**ARBITRATION DECISION NO.:**
305

**UNION:**
OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**
Department of Transportation
District 7, Sydney Garage

**DATE OF ARBITRATION:**
September 19, 1990

**DATE OF DECISION:**
November 14, 1990

**GRIEVANT:**
David Donart

**OCB GRIEVANCE NO.:**
31-07-(90-05-14)-0037-01-06

**ARBITRATOR:**
Jonathan Dworkin

**FOR THE UNION:**
Patrick A. Mayer

**FOR THE EMPLOYER:**
Roger Coe
Rachel Livengood

**KEY WORDS:**
Job Abandonment
Unauthorized Absence
Removal
Failure to Call Off
EAP

**ARTICLES:**
Article 9-Employee Assistance Program
Article 24-Discipline
- §24.01-Standard
- §24.02-Progressive Discipline
- §24.05-Imposition of Discipline
- §24.08-Employee Assistance Program

**FACTS:**

The grievant was an Auto Body Repair Worker I for the Ohio Department of Transportation (ODOT) for less than three years when he was removed for three consecutive days of unauthorized absence. The grievant had pleaded guilty to a second Driving Under the Influence (DUI) charge. The grievant did not inform the employer that he was missing work to be at this trial. He did not expect to be incarcerated. He expected that he would only pay a fine and be free to go. The judge accepted the grievant's guilty plea and sentenced him to sixty days in jail.

Due to his sixty day sentence the grievant could not report to work. The grievant was not able to call in. Initially the grievant's mother called in for her son and explained the situation to the grievant's supervisor. She stopped calling in after a few days since the employer knew that her son could not return to work until he was released from jail. When the grievant was absent for one week without calling off the employer decided to remove the grievant. The employer knew at this time that the grievant was in jail. The employer cites a long established and well known work rule that an employee that does not call in for three consecutive days will be removed.

**EMPLOYER'S POSITION:**

The discharge was not punitive. There was no other remedy. The work rule is reasonable and it is unquestioned that the grievant violated this work rule. ODOT must have employees who consistently report to work. The grievant may not have expected to be incarcerated but because of a second DUI charge he put himself at risk of discipline. The Union's argument that the grievant should be allowed to enter an Employee Assistance Program is without merit. The grievant only entered an alcoholic treatment program when his trial and sentence was imminent. The grievant made no other prior attempts at treatment. The employer should not have to mitigate discipline based on this last ditch effort to escape a harsh sentence. There was just cause for the removal.

**UNION'S POSITION:**

The Union argues that this is not a removal for just cause. The work rule was established to prevent job abandonment. The grievant did not abandon his job and the employer knew where and when the grievant would return. The grievant did not expect to be sentenced and was not willfully absent. The ODOT work rule was not designed to punish the grievant in this situation. The employer knew the reason why the grievant could not report to work. He was in jail.

There was also no mitigation by the employer; the grievant had received only one verbal reprimand for failure to meet his schedule. The removal in this case is not progressive. The employer should have offered the grievant a chance to enroll in the Employee Assistance Program. It is unfair not to consider the special circumstances of this grievant.

**ARBITRATOR'S OPINION:**

The arbitrator found that the employer almost automatically fired the grievant because of his prison sentence. There was no mitigation. Even though the work rule is reasonable on its face, automatic discharge for a violation is highly suspect when it results in removal. Since the employer did not weigh the individual circumstances in this case, it can not be said that the employer had just cause for the removal.

**AWARD:**

The discharge will be reduced to a sixty-working day suspension.

**TEXT OF THE OPINION:**

**OCB-OCSEA VOLUNTARY GRIEVANCE PROCEEDING**
**ARBITRATION OPINION AND AWARD**

In The Matter of Arbitration
Between:

**THE STATE OF OHIO**
Ohio Department of Transportation

-and-

**OHIO CIVIL SERVICE EMPLOYEE ASSOCIATION, OSCEA/AFSCME**
Local Union 11, State Unit 6

Case No 31-07(90-05-14)0037-01-06

Decision Issued:
November 14, 1990

## APPEARANCES

FOR THE STATE
Roger Coe, Employer Advocate
Rachel Livengood, OCB Representative
Larry L. Rowan, Labor Relations Officer
Jerry Quinlisk, District Superintendent

FOR THE UNION
Patrick A. Mayer, OCSEA Staff Representative
David Donart, Grievant
Rosemary Donart, Witness

## ISSUE:

Article 24, §24.01: Removal For More Than Three Consecutive Days' Unauthorized Absence. Absence Because of Employees incarceration.

Jonathan Dworkin, Arbitrator
9461 Vermilion Road
Amherst, Ohio 44001

## SUMMARY

Removal is the subject of this dispute. Grievant was an Auto Body Repair Worker 1 employed by the Ohio Department of Transportation (ODOT). His seniority date was August 17, 1987. He worked at the ODOT District 7 Garage in Sydney, Ohio. His job was painting; he was responsible for the painting and general cosmetic appearance of road vehicles housed at the Garage.

Grievant was dismissed on May 11, 1990, after fewer than three years of employment. He was charged with violating a provision of employment rules issued by ODOT in June, 1987. Rule 16 deals with unapproved absences. It is divided into two parts. The first sets progressive penalties for typical, day-at-a-time absences (written reprimand for a first offense; one-day suspension for a second; five-day suspension for a third; removal for a fourth). The second part of Rule 16 establishes removal as the penalty for a first offense of three or more consecutive days' absence without authorization. Grievant was discharged under this provision. Beginning Wednesday, March 28, 1990, he was absent from work continually until April 16.

His prolonged absence was not deliberate; he was unable to report to work because he was serving a sixty-day jail sentence.

The facts are not in dispute. Although Grievant was only twenty-three years old, he already had a full-blown alcohol problem. In 1989 he was arrested and convicted for DUI. Later the same year he was arrested and charged with DUI again. According to his testimony, he was not driving at the time of the second arrest. He was intoxicated, but was just sitting on his motorcycle with the engine off when the police apprehended him. He fought the charge for nearly a year, making more than a dozen court appearances and managing to secure a reduction to "Reckless Driving."

Grievant's final court appearance was scheduled for March 28, 1990. That morning he called the Garage to report that he would be late; he made an excuse, not revealing the true reason for his anticipated tardiness. His expectation was that he would appear in court, plead guilty to reckless driving, pay a fine, and report to work that afternoon. But the judge had other plans. S/he accepted the guilty plea and sentenced the Employee to sixty days in jail.

Grievant went directly to jail and was not permitted to use the telephone until that evening. He first called his mother (also an ODOT employee) and explained his predicament. She telephoned Supervision early the next morning to report her son's absence. She disclosed the whole situation, notifying the Employer that Grievant would not be able to return to work until he completed his sentence. In the beginning, she called daily on her son's behalf. The calls were pro forma, to comply with her understanding of the report-off rule. They had no substantive value and provided the Employer with no information it did not already have. Garage supervisors knew that Grievant would not return to work until he was released from jail,[1] and the daily reminders added nothing to their understanding of the situation. After a few days, Grievant's mother stopped calling.

By April 4, 1990, Grievant had been absent one week. On that day, the Employer sent him a letter advising him that discipline had been proposed and a pre-disciplinary meeting was scheduled. The letter stated in part:

"Notice is hereby given that your supervisors have decided you should be disciplined according to the Policies and Directives of the Department. Therefore, a Hearing will be held pursuant to ODOT Directive A-302 on Tuesday, April 10, 1990, at 9:00 A.M., in the District Planning and Design Conference Room.

The purpose of this Hearing is to provide you with an opportunity to present your side of the story and explain why you should not be disciplined as recommended. This Hearing is also to provide you with the facts and evidence on which the State is basing the proposed discipline.

Specifically, violation of Directive A-301, Section 16b - Unauthorized Absence, 3 days or more (consecutive).

The evidence upon which the charges are based is you have been absent without authorization from March 27, 1990 through this date, April 4, 1990."

The discharge was finalized on May 11, and the grievance challenging it was initiated three days later. The Employer remained firm throughout the preliminary grievance levels, declining to modify or withdraw the penalty, and the Union appealed to arbitration. A hearing was convened in Columbus, Ohio on September 19, 1990. At the outset, the parties agreed that the dispute was arbitrable and the Arbitrator was authorized to issue a conclusive award on the merits. It is to be observed that the scope of arbitral authority is defined and limited by the following language in Article 25, §25.03 of the governing Collective Bargaining Agreement:

"Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement."

**THE ISSUES**

The determinant issue is whether or not Grievant's removal conformed to contractual standards regulating Management's disciplinary prerogatives. The chief requirement, established by Article 24, §24.01 of the Agreement, is that discipline must be supported by just cause. The Section provides in pertinent part:

**ARTICLE 24 - DISCIPLINE**

**§24.01 - Standard**

Disciplinary action shall not he imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action.

The just-cause principle is given critical definition by subsequent provisions Article 24. Most noteworthy are the following statements in §§ 24.02 and 24.05:

**§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 verbal reprimand(s) (with appropriate notation in employee's file);
B. One or more written reprimand(s);
C. One or more suspension(s);
D. 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.

There is a remarkable aspect to the written grievance which adds dimension and a subordinate issue to the question of just cause. While claiming that the removal lacked just cause and demanding reinstatement with compensation for losses, the grievance suggested a compromise. It indicated that Management should have placed Grievant in alcohol recovery rather than firing him. It stated:

“Due to circumstances beyond [Grievant's] immediate control, he was unable to call in for three consecutive days. Beginning March 28, he was incarcerated for fifteen days. Due to his past record, the Union feels that Grievant should have been given a "last chance” opportunity to remain working under the condition he seek assistance from the Employee Assistance Program. Due to exterior circumstances leading up to this situation, the position taken by Management shows an uncaring attitude towards its employees.”

According to testimony, Grievant antlered an alcoholism program a day or two before his scheduled court date. He committed to a period of hospitalization and follow-up therapy. Subsequently, he abandoned the plan, primarily because he lost his hospitalization and disability benefits when he was removed.

The Union's assertion that the Employee should have been given a chance to achieve rehabilitation calls for examination of Article 9 and Article 24, §24.08. Article 9 is titled, "EMPLOYEE ASSISTANCE PROGRAM." The provisions germane to this controversy are:

“A. The Employer and the Union recognize the value of counseling and assistance programs to those employees who have personal problems which interfere with their job duties and responsibilities. The Union and the Employer, therefore, agree to continue the existing E.A.P. and to work jointly to promote the program.

. . .

D. Employee participation

. . .

3. The Employer or its representative shall not direct an employee to participate in the E.A.P. Such participation shall be strictly voluntary."

Article 24 sets forth the contractual disciplinary policies, and §24.08 ties EAP's to the principles of just cause:

**24.08 - 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.

The Union's contention that Grievant was entitled to a chance for recovery does not actually raise a separate issue. But it does add an area for consideration in deciding the single, fundamental issue: Was the removal of Grievant supported by just cause?

**THE EMPLOYER'S POSITION**

ODOT has a long-standing rule which was published and distributed to all employees. It calls for summary discharge of anyone absent without leave for three consecutive days. In the Agency's judgment, the rule is fair and reasonable on its face, and has been applied fairly, reasonably, and without discrimination for as long as it has existed. When Grievant absented himself, not for days but for consecutive weeks, he brought the prescribed penalty upon himself.

According to the Employer, the removal met pivotal tests of just cause. Admittedly it was not corrective but, as the State's Advocate argued:

". . . the employer reasonably determined that no other remedy was appropriate given the serious nature of Grievant's actions, the mission and organization of the Department, as well as the deterrent effect of the discipline."

The Agency insists that its action was not punitive or vindictive; it was taken to serve a "legitimate interest of the Employer." Moreover, it was justified. The Employer's Representative made this argument in a most thoughtful and thought provoking way:

"Discipline must be premised upon just cause. This standard requires the Arbitrator to invoke his or her own sense of fairness and justice. However, the Arbitrator must read the facts of the case through the lens of the contractual language to determine the application of fairness and justice. It is not enough that the Arbitrator determine that a fact pattern might give rise to a subjective conclusion of unfairness; the Arbitrator must first ask whether the parties have determined [a rule] to be just as evidenced by their free and reasoned act at the bargaining table."

The Employer finds no plausibility in Grievant's attempt to save his job through EAP rehabilitation. It calls attention to the fact that he had no thoughts of alcohol recovery until just before he was to appear in court for sentencing. In his closing remarks, the Agency's Representative asked the Arbitrator to evaluate Grievant's conversion with judgment and a measure of cynicism. "Jail house conversions" of this kind, according to the Employer, are not unusual. More often than not, they are last-ditch attempts to avoid disciplinary penalties, with little (if any) true regard for the underlying problem. Sometimes there is no underlying problem; an employee will enter an alcohol rehabilitation program even if s/he suffers no alcoholism from which to be rehabilitated. Everyone familiar with this area of labor-management relations knows that a confessed, repentant alcoholic seeking recovery has a better chance of escaping discharge (the first time) than an employee with no substance dependencies. The inclination towards leniency for alcoholics is bound to be abused by non-alcoholics looking for "last chances." The Employer regards Grievant's expressed desire for

recovery with unbridled skepticism, terming it, "disingenuous and . . . motivated by his fear of the consequences of his actions rather than any penitent desire for reform."

The Employer urges the Arbitrator to defer to the Agency's judgment and realize that the removal was factually and contractually justified. It requests an award denying the grievance.

**THE UNION'S POSITION**

The Union points out that the rule relied on by the Agency was fashioned to deal with job abandonment. When an employee is absent for several days without a call-in or explanation, the Employer may well be justified in the presumption that s/he has no intention of returning. Such an employee can and should be removed from the payroll. In a sense, his/her act is one of desertion and can be viewed as voluntarily canceling the employment relationship. But Grievant's situation did not fall in this category, and Supervision had no cause for believing otherwise. He went to court on March 28 reasonably expecting to pay a fine and go to work. He had no cause for suspecting anything else, and certainly no reason to imagine that a malevolent judge would send him to jail for sixty days. There was absolutely nothing voluntary in his absence and clearly no manifest intent to abandon his job. The Employer knew from the start that he meant to return to work as soon as he was able.

The Union contends that, under these circumstances, Grievant's removal was the antithesis of just cause. The Employer casually applied its rule without a scintilla of consideration for the Employee's individual mitigating circumstances. The penalty reflected indifference to the sober reflection demanded by just-cause principles. It was purely mechanical. It also demonstrated Supervision's cavalier disregard for Grievant's record. The only other discipline this Employee ever received was a verbal reprimand for failure to meet his schedule -- nothing else.

The most disgraceful aspect of the removal, according to the Union, is that it rescinded Grievant's chance for alcohol rehabilitation. Here was a twenty-three year old man with a terrible alcohol problem. His substance dependency was totally responsible for his prison time and his discharge. He wanted to reclaim his self control to save his job and his life. The Employer took the opportunity from him, refusing to even consider his willingness to enter an EAP. It simply fired him, claiming that the discharge was somehow necessary to preserve ODOT's "mission." If the Agency's action is permitted to stand, according to the Union, the State's commitment to employee assistance will become an empty illusion.

**OPINION**

During the hearing, the parties were sidetracked on the question of whether or not Grievant's prolonged time away from work caused more than minor inconvenience for the Sydney Garage. The Union insisted that it did not; that the Employee's work was seasonal and March was a time when there was not much for him to do. The Employer presented rebuttal testimony that County help had to be called in "due partly to [Grievant's] absence." Moreover, it pointed out that Grievant had low scores in his probation evaluations and was not a particularly gifted or valuable employee.

In the Arbitrator's judgment, none of this had much relevancy. The issue was one of just cause for removal. While the impact of an employee's misconduct on his/her employer might occasionally be considered in a just-cause evaluation, this is clearly not that kind of case. Neither the Union's arguments in this regard nor the Agency's counterarguments are persuasive and, therefore, neither will be considered.

When the evidence in this case is reduced to its germane elements, a fact emerges with absolute transparency: the Employee was fired solely because his prison sentence forced him to violate a rule. The decision to execute the penalty gave no consideration to the length and quality of Grievant's work record or any of the potentially mitigating factors of the case. Despite the Employer's arguments to the contrary, the action was automatic.

The rule Grievant violated was part of an ODOT Directive -- a unilateral expression of how the Employer intended to carry out its disciplinary authority on and after June 1, 1987. Rule 16b stated that anyone absent three or more consecutive days without authorization would be discharged. The Employer contends that the

rule was reasonable on its face; and the Arbitrator agrees. While the Employer did not refer to the origin of the rule, the Arbitrator notes that it is a carryover from Civil Service legislation which governed the State's labor-management relations prior to enactment of *Ohio Revised* Code Chapter 4117 -- the Public Employee Collective Bargaining Law. Once these parties adopted their Collective Bargaining Agreement, most elements of Civil Service law became irrelevant to them; but vestiges of pre-Agreement regulations and concepts continued to survive in both the Agreement and Agency employment directives. Thus, ODOT's Rule 16b is a copy of *Ohio Administrative Code* §123:1-31-03. But it is demonstrably less moderate and lacks the Code's acknowledgment that discharge is not always the appropriate penalty for three days' unauthorized absence. Section 123:1-31-03 provides:

"(A) Any employee in the classified service who absents himself from duty habitually or for three or more successive duty days, without leave and without notice to his superior officer of the reasons for such absence may be subject to removal for neglect of duty under provisions of Section 124.34, Ohio Revised Code.
(B) This rule does not require an appointing authority to initiate removal action if he determines it unwarranted nor does it preclude removal action for a shorter period of absence if the absence is of sufficient seriousness. The determination as to what constitutes a serious situation shall be made by the appointing authority of the agency concerned based upon evidence received from supervising subordinates or personal observations or knowledge."

The demands of just cause are almost never met when discharge is based entirely on a rule violation. Management must be cautious in inflicting the penalty. It must perform a judicious study of the employee, his/her record, and the distinctive circumstances attending the misconduct. It must ask itself whether or not elemental justice and the true needs of the Employer world be better served by corrective rather than terminal discipline. It must bear in mind that just-cause standards circumscribe Management Rights; they do not expand them. Most importantly, 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.
The Agency took a risk by acting against Grievant's misconduct reflexively, without consideration of whether lesser discipline (or no discipline) would have sufficed. But it had a basis for confidence that the removal was likely to escape arbitral intrusion. It placed signal reliance on an earlier decision of Panel Arbitrator Rhonda R. Rivera in a dispute between the Union and the Ohio Department of Mental Health.[2] The dispute involved the removal of a Psychiatric Aide employed at the Dayton Mental Health. Center. The employee was hired in December, 1981. and discharged six years later. In the interim, she had so many incidents of warnings and suspensions for neglect of duty, absenteeism, and tardiness, that it took Arbitrator Rivera fully three typewritten pages to recount them. Finally, when the employee failed to report for duty on January 12, 1987, the Agency moved for dismissal.
In the arbitration hearing, the Union pointed out that the penalty could be modified by an arbitral decision. Arbitrator Rivera agreed, but stated:

"The power of the Arbitrator to modify an "unjust" penalty is not, however, the issue here. The issue here is one of clemency."[3]

Another passage in the decision turned out to be the root of ODOT's position in this controversy. In assessing the connection between employment rules and just cause, Arbitrator Rivera commented:

"If a penalty is "too severe", the justness of the decision at hand fails. However, where management rules provided under the contract are reasonable and fair and where the disciplined behavior falls squarely within those rules, the Arbitrator's discretion is limited solely to her sense of justice being egregiously offended."[4]

Viewing this statement out of context, it seems to imply that unilateral agency rules define just cause, and an arbitrator is compelled to apply the attending penalties (which are also unilaterally prescribed) unless

his/her sense of justice is “egregiously offended." The Arbitrator does not believe the excerpt was meant to be read out of context or exalt Employer rules over universally observed principles of just cause; but if it was, this Arbitrator takes vigorous exception. "Just cause" is a contractual term. By agreeing to it, the Employer accepted restrictions on Management Rights and undertook a host of disciplinary obligations. Agency rules, on the other hand, are commitments of the Employer to exercise its disciplinary discretion in a certain manner. They give fair warning to employees of what types of behavior are deemed unacceptable and what penalties are likely to be imposed for misconduct. Agency rules may be entitled to a measure of arbitral deference, but they never take the place of just cause. Furthermore, a rule may be fair on its face but unjust in a particular application, especially when the Employer applies it without attention to mitigating factors. When that happens, it may be that "the disciplined behavior falls squarely within [the] rules.” But if the discipline falls outside the precepts of just cause, an arbitrator not only can, but must intervene.

Whatever rationale she used, Arbitrator Rivera decided the case on elements of just cause. She noted that the grievant had been disciplined repeatedly, referred to EAP at least twice, and appeared to be incorrigible. It should be observed that none of these factors apply to the Grievant in this dispute. The concluding paragraph of the Rivera decision placed just cause in a more appropriate perspective. It stated:

“Clearly, the Grievant has been a person burdened by circumstances often beyond her control. However, the employer has attempted in good faith to help the employee. The real question for the employer was how to balance a human concern for the individual employee as against the needs of the institution and its patients. This latter question is not a question for the Arbitrator. Once the Arbitrator finds just cause as she has here, she must leave the issue of "balance" to management of the institution. Given the nature of the institution, the nature of Grievant’s job, and the potential dangers, the Arbitrator cannot find the decision either arbitrary, whimsical, or capricious nor an abuse of power.”[5]

The discipline leveled against Grievant in this dispute was shockingly harsh unless his misconduct severely impaired the Agency’s objectives. The crux of the Employer's position is that the discharge was necessary to preserve the mission of the Agency. There was no other viable choice. It is asserted that ODOT would have suffered unwarranted harm if Grievant had been reprimanded, suspended, or permitted to work out his alcohol problems through an EAP. At first glance, the Employer's allegation seems an exaggeration. How likely is it that a three-week absence of a painter in Sydney, Ohio could have disastrous impact on the operations of the Ohio Department of Transportation or even the Sydney Garage? Admittedly, the Arbitrator was dubious, but he tried to keep his mind open for the Agency's proof. There had to be proof to support the contention. Article 24, §24.01 specifically placed the burden of proof on the Employer. Except for the evidence that County employees were brought into the Sydney Garage to work, and the admission that the Employee’s absence was not the only reason, nothing was offered to demonstrate the Agency's need to remove Grievant.

Why then was Grievant discharged? Maybe because Supervision incorrectly presumed it had authority to follow Department rules without regard for just cause. Another reason might have been to set an example for other employees. The Employer hinted at this possibility in its closing statement:

“. . . the employer reasonably determined the serious nature of the Grievant's actions, the mission and organization of the Department, as well as the deterrent effect of the discipline.”

Employees covered by just cause may be disciplined for their own misconduct, but may not be singled out and punished with special severity as an example for others.

In sum, it is the finding of the Arbitrator that Grievant's removal was not for just cause.

**REMEDY**

Upon reviewing the decision, the Arbitrator discovers that his concentration on the Employer's disciplinary errors tends to ignore the seriousness of Grievant's misconduct and implies that the Employee was faultless.

The implication was unintentional and needs to be corrected. Grievant was by no means an innocent victim. He not only violated his Employer's attendance policies, he did so willfully. He was hauled into court on a drunken driving charge for the second time in less than a year. He managed somehow to plead guilty to a reduced charge and expected a mild sentence. He had no legitimate right to that expectation. Undoubtedly the judge knew of the reduction and felt justified in applying as harsh a sentence as the law allowed Any rational adult standing before that judge might well have anticipated the result.

More to the point, the root cause of Grievant's absence was not the unreasonable sentence or the fact that he was powerless to report to work while incarcerated. It wasn't even his alcoholism. The fact is that he took his motorcycle onto the highway when he knew he was drunk. He voluntarily risked his life, the lives of others, and his job. He cavalierly made that choice and opened himself to a reasonable penalty. His Employer was not bound to excuse or forgive the long absence that came about as the consequence of his willful act.

Grievant invited discipline, and the Arbitrator finds no reason to mitigate it below the maximum possible under the guidelines of just cause. The penalty will be a sixty-working-day suspension.

The Arbitrator has contemplated the possibility of following the Union's suggestion (in the written grievance) and postponing Grievant's reinstatement until he successfully finishes an EAP. He has decided not to interfere with the parties' free will to that extent. He has been influenced in part by Article 9, §D3 of the Agreement which states that the EAP referral is to be entirely at the employee’s volition; that the Employer may not direct anyone into a program. If Grievant desires leave to pursue alcohol recovery, he knows how to make application for it, and the Agency undoubtedly will approve his application in accordance with the Agreement. But that is up to him and the Employer. If he needs it and does not ask for it, this reinstatement is likely to accomplish no more than postpone his inevitable (and final) discharge.

## AWARD

The grievance is sustained in part and denied in part. The removal at issue is hereby reduced to a disciplinary suspension. The suspension shall begin on the day Grievant was removed and end sixty working days thereafter. The Employer is directed to correct its personnel files to reflect the reduced penalty.

The Employer is further directed to compensate Grievant at straight-time rates for all days he would have been scheduled to work if a sixty-day suspension rather than a removal had been imposed. It shall also restore his full, unbroken seniority and compensate him for all other actual demonstrated losses stemming from the fact that a removal rather than a sixty-day suspension was imposed.

Decision issued at Lorain County, Ohio November 14, 1990.

Jonathan Dworkin, Arbitrator

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[1] The sentence was later reduced. Grievant actually served fifteen days and then returned to work. Meanwhile, the discipline proposal proceeded through the State system.

[2] Case No. G-87-0486; Decision issued November 10, 1987.

[3] Id., at 8.

[4] Ibid.

[5] Id, 9.