#924

IN THE MATTER OF THE ARBITRATION BETWEEN	*
	*
Ohio Civil Rights Commission	* **Grievance No.**
	* **06-04 (93-04-26)**
-and-	* **0006-01-14**
	*
Ohio Civil Service Employees Association	*
Local 11, AFSCME, AFL-CIO	*

ARBITRATOR: Mollie H. Bowers

APPEARANCES:

For the State:

Dennis Van Sickle, Advocate
Nancy Stir, Manager, Human Resources
Thelma Burton, Office Manager
Eva Bess, Supervisor
Gregory Vincent, Regional Director, Cleveland Office

For the Union:

Steve Lieber, Staff Representative
Lon Brown, Grievant

The Hearing was held on November 4, 1993 at 12:30 p.m. in Room 703 at the Office of Collective Bargaining, Columbus, Ohio. Both parties were represented. They had a full and fair opportunity to present evidence and testimony in support of their case and to cross-examine that presented by the opposing party.

This case was brought to arbitration by the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO (hereinafter, "the Union") to protest, as without just cause, the termination of Lon Brown (hereinafter, "the Grievant") by the Ohio Civil Rights Commission (hereinafter, "the State" or "the OCRC"). The parties stipulated that the case is properly before this Arbitrator.

ISSUE

Did the OCRC have just cause to terminate the Grievant's employment on April 15, 1993? If not, what should the remedy be?

CONTRACT CLAUSES AND PERTINENT WORK RULES

ARTICLE 2 - NON-DISCRIMINATION

2.01 - Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio or Executive Order 83-64 of the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, handicap or sexual orientation. Nor shall either party discriminate on the basis of family relationship. The Employer shall prohibit sexual harassment and take action to eliminate sexual harassment in accordance with Executive Order 87-30, Section 4112 of the Ohio Revised Code, and Section 703 of Title VII of the Civil Rights Act of 1964 (as amended).

The Employer shall not solicit bargaining unit employees to make political contributions or to support any political candidate, party or issue.

2.02 - Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes.

ARTICLE 24 - DISCIPLINE

24.01 - Standard

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

24.02 - Progressive Discipline

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

Disciplinary action shall include:

A. One or more oral reprimand(s) (with appropriate notation in employee's file);

B. One or more written reprimand(s);

C. One or more suspension(s);

D. Termination.

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

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

24.03 - Supervisory Intimidation

An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee.

In those instances where an employee believes this section has been violated, he/she may file a grievance, including an anonymous grievance filed by and processed by the Union in which the employee's name shall not be disclosed to the Employer representative allegedly violating this section, unless the Employer determines that the Employer representative is to be disciplined.

The Employer reserves the right to reassign or discipline Employer representatives who violate this section.

Knowingly making a false statement alleging patient abuse when the statement is made with the purpose of incriminating another will subject the person making such an allegation to possible disciplinary action.

24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. Absent any extenuating circumstances, failure to appear at the meeting will result in a waiver of the right to a meeting. An employee who is charged, or his/her representative, may make a written request for a continuance of up to 48 hours. Such continuance shall not be unreasonably denied. A continuance may be longer than 48 hours if mutually agreed to by the parties. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The Employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after discipline of the criminal charges.

24.05 - Imposition of Discipline

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

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

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

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

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

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

24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

The retention period may be extended by a period equal to employee leaves of fourteen (14) consecutive days or longer, except for approved periods of vacation leave.

24.07 - Polygraph Stress Tests

No employee shall be required to take a polygraph, voice stress or psychological stress examination as a condition of retaining employment, nor shall an employee be subject to discipline for the refusal to take such a test.

24.08 - Drug Testing

Unless mandated by federal law or regulation, there will be no random drug testing of employees covered by this Agreement. Any reasonable suspicion testing shall be conducted pursuant to appendix M.

24.09 - Employee Assistance Program

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 meet and give serious consideration to modifying the contemplated disciplinary action. Participation in an EAP program

by an employee may be considered in mitigating disciplinary action only if such participation commenced within five (5) days of a pre-disciplinary meeting or prior to the imposition of discipline, whichever is later. Separate disciplinary action may be instituted for offenses committed after commencement of an EAP program.

ARTICLE 31 - LEAVES OF ABSENCE

31.01 - Unpaid Leaves

The Employer shall grant unpaid leaves of absence to employees upon request for the following reasons:

A. If an employee is serving as a union representative or union officer, for no longer than the duration of his/her term of office up to four (4) years. If the employee's term of office extends more than four (4) years, the Employer may, at its discretion, extend the unpaid leave of absence. Employees returning from union leaves of absence shall be reinstated to the job previously held. The person holding such a position shall be displaced.

B. If an employee is pregnant, up to six (6) months leave after all other paid leave has been used.

C. For an extended illness up to one (1) year, if an employee has exhausted all other paid leave. The employee shall provide periodic, written verification by a medical doctor showing the diagnosis, prognosis and expected duration of the illness. Prior to requesting an extended illness leave, the employee shall inform the Employer in writing of the nature of the illness and estimated length of time needed for leave, with written verification by a medical doctor. Except in the case of Workers' Compensation cases, if the Employer questions the employee's ability to perform his/her regularly assigned duties, the Employer may require a decision from an impartial medical doctor paid by the Employer as to the employee's ability to return to work. If the employee is determined to be physically capable to return to work, the employee may be terminated if he/she refuses to return to work. In Workers' Compensation cases, where the Employer questions the employee's ability to perform his/her regularly assigned duties, the Employer will use the procedure spelled out in the Workers' Compensation laws and regulations to determine if the employee is able to perform his/her duties.

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).

The position of an employee who is on an unpaid leave of absence may be filled on a temporary basis in accordance with Article 7. The employee shall be reinstated to the same or a similar position if he/she returns to work within one (1) year. The Employer may extend the leave upon the request of the employee.

If an employee enters military service, his/her employment will be separated with the right to reinstatement in accordance with federal statutes.

31.02 - Application for Leave

A request for a leave of absence shall be submitted in writing by an employee to the Agency designee. A request for leave shall be submitted as soon as the need for such a leave is known. The request shall state the reason for and the anticipated duration of the leave of absence.

31.03 - Authorization for Leave

Authorization for or denial of a leave of absence shall be promptly furnished to the employee in writing by the Agency designee.

31.04 - Failure to Return From Leave

Failure to return from a leave of absence within five (5) working days after the expiration date thereof may be cause for discipline unless an emergency situation prevents the employee's return and evidence of such is presented to the Employer as soon as physically possible.

ARTICLE 44 - Miscellaneous

44.04 - Successor

In the event that the Employer or any of its Agencies covered by this Agreement sells, leases, transfers or assigns any of its facilities to political subdivisions, corporations or persons, and such sale, lease, transfer or assignment would result in the layoff or termination of employees covered by this Agreement, the Agency and Employer shall attempt in good faith to arrange for the placement of such employees with the new employer or the State.

The Agency shall notify the Union in writing at least thirty (30) days in advance of the final date of any such sale, lease, transfer or assignment.

In the event the Employer plans to close an institution or part thereof it shall give ninety (90) days advance notice to the Union. The Union shall be given the opportunity to discuss the planned closure with the Employer. Should it become necessary to close an institution or part thereof, the following guidelines will be utilized:

A. Where individual institution(s) or part(s) thereof are closed, the provision of Article 18 will apply;

B. The Agency(s) will seek to absorb all affected employees or help displaced workers obtain employment in other areas of the public sector;

C. A concerted effort will be made to relocate displaced employees within the framework of any new delivery system. The Employer will seek to involve the Union and any newly-created structure in a positive program for the hiring and possible retraining of any displaced employee;

WORK RULES

Violations	Occurrences			
	1st	2nd	3rd	4th
2. Insubordination				
c. Failure to follow written policies	Written/ Suspension	Suspension	Removal	
13. Absent without leave (AWOL)				
a. Less than one day	Verbal/ Written	Written/ Suspension	Suspension/ Removal	Removal
d. 3 consecutively scheduled workdays	Removal			

BACKGROUND

The facts of this case are largely undisputed. The Grievant was employed by the OCRC on April 25, 1988, and worked as a Civil Rights Representative 2 (also known as Investigator) until he was

terminated on April 15, 1993. The events which were the cause of action for this discipline began on March 9, 1993, when his Supervisor, Eva Bess, was unable to locate the Grievant at or about 8:35 a.m. Investigation of this matter revealed that the Grievant had gone on `break.´ For this he was charged with failure to follow written policies in violation of Work Rule 2C.

On March 12, the Grievant had received pre-approved leave for the hours of 1:00 - 4:00 p.m. However, the Grievant was also absent, on a no call-no show basis, from 8:00 a.m. - 12:00 noon. He was charged with violation of Work Rule 13A, absent without leave (AWOL) for less than one day.

The last offense occurred on March 23, 1993, when the Grievant telephoned Thelma Burton and told her that he was giving "official" notice of his resignation. He was told that his resignation had to be in writing to be processed. There is no dispute that the Grievant has not reported for work since then and he has not received approved leave to cover this absence.

Mr. Vincent testified that on or about March 23, he read in the newspaper that the Grievant was arrested on March 22, and was incarcerated in the Shaker Heights jail. The parties disagree about Mr. Vincent's motivation, but not with the fact that he subsequently had a letter of resignation prepared and took it to the Grievant in jail. The Grievant, however, had changed his mind about resigning. On April 2, he requested time off from work to cover his absence. This request was denied. The OCRC then charged

the Grievant with violation of Work Rule 13D, AWOL for three consecutively scheduled workdays. This was, in essence, the straw that broke the camel's back and the OCRC then moved to terminate the Grievant.

The parties agree that the Grievant has a prior disciplinary record which includes the following actions:

- 10 days suspension - February 12, 1993
- 5 day suspension - November 27, 1992
- Written reprimand - September 15, 1992
- 3 day suspension - January 29, 1992
- 3 day suspension - April 22, 1991
- 3 day suspension - February 26, 1991
- 1 day suspension - January 23, 1991
- Written reprimand - September 10, 1990
- Written reprimand - September 6, 1990
- Written reprimand - August 28, 1990
- Written reprimand - August 21, 1990
- Written reprimand - August 16, 1990
- Verbal reprimand - April 23, 1990
- Written reprimand - April 4, 1990
- Written reprimand - August 9, 1989
- Verbal reprimand - July 13, 1989

On April 22, 1993, the Union filed a grievance protesting the Grievant's discharge. It alleged that the OCRC had violated the Preamble as well as Article 2, Sections 2.01 and 2.02, Article 9,

Article 24, Article 31, Article 35, Sections A.01-A.05, Article 44, Section 44.03, and any other "pertinent articles of the contract" that apply. In the "Statement of facts," the Union indicated that the Grievant denied the violations alleged. As remedy, the Union asked that the Grievant be reinstated to his former position as Civil Rights Representative 2, including "back pay with all benefits, seniority, etc.," that his record be expunged at this discipline, and that management be ordered to follow the collective bargaining agreement in the future.

The grievance was properly processed through the negotiated procedure, but the parties were unable to reach a mutually acceptable resolution of their differences. The case was then advanced to arbitration for decision.

POSITIONS OF THE PARTIES

State Position:

The OCRC asserts that the record contains sufficient factual evidence to support a ruling that the Grievant's termination was for just cause. It emphasizes that none of the three aforementioned incidents which led directly to this discipline is disputed. The OCRC therefore, rejects the Union's allegation that the incidents were not fairly and thoroughly investigated. Since there has been no assertion that the Work Rules upon which the discipline was based are unreasonable and/or that the Grievant was unaware of such rules, the OCRC maintains that these factors cannot be used to overturn the discipline at bar.

The record also shows, according to the OCRC, that the Grievant has received progressive discipline and has had numerous opportunities to correct his behavior and, thus, to salvage his career. It is also evident from the Grievant's prior discipline, the OCRC contends, that he understood he could be terminated if his conduct did not improve. Although these efforts came to no avail, the OCRC points out that it also afforded the Grievant substantial involvement with the Employee Assistance Program (EAP). The OCRC stress that such involvement included an EAP participation agreement, during which two proposed disciplinary actions were held in abeyance. It is an uncontroverted fact, the OCRC stresses, that the Grievant did not complete the agreement, and yet he is still demanding another such agreement through this proceeding. Because the record shows that the Grievant has had several involvements with substance abuse treatment, "to hold off the inevitable," and contains letters from treatment facilities stating that he is able to come back to work, the OCRC contends that it has gone more than the extra mile with him. Finally, the OCRC argues that it has complied with the Americans With Disabilities Act, 42 U.S.C. Section 12101, et. seq. by affording the Grievant opportunities for wellness assistance during working hours.

Given the Grievant's record and his failure to correct his behavior in the face of discipline and with extensive EAP involvement, the OCRC maintains that nothing will change if the Grievant is returned to work as a result of this proceeding; he

will simply continue "to repeat his inappropriate behavior." Moreover, the OCRC contends that it has a right to expect employees to conform with reasonable standards of attendance. When the Grievant failed to meet these expectations, according to the OCRC, it created an undue hardship by diminishing the efficient, delivery and high quality of service promised the public in civil rights matters by the Agency's mission statement. The OCRC also contends that neither the Grievant's five years' employment with the State nor his disciplinary record can serve as mitigation in this proceeding.

The OCRC asks, therefore, that this grievance be denied.

Union Position:

The Union asserts that the Grievant's termination was not for just cause. It alleges, first, that no full and fair investigation was conducted in the instant case. As supporting evidence, the Union cites the fact that management knew the Grievant was incarcerated in the Shaker Heights jail, "yet used these circumstances to rid themselves of the Grievant."

According to the Union, the Grievant is also not guilty of the offenses charged. It relies upon his testimony to purport that, on March 9, 1993, the Grievant did not go on `break,´ but rather he went to move his car from a meter where he had parked so that he would not be late for work. Since management has made much of the Grievant's attendance problems, the Union contends that the OCRC sought to punish unfairly the Grievant for attempting to comply

with instructions to be on time for work.

With respect to March 12, the Union again points to the Grievant's testimony that his failure to call in and/or to show up for work that morning "was an honest mistake." According to the Grievant, he was "emotionally distraught" at the time because of personal problems and thought he had the whole day off. The Union contends that such unfortunate circumstances should not be used as fodder in justifying a termination action.

The Union also challenges the OCRC's handling of the Grievant's incarceration in the Shaker Heights jail. It insists that he is not guilty of violating Work Rule 13D because Mr. Vincent and other management representatives knew the Grievant's whereabouts. The Union further asserts that management wanted to get rid of the Grievant so badly that it sent <u>two</u> representatives, Mr. Vincent and Mr. Don Willis, Unit Supervisor, to the jail to try to coerce him into resigning. When the Grievant did not accede to their demands, the Union contends that the OCRC simply sought another means of achieving its end of terminating him. The Union argues that such wrongful use of the disciplinary process is not evidence of just cause.

According to the Union, the Grievant has also been subjected to disparate treatment where his access to the EAP is concerned. Specifically, the Union maintains that the Grievant has been denied the opportunity to enter into a second EAP participation agreement even though Ms. Stir acknowledged that other employees have been

afforded more than one such agreement. That disparate treatment occurred is further confirmed, the Union maintains, by the fact that an African-American female who was similarly situated with the Grievant was granted a second EAP participation agreement. The same approach was evidenced by management, the Union claims, where compliance with the American With Disabilities Act was concerned. The Union stresses that the OCRC refused to grant the Grievant the reasonable accommodations he requested to continue rehabilitation from an alcohol abuse problem.

The Union also alleges that the Grievant did not have proper notice that discipline, including termination, could result from his conduct. It pointed to the disciplinary notices and states that the warning provided is nothing more than meaningless "boiler plate" that was "confusing to the Grievant as to what he should expect if another problem arose." According to the Union, the short time period which elapsed between the Grievant's five and ten day suspensions, and the termination, did not afford him a viable opportunity for correcting his behavior. The Union maintains that this is further evidence confirming that the OCRC was "out to get" the Grievant.

Since none of these facts and circumstances constitute just cause for termination, the Union asks that the grievance be granted and the remedy requested awarded, or any other remedy that the Arbitrator deems appropriate.

DISCUSSION

The record in its entirety was carefully and thoroughly reviewed by the Arbitrator. She concluded from this review that the State provided sufficient proof that the Grievant's discharge was for just cause. As a preliminary matter, the Arbitrator considered the articles of the collective bargaining agreement alleged in the grievance to have been violated by the OCRC vis-a-vis the evidence and testimony contained in the Hearing record. She found that the record is devoid of any reference, direct or indirect, about how the Preamble and Articles 9 and 35 of the Agreement had been violated. The Arbitrator therefore, gave no further consideration to these portions of the Agreement in deciding what the outcome of this case shall be.

Attention was then turned to the charges which gave rise to the Grievant's termination and to assessing whether just cause existed for this discipline. It is a fact of record that incidents involving the Grievant occurred on March 9, 12, and 22, 1993, and that these incidents provided the basis for management's determination that discharge was the appropriate penalty in the instant case. The Union claims, however, that the OCRC failed what is commonly called a test of just cause by not conducting a full and fair investigation of these incidents and, thus, that management's decision to terminate the Grievant is flawed.

The first charge against the Grievant is that he left the office to take a `break´ at or about 8:35 a.m. and that he did not

sign out/in. These actions, the OCRC contends, violate "the written policy with regard to scheduling your break." The parties agree that the Grievant's work hours began at 8:00 a.m., that employees in the Cleveland office are required to sign out and in for both breaks and lunch periods, that this policy is reasonable, and that the Grievant was aware of it. State Exhibit 8, the sign out/sign in sheet for March 9, 1993, contains no notation that the Grievant signed out or in for a `break´ at or about 8:35 a.m. on this date. Included in Joint Exhibit 4 is the OCRC policy on Hours of Work which the parties agree is reasonable and was received by the Grievant. This policy contains the statement that, "The break periods may be scheduled during the course of work or in conjunction with meal periods, dependent upon each supervisor's opinion as to how the following conditions will best be served:" The conditions that follow have no application to the reason the Grievant gave for taking a `break´ at or about 8:35 a.m. on March 9, 1993.

Ms. Eva Bess testified that it was contrary to her "policy," as the Grievant's immediate Supervisor, for employees to take a break during the first hour after scheduled reporting time. Neither the Union nor the Grievant disputed this "policy," and no claim was made that the Grievant was unaware of it. On December 29, 1992, moreover, Mr. Vincent distributed a memorandum to "All Cleveland Regional Office Staff" on the subject "Reiteration of Policy Re Break Schedules." This document in Joint Exhibit 4

states, in pertinent part,

> "Individuals are not to take breaks during the first hour of their workday and when you take your breaks, all staff is (sic) **required** to sign out at the time they begin their break and sign back in at the end of their break."

There is no indication in the record that the Grievant did not receive this memorandum or that the Union grieved its content. The Arbitrator therefore, concluded that the Grievant was guilty of violating Work Rule 2C.

In defense of this behavior on March 9, the Grievant testified that he never signed a form acknowledging that he understood he could not take a break during the first hour of the workday. Since the Grievant did not claim that he was unaware of the "policy" on breaks and on sign out/in, and because his job as a Civil Rights Representative 2 involves understanding and interpretation of complex legal and factual situations, the Arbitrator found the Grievant's defense to be frivolous and not credible. He offered no explanation for his failure to sign out/in for the `break´ he took at or about 8:35 a.m. Thus, that violation stands as charged as part of the justification for the Grievant's termination.

The Arbitrator also rejected the reason given by the Grievant for taking an early `break´ on March 9. His failure to arrive at work early enough to park his car in a location where it would not be towed from an expired meter is not an acceptable reason for ignoring break and sign out/in policies, applied to all other employees in the Cleveland Office, for self-serving purposes.

In view of these findings and of the information contained in Joint Exhibit 6, it is evident that neither the Union nor the Grievant ever protested the investigation of the alleged violation of Work Rule 2C prior to the instant proceeding. The Union placed nothing in the record that would indicate that the investigation was flawed by being less than full and fair, thus, the Arbitrator gave no weight to this claim. Similarly, there is no evidence that the policy on breaks and sign out/in was applied in a disparate manner to the Grievant. What the record does show clearly and unambiguously is that the Grievant knowingly and willingly violated the written policy for self-serving reasons and is guilty of violating Work Rule 2C.

The second charge against the Grievant is that he violated Work Rule 13a by being AWOL for less than one day on March 12, 1993. He does not dispute the fact that he was AWOL from 8:00 a.m. until 12:00 noon. The Grievant's only defense in this matter is that he was having personal problems and mistakenly thought he had the whole day off, or by the time he realized this was not the case, "it was too late to call or to come to work." No showing was made by the Union as to how management failed to conduct a proper investigation of this incident. Also, no testimony or evidence was produced that the Grievant was subjected to disparate treatment by being charged with AWOL for not calling or showing up for work on the morning of March 12, 1993. The Grievant's defense against this AWOL charge cannot prevail, first, because it is self-serving to

the point of lacking any credibility. Second, because management has a right to expect employees to be at work during scheduled hours and to provide timely notification if a reason arises which prevents an employee from reporting for work. The Arbitrator holds, therefore, that the facts and circumstances surrounding this incident support the charge that the Grievant violated Work Rule 13a on March 12, 1993.

The final charge against the Grievant is violation of Work Rule 13d for being AWOL for three consecutive days. There is no dispute that the Grievant has never returned to work since he was arrested, on March 22, although he was only incarcerated temporarily in the Shaker Heights jail. He acknowledges talking to Ms. Burton on March 23, and telling her that he was giving official notification of his resignation. The Grievant also admits that he later changed his mind "when his head cleared." Thereafter, the Grievant asked for leave to cover the period of his incarceration. This request was denied and the Grievant never returned to work. There is no doubt, therefore, that the Grievant is guilty of being absent from work without <u>permission</u> from management for three consecutive days - and more.

Nevertheless, the Grievant has a number of reasons why this behavior should not be considered in determining whether the discharge should stand. He believes that management acted arbitrarily and capriciously by denying him leave while he was incarcerated. The Arbitrator disagrees - An employer has the right

to expect that employees will be regular in their attendance. The Grievant's record shows that he has had difficulty meeting this basic requirement for holding a job. Furthermore, there is no law, rule or regulation which mandates that an employer hold a job open for an employee while he/she is incarcerated or grant leave for the duration of sentence.

The Grievant also alleges that he was subjected to disparate treatment because he was denied a second EAP participation agreement while other employees have been afforded such agreements. Again, the Arbitrator disagrees. It is clear from the language contained in Article 24, Section 24.09 of the Agreement that there are limits on the time when an employee is eligible for a participation agreement. The Grievant presented no proof that his request for an EAP participation agreement was timely. Since it is a fact that the Grievant failed to complete his first participation agreement, the employer's willingness to enter into any subsequent agreement is purely discretionary. This is especially true in the instant case where the record is replete with examples of the OCRC's efforts to assist the Grievant with his rehabilitation. The Arbitrator noted the allegation that an African-American female was similarly situated with the Grievant and that she was given a second participation agreement. This allegation was not supported by testimony or evidence demonstrating that the aforesaid female was, in fact, similarly situated with the Grievant. The allegation, therefore, was given no weight in this decision.

The Union asks that the Grievant's post-discharge conduct be taken into account in determining whether the discipline should stand. Union Exhibit 3 is a note from Glenbeigh Hospital indicating that the Grievant experienced in-patient care from April 27 to May 14, 1993, and is able to return to work. This was not the first time the Grievant had been in in-patient therapy for an alcohol abuse problem. According to the Grievant, he now copes with his problem by attending AA meetings and by "counseling with his pastor." This testimony might be accurate, however, the Grievant's track record on other matters discussed here has not persuaded the Arbitrator of his credibility. Moreover, the Grievant should have been able to demonstrate that his sobriety has been continuous with better evidence if he really sought to convince the Arbitrator that there was a reasonable expectation, this time, of his rehabilitation. Under the circumstances of this case, involvement in in-patient treatment is not, in and of itself, sufficient to confirm that a reasonable expectation exists.

The Union also alleges that the OCRC failed to comply with the Americans With Disabilities Act because it did not grant the Grievant the accommodation he requested for his alcohol abuse problem. The Arbitrator disagrees finding first, that the Act only requires "reasonable accommodation;" not accommodation of any request an employee makes. In the decision on the Grievant's five and ten day suspensions, this Arbitrator ruled that the OCRC's accommodation for the Grievant was reasonable. That ruling remains

valid in the instant case. Finally, the Act does not extend to the point of voiding bona fide employment criteria, such as regular attendance. The OCRC has gone well beyond what is required of any employer by the Act in terms of the specific accommodation of the Grievant's problem, as well as the efforts the OCRC made to utilize involvement with the EAP and in a participation agreement to help him overcome his alcohol abuse, and progressive discipline correctively administered to deal with his attendance and other work-related problems. The Arbitrator holds, therefore, that the Union has not shown how the OCRC violated the Americans With Disabilities Act in the instant case.

According to the Union, the Grievant was not given sufficient time to correct his behavior between the incidents which formed the basis for the discharge and between these incidents and the imposition of the five and ten day suspensions. The Arbitrator disagrees. The Grievant was aware of the rules and policies pertaining to attendance, had experience with past discipline as a result of his failure to be regular in his attendance, and had been warned that additional discipline could be imposed if his record did not improve. The Arbitrator rules that the Grievant had ample opportunities to correct this behavior, but did not. As a consequence, she sustains the discharge finding that the OCRC has met its burden of proving just cause for this discipline.

AWARD

The grievance is denied.

November 29, 1993
Date

Møllie H. Bowers, Ph.D.
Arbitrator