ARBITRATION SUMMARY AND AWARD LOG
OCB AWARD NUMBER: ~~2013~~
1213

OCB GRIEVANT NUMBER: 27-25-960617- 1092-01-03

GRIEVANT NAME: Victor Block

UNION: OCSEA

DEPARTMENT: Rehabilitation & Correction

ARBITRATOR: Jonathan Dworkin

MANAGEMENT ADVOCATE: David Burris
2ND CHAIR: Pat Mogan

UNION ADVOCATE: Don Sargent

ARBITRATION DATE: May 5, 1997

DECISION DATE: July 16, 1997

DECISION: Modified to a 90-day suspension

CONTRACT SECTIONS AND/OR ISSUES: Article 24 Was grievant removed for just cause?

HOLDING: The Grievant was awarded reinstatement because the Employer failed to at least consider his entry into the Employee Assistance Program(EAP). Therefore, the removal did not meet all aspects of just cause. The removal was modified to a 90-day suspension. His reinstatement included no loss of seniority. The award was conditional based on a two-year Last Chance Agreement which included the following:

1. Regular attendance at AA meetings for two years from the date of reinstatement
2. During those two years, the Employee shall submit to sobriety testing when Management requires. His refusal will be grounds for a summary discharge.
3. If Grievant is found to have a blood alcohol level of .04 or higher, the Employer shall have the right to remove him immediately.
4. If within the two years the Grievant is again found sleeping on duty, the Employer shall have the right to remove him immediately.
5. In any arbitration stemming from a removal authorized by the Last Chance Agreement, the only issue presented to an arbitrator shall be whether Grievant violated these conditions.

The Arbitrator reserves jurisdiction to resolve disputes flowing from this remedy. Should Grievant decline to sign a reasonable Last Chance Agreement (or a Last Chance Agreement that the Arbitrator finds to be reasonable), this award will be void and the removal will stand.

ARB COST: **$452.49**

#2013
12/13

OCB-OCSEA VOLUNTARY GRIEVANCE PROCEEDING
ARBITRATION OPINION AND AWARD

Arbitration Between:	*	
	*	
STATE OF OHIO	*	Case No. 27-25-960617-1092-01-03
Department of Rehabilitation	*	
and Correction	*	
	*	
-and-	*	Decision Issued:
	*	July 16, 1997
OHIO CIVIL SERVICE EMPLOYEES	*	
ASSOCIATION, OSCEA/AFSCME	*	
Local 11	*	

FOR THE EMPLOYER

David Burrus	Labor Relations Officer
Pat Mogan	OCB Labor Relations
Victor Crum	Labor Relations Officer
Charles Adams	Labor Relations Officer
Lt. Kevin Underwood	Supervisor

FOR THE UNION

Don Sargent	OCSEA Staff Representative
Glen Barlowe	Chapter President
Robert Clagg	Chapter Vice President
Nate Miller	Chief Steward
Victor Block	Grievant
Thomas Marsh	Witness

Jonathan Dworkin, Arbitrator
101 Park Avenue
Amherst, Ohio 44001

REMOVAL: THE UNDISPUTED FACTS

Grievant was an eleven-year Correction Officer with the Ohio Department of Rehabilitation and Correction. He worked as a cell-block guard at Lucasville (Southern Ohio Correctional Institution), the State's highest security prison -- the site of the longest and one of the deadliest prisoner riots in U.S. history.

May 2, 1996, while the Employee was assigned as roving guard between cell blocks K7 and K8, he fell sound asleep. A Lieutenant found Grievant and, according to the written report, tried for nearly twenty minutes to awaken him. The Lieutenant made a written report of the incident; it stated in part:

> . . . I could not find the rover who was [Grievant]. While looking for [him] I found him in a unit office between K-6 and K-7. [Grievant] was in a chair and appeared to be asleep or passed out. I made many attempts to wake [Grievant] such as shaking him, loudly calling out his name, kicking his shoes, but was unable to wake him up. Finally after shaking him continuously [Grievant] began to moan and smack his lips and began to stir and get up. I told [Grievant] I needed a count slip for K-7. [Grievant] got up and staggered as though intoxicated.
>
> . . .
>
> It took almost twenty minutes to wake [Grievant] up and get the K-7 count slip.

Grievant fell asleep again less than an hour later. Another Lieutenant discovered it that time when he heard an unanswered

phone ringing in the K8 area. Looking through the gates toward the block, he saw the Employee sitting next to the ringing telephone with his head resting on his hand, eyes closed. Grievant remained immobile even when the supervisory employee stood over him and called his name; only by kicking the legs of his chair was the Lieutenant able to awaken him. Grievant rubbed his eyes, explained he had a "long day" and would be all right. The Lieutenant did not accept the assurance. He directed the Employee to report to the medical unit as soon as he could be relieved.

At 12:30 a.m. (about an hour later), the Lieutenant learned that an officer had been found for relief but Grievant had not left his post. The written report tells what happened next:

> . . . I talked with [Grievant] again and advised him that I wanted him to be checked by a nurse to see if he was medically ale to continue his job duties, ***at this point I smelled what appeared to be alcohol coming from his breath.*** Lt. Ramsey and I escorted him to the infirmary where he was checked by Nurse Baker, who advised me that his blood pressure was ok but his eye movement seemed a little slow and she also smelled what appeared to be alcohol on his breath. [Emphasis added.]

The Lieutenants took Grievant to the Captain who ordered him to take a breathalyzer test for blood alcohol. He refused. A disciplinary proposal, a predisciplinary hearing, a Removal Notice (effective June 7, 1996), and this grievance followed those events.

* * *

These are the operative facts that induced the Department to remove Grievant. The Union does not challenge any of them; nor does it deny there were aggravating factors that further justified the penalty. Chief among those factors was this Employee's disciplinary record. May 2 was the third (and fourth) time(s) in less than two years that he was caught sleeping at his post. He committed the same offense on February 2 and March 11, 1994, receiving a five-day suspension for the first offense and a ten-day suspension (imposed May 18, 1994) for the second. The ten-day suspension was demonstrably mild. According to the Disciplinary Notice, Grievant compounded his misconduct with unpardonable insubordination:

> At that time, the Shift Captain had you relieved to report to D-1, and once you were told that you were going to be written up for sleeping you became very agitated, loud, and began calling the Shift Captain, Lieutenant, and Sergeant names (e.g. racists, honkeys, red-necked mother-fuckers, sons of bitches, etc.). When the Shift Captain tried to calm you down and offered you coffee you stated: "Fuck you and your coffee," and continued to be boisterous in your name calling.[1]

* * *

[1] Excerpt from the Disciplinary Notice of May 18, 1994.

The Removal was consistent with the (unilateral) Rules and Standards of Employee Conduct, which the Department of Rehabilitation and Correction issued to all its employees. Rule 10 addresses "Sleeping on Duty" and prescribes progressive penalties of 3 to 5 days off or removal for a first offense, 5 to 10 days or removal for a second, and removal for a third. This was Grievant's third violation of record.[2]

* * *

Another component of Grievant's misconduct was his refusal to submit to a breathalyzer test at his Captain's direction. This was more than just an aggravating factor; it was an independent cause for removal. Appendix M of the Agreement deals with drug/alcohol abuse, EPA assistance, and the procedures for mandated testing. It dovetails with and augments the Ohio Employee Assistance Program Clause, Article 9 of the Agreement. Appendix M, §2 provides that an employee can be ordered to submit a urine speci-

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[2] Article 24, §24.04 of the Agreement calls for expunging stale discipline under defined circumstances. It provides in part: "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." As will be discussed, if Grievant had committed this misconduct a few days later, the past discipline would not have been admissible.

men for drugs or a breath sample for alcohol "where there is reasonable suspicion to believe that the employee . . . is under the influence of, or his/her job performance, is impaired by alcohol or other drugs." Section 2, Subsection H states that if certain conditions and procedures for testing are in place and a testing directive is given, refusing is insubordination and cause for discipline:

> H. Although no employee may be tested against his/her will, any employee who refuses to submit to a properly ordered drug test may be subject to disciplinary charges for insubordination consistent with the just cause standards set forth in Article 24 of this Agreement.

According to the evidence, the Captain followed the contractual procedures. Moreover, his suspicion that Grievant was alcohol impaired was reasonable and adequately supported. The Employee was carefully advised that unless he submitted to breathalyzer testing, he risked discipline up to and including discharge. Yet he continued to refuse and, before going home, signed the following acknowledgement:

> I, [Grievant], having been given a direct order to undergo a urine and/or breath sample test, do hereby refuse to take such test. I have been advised that such refusal constitutes insubordination in accordance with Standards of Employee Conduct - Rule 6 - and I understand

that disciplinary action up to and including termination may occur as a result of this act of insubordination.

Grievant later acknowledged that he was drunk on his May 2 duty tour and the two times he received suspensions for sleeping. He was afraid to take a test, he said, because he did not want the Employer to discover his condition and "I was in denial." He knew his refusal carried the potential for removal.

PRELIMINARY ARBITRAL FINDINGS;
THE UNION'S POSITION

The Employer is contractually constrained to impose only such discipline as is consistent with just cause, and in ordinary circumstances, must exercise its disciplinary authority correctively and nonpunitively. These standards appear in Article 24, §§24.01, 24.02, and 24.05 of the Agreement:

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.

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. a fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;

D. one or more day(s) suspension(s);

E. termination.

24.05 - Imposition of Discipline

. . .

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

In its initial grievance, the Union claimed that Management violated these Sections. It demanded Grievant's reinstatement with back pay. On reconsideration, it admitted that all the charges were true. It still claimed that just cause was lacking and it asked for a more moderate penalty.

* * *

Based on the evidence, the Arbitrator finds that Grievant was a wretched Correction Officer. He proved that he was resistant

to corrective discipline. Also, he clearly established that he had an incorrigible penchant for insubordination. In short, if the admitted facts alone were considered, there would be no rational basis for overturning the penalty. Based on those facts, the Employer had ample just cause. The only possible way the Union could succeed in this dispute would be to present affirmative evidence proving substantive due-process violations.

The Union did present affirmative arguments and evidence. They were:

1. The Union argued that the Agency should have considered Grievant's twenty-three months of unblemished service. Such consideration not only is necessary if discipline can be said to be premised on just cause, it also was a stated qualification in the Agency's 1990 Rules. The Department omitted the qualification when it amended the Rules, but the Union contends that it is still an essential ingredient of justice, fairness, and corrective discipline.

2. The Union urged that Grievant was denied a procedurally correct predisciplinary hearing. He had no representation for the first forty-five minutes of the hearing, and neither he nor his Union Steward was allowed to question the Employer's chief witness.

3. The Employee entered an EPA program for alcohol recovery before he was formally disciplined. Though Management was informed of this fact at the predisciplinary hearing, it refused to consider it. According to the Union, the Agency's recalcitrance in this regard violated express employee protections set forth in Articles 9, 24 and Appendix M.

* * *

The Union's allegations will be the substance of the discussion and opinion. Since the Arbitrator has decided that the undisputed facts, standing alone, support the Agency's position, there is no need to analyze Employer arguments except as they relate to the Union's affirmative assertions.

WAS THE EMPLOYER REQUIRED TO CONSIDER GRIEVANT'S TWENTY-THREE MONTHS WITHOUT DISCIPLINE?

The 1990 Departmental Rules contained a special provision covering discipline for sleeping on duty. Rule 9 prohibited the offense, but with a specific proviso in parentheses: "(special consideration given to close proximity)." Subsequently (and before Grievant committed the misconduct at issue), the Department issued amended Rules which eliminated the parenthetical qualification. Although the Union concedes that Management had authority to make

the amendment, it contends that proximity still should have been considered. With or without the statement in the 1990 Rules, according to the Union, it is a mitigating factor that the Employer had to assess before issuing the penalty. Grievant went more than twenty-three months without so much as a verbal reprimand. His past infractions would have been expunged in just a few days. Yet Supervision gave absolutely no thought to mitigating the removal on that basis. Therefore, the Union believes that Grievant was denied an important element of just cause and is entitled tc reinstatement.

The Arbitrator does not philosophically disagree. If the Agency thought in 1990 that proximity should have been considered, how can it justify eliminating the factor in 1996? If it had justification, it did not offer any to counter the Union's position.

The Arbitrator, of course, has no authority to grant a 23-month expunction when Article 24, §24.06 of the negotiated Agreement provides for twenty-four months. Nevertheless, he concurs that the time between disciplinary events is a consideration the Employer should make to fulfill its just-cause obligation. Here, however, the fact that Management ignored Grievant's term of apparently good behavior is substantively irrelevant. It made no difference. Grievant was an employee who obdurately and repeatedly violated

the Rules against sleeping on duty and insubordination. The aggravating factors eclipsed this potentially mitigating factor, rendering it meaningless. The Employer opened itself to fair criticism by disregarding proximity, but the Arbitrator is unconvinced that any resulting just-cause irregularity was not fatal to the removal.

PREDISCIPLINARY HEARING FLAWS

Every Bargaining Unit employee facing termination has a right to a hearing. Article 24, §24.04 provides this right and mandates the following procedures:

> 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.*** [Emphasis added.]

Grievant's predisciplinary hearing was profoundly out of compliance. The Employee had no Union representation at its beginning, as Management was unable to schedule relief for the Correction Officer who served as Steward. Even so, the hearing began as sched-

uled, and continued for three-quarter's of an hour before the Steward arrived. Those forty-five minutes were critical. It was during that time that the Lieutenant who recommended discipline appeared and testified. Then he was excused to serve in an honor guard ceremony at another facility. Neither Grievant nor his Steward had a chance to question the Lieutenant or challenge his testimony face-to-face.

In the Arbitrator's opinion, this was a major due-process violation. The Agreement does not sanction "star chamber" processes. It says that the accusing witness shall appear at the predisciplinary hearing (unless inappropriate or he/she is legitimately unable to attend) and that the Union "shall be given the opportunity to ask questions."

The Employer argues that Grievant was at fault because he failed to ask for an adjournment. The argument is specious. It is the Employer who schedules and conducts predisciplinary hearings, and it is the Employer's obligation to ensure that the process is contractually fair, consistent with §24.05, and meets elemental just-cause standards. To go forward without allowing a Steward to attend and without retaining its principal witness for Union questioning is unthinkable. This was a vital failure of due process.

In this situation, however, the Union did not adequately advise the Agency of its §24.04 argument until the arbitration. While the Steward's affidavit is in evidence, stating that he did make the argument at Step 3, there is no substantial confirmation of the affidavit. Nothing in the predisciplinary hearing officer's report refers to the objection; the Employer's Step 3 Representative remembered no such objection; the argument did not emerge at Step 4 (mediation). Curiously, the Steward did write "24.04" on a copy of the grievance that was to accompany the arbitration demand. But that copy never reached the Employer. The only excuse offered in arbitration was that someone probably attached the wrong grievance form to the demand.

A basic understanding of these parties is that arguments not disclosed at preliminary grievance levels cannot be raised in arbitration. Often that axiom has served the Union well, especially where the Employer has failed to assert timely procedural-arbitrability claims. A common ruling (and one this Arbitrator has expressed in prior decisions) is that the arbitrability argument is consequently waived or lost. The same reasoning applies here. The Arbitrator finds that the Union's neglect to assert its §24.04 position implicitly waived that argument. It could not be revived in arbitration, and it is dismissed.

THE EMPLOYER'S LACK OF CONSIDERATION FOR GRIEVANT'S ENTRY INTO ALCOHOL RECOVERY

This part of the Opinion discusses the Union's contention that the Employer refused to consider Grievant's voluntary entry into an alcohol-recovery program. At issue are Article 9, Article 24, §24.09, and Appendix M. As in the case of the Union's position on §24.04, none of these was cited on the grievance form. However, the Union raised the argument at the predisciplinary hearing as well as Steps 3 and 4. It follows that the Agency was fully informed and well aware that these contractual provisions were at issue. The failure to mention them on the grievance form was immaterial; they are properly before the Arbitrator.

Grievant testified (believably) that he is alcohol dependent. He was drunk when he fell asleep on May 2 and the other times as well. Probably, these were not the only occasions when he reported for duty under the influence of alcohol, but he managed to keep his condition hidden. He said he has been drinking regularly since he was a teenager, and uncontrollably for approximately two years.

Between the May 2 misconduct and the May 10 predisciplinary conference, the Employee voluntarily placed himself in an alcohol-recovery program. That was more than a year ago, and he has been attending meetings three times per week since then. According to Grievant, he has not had a drink in that year.

If an alcoholic employee facing discipline enters into a recovery program, §24.09 requires the Employer to consider that fact. The provision also places a time limit on the requirement:

> 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 notification by the Ohio EAP case monitor of successful completion of the program under the provisions of an Ohio EAP Participation Agreement, ***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 predisciplinary meeting or prior to the imposition of discipline, whichever is later.*** Separate disciplinary action may be instituted for offenses committed after the commencement of an EAP program. [Emphasis added.]

Grievant met the five-day limitation and asked for clemency under §24.09. The Employer did not investigate the facts and refused to consider them. It should be observed that the information given on the Employee's attempt to recover from alcoholism was not second-hand or rumor. It was conveyed at the predisciplinary conference, and the hearing officer's opinion reflects it:

> [Grievant] and Union Representative Nate Miller do not contest the facts as written or stated regarding this series of events but introduce paperwork to establish [Grievant] is currently under an E.A.P. program for alcohol abuse.

Captain Newsome and Lieutenant Underwood represented the Agency at the hearing. They heard the EAP testimony yet refused to give it any consideration.

In defense of the Agency's refusal, the Labor Relations Officer testified that only he and the Warden had authority to make EAP referrals. He said that making the plea to other supervisors -- the Captain and Lieutenant -- was pointless. In other words, Management deemed the Union's §24.09 argument moot because it did not go through proper channels.

OPINION

The Arbitrator disagrees with the Agency on this point. He finds that accepting the explanation as sound would gut §24.09. Nowhere in the Agreement or in the evidence presented at arbitration is there a statement that §24.09 is effective only if an EAP enrollment is reported to the "right" official. The contractual essence is that the Employer must consider an individual's election to participate in EAP, and if the recovery attempt proves successful, "the Employer ***will meet and give serious consideration to modifying the contemplated disciplinary action.***" The meaning and intent are clear; the Employer at least has to consider the EAP defense.

The Agency is on firmer ground arguing that it does not have to ameliorate this removal just because Grievant entered an EAP program in a last-ditch effort to save his job. That is true. Section 24.09 says that discipline action **may** be delayed until completion of the program. It does not say it **must** be delayed; it is not a mandate. It also says that EAP participation **may** be considered in mitigation.

It is true that granting clemency under §24.09 is a matter of managerial discretion. The possibility, once considered, can be rejected. But the Employer is not at liberty to ignore the provision completely, as the Agency did here.

The Arbitrator finds that attention to §24.09 is a contractually specific element of just cause. Where the Employer wholly disregards any just-cause element, it becomes an arbitrator's duty to insert it him/herself. Sometimes, that means an arbitrator will second-guess an agency's otherwise sound judgment.

Grievant was a terrible employee, but the Union made a convincing case that his alcoholism was to blame, he recognized his addiction, and tried to remedy it within the contractually prescribed time. Though Management felt that it did not have to weigh this potentially mitigating circumstance, the Arbitrator finds that it did. On that basis, he will award the Employee reinstatement.

This decision does not mean to ignore Grievant's independent misconduct of insubordination. The record confirms, however, that both sleeping on the job and refusal to submit to a sobriety test were attributable to the Employee's inebriation. Management should have considered §24.09 for both. It did not have to reduce the penalty; all it had to do was ***consider*** the defense. This it did not do.

* * *

The Union does not seek to exonerate Grievant. The remedy it asks for is harsh, though not so harsh as removal. It is:

> . . . the Union would request the Arbitrator and Management to modify the resolution of the grievance to a last chance agreement, without back pay, but reinstatement to his CO position and no loss of seniority or step increases. That the removal be modified to a 90 day suspension with the balance of his time off shown as leave without pay. This would be contingent upon his continued participation in AA or NA for at least 2 years. Also that it would be understood that any request by Management to submit to a sobriety test upon reasonable suspicion must be submitted to at once, refusal would be grounds for dismissal immediately, for a two year period, starting upon his first day back at work. Also that any instance of sleeping on post would also be a removable offense within two years of his first day back to work . . .[3]

[3] Union opening statement.

The Union's request is reasonable and will be substantively awarded. However, the Arbitrator cannot impose a last-chance agreement -- "agreement" can derive only from the parties' negotiations. But the award will dictate nonexclusive provisions for the parties' agreement, and condition Grievant's reinstatement on his acceptance.

AWARD

Management did not consider and reject Grievant's plea under Article 24, §24.09; it ignored the plea altogether. Based on this conclusion, the Arbitrator finds that the removal penalty did not meet all aspects of just-cause. Accordingly, the removal is modified to a 90-day suspension. Grievant shall not recover back pay. The balance of his time off from the date of his removal is to be recorded as Leave Without Pay. Grievant shall be reinstated with full, unbroken seniority.

This award is conditioned on a two-year Last Chance Agreement which shall include the following, nonexclusive requirements:

1. Grievant shall regularly attend AA or NA meetings for two years from the date of his reinstatement and furnish the Employer with documentation of attendance.

2. During those two years, the Employee shall submit to sobriety testing when Management requires. His refusal will be grounds for summary discharge.

3. If Grievant does submit to such test and is found to have a blood alcohol level of .04 or higher, the Employer shall have the right to remove him immediately.

4. If, within the two years covered by the Last Chance Agreement, Grievant is again found sleeping on duty, the Employer shall have the right to remove him immediately.

5. In any arbitration stemming from a removal authorized by the Last Chance Agreement, the only issue presented to an arbitrator shall be whether Grievant violated these conditions.

The Arbitrator reserves jurisdiction to resolve disputes flowing from this remedy. If the parties cannot agree on the exact terms or reasonableness of a proposed Last Chance Agreement, either party may invoke the Arbitrator's jurisdiction to resolve the issues by giving appropriate notice to the Arbitrator and the other party.

Should Grievant decline to sign a reasonable Last Chance Agreement (or a Last Chance Agreement that the Arbitrator finds to be reasonable), this award will be void and the removal of June 7, 1996 will stand.

Decision issued at Lorain County, Ohio July 16, 1997.

Jonathan Dworkin, Arbitrator