agreement
2. Discipline Trail:
   - Notification of Request for Discipline
   - Pre-Disciplinary Meeting Notice
   - Pre-Disciplinary Report and Recommendation
   - Termination Notice
3. Grievance Trail:
   - Grievance
   - Step 3/Step 4 Response
   - Demand for Arbitration
4. 1987-1991 Evaluations of Grievant's Performance
5. Phone Logs of Barry Snider
6. EAP Participation of Grievant

Case History

The Grievant in this case was removed from State employment in June 1991 for unapproved absences, conviction of a drug charge, and failure to report the conviction in compliance with the State's Drug-Free Workplace Policy. At the time of her discharge, the Grievant had ten years of continuous service with the State plus an additional three years in the 1970s. The position from which she was removed was Office Assistant 2 at the Bureau of Disability Determination. She also served as a Union steward.

The Bureau is one of three comprising the Ohio Rehabilitation Services Commission, whose mission is "to work in partnership with people with disabilities to assist them to achieve full community participation through employment and independent living opportunities" (Union Ex. 1). The function of the Bureau where the Grievant was employed is the adjudication of social security disability claims. As such, the Bureau is funded by the Federal Social Security Trust Fund and is thus subject to the Drug-Free Workplace Act of 1988. Amongst else, this Act requires Federal contractors to certify

> (A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's workplace and specifying the actions that will be taken against employees for violations of such prohibition;
>
> (F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 5154;....
>
> (State Ex. 6)

The Policy adopted by the State of Ohio to comply with provisions of the Acts states in relevant part

> 1. Any state employee who, in any way, uses, gives, or transfers to another person a controlled substance or who sells or manufactures a controlled substance while at his or her place of employment or at any place where State of Ohio business is or would be conducted will be subject to discipline, up to and including termination.
>
> 3. Each state employee is required by law to inform his or her State of Ohio employer within five (5) days after he or she is convicted for violation of any federal or state criminal drug statute where such violation occurred at the worksite. A conviction means a finding of guilty, no contest (including a plea of nolo contendre) or the imposition of a sentence by a judge or jury in any federal or state court.
>
> 5. If an employee is convicted of violating any criminal drug statute while at the workplace, he or she will be subject to discipline, up to and including termination.
>
> (State Ex. 6)

By the Grievant's own admission, she has a drinking history pre-dating 1988, but during that year she entered a difficult personal relationship with a co-worker and her alcohol problems escalated. Her performance reviews are indicative of the progression of her drug and alcohol abuse as her ratings slipped from favorable in 1987 and 1988 to neutral in 1989 and 1990, and to unfavorable in 1991. Her supervisor's comments explaining the poor ratings in the last two years relate them to excessive absenteeism. Her performance when at work was nevertheless satisfactory (Joint Ex. 4). In 1990 she exhausted all leave balances. As a result of her attendance problems, she was informed on April 27, 1990, that the Bureau would no longer authorize unpaid leave and warned of

disciplinary consequences of being AWOL (State Ex. 1). On June 15, 1990, she received a written reprimand for being AWOL on May 25, 1990. Additional unapproved absences resulted in a 10-day suspension effective March 11, 1991, later reduced to one day in arbitration. After her pre-disciplinary meeting on the latter action, the Grievant continued to take unauthorized leave, accumulating 19 hours from February 12 through March 8 (State Ex. 11).

In the meantime, the Grievant's relationship with her co-worker had become troubled was ultimately broken off. About this time--May 1990--the Grievant entered the State's Employee Assistance Program, seeking help with her difficulties. She testified that her former boyfriend had begun to harass her at work. Two witnesses told of incidents they observed. The harassment was reported to the Grievant's supervisor and to the Area Manager, Bruce Hickins, who later came to believe that the harassment stopped. However, the Grievant testified this was but a temporary cessation, and that it continued even after she spoke with the Agency's EEO officer. An EEO complaint was ultimately filed, in May 1991, contemporaneously with the Grievant's request for Employer accommodation to her disability and the Employer's pre-disciplinary action against her.

The events that directly led to the Grievant's removal began with an anonymous phone call to the State Highway Patrol in November 1990. (The Union suggests this call was actually placed by the Grievant's former boyfriend, who had recently threatened

her.) The caller reported that the Grievant smoked marijuana in her car while it was parked in the Ohio Rehabilitation Services Commission parking lot (State Ex. 4). The Highway Patrol initiated an investigation, during which drug paraphernalia and a small amount (less than 100 grams) of marijuana was obtained from the Grievant's vehicle during working hours in the Commission's parking lot (State Ex. 5). The Grievant was charged with Drug Abuse 2925.11(A) O.R.C. On the advice of her attorney, who said the offense was a minor misdemeanor for which no criminal record would be established, the Grievant pled guilty, and paid the $75 fine (State Ex. 8). The Agency's Human Resources Officer, Lori Trinkley, was informed of these events, and asked the Grievant during an investigatory meeting March 25, 1991, whether she had been convicted. The Grievant twice said she had not. When she was confronted with the Drug-Free Workplace Policy which requires the employee to report conviction for worksite violation of a federal or state criminal drug statute (State Ex. 6), she said--again based on her attorney's advice--that this did not apply to her since her offense was a minor misdemeanor. The Grievant was then informed that discipline would be sought for accumulated AWOLs and drug policy violations.

The Grievant testified she became despondent over the amassed weight of her problems. On March 28, she called off work, began to drink, and consumed the Prozac and Xanax she had available (her psychologist had referred her to a doctor for anti-anxiety medication (Union Ex. 7)). She remembers nothing until the next

day at about 5 p.m. when she received a phone call from friends who were concerned about her absence from work. One, Radene Matheny, testified the Grievant was in very bad condition when she arrived at the Grievant's home, and that she found a number of suicide notes there. The Grievant was admitted to the hospital that evening. She testified she remained in intensive care until transferred to the drug and alcohol treatment unit. Altogether she was hospitalized two weeks, returning to work on April 15 (State Ex. 3 and 14). During this period, from April 1-12, she was carried on approved leave status so as not to jeopardize her disability claim. The absences of March 28 and March 29, however, were not approved.

On April 19, 1991, the Grievant was informed the Director of the Bureau was seeking her removal for neglect of duty, dishonesty, insubordination and failure of good behavior (Joint Ex. 2). A pre-disciplinary meeting was held May 6, 1991, at which time the Grievant requested that disciplinary actions be held in abeyance during her EAP participation (Joint Ex. 2). Before the hearing officer's report and recommendations were issued, the Agency received word that the Grievant was considered out of compliance with the EAP (State Ex. 12). The Grievant testified that this was because she was placed with a new doctor when discharged from the inpatient program, and the EAP coordinator had not yet received notification of the change.

On June 3, the hearing officer's finding of just cause was issued. The removal order was issued June 14 (effective the same

date), citing the "extremely serious" failures and the Grievant's disciplinary record of a written reprimand and 10-day suspension (Joint Ex. 2).

A grievance was filed June 24, 1991, protesting the removal as being in violation of multiple sections of the Contract and seeking reduction of discipline, reinstatement, and restitution for losses. Being processed through the grievance procedure without resolution, the dispute came to arbitration, free of procedural defect, for final and binding decision (Joint Ex. 3).

Arguments of the Parties

Argument of the Employer

The Employer's position is that it has clearly demonstrated that the Grievant was removed for just cause.

First addressed is the issue of the drug offense. The Employer points out that the Drug-Free Workplace Act requires it to take disciplinary action if an employee is convicted of a criminal drug statute as a result of workplace behavior. The Grievant was so convicted within the meaning of the Act, which defines a criminal drug statute to be "involving manufacture, distribution, dispensation, use, or possession of any controlled substance."

The Employer disputes the Union's reliance on State v. Weber for two reasons. First, Weber predates the Act and thus is not controlling. Second, the Weber case does not stand for the proposition that the Grievant's offense is not a conviction because it is a minor misdemeanor. Instead, the Employer argues, the Weber case established minor misdemeanors as "offenses" for purposes of

expungement statutes, although 2925.11(D) relieves the individual from disclosing such conviction when asked. Since the Employer here could retrieve her conviction, it must be part of the criminal record archives. Therefore, the Drug-Free Workplace Policy applies and has been violated. The Employer further points out neither the Act nor the Policy distinguishes between felonies, misdemeanors, and minor misdemeanors. That the Grievant's offense was a minor misdemeanor is therefore not relevant.

The Employer additionally notes that the Grievant was on notice of the Policy through training and distribution of the pamphlet, and that her claim of attorney's advice is without corroboration. In sum, the State asserts she was convicted, did not inform her Employer as required, and was dishonest when asked about it.

The State next turns its attention to the unauthorized absences, only one of which it sees disputed by the Grievant (March 29). Here it challenges the Union claim of extenuating circumstances by calling into question the veracity of witness Matheny's testimony about her concern for the Grievant and by noting the lack of independent medical evidence of a suicide attempt and/or coma prior to hospital admission. While it can only speculate as to how it might have acted had it received evidence this claim is true, the Employer points out it did grant two weeks unpaid leave despite the April 27, 1990 cut-off.

Regarding the Grievant's claim that her problems were caused by her former boyfriend's harassment and the Employer's failure to

stop it, the State says her alcohol and attendance problems go back to 1981-82, prior to her relationship with the co-worker. The State also denies it gave lax attention to the claim of harassment, thinks it is simply part of a pattern of charges and countercharges in a soured relationship, and points out that the EEO case has been adjudicated in another forum.

The Employer last takes up the level of discipline. Although the Grievant has only a written reprimand and a one-day suspension on her record, the drug offense is so serious as to warrant termination. In support, the State offers Cooper & Barber v. Ohio Department of Rehabilitation & Corrections wherein removal was upheld for 3-1/2 and 7-1/2-year employees with short or no prior discipline records. Allowing there are differences between the two agencies, the Employer nevertheless argues a similarity in the impact of drug offenses on the Agency's ability to carry out its mission through loss of Federal funding.

In conclusion, the State contends the Grievant was dishonest in failing to report her conviction, was insubordinate in her absences without leave and failure to call in properly, and neglected her duties by her continued absences.

For all these reasons the Employer asks that the grievance be denied in its entirety.

Argument of the Union

The Union argues that the evidence shows beyond even a reasonable doubt that Management removed the Grievant without just cause. Indeed, it goes on, the evidence shows that the same

Employer whose stated mission is partnership with people with disabilities has acted insensitively towards one of its own disabled staff.

The Union further contends that the Wellness training received by the Grievant on the drug policy was not as represented by Employer witnesses. The Human Resources Officer did not know what the training was about. Additionally, the Drug-Free Workplace Act of 1988, the text of which was deceptively included in the State's Exhibit 6 as if it was part of the packet given to employees, was never any part of training nor even given to employees.

The Union points out that the Policy omits possession of drugs as a disciplinary offense and claims Management tries to cover its error by asserting that "in any way" includes "possession." Moveover, Management erroneously excludes R.C. 2925.11(C)(3) and (D) and appropriate case law (State v. Weber) which provide exceptions for minor misdemeanor convictions, such as the Grievant's.

The investigation, claims the Union, was not fair and objective inasmuch as Management talked only to Management personnel. Additionally, the Employer took no action against the harasser and tried to cloud the issue by including absenteeism which its insensitivity helped to create.

Finally, the Union contends that the penalty was not progressive nor reasonably related to the offense, and did not take into account the Grievant's good work record, year-long EAP

involvement, and suicide attempt. What it did consider, the Union claims, is her tenure as a Union steward.

In conclusion, the Union asks that the Grievant be returned to work with appropriate modification of the discipline and award of back pay, seniority and benefits.

Opinion of the Arbitrator

At the outset, it bears stating that the right of the Employer to promulgate reasonable policies and rules to guide employees' work-related conduct is not questioned. Certainly a drug and alcohol policy that protects the Employer's interest in retaining its source of funding and its employees' job performance has legitimate ends. So, too, do rules concerning absenteeism. But--and this is where the Employer has failed here--no rule may be applied with disregard for employee rights agreed to by the Employer at the bargaining table. The contractually guaranteed rights violated here are just cause (§24.01), progressive discipline (§24.02) and nonpunitive discipline (§24.05).

I first take up the incidents surrounding the Grievant's undisputed possession of marijuana at the worksite. The Employer's reliance on the Drug-Free Workplace Act and Policy to justify removal is misplaced, for neither requires the penalty of discharge. The Act states

> (1) take appropriate personnel action against such employee up to and including termination; or
> (2) require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.
> (§5154, State Ex. 6, emphasis added)

The Policy is similarly permissive with respect to discipline, stating in both (1) and (5) that the employee is subject to discipline "up to and including termination." Both the Act and the Policy thus anticipate instances where discipline less severe than removal would be appropriate. Therefore, neither the Act nor Policy is in conflict with the Contractual mandate for "reasonable and commensurate" disciplinary measures or the Contract's allowance for abeyance of discipline pending EAP completion (§24.08). In fact, the Act makes specific provision for rehabilitation, and the Employer's Policy pamphlet itself urges consultation with the Ohio EAP.

The Employer also contends that the bare fact of the Grievant's conviction justifies removal. This argument ignores the Ohio criminal justice system's view that possession of a small amount of marijuana, although against public interest, is a minor misdemeanor. In some settings, such as the Department of Rehabilitation and Corrections, removal on a first workplace drug offense of any degree could be justified. In other settings, however, a factor to consider in evaluating the commensurateness of the penalty is the gravity of the drug offense. Such is the case here.

The Employer further states that removal is justified because its ability to accomplish its mission is compromised by the Grievant's behavior. This is patently not true. Federal funding is threatened by employer conduct (§5152(b)), not one employee's single worksite minor misdemeanor, and the Act specifically allows

the Employer certain flexibility in dealing with convicted employees. In sum, neither the existence of the Act and Policy nor their specific provisions relieves the Employer of its contractual obligation to discipline for just cause.

None of this is to say that the Grievant's behavior should be condoned because it constitutes only a minor misdemeanor. It is an undisputed fact that the marijuana was obtained from her car while it was parked in the Employer's parking lot, that she was convicted, and that she was on notice through Item #5 and the general anti-drug message of the Policy. Corrective action is called for, but it must be within the bounds of the Contract's just cause requirement.

Although the Grievant is guilty of violating Item #5 of the Policy, violations of Items 1 and 3 were not sufficiently established. Item 1 makes using, giving, transfering, selling and manufacturing controlled substances violations. The Grievant stands accused of none of these. The Employer argues that the phrase "in any way" means that possession is a violation, too. No doubt the Employer intended to include possession as an offense since the Act requires it, but I cannot see how "in any way" conveys this. The apparent meaning of "in any way" is "knowingly or otherwise." If the Employer intended an unconventional meaning, it has the duty to explain this to its employees lest they conclude that what is omitted from a list of specifics is not subject to discipline.

The Grievant is also not guilty of dishonesty either in failing to report her conviction or in her answers to Human Resources Officer Trinkley's questions. Her testimony that she relied on her attorney's advice that she had no record and thus was exempt from reporting it was credible. This is particularly so since she gave this defense as early as the investigatory interview. Since she gave the truth as she knew it to be, she was not intentionally dishonest.

Turning now to the absenteeism issue, there is no question that the Grievant has shown a disregard for the Employer's need for regular attendance and its prior attempts to bring her into compliance with acceptable standards. It is also evident that her attendance history is associated with her history of alcohol and drug abuse, much of which she seems to blame on her ex-boyfriend and employer. Whether, instead, her relationship and work problems are themselves the result, rather than the cause, of alcohol and/or drug abuse is for the Grievant to discover in her recovery. In any event, the Arbitrator cannot shield the Grievant from her own behavior, however it is best explained. The fact is that the Grievant presents a series of absences that occurred after she was warned of the consequences and disciplined twice. However, it was unreasonable for the Employer to ignore the circumstances under which the Grievant was admitted to the hospital on March 29. If the Employer doubted her claim that she was in no condition to call in or appear for work on March 29, it should have asked for corroborating evidence before deciding to discipline her for this

particular absence. Setting this absence aside, corrective action is still warranted for the prior unexcused absences. Removal, however, is too severe, as being neither corrective nor progressive following a one-day suspension.

The Arbitrator is disturbed by the atmosphere in which this employee was terminated. The picture that emerges from the evidence and argument is that of a cold and unduly harsh employer. Though its mission states a commitment to the disabled, it enforces a drug and alcohol policy punitively rather than supportively, ignoring legislated and bargained flexibility in favor of a rigid maximum penalty. It submits evidence of training its staff in drug and alcohol abuse, including identification and intervention, yet it ignores the evidence of such a problem in a long-term, otherwise well-performing employee. It is true that the Grievant has violated both attendance requirements and drug policy, but the discipline meted out disregards the degree of the drug violation, the extenuating circumstances of her admission to the hospital, her attendant illness and apparent confrontation with and acceptance of it, and the long record of good service before alcohol affected her attendance. The disciplinary action was also accompanied by an unwillingness to investigate and consider fairly claims made by the Grievant and her Representatives, such as her suicide attempt and EAP participation. If this Employer was not disciplining the Grievant to punish her, at the very least it acted arbitrarily in failing to consider the totality of her conduct and the

circumstances that surrounded it. For these reasons I find for the Union.

Award

The removal of the Grievant, Jeanette Sammons, was not for just cause. The grievance is sustained. The removal is set aside and reduced to a ten (10) day suspension without pay for violation of drug policy and unexcused absences. The Grievant will receive back pay, benefits and seniority retroactive to the date of her removal less the ten days suspension, normal deductions, and any earnings she may have had in the interim on account of her unjust dismissal. Further, the record of her absence of March 29 will be changed to reflect excused unpaid leave. This award is conditioned upon the Grievant's participation in and compliance with her Employer's Employee Assistance Program. The Grievant is further placed on notice that a second violation of the Drug-Free Workplace Policy will provide grounds for her removal. She is also warned that further unexcused absences during the Contract's 24-month statute of limitations (§24.06) will subject her to further discipline, up to and including removal.

Anna D. Smith

Anna D. Smith, Ph.D.
Arbitrator

April 13, 1992
Shaker Heights, Ohio