VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 27-26-970604-0784-01-03
and	*	
	*	
OHIO DEPARTMENT OF	*	Karla Bobo, Grievant
REHABILITATION AND	*	Removal
CORRECTIONS	*	

Appearances

For the Ohio Civil Service Employees Association:

Robert Jones, Staff Representative
Ohio Civil Service Employees Association

For the Ohio Department of Rehabilitation and Corrections:

Patrick Mayer, Labor Relations Officer
Ohio Department of Rehabilitation and Corrections

Rodney Sampson, Labor Relations Specialist
Ohio Office of Collective Bargaining

HEARING

A hearing on this matter was held at 9:00 a.m. on March 31, 1998, at the Warren Correctional Institution in Lebanon, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. Issues on arbitrability and the merits were raised. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the State were Warden Anthony Brigano, Captain Edward Everhart and Major Carl Mockabee. Testifying for the Union was the Grievant, Karla Bobo. Also in attendance were Joseph L. Coleman and Ronald Sixt. A number of documents were entered into evidence: Joint Exhibits 1-11, State Exhibits 1-3 and Union Exhibits 1-6. The oral hearing was concluded at 4:30 p.m. on March 31, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

ARBITRABILITY

Issue

Was the grievance timely appealed to the fourth step and is it therefore arbitrable?

Decision

This issue was withdrawn by the State following a review of documents presented by the Union. The grievance is accordingly deemed timely appealed to Step 4 and is therefore arbitrable.

MERITS

Stipulated Issue

Was the removal of the Grievant, Karla Bobo, for just cause? If not, what is the remedy?

Statement of the Case

At the time of her dismissal for failing to follow call-off procedure, the Grievant was a Correction Officer working the third shift at the Warren Correctional Institution in Lebanon, Ohio. This institution is a close security facility housing approximately 1500 inmates, including a number with special needs. As a 24-hour security operation, procedures are in place to provide adequate staffing when employees scheduled to work are absent. One of these requires employees to call in 90 minutes before the start of their shift when they are unable to report at their designated time. This allows the shift commander time to locate a substitute. State witnesses testified that call-offs result in lost managerial time and reduced staff morale, and that the effects are worse when an employees fails to appear without any notice at all.

The Grievant has been employed by the Ohio Department of Rehabilitation and Corrections as a Correction Officer since October 23, 1989, first at the Warren facility, then at Dayton Correctional Institution, and then again at Warren. Her performance evaluations have been mixed, in most years meeting expectations. Attendance problems began to be noted in 1993. The evaluation for 1994 when she was at Dayton Correctional Institution is dominated by "below" ratings and also notes attendance problems, the former of which the Grievant testified were due to having been assigned to inmate housing without training and to her strictness with inmates who were accustomed to lax treatment. In 1995 she was back at Warren, and her ratings returned to "meets expectations" levels, but attendance continued to be a problem. Indeed, during the 13 months from

April 1995 through May 1996, the Grievant accumulated the following disciplinary record, none of which were grieved.

Date of Notice	Action	Violation
April 25, 1995	Written reprimand	AWOL
October 5, 1995	Written reprimand	Call-off procedure
October 6, 1995	Written reprimand	Loss of tool control
November 17, 1995	1-day suspension	Tardiness/Call-off
January 17, 1996	3-day suspension	Call-off procedure
February 14, 1996	5-day suspension	AWOL/Call-off
February 28, 1996	Oral reprimand	Clock-in/out procedure
February 29, 1996	Written reprimand	Clock-in/out procedure
April 23, 1996	10-day suspension	Tardiness/Call-off
May 20, 1996	1-day suspension	Clock-in/out

In July 1996, the Grievant entered the Ohio Employee Assistance Program (EAP) and went on disability leave for major depression and alcohol abuse. Suffering financial difficulties as well, she returned to work that fall after her application to extend this leave was denied. She was placed on third shift in an attempt to accommodate her and minimize disruptions from her attendance problems. She nevertheless reported for work late on November 24 and again on November 28 without calling in in a timely fashion. For these infractions, she received another 10-day suspension in February 1997 which also went ungrieved. The Grievant recalls being told at the time that she could not afford any more such infractions.

Two months later, on April 9, the Grievant again did not appear at the 9:50 p.m. third shift roll call, nor was she at her post at the 10:00 p.m. start of her shift. The Grievant testified her electricity had been cut off while she slept, thus disabling her alarm clock. She called in to work at 11:05 p.m., after the cold of the house awoke her, and requested emergency personal leave. The shift commander, Captain Edward Everhart, testified he told her she would have to bring in documentation to support her request, a statement disputed by the Grievant who testified he merely said, "Whatever you want to do, ma'am." No request for leave form nor any documentation was presented, so Captain Everhart turned in the call-off slip. An incident report was filed and an

investigatory interview was conducted, at which time the Grievant said that for medical and financial reasons her utility company was not supposed to turn off her power. She later supplied the doctor's April 9, 1997 medical certificate (for severe asthma) that was supposed to prevent termination of utility service, and computer printouts showing a past due balance on her electric bill. In arbitration she also presented Chapter 13 bankruptcy documents showing the Trustee's allowance for the utility company's claim.

A pre-disciplinary hearing was conducted on April 18, 1997. The hearing officer rejected the Grievant's excuse because no proof was provided to show if or when the electricity was turned off and how this prevented her from calling off properly. The Grievant was therefore removed on May 23, 1997.

A grievance protesting this action was filed June 2, alleging discrimination on the basis of disability and no consideration given to the mitigating circumstances of power outage or to the Grievant's participation in the EAP. This grievance was thereafter processed through the grievance steps without resolution, finally coming to arbitration where it presently resides for a final and binding decision, free of procedural defect.

The Warden testified that the Grievant had asked about EAP and a last chance agreement, and that he had considered it. However, he does not believe the reasons she was late and failed to call-off bear any relationship to EAP issues. Moreover, she did not make him aware that she was already in an EAP and he has no idea why someone already in one would seek discipline deferral pending EAP. In addition, had she requested accommodation under ADA, which she did not do, he would have looked at that, too.

For her part, the Grievant testified that although she did not mention she was in EAP for alcoholism during these disciplinary proceedings, management had learned of it at her pre-disciplinary hearing for her 10-day suspension in 1996 and she signed a release on July 24, 1997 so

her EAP could inform management themselves. She never requested ADA accommodation, except for a hearing loss, nor is she aware whether alcoholism, depression or financial problems are covered. She did not grieve her prior discipline, assuming the Union had done so as, in her opinion, it is their responsibility. She has not made use of her FMLA rights either. She does, however, want her job back and believes her attendance improved after she entered the EAP.

Arguments of the Parties

Argument of the State

The State argues it has proved just cause for terminating the Grievant. There is no dispute that she called in more than 2-1/2 hours later than required. She never submitted a request-for-leave form or brought evidence that her power was shut off. But even if it was improperly turned off as she claims, the State argues that as a person on the edge of removal, she had the obligation to take every possible means to assure she was in compliance with the standards of conduct.

The State argues removal in this case is progressive, commensurate, and corrective. The Grievant had twelve disciplines in the two years preceding this incident, at least seven of which were for similar offenses. The State gave her a second and a third chance, for the disciplinary grid provides for removal on a fifth offense. The State's decision not to mitigate or make a last chance agreement was based on what it knew at the time. Neither EAP nor ADA reasons for her lapse were raised. The reason provided was power shut off. Power shut off for nonpayment of bills is not an EAP issue and, even if it were, the employer is not obligated to hold discipline in abeyance pending EAP results. In any event, even though she brought no evidence of an EAP issue at the time, she was already in the program, but with no effect on her attendance. Enough is enough. The effect of poor attendance is felt primarily by fellow officers who have to cover for the absent one, whether by overtime or by working a different assignment than customary. Putting the Grievant back will send a message to other employees that they can disregard attendance rules and procedures eight

times before it costs them their jobs. On the other hand, upholding the removal, which another arbitrator did in a strikingly similar case, will send the message that attendance matters. [1]

The State asks that the grievance be denied in its entirety.

Argument of the Union

In the Union's view, the State lacked just cause to remove the Grievant. The record shows that the incident of April 9 occurred because her power was turned off when Bankruptcy Court failed to pay her bill and the utility company disregarded the Grievant's medical certificate. The Grievant was in Chapter 13 and having her wages garnisheed, leaving only a little money for food, gasoline, and other necessities.

The Grievant had entered the EAP and gone on disability leave to address her problems. This did affect her attendance, but the employer gave no consideration to these facts. Indeed, the Union asserts the State disregarded her participation in EAP when it served her with discipline on February 4, 1997. Failure to consider EAP is a violation of Article 24.09 of the Collective Bargaining Agreement.

The Union pleads that the Grievant deserves another chance. She was a good officer whose problems began in 1995 after some years of State service. She felt discriminated against and believed the State was out of compliance with the ADA in violation of Article 2.01 (Non-discrimination) and 2.02 (Agreement Rights) of the Collective Bargaining Agreement. It is unjust to punish a person with health problems of severe asthma, depression, and alcoholism. The Union concedes her failure to call-off did create hardship for the institution, but five extra officers were assigned to relief that night, so the situation was not critical.

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[1] *Ohio D.R.C. v. OCSEA/AFSCME Local 11 (Fawley, Grievant)*, No. 27-26-930119-368-01-03 (Loeb, 1995).

In support of its position, the Union offers the decisions of *Kelly-Springfield Tire Co. v. U.R.W. Local 746*, 108 LA 984 (Nicholas, 1997); *Vons Companies, Inc. v. Teamsters Local 848*, 106 LA 740 (Darrow, 1996); *Georgia-Pacific Corp. v. Woodworkers/I.A.M. Local W 376*, 108 LA 43 (Nicholas, 1997); *Ohio D.R.C. v. OCSEA/AFSCME Local 11 (Block, Grievant)*, No. 27-25-960617-1092-01-03 (Dworkin, 1997). It asks that the grievance be granted, the Grievant returned to her former position, awarded back pay, benefits and seniority, and made whole.

Pertinent Contract Provisions

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 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 pre-disciplinary 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. (Joint Ex. 1)

Opinion of the Arbitrator

There is no dispute that the Grievant once again violated the State's reasonable rule to report her inability to appear for work when expected or that this followed a history of discipline for eleven rule violations, including attendance rules, in the preceding two years. That being the case, there are really only two questions for the Arbitrator to decide: (1) Should the removal be mitigated by the role, if any, that the alleged power outage played and (2) should her participation in EAP have been given greater weight than it was?

Regarding the alleged power outage, I have the same problem the State did at the pre-disciplinary hearing, lack of proof. While there is evidence the Grievant owed the utility a

substantial amount of money, was facing a shut-off against which she obtained a medical prohibition on the very day she overslept, and that she was in Chapter 13, she has never brought proof that her electricity was shut off on the day in question or offered any explanation for why, knowing she could ill afford another rule infraction, she did not take precautions to assure her timely appearance for work. She has had many opportunities to present such proof. Even if Captain Everhart did not request it when she finally called in April 9, it was an issue during the pre-disciplinary hearing and was noted on the pre-disciplinary report. Since then, there have been grievance meetings and an arbitration hearing. The Grievant has brought other documentation, but this piece remains singularly lacking. From this, the inference is drawn that no such proof exists. Lest the Grievant believe that it is the employer's responsibility to substantiate her claim, I point out that hers is an affirmative defense. She is the one who claims mitigating circumstances and she is the one who has the power to request the records of the utility company. As it stands, even the medical certificate raises questions about the veracity of the Grievant's claim that the situation was beyond her control, for it is dated April 9 and lacks any indication of when it was presented to the utility company or by whom.

Turning now to the EAP issue, it is difficult for me to believe that the employer was as ignorant as it claims of the Grievant's history of depression and alcoholism or the part these illnesses may have played in the Grievant's financial difficulties that she says caused her to miss the call-in window. Her disability leave, after all, had to be processed through the Department.

However, giving greater consideration to her request, as I do now, does not compel that the removal be reduced. Article 24.09 makes clear that the employer need not modify contemplated discipline, but must only give it serious consideration. What is more, it specifically contemplates discipline for infractions occurring while the employee is in a program, which is precisely what occurred here. EAP is not a license to disregard legitimate employer directives. The employer still

has the right to expect employees to come to work when scheduled or to provide adequate notice when they cannot. The Grievant had been in the EAP for nine months, a large portion of which she spent on disability leave. Despite this, her prior disciplines and movement to the third shift, she still could not conform herself to her employer's attendance expectations. Moreover, she blames everything and everyone else for her troubles. Without some indication that something is different from the preceding nine months, and different in a way indicative of success, a last chance agreement seems only a last chance at more of the same. This, in fact, is what Arbitrators Dworkin and Darrow had in the cases cited by the Union: impending discipline served as a wake-up call to Dworkin's grievant and Darrow's grievant had a long, unblemished record indicative of success.[2] If, as my learned co-panelist Jonathan Dworkin holds, the litmus test in a removal is whether the grievant is redeemable, I have to say that I agree with the State. This Grievant has had her second chance and then some. While it is never easy to sustain a removal, particularly of a troubled employee who has given good service, there comes a time when it must be recognized that the employer can do no more without compromising the expectations and well-being of other employees.

Award

The grievance is denied in its entirety.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
May 15, 1998

ODRC448

[2]The other two cases cited by the Union, *Kelly-Springfield Tire* and *Vons Companies* are distinguished by proof of disparate treatment.