**ARBITRATION DECISION NO.:**
413

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

**EMPLOYER:**
Department of Rehabilitation
and Correction
Madison Correctional Institute

**DATE OF ARBITRATION:**
December 16, 1991

**DATE OF DECISION:**
January 23, 1992

**GRIEVANT:**
John Hargrave

**OCB GRIEVANCE NO.:**
27-15-(91-07-05)-0170-01-03

**ARBITRATOR:**
Rhonda Rivera

**FOR THE UNION:**
Steve Wiles
John Feldmeir

**FOR THE EMPLOYER:**
Thomas E. Durkee
Lou Kitchen

**KEY WORDS:**
Removal
Failure to Follow Call-In
Procedures
Alcoholism
Job Abandonment
EAP

**ARTICLES:**
Article 24-Discipline
§24.01-Standard
§24.02-Progressive Discipline
§24.05-Imposition of Discipline
§24.08-EAP

**FACTS:**

The grievant, a Corrections Officer at Madison Correctional Institute for three years, was discharged for job abandonment. The grievant had a history of bad attendance primarily due to an alcohol problem which the employer was aware of. At one point the employer visited the grievant's home after he failed to report to work and found him to be exhibiting symptoms of alcoholism. The grievant also had two charges of Driving Under the Influence which caused him to miss work. The grievant was only issued a verbal reprimand during this time. On May 18, 19, 20, 21, 1991 the grievant did not report to work. He did not show up to the pre-disciplinary hearing and was eventually discharged.

**EMPLOYER'S POSITION:**

The employer argued that it had good reason to believe the grievant had abandoned his job. The employer claimed that the reason the grievant did not receive more discipline for his behavior was that the employer was trying to rehabilitate him. Further, the employer argued that the grievant was being removed for job abandonment and not for failing to call-in or report to work. The employer stated that job abandonment is a removable offense for the first instance.

**UNION'S POSITION:**

The union acknowledges that the Warden and the Labor Relations Officer have tried informally to help the grievant. However, over the three year period, the grievant only received one discipline - a verbal reprimand. Thus, discipline has not been either corrective or progressive. The union cites the Warden's testimony in which he stated that had the grievant shown up at the pre-disciplinary meeting, he would have probably received only a 10 day suspension. The grievant now understands that his behavior was wrong and is under treatment for his alcohol problem. He asks for another chance.

**ARBITRATOR'S OPINION:**

The grievant's behavior clearly met the standards for job abandonment. Under most circumstances, removal would have been both commensurate and just. However, the imposition of a removal after a verbal reprimand was not commensurate and did not put the grievant on notice of the consequences of his behavior. The Contract mandates progressive discipline as well as providing for EAP. Those mandates should, under the Contract, go hand in hand.

**AWARD:**

The grievance is sustained in part. The grievant is to be reinstated subject to a last chance agreement. The time between his removal and the date of the award is to be considered a disciplinary suspension.

**TEXT OF THE OPINION:**

**In the Matter of the**
**Arbitration Between**

**OCSEA, Local 11**
**AFSCME, AFL-CIO**
Union

and

**State of Ohio**
Employer.

**Grievance No.:**
27-15-(91-07-05)-170-01-03
**Grievant:**
John Hargrave

**Hearing Date:**
December 16, 1991
**Award Date:**
January 23, 1992

**Arbitrator:**
R. Rivera

**For the Employer:**
Thomas E. Durkee
Lou Kitchen

**For the Union:**
Steve Wiles
John Feldmeir

Present at the Hearing in addition to the Grievant and Advocates were Rex Zent, Warden MadCI (witness), and Phil Lomax, Labor Relations Officer (witness).

**Preliminary Matters**

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

**Joint Exhibits**

1. Contract
2. Disciplinary Trail
3. Grievance Trail
4. Standards of Employee Conduct and Employee Receipt
5. Verbal reprimand of June 30, 1990
6. Letter from Positive Perspectives dated December 5, 1991
7. Performance Evaluations
8. Release from Treatment Center

**Employer's Exhibits**

1. Sick Leave Balance Notifications dated July 17, 1990 and April 1, 1991
2. Verification of Admission to Greene Hospital dated August 17, 1990

**Union Exhibit**

1. Call-Off Slips for May 27, May 28, May 31, June 4, and June 7

**Jointly Stipulated Facts**

1. Grievant was hired February 29, 1988 at Madison Correctional Institution as a Correction Officer.

2. Grievant's performance evaluations were rated as average.

3. Grievant was removed on July 1, 1991.

4. Grievant received a prior verbal reprimand for failing to notify the institution of his absence.

5. The call in policy at MadCI is 90 minutes prior to the shift.
6 Grievant was scheduled to work May 18-21, 1991 and neither reported for duty, nor called off as absent.

**Issue**

Was the removal of Grievant, on July 1, 1991, for just cause?
If not, what should the remedy be?

**Contract Provisions**

§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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

§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.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.
Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

§24.05 - Imposition of Discipline
The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer

decides not to make a decision on the discipline until after disposition of the criminal charges.

The employer and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. The OCSEA Chapter President shall designate the Union representative who shall receive such notice who is assigned to selected work areas under the jurisdiction of the Chapter. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

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

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

§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.

**Facts**

The Grievant is a Corrections Officer at Madison Correction Institute (MadCI). He was hired on February 29, 1988. On March 18, 1988, he completed his training and began his employment at MadCI. On April 21, 1988, he received his first probationary evaluation (Joint Exhibit 7). This evaluation showed him to be "adequate." According to the Testimony of Warden Zent, the Grievant was tardy by 30 minutes on May 26, 1988 and received corrective counseling. On June 12, 1988, the Grievant received his second probationary evaluation. His ratings had improved to "high average" (Joint Exhibit 7). On June 22, 1988, the Grievant was tardy and again received corrective counseling. Shortly thereafter, the Warden received a call from an attorney who was seeking help for the Grievant to arrange incarceration for a DUI that would not interfere with the Grievant's work. With this call, the Warden became aware of Grievant's drinking problem. On April 8, 1990, the Grievant was given a Verbal Reprimand for failure to call-in and notify the Institution of an absence. This discipline was issued June 30, 1990 (Joint Exhibit 5). On April 2, 1990, the Grievant was given his annual evaluation and in that evaluation he was rated as meeting all expectations (Joint Exhibit 7). In early June of 1990, the Sheriff's Office called the Warden to ascertain if the Grievant was authorized to carry a weapon. The Warden informed the Sheriff that the Grievant was not so authorized; the Sheriff told the Warden that the Grievant had been arrested again for a DUI as well as for carrying a concealed weapon. On July 17, 1990, the Grievant was notified in writing that he had used 80 hours of sick leave pursuant to Contract (§29.04 III(A)). In mid-august 1990, the Grievant called in and said he was not coming to work. Labor Relations Officer Lomax together with Officer Pagels visited the home of the Grievant. LRO Lomax testified that he made the visit because of the Grievant's extremely bad attendance record and because the Grievant's call-ins were inconsistent and late. LRO Lomax and Pagels found the Grievant in bed at 11:00 a.m. apparently because of an alcohol problem. Lomax urged the Grievant to seek professional help. The next day the Grievant checked himself into Greene Memorial Hospital's alcohol program (Employer's Exhibit 2). LRO Lomax arranged the Grievant's leave status so that the Grievant was in a "pay status" and thus was eligible to have his insurance cover the 7 day in-patient care program.

The Warden testified that on December 30, 1990, the Grievant's mother "called-in" for him to report that he had again been arrested on DUI. On March 3, 1991, the Grievant failed to call-in. The Warden testified that this call-in failure was the 11th failure in 12 months. On March 19, 1991, the Grievant was given his Annual Review. He "met" expectations in all categories except "Adhering to Procedures" -- where the rater

noted his attendance problems. On March 19, 1991, the Grievant signed a IOC from Sgt. Dunsmore which indicated that in the last quarter he had improved his attendance; however, he agreed that he needed to continue the improvement in this area (Joint Exhibit 7). On April 1, 1991, Grievant was issued a Sick Leave Balance Notice (Employer's Exhibit 1) which stated that between December 1, 1990 through March 23, 1991 he had used 80 hours of new sick leave and other leave.

On May 18, 19, 20, 21, the Grievant failed to call-off and failed to report for work (See IOC dated May 21, 1991, Joint Exhibit 2). Officer Jones attempted to call the Grievant on May 18, 1991. A sleepy male voice answered but hung up when the Officer asked, "CO Hargrave?" The phone remained "busy" when further calls were placed (see Incident Report dated May 18, 1991, Joint Exhibit 2). On May 29, 1991, the Grievant was mailed a notice of a pre-disciplinary meeting scheduled for June 3, 1991. That notice read as follows:

"It is alleged you violated the Standard of Employee Conduct Rule #3-(B) -- being absent without proper authorization; 4(A) -- job abandonment three or more working days consecutive without proper notice, 4(C) -- failure to request an approved leave when in an unpaid status for more than five (5) consecutive days.

This allegation is supported by the following incident/facts: beginning on May 18, 1991 you have failed to report to work nor have you contacted the institution to report off. Your actions constitute violations of the Standards of Employee Conduct as cited above. A finding of guilt against you to these charges could result in a ten (10) day suspension up to and including removal." (emphasis added) (Joint Exhibit 2)

The Grievant received and signed for this Notice on June 1, 1991 (Employer's Exhibit 3). The pre-disciplinary meeting was held, but the Grievant failed to attend. Warden Zent testified that had the Grievant come to the pre-disciplinary conference and offered any mitigating circumstances and evidenced any intention to reform and improve, he (the Warden) would probably have only given the Grievant a 10 day suspension. However, the Warden said that the Grievant's failure to show up at the pre-disciplinary meeting after 5 days of AWOL without any call-ins clearly evidenced an intention to abandon his job. Hence, the Warden concluded that removal under §4(A) Job Abandonment was commensurate and with just cause.

The Union introduced evidence that on May 27, May 28, May 31, June 4, and June 7, the Grievant called off for reasons focusing on diabetes. The call off slip for June 7, 1991 indicates that Grievant was admitted to Greene Memorial Hospital. Joint Exhibit 6 is a letter from the Grievant's counselor which details much of Grievant's situation during this period. The social worker states that, in addition to his alcohol problems, the Grievant was diagnosed as a diabetic. According to the social worker, the Grievant was in "denial" about his diabetes and alcoholism until June 1, 1991. He then attended, after his second in-patient stay at Greene, a 30 day out-patient alcohol program. The social worker said in her letter that by August 30, 1991, the Grievant was doing well -- sober, attending AA regularly, and taking his insulin properly. The social worker urged (December 5, 1991) that the Employer to give the Grievant a second chance (Joint Exhibit 6). Joint Exhibit 8 is a discharge summary from Greene Memorial Hospital dated June 28, 1991 which supports the facts of the Grievant's alcoholism and diabetes problems.

After Grievant's failure to show for the June 3, 1991 pre-disciplinary meeting, he was removed effective July 1, 1991. The stated reasons were as follows:

"Beginning on May 18, 1991 Grievant has been absent without leave on four (4) consecutive days, May 18, 19, 20 and 21. He is also in a non-paid status for the rest of the month. His call-in's have reflected various illnesses however, it is our opinion that Grievant has constructively abandoned his job. During the month of May, Grievant should have worked twenty days (20), he worked nine (9) or 48% of the time he should have worked.

Rules infractions:
3-(B)- Being absent without proper
authorization
4-(A)- Job abandonment
4-(C)- Failure to request an

approved leave when in an unpaid status for more than five (5) consecutive days.

A Step III was held August 6, 1991. The Grievant did attend. The removal was upheld as with just cause (Joint Exhibit 3). On August 30, 1991, Arbitration was requested (Joint Exhibit 3).

At the Arbitration Hearing, in addition to the facts adduced as previously described, a number of other salient facts were adduced. The Warden was asked why, during this long period of time when the Grievant was apparently often late, absent, or failed to call-off properly, only one discipline, (the verbal reprimand on June 30, 1990) was issued. The Warden said that "I was probably negligent." Both the Warden and Mr. Lomax, the Labor Relations Officer, testified extensively to their attempts to help this Grievant informally.

The Grievant testified. He testified as to a severe alcohol problem compounded by diabetes. He admitted receiving notice of the pre-disciplinary meeting, but he claimed he had "called off" that day. He also stated that he believed he would only receive a ten (10) suspension not removal.

The Grievant testified that as of the Arbitration Hearing date that he had been sober 6 months, that he attended AA 5 or 6 meetings a week, and that he was managing his diabetes, in particular, following the prescribed diet and taking his insulin.

**Employer's Position**

The Employer had good reason to believe that the Grievant had abandoned his job. The 5 day absence with no notice coupled with his failure to show at the pre-disciplinary hearing was sufficient to show job abandonment. The Grievant now claims he called off on June 3, 1991, the day of the pre-disciplinary meeting. That statement is supported by no evidence. The Union introduced call-off slips for other days but no call off slip for June 3. The Employer admits that no discipline was issued between the verbal reprimand and the removal. Good reason exists for this seeming failure. First, all the other problems were with late call off, tardiness, etc. This situation was complete job abandonment. Secondly, the Employer, through the Labor Relations Officer and others, was during this whole period seeking informally to rehabilitate this employee. The Employer should not be punished for its leniency. The Employer has spent nearly 3 years with a problem employee and has gone the "second" mile more than once. Although painful, removal is commensurate and just.

**Union's Position**

The Union acknowledges that the Warden and the LRO have tried informally to help the Grievant. However, over the 3 year period, the Grievant only received 1 discipline -- a verbal reprimand in June of 1990. Thus, discipline has not been either corrective or progressive. The Warden admits that had the Grievant shown up at the pre-disciplinary meeting, he would have received, probably, only a 10 day suspension. The Grievant understands now that his behavior was wrong. He is now on the road to recovery and deserves another chance.

**Discussion**

The Grievant's behavior clearly met the standards laid down for job abandonment. Moreover, his failure to show for the pre-disciplinary meeting lent clear credence to the job abandonment scenario. Under most circumstances, removal would have been both commensurate and just.

However, Grievant's failure to appear for work and failure to call-off was the culmination not of one period but of nearly a three year history of "absence-related" job problems. Yet, in the prior years, the Grievant had received only one minor discipline for these infractions: a verbal reprimand nearly 1 year earlier. The Warden testified to numerous work rule violations during the one year between the verbal reprimand and this discipline. During this period no other discipline was imposed.

The Grievant said he only expected a 10 day discipline. That expectation was not unreasonable given the words of the pre-disciplinary notice (Joint Exhibit 3) and his own experience. The purpose of progressive, corrective discipline is to put employees clearly on notice of their shortcomings and to notify them clearly of the consequences. In this case, Grievant was not disciplined progressively; hence, he was not "corrected" nor put on notice of the consequences. That failure to apply corrective discipline and then to move precipitously to removal violated the contract (§§ 24.01, 24.02 and 24.05).

The Employer asks that it not be penalized for its "leniency." The Arbitrator wishes to make clear that the Employer is to be commended for its desire to work with employees to solve their problems. However, progressive discipline coupled with responsible and responsive Employer help can also rehabilitate problem employees. The Contract mandates progressive discipline as well as providing for EAP. Those mandates should, under the Contract, go hand-in-hand.

The Employee was entitled to clear cut notice of the serious nature of his behavior. In this case, he did not receive such notice.

On the other side, the employee received lots of informal notice from his Employer; most of which he ignored. The Arbitrator did not believe the employee's statement that he called in on June 3, 1991. Because of the Employer's failure to impose progressive discipline in this case, the Arbitrator will sustain the Grievance in part. However, this award constitutes clear cut notice to the Grievant and places him in a "last chance situation."

**Award**

Grievance is sustained in part. Grievant is to be reinstated as of the date of this award subject to a last chance agreement. The time between his removal and the date of this Award is to be considered a disciplinary suspension. The Arbitrator retains jurisdiction solely to monitor the last chance agreement. The agreement shall be presented to the Arbitrator no later than 30 days after the date of the Award.

Date: January 23, 1992
RHONDA R. RIVERA, Arbitrator