#1313

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.31-04-971010-0020-01-07
and	*	
	*	Frank D. Davis, Grievant
OHIO DEPARTMENT OF	*	Removal
TRANSPORTATION	*	

Appearances

For the Ohio Civil Service Employees Association:

Lynn Kemp, Staff Representative
Ohio Civil Service Employees Association

For the Ohio Department of Transportation:

Edward A. Flynn
Assistant Administrator, Labor Relations
Ohio Department of Transportation

Rhonda G. Bell
Ohio Office of Collective Bargaining

Hearing

A hearing on this matter was held at 9:00 a.m. on July 30, 1998, at the Ohio Department of Transportation garage in Boston Heights, Ohio before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They 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 Charles Miner (former Safety Supervisor), Bryan Doolittle (Highway Worker II and Union Steward, by subpoena), and Greg Zemla (Labor Relations Officer). Testifying for the Union were Lorraine Ellithorp, LISW, CCDC III of Family Services, Akron, Ohio, and the Grievant, Frank Davis. Also in attendance was Sandra Rienzi, Chapter President. A number of documents were entered into evidence: Joint Exhibits 1-11, State Exhibits 1-4 and Union Exhibits 1-3. The oral hearing was concluded at 3:30 p.m., whereupon the record was closed. This opinion and award is based solely on the record as described herein.

Stipulated Issue

Was the Grievant removed for just case? If not, what shall the remedy be?

Statement of the Case

This case concerns the removal of a nine-year employee of good record for his absence while he was attempting to recover from drug and alcohol dependence after failing a random drug test. The Grievant was employed by the Ohio Department of Transportation (ODOT) on March 31, 1988. At the time of his removal on October 3,1997, he was a Project Inspector I, a job whose duties are performed during construction season, April to November. During the off months, these employees

are assigned other duties, some of which necessitate a commercial drivers license, hence subjecting them to random drug testing under the Federal Omnibus Transportation Employee Testing Act, Employer policy and the Collective Bargaining Agreement. The Grievant met or exceeded his employer's expectations and had only one discipline on his record, a written reprimand for sick leave occasions.

On February 25, 1997, the Grievant was administered a random drug test, testing positive for marijuana. District Safety Supervisor Charlie Miner met with him and Union Steward Bryan Doolittle on March 7, at which time Miner explained the policy and procedure by which the Grievant could be returned to duty. The Grievant signed an Employee Assistance Program (EAP) Participation Agreement, which states in part,

> The employee agrees to participate in a plan for a period of 365 days. Said plan will be developed by the Health Care Provider. The employee agrees to meet all the requirements set forth in that plan....A Participation Outline, including the lengths of the various aspects of service and the frequency of appointments or treatment sessions, shall be attached to and made a part of this agreement as soon as possible, but not later than thirty (30) days from the date of signing. If the agency is unable to secure information from the Case Monitor, it shall be the employee's responsibility to provide the employer representative with such information....ODOT agrees that, so long as this contract is complied with in its entirety, the discipline recommended for this employee pursuant to the letter dated 3-11-97 shall be held in abeyance. Should the employee violate this contract, in any part, the recommended disciplinary procedure will be implemented. (Joint Ex. 7a)

Labor Relations Officer Greg Zemla testified 365 days was used to allow for aftercare or other requirements imposed by the employee's Substance Abuse Professional (SAP) after he is returned to work. Miner testified he told the Grievant that he would get a pre-disciplinary meeting notice, but that if he signed a last-chance agreement, the discipline would be held in abeyance. He also gave the Grievant a copies of the Participation Outline and Substance Abuse Professional Certifications that were to be completed and returned, had him sign acknowledgment of having read and

understood the Ohio EAP Client Confidentiality policy and authorize release of information from the Ohio EAP to Miner. A final document provided to the Grievant was a memorandum outlining the requirements for returning to work. This document states, "you are immediately relieved of your duties and placed on a mandatory authorized leave of absence until re-qualification procedures are complied with" and tells the employee of his rights to use paid leave balances or FMLA leave during his absence. It further directs him to make "an *immediate* contact with the Ohio Employee Assistance Program" (emphasis in the original), outlines other treatment options, states that the employee will be asked to execute a last-chance agreement at his pre-disciplinary hearing, and provides information on return-to-duty and follow-up testing (Joint Ex. 7d). Union Steward Doolittle confirmed that Miner told the Grievant that at his pre-disciplinary hearing he would be required to sign a last-chance agreement giving him 180 days to get through a drug program and return to work. Otherwise he would be terminated.

On March 27, Miner received a telephone call from Julie Yacobucci of the Ohio EAP in which she stated that she had no record of the Grievant having been treated. The notice of the Grievant's April 3 pre-disciplinary hearing for the positive test set was sent by certified mail the next day and signed for by a Jeff Watson on March 29 (Joint Ex. 3a). The Grievant testified he never saw it and does not know who Jeff Watson is. Accompanying this document was a copy of the Last Chance Agreement the Grievant was going to be asked to sign. This Agreement states in part,

> It is agreed by the parties that the employee shall be considered on leave of absence (or the employee can use accrued leave) until such time that he/she returns to work under the above conditions or 180 calendar days whichever is shorter. Should the employee fail to properly be certified to return to work by the Substance Abuse Professional and return to work within 180 calendar days he/she shall be terminated from employment. Should the employee not cooperate fully with the directives of the Substance Abuse Professional or fail to return to work, the employer may terminate his/her employment and seek repayment, from the employee's last

> paycheck, of any medical premiums paid on his/her behalf during their period of unpaid leave. (Employer Ex. 4)

The Grievant failed to appear for his April 3 pre-disciplinary hearing, so the Union steward got a 48-hour extension for the hearing and called the Grievant, who said he would attend the rescheduled hearing. Meanwhile, Yacobucci still had not heard from him, so Miner sent another letter reminding him that he must maintain contact with EAP personnel and stay in compliance with the agreement he signed on March 7. He was directed to contact the EAP immediately (Joint Ex. 10). This letter, dated April 4, was returned as unclaimed.

The rescheduled pre-disciplinary hearing was convened on April 7, and again the Grievant did not appear (because he knew he would be discharged and, he testified, he was high). After waiting some time, the hearing went forward without him, but with the union steward in attendance. The hearing officer found just cause for discipline (Joint Ex. 3), but the State held discipline in abeyance because, according to Minor and Labor Relations Officer Greg Zemla, it wanted to give the Grievant every chance to return to work.

Meanwhile, the Grievant had contacted Lorraine Ellithorp, LISW, CCDCIII, of Family Services, who saw him on March 25. She made an initial diagnosis of Cocaine Dependence, Alcohol Dependence and Marijuana Abuse (later modified to Marijuana Dependence) and referred him to St. Thomas Hospital for intensive outpatient treatment (Joint Ex. 6). This was reported to Yacobucci who, in turn, informed Miner on April 11. Ellithorp also executed and mailed the required Participation Outline and Substance Abuse Professional Certification, and had the Grievant sign a Family Services release of information on treatment payment options (Union Ex. 3), but Miner testified he never received these documents.

By April 18, Yacobucci still had not heard from the Grievant, so she sent him a letter telling him that she had to hear from him by April 25 in order to report him in compliance with the EAP agreement (Joint Ex. 11). The Grievant testified he received this letter and did as directed. He finally checked in to St. Thomas on April 23, informing Miner of this fact in a phone call on April 24. This was the last communication Miner received from him before he was terminated, though he did hear about him second-hand after that. The Grievant's last day of inpatient treatment at St. Thomas was April 28 when he was referred to outpatient after asking to be released. Ellithorpe testified the Grievant had accepted that he had a cocaine problem, but was still minimizing his problems with alcohol and marijuana. Out of the hospital, he abused alcohol and missed two appointments with his SAP, Ms. Ellithorp. On May 19, he entered Edwin Shaw Hospital for three days, and then transferred to their outpatient program. He was administratively discharged from this program on May 23 for excessive, unexcused absences, which he and Ellithorp testified were because of financial difficulties and his need to obtain basic necessities and attend to other personal business. He re-entered the program on June 24, but was again administratively discharged on July 15 for dirty drug screens. According to Ellithorp, Edwin Shaw staff thought he needed an extended care program for at least six months. He was able to arrange this, entering the Interval Brotherhood Home (IBH) Alcohol Rehabilitation Center on August 18 when a bed became available. While there, he finally surrendered to his alcoholism, accepted that he needed to change his life style, and began to work very seriously at a program of recovery.

However, by August 21, nearly six months had passed since the Grievant's random drug test, the State had not heard from him in four months, and had information that he had been dismissed from several rehabilitation programs and was not in compliance with his EAP Agreemen or the last-chance agreement he would have signed had he attended his pre-disciplinary meeting. Therefore,

Zemla instituted new discipline proceedings. A pre-discipline meeting notice charging him with violation of ODOT Directive WR-101, Item 14, Excessive absenteeism and Item 17, Unauthorized absence for 3 or more consecutive days was sent on August 28, but it, too, was returned as unclaimed, the Grievant being in IBH at the time (Joint Ex. 3b). The hearing was held September 3, again without the Grievant but with Union Steward Doolittle in attendance. The hearing officer again found just cause for discipline (Joint Ex. 3d). On September 29, the Grievant was sent a letter by certified and regular mail to inform him he was terminated effective October 3 (Joint Ex. 3e). The Grievant testified he was surprised by the news that he had been discharged when he received the copy sent by regular mail, delivered to him with other accumulated mail by a neighbor. He had been told, he said, that he could not come back to work until his problem was taken care of and he had made sure, by signing releases, that ODOT would be notified of his whereabouts.

A grievance was filed by the Union and the Grievant on October 10, 1997, protesting the Grievant's discharge. Approximately one month later, on November 7, the Grievant was discharged from IBH "with staff approval and a good relapse plan" (Union Ex. 2). He continued to attend Alcoholics Anonymous meetings and eventually found other employment. Being unresolved at lower steps of the grievance procedure, his case came to arbitration, where it presently resides, free of procedural defect, for final and binding decision. At his hearing, almost nine months after his release from IBH, he was still clean, sober and attending AA meetings. His SAP, Ms. Ellithorp, testified his prognosis was good as he had almost a year of sobriety, a sober mind set, and had probably had to deal with cravings and done so despite his stressful circumstances.

Arguments of the Parties

Argument of the State

The State argues the evidence shows the Grievant was informed of the requirements for returning to work but chose to disregard them. He failed to abide by his EAP agreement, missed three pre-disciplinary hearings, was in and out of treatment, did not follow his counselor's advice and, as late as September, was just marking time to get his job back. The Grievant's last contact with the Department was April 28, thereby failing utterly in the most fundamental employee responsibility of communicating with his employer.

Even though the Grievant had failed his EAP agreement, the State decided to wait 180 days from the time of the second pre-disciplinary meeting, as it had before, so as to give the Grievant every chance to get medically fit for duty. The Employer must have a time period for employees to rehabilitate. 180 days is reasonable and has never been challenged by the Union.

Although the Department is extremely aggressive in rehabilitating employees, it is equally aggressive when employees violate their EAP agreements, as three similar cases show. D. Love was separated for job abandonment and this was not grieved. C. Sayer was discharged under similar circumstances. Although this action was grieved, it was not appealed to arbitration. Morrow failed his second drug test and chose to resign rather than be terminated. If the Arbitrator returns the Grievant to work, this will send a powerful message to the workforce that they can evade their responsibilities and still get their jobs back.

Citing two previous arbitration decisions [*ODRC v. OCSEA/AFSCME* (Davis, Grievant), 27-07-891215-0028-01-03 (Smith, Arb.) and *ODRC v. OCSEA/AFSCME* (Hargrave, Grievant), 27-15-910705-170-01-03 (Rivera, Arb.)] on job abandonment and absenteeism, the State contends the

Grievant was on unauthorized absence for an extended period and so it had no choice but to terminate his employment. It asks that the grievance be denied in its entirety.

Argument of the Union

The Union argues the Employer changed rules in midstream without informing the Grievant. First, it entered into an EAP agreement with him for 365 days and told him he was on authorized leave. Then it removed him for his absences though he was never in unauthorized leave status and was never told he had to use normal call-off procedures.

In addition, although the State was aware he was administratively discharged from a program on May 23, it chose not to initiate discipline until September. The State's failure to act in May led the Grievant to believe that as long as he was making attempts to recover, he had 365 days to return to work. He never saw the last-chance agreement and was therefore unaware of a 180-day limit.

In fact, the Grievant has a serious substance abuse problem of which he was in deep denial at the time. He continuously sought treatment from March to November and was ultimately successful in getting the long term program he needed. If the State was giving him 180 days to return to work, why terminate him if he was enrolled in a program as he hit the 180-day mark?

Management is not even clear about the specific dates the Grievant was allegedly in AWOL status, contends the Union. The pre-disciplinary notice does not cite specific dates and State witnesses disagree whether they initiated the 180-day period on April 7 or April 14.

The Union takes issue with cases cited by the State. The Sayer case was appealed to arbitration and did not involve any kind of EAP agreement or drug screen. Lawrence Davis was terminated for job abandonment, not for an unauthorized absence of three or more consecutive days as here. And, finally, the Grievant's absence from his September pre-disciplinary hearing is explained by being enrolled at IBH at the time.

The Union concludes that the Grievant was not terminated for just cause. It asks that he be reinstated and granted full back pay, benefits and seniority, and made whole.

Opinion of the Arbitrator

The State paints a picture of a man engaging in evasive tactics to avoid his responsibilities under federal law and his employer's policy. I do not think that is a complete picture. While it is true that the Grievant missed meetings and appointments, did not claim mail sent to his address, and was in and out of treatment programs, what the record reveals to me is a man struggling with addiction, eventually overcoming hopelessness, powerful denial, and what must have been intense cravings to deal with the wreckage of his life caused by the substances he used. Viewed in this light, his story is a testament to the human spirit. One must respect the Grievant and those who helped him for their persistence through the repeated false starts that ultimately resulted in his commitment to lifelong recovery a day at a time. Sadly, the fact that this was finally achieved, does not lead to the conclusion that the State discharged him without just cause.

If probability of rehabilitation were the sole consideration, this would be an open-and-shut case, for the Grievant's claim of recovery is supported by his post-discharge history, his demeanor in the hearing, and the judgment of the expert chemical dependency counselor who testified in his behalf. However, one must also give due consideration to the legitimate employer need for working, not absent, employees. It is unreasonable to expect an employer to hold jobs open indefinitely while employees continue to use the substances that made them unfit for duty or otherwise act in disregard of the professional advice targeted to return them to duty, even if this conduct is a feature of the disabling condition. Indeed, the Arbitrator notes that open-ended and long-term agreements enable

continued substance abuse because they provide no incentive for the affected employee to deal with his condition in an expeditious fashion.

As I understand it, the Union's position essentially is that the State violated the expectations it created for the Grievant on March 7, 1997. These expectations, the Union claims, were that he had 365 days of authorized leave to re-qualify for return to work. I disagree that was the case. To begin with, I do agree that there is room for confusion about the various deadlines, for they and their relationships to each other are not clearly spelled out on the documents provided during the meeting with the Safety Supervisor. Notably absent is any explicit reference to a return-to-duty deadline because it is stated in writing only in the last-chance agreement, which the employee does not receive until he gets his pre-disciplinary meeting packet. Were it not for the fact that the Safety Supervisor orally informed the Grievant that he had 180 days to complete a program of rehabilitation and that there was a corroborating witness, this could be a flaw in the State's case. The State may want to clarify the deadlines and their relationships to each other on documents provided to employees.

Be that as it may, it is clear from Joint Ex. 7d that authorized leave was extended "until re-qualification procedures are complied with." The conditions for re-qualifying are then set forth. The implication is that authorized leave is contingent on complying with the re-qualifying conditions. That is, there are two paths. The first, compliance, places the employee in an authorized leave status and results in the employee's return to work. The alternative, noncompliance, places the employee in unauthorized absence and subjects the employee to termination. It is certainly clear that the EAP Participation Agreement, which requires participation in a plan of rehabilitation for 365 days (Joint Ex. 7a), is only one of the several conditions for being returned to service. The employee has to be following a qualified program of rehabilitation and execute releases for verification. He also has a

pre-disciplinary hearing and must execute a last-chance agreement. Finally, there are return-to-duty and follow-up tests. If the employee fails any one of these, he leaves the path of compliance, loses his authorized leave status and becomes subject to termination. All of these were explained to the Grievant and he signed Joint Ex. 7d in acknowledgment.

The question now becomes whether and when the Grievant became noncompliant. The State made much of the Grievant not returning the completed Participation Outline to the Safety Supervisor. In point of fact, the Participation Outline was executed by the SAP and I have no reason to believe it was not sent as she testified. Also in point of fact, all documentation, from the Ohio EAP Participation Agreement Procedure (Employer Ex. 3, p. 1) to the memo to the Treatment Provider/Counselor (Employer Ex. 3, p. 6), to the Participation Outline itself directs the SAP to file the outline directly to the Ohio EAP. It does not direct the SAP to return the documents to the employee or to ODOT. Moreover, the EAP Participation Agreement itself states merely that the Participation Outline will be made a part of the Agreement no later than 30 days from date of signing, but it goes on to say that if the agency cannot secure information from the EAP case monitor, then the employee is to provide it. The clear implication is that the expected flow of information was from the SAP through the Ohio EAP to the agency, in this case, ODOT. If ODOT wanted a direct channel from the SAP, bypassing EAP, it needed to provide different instructions to the SAP. Since there is no evidence otherwise, I must assume Ellithorpe followed directions when she mailed these documents and I can hardly fault the Grievant when his SAP followed the only directions she had.

The next point of alleged violation was the missed pre-disciplinary hearing and execution of last-chance agreement. Here the State is on solid ground. The Grievant was clearly informed and knew the consequences. Both the Safety Supervisor and Union Steward testified Miner went over

this requirement on March 7, and it is itemized as a condition for returning to duty on Joint Ex. 7d. The Steward got the April 3 pre-disciplinary meeting rescheduled, contacted the Grievant, and obtained his assurance he would appear. He then failed to do so because he knew he would lose his job and was high. It was not unreasonable for the State to require a last-chance agreement as a condition of holding discipline in abeyance and such a condition is contemplated by Appendix M of the Collective Bargaining Agreement. The State might have proceeded at this point to terminate the Grievant on these grounds alone and its decision to do so may have been upheld in arbitration. But the State was lenient, possibly in consideration for the Grievant's long, good service, possibly because of its view of substance abuse as a complex but treatable disorder and/or its compassion for employees so afflicted. Thus, instead of discharging the Grievant forthwith, it took no action, giving the Grievant additional time to qualify for duty. But even though the State elected not to discharge the Grievant at that time, it was still entitled to carry his absence as unauthorized once he was clearly out of compliance with the conditions for re-qualification. Missing the rescheduled pre-disciplinary hearing and thereby failing to execute the required last-chance agreement was just such an unambiguous act of noncompliance. The State was therefore not wrong to deem him absent without authorization from that date forward.

The next question is whether the State abused its discretion in giving the Grievant 180 days to return to work once it made the decision not to terminate him when he failed to appear and enter into a last-chance agreement. The Union argues he should have been given 365 days because that is what the EAP Agreement gave him and what he was led to believe when the State failed to act in May, he was unaware of the 180-day deadline, he was actually in treatment at the 180-day mark, and State witnesses did not agree which was the first day of unexcused absence. As ruled above, the State is not bound by the 365 deadline on the EAP Agreement. That is the length of that agreement,

not the return-to-work deadline, and the Grievant was so informed. As for the rest, the State is between a rock and a hard place. If an employer acts too soon, it is argued the employee has not been given a fair chance to overcome a condition with features of denial and relapse. If it waits too long, it is argued, as here, the employee has been lulled into a false sense of security. In my opinion, the State's choice of 180 days cannot be faulted on either count. It was generous because it gave the Grievant the same length of time he would have had if he had executed the last-chance agreement. The State ought not to be penalized for its leniency. It was also not an arbitrary, capricious or discriminatory length of time to apply for it was based on the standard return-to-work deadline applied to others that was, itself, not an unreasonable balance of the employer's need to have working employees and the employee's need to have adequate opportunity to rehabilitate. As far as the Grievant's expectations are concerned, it seems to me once the Grievant was not fired at the 30-day mark or when he missed the pre-disciplinary hearing (which is what his testimony repeatedly indicates was his belief on the time he had), he could not have reasonably expected to be treated more generously than those who did execute a last-chance agreement. Nor will this Arbitrator require that of the State, for it would permit employees to evade their responsibilities simply by not showing up for their pre-disciplinary hearings. Finally, there is the matter of the Grievant being enrolled in a program on the 180th day. Again I cannot fault the State. It showed leniency when it gave the Grievant 180 days. Given that the Grievant had tried and failed in several other programs, then dropped out of sight (thereby being out of compliance with his EAP Agreement), it had no basis to expect this treatment would bring success. Moreover, the State's concern regarding the message this sends to the workforce is well-founded. For those employees needing the wake-up call of serious consequences for failure to meet a deadline, a soft deadline merely postpones the day of

reckoning. Having shown leniency in the first place, it was not an abuse of discretion to be firm in its application.

Award

For all these reasons, the grievance is denied in its entirety.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
September 16, 1998