#1955

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	*	
	*	
and	*	Case No. 33-00-20070418-0063-01-05
	*	
	*	George Yancey, Grievant
OHIO VETERANS HOME	*	Removal
	*	

APPEARANCES

For the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO:

Robert Robinson, Staff Representative
Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO

For the Ohio Veterans Home:

Joe Trejo, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:40 a.m. on October 15, 2007, at the Ohio Veterans Home in Sandusky, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties by direct appointment 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 Ohio Veterans Home ("Employer") was Donna Green. Testifying for the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO ("Union") were Kathleen Boger, Lynn Warren, Chapter President Mark Weikle, and the Grievant, George Yancey. A number of documents were entered into evidence: Joint Exhibits 1-4, Employer Exhibits 1-2, and Union Exhibits 1-4. The oral hearing was concluded at 11:45 a.m. following oral argument whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

The State of Ohio and OCSEA are parties to a collective bargaining agreement governing the terms and conditions of employment of employees in numerous classifications. Until his removal on April 17, 2007, for job abandonment and late notification of an absence, the Grievant was one of these. He had nearly seven years of state employment, all as a Food Service Worker at the Ohio Veterans Home. His disciplinary record at the time consisted of the following:

Date	Action	Rule
October 17, 2006	Physician verification	Attendance
October 19, 2006	Written reprimand	A-01 Late notice of absence
December 3, 2006	Counseling	A-06 Extending breaks
January 9, 2007	Verbal reprimand	I-01 Failure to accept authority or supervision

He was rated as performing at or above expectations in his 2001-2002 through 2004-2005 evaluations, and fellow employees testified he was a great co-worker, always willing to help out and very reliable.

In the period leading up to his dismissal the Grievant was having issues with members of his household and his own health. He testified his girlfriend was on drugs and the three children in their household were not being cared for to the point that they were removed by Children's Services. He said he had no one to talk to about his troubles and could not handle the situation. Under pressure, he just sat in a dark basement for three or four days not wanting to live, then stayed in hotels for several weeks. After some time he ran into the former Union Chapter President, Vanessa Brown who told him to call in because no one knew where he was. He did so on March 21, talking with Chapter President Mark Weikle, and telling him his story. Mr. Weikle advised him to come in the next day and then spoke with Labor Relations Officer Donna Green, apprising her of the situation. Meanwhile, Ohio Veterans Home had sent him a return-to-work order on March 6, 2007, after he had been no-call-no-show on February 2, made a late call-off on February 23, and then no-call-no-show for three consecutive work days on March 2, 5, and 6, but this notice was returned after being unclaimed as of March 24. Since the Agency had not heard from him until he called Mr. Weikle and then came in on March 22, it decided it was too late, did not allow him to work and then issued a pre-disciplinary hearing notice on March 28.

Said hearing was held on April 12. The Grievant and Union requested a last chance agreement in light of the circumstances. The hearing officer found that although the Grievant did not follow proper procedure, he was a seven year employee with a clean work record, and concluded that discipline should be deferred to allow the Grievant participation in the employee assistance program as permitted by Article 24.10 of the Collective Bargaining Agreement. Management nevertheless decided to sever the relationship and so terminated the Grievant on April 17 for violation of two rules, AWOL-Job Abandonment (A-03) and Late Notification of an absence (A-01). This action was timely grieved on April 18. At the third step and even in

unofficial meetings with Management, the Union renewed its request for a last chance agreement, but these, too, fell on deaf ears. Thus, the case came for arbitration as aforesaid free of procedural defect, on the stipulated issue of: *Was the Grievant, George Yancey, removed from his position of Food Service Worker for just cause? If not, what shall the remedy be?*

III. PERTINENT PROVISIONS OF THE CONTRACT

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.

24.10 - Employee Assistance Program (EAP)

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program (EAP), 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.

IV. ARGUMENTS OF THE PARTIES

Argument of the Employer

The Employer points out that the facts are not in dispute. The Grievant did not call in or show up for work for three consecutive days. He did not report even after talking to the Union on March 21 or before going to the kitchen on March 22. The work rules are clear and reasonable. The Grievant acknowledges he understands them. The Employer cannot have employees no-call-no-show for three days in a row, and it has been consistent in enforcing its rules. It cannot make exceptions because of the precedent they set. Indeed, the Union does not raise an argument of disparate treatment. But for having run into the former Chapter president, the Grievant may still be out. What is more, he has never supported his claim with medical documentation. For all these reasons it urges that the removal be upheld and the grievance be denied.

Argument of the Union

The Union does not dispute that the Grievant was no-call-no-show, but says it was for sixteen days inasmuch as he attempted to return on March 22 but was rebuffed by his employer. The Agency is so short of staff that one would think it would accept his offer to work pending completion of the discipline process. Even so, discharge was not justified. The Grievant has been a good employee for nearly seven years as shown by his evaluations and the opinions of his co-workers. Then, too, there were mitigating circumstances here. The Grievant's concern over his girlfriend and the children of his household, and his own serious health issue pushed him over the edge. Unaware that there was a solution, the Grievant did not react well. The Union tried to help him, but Management refused to join in this endeavor. The Union urges upon this arbitrator an opinion of Arbitrator Jonathan Dworkin who held that "an employer must recognize that a just-cause provision in an Agreement is designed to salvage employees who are salvageable and sacrifice only those who are not." (Parties' 31-07-900514-0037-01-06) The Union admits that discipline is warranted, but removal is too harsh. It argues that the Grievant be returned to work with a suspension, complete restoration of his seniority and insurance, granted a minimum of forty hours vacation and sick time, and that the three weeks between his attempted return to work and his removal be paid.

V. OPINION OF THE ARBITRATOR

Employers unquestionably have the right to expect employees to come to work ready to work when scheduled. Attendance is particularly important in residential and health care where the welfare of dependent and fragile clients and patients is at stake. Employees cannot just disappear and expect their employers to keep their jobs open for them. Consistent application of a job-abandonment/no-call-no-shows rule conveys the importance of this principle to employees, helping them to understand the importance of the rule and to know the consequences of its violation. But just cause also demands consideration for the surrounding circumstances of a violation, both mitigating and aggravating.

Here the circumstances are not apparently those of a "troubled employee" as understood to be one suffering from addiction or serious mental illness. Rather, it is of an employee temporarily in crisis (because of circumstances beyond his control) and unable to help himself. The Employer is no less in a position to intervene in an attempt to salvage an otherwise good employee under these circumstance than employees with chronic or more severe "troubles." The pre-disciplinary hearing officer apparently saw this, but his view did not survive higher management's review. Perhaps higher management saw that the Grievant had been offered EAP within the year preceding this Grievant's apparent abandonment of his job and concluded that its intervention was unwelcome or that it had already met its responsibility. But there is no evidence that these related in any way to the reason for the absence leading to his removal. Indeed, Ms. Green testified that the mitigating circumstances brought forth at the pre-disciplinary hearing were different from the circumstances for which he had previously been offered.

In any event, within days of knowing he was charged with job abandonment, the Grievant had secured a doctor's note stating the Grievant was under her care. Thus, this case, because it has an otherwise good employee in crisis amendable to professional intervention that may eventually rehabilitate the employee, is ripe for corrective discipline rather than discharge. His removal, then, was without just cause. Instead, he will receive a thirty-day suspension to impress upon him his responsibility to inform his employer of his status.

VI. AWARD

The Grievant, George Yancey, was removed from his position of Food Service Worker without just cause. The Grievant is to be reinstated to his former position with a thirty-day suspension. The Grievant is granted full pay and benefits less thirty (30) days retroactive to the first day after March 22 he normally would have been scheduled to work had he not been in AWOL status. The Arbitrator retains jurisdiction for a period of sixty (60) days on the sole matter of remedy.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
October 24, 2007

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