ARBITRATION DECISION NO.:
456

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

EMPLOYER:
Department of Transportation

DATE OF ARBITRATION:
June 3, 1992

DATE OF DECISION:
July 6, 1992

GRIEVANT:
Eugene F. McGlinchy

OCB GRIEVANCE NO.:
31-03-(92-01-06)-0002-01-06

ARBITRATOR:
Nels E. Nelson

FOR THE UNION:
Robert L. Goheen

FOR THE EMPLOYER:
Gil Sellers

KEY WORDS:
Removal
AWOL
Removal Due to Short Term
    Jail Sentence Overturned
Mitigation

ARTICLES:
Article 9 - Employee
Assistance Program
Article 24 - Discipline
    §24.01-Standard
    §24.02-Progressive
Discipline
    §24.03-Supervisory
Intimidation
    §24.04-Pre-Discipline
    §24.08-Employee
Assistance Program

FACTS:

The grievant was a highway maintenance worker 1 for the Department of Transportation. The grievant had an attendance problem and had previously received discipline in the form of three written reprimands and a one-day suspension. On Monday, November 4, 1991, the grievant's father stopped at the grievant's place of work and told his supervisor that the grievant would not be at work because he was in jail, and that he would probably be gone for up to a week. The grievant was released from jail sometime after Friday, November 8, and returned to work on Tuesday, November 12, the day after the November 11 holiday. On November 15, the grievant received a pre-disciplinary meeting notice. At that meeting the grievant was informed he was being terminated effective immediately.

EMPLOYER'S POSITION:

The Employer asserted that it had just cause to remove the grievant. The grievant was absent for five consecutive days without calling off. The State acknowledged that the grievant's father notified the grievant's supervisor, but refused to accept calling off by family members except in extenuating circumstances. The Employer stated that the grievant's conduct violated Directive A-601, Item 24, unauthorized absences of three or more consecutive days, which specifies removal as the penalty. The grievant's supervisor testified that it is State policy not to grant authorized absences to an employee who is in jail. The grievant did not have enough personal or vacation leave to cover the week.

The State argued that it used progressive discipline which was demonstrated by the grievant's disciplinary record. The State also challenged the form submitted by the Union indicating that the grievant was enrolled in EAP. The form was signed only when discipline was pending, and the State asserted that this was done only to avoid discipline.

UNION'S POSITION:

The Union asserted that the Employer lacked just cause to remove the grievant. The Union stated that the grievant was in jail because of an administrative error. The grievant's father testified that the second offense was supposed to have been addressed at the pre-trial hearing for the first offense. The grievant made an honest effort to call off in a proper fashion, and his father telephoned and visited the grievant's place of employment to explain the situation to his supervisor. The Union stated that other Union members had their wives call off for them without any problems. The Union acknowledged that the grievant had exhausted his leave time, but that this was because of injuries on the job, and further that his leave time was about to be restored through worker's compensation.

The Union asserted that the grievant sought help and enrolled in EAP before disciplinary action, not in an effort to reduce or avoid disciplinary action. The grievant signed the EAP form on November 12, and the state's pre-disciplinary notice was dated November 13 and was not served on the grievant until November 15.

The Union cited the decision of Arbitrator Hyman Cohen in State of Ohio, Department of Transportation and OCSEA, Local 11, AFSCME, AFL-CIO, Case no. 31-06-(89-04-13)-0006, in which an employee who was in jail for ten days was removed and then was reinstated by the arbitrator. The arbitrator stated that the Agreement governed rather than the department's rules and that the State failed to show that the grievant's absence caused a hardship. He cited Ralphs-Pugh Co., Inc. 76 LA 6 (McKay, 1982), which indicated that mitigating factors should be considered when an employee is incarcerated, such as length of service, dependability, length of incarceration, prior disciplinary record, and difficulty of temporarily replacing the employee. The Union also cited Arbitrator Rhonda Rivera in OCSEA, Local 11, AFSCME, AFL-CIO and State of Ohio, Case no. 27-15-(91-07-05)-170-01-03. The arbitrator reinstated a grievant who had been jailed for five days without reporting off, subject to a last chance agreement.

ARBITRATOR'S OPINION:

The State did not have just cause to remove the grievant. The approach in recent years has been to rehabilitate rather than terminate employees who experience job difficulties because of alcohol or drug problems. This is reflected in Articles 9 and 24 of the Agreement. When the grievant was jailed, it appeared

that he finally recognized that he had a problem. He contacted the Department of Mental Health about EAP upon his release, and he presented the EAP form at his Step III hearing. The record showed that he did not enroll as a result of pending discipline but signed the form three days before he was notified of such proceedings.

The employee's service was satisfactory except for attendance problems, which is not unusual for a chemically dependent employee. He had five years seniority and, as such, was entitled to more consideration than a new employee. In addition, the State did not demonstrate substantial harm due to the grievant's absence. The employee did commit a serious breach of rules, and it is only his recognition of his substance abuse problem and seeking help that saves him from removal. However, because the grievant must bear the responsibility for his poor attendance and two incarcerations, he is to be reinstated without back pay or benefits. To do otherwise would send the grievant the wrong message about the seriousness of his situation.

AWARD:

The grievant is to be reinstated with full seniority but without back pay or benefits, conditioned upon continued treatment for substance abuse and emotional problems, and the maintenance of a satisfactory attendance record.

TEXT OF THE OPINION:

ARBITRATION DECISION

July 6, 1992

In the Matter of:

State of Ohio, Department of Transportation

and

Ohio Civil Service Employees Association, Local 11, AFSCME

Grievance No.:
31-03(01-06-92)02-01-06

Grievant:
Eugene F. McGlinchy

APPEARANCES

For the Union:
Robert L. Goheen, Staff Representative
Eugene F. McGlinchy, Grievant
Chris Jones, Steward
Lawrence McGlinchy, Witness

For the State:
Gil Sellers, District Labor Relations Officer
Robert Thornton, Labor Relations

Specialist, Office of Collective Bargaining
Richard Honoshofsky, Superintendent
Jim Dunchuck, District Assistant Administrator
Jim Bird, Assistant District Auditor

Arbitrator:
Nels E. Nelson

BACKGROUND

The grievant is Eugene McGlinchy. He was hired as a part-time employee by the Department of Transportation on August 11, 1986 and became a full-time employee on August 25, 1986. On November 7, 1988 the grievant was made a highway maintenance worker 1 and was assigned to Lorain County. The grievant's evaluations and the testimony of Richard Honoshofsky, the superintendent of the Lorain garage, indicate that the grievant was an average worker. Records also indicate that the grievant had an attendance problem. The parties stipulated that the problem led to written reprimands on July 7, 1989; January 10, 1990; and July 7, 1991 and a one-day suspension on October 18, 1991.

In September, 1991 there was a clear indication that the grievant had a serious problem. On September 9 the grievant's father, Lawrence McClinchy, telephoned Honoshofsky to tell him that his son had been arrested for cashing checks he had stolen from him and was in jail. He indicated to Honoshofsky that he thought that his son had a drug problem and was emotionally upset.

Shortly after this report, two meetings were held with the grievant. On September 10 Honoshofsky told the grievant that he needed to save leave time presumably to cover possible absences due to his legal problems. He also indicated to the grievant that the state had an employee assistance program and offered to give the grievant the telephone numbers. On September 12 Jim Dunchuck, the district assistant administrator; Gilbert Sellers, the district 3 labor relations officer; and Honoshofsky met with the grievant. According to the testimony of Dunchuck and Honoshofsky they talked to the grievant about his attendance and his leave balances. They stated that the grievant denied having any problems.

The events leading to the grievants removal began on Monday, November 4. Between 7:30 AM and 8:00 AM on that day the grievant's father stopped at the Lorain garage and told Honoshofsky that his son would not be at work because he was in jail. He testified that he told Honoshofsky that his son would probably be off up to a week. As it turned out the grievant was released from jail sometime after Friday, November 8 and returned to work on Tuesday, November 12 which was the day after the November 11 holiday.

On November 15 the grievant received a notice that the state was considering disciplinary action. It stated that he was absent for more than three days in violation of Directive A-601, Item 24 and that a pre-disciplinary meeting pursuant to Directive A-602 and Article 24, Section 24.04 of the collective bargaining agreement was scheduled for November 21. The meeting took place as scheduled and on January 3, 1992 the grievant was informed that he was being terminated effective that day.

The grievant filed a grievance the same day. It charges that the state violated Sections 24.01, 24.02, 24.03, and 24.08 of Article 24 of the collective bargaining agreement. The grievance asks that the grievant be restored to his job with full back pay, benefits, and overtime.

The level III grievance meeting was held on January 14. The state indicated that the grievant was absent for five days while in jail and had no leave balance to cover the time so he was properly terminated under Directive A-601, Item 24. It acknowledged that it was told at the pre-disciplinary meeting that the grievant was enrolled in an employee assistance program but maintained that he was never under an employee assistance program agreement with it. The union argued that while the grievant was in jail he was in the process of having sick leave restored through workers' compensation which would have covered his absence. It also maintained that the state failed to use progressive discipline and that the grievant was harassed by Honoshofsky. The union provided a form from the Ohio Department of Mental Health showing that the grievant was enrolled in the employee assistance program that was signed by the grievant on November 12, 1991.

The grievance was denied by the hearing officer on February 5 and the grievance was appealed to

arbitration on February 18. The Arbitrator was notified of his appointment on May 25 and the hearing was held on June 3. No post-hearing briefs were submitted and the record was closed at the end of the hearing.

ISSUE

The issue as agreed to by the parties is as follows:

"Did the Department of Transportation discharge Mr. McGlinchy for just cause in accordance with Article 24? If not, what shall the remedy be?"

RELEVANT CONTRACT PROVISIONS

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. 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.

24.03 - Supervisory Intimidation

An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee.

In those instances where an employee believes this section has been violated, he/she may file a grievance, including an anonymous grievance filed by and processed by the Union in which the employees name shall not be disclosed to the Employer representative allegedly violating this section, unless the Employer determines that the Employer representative is to be disciplined.

The Employer reserves the right to reassign or discipline employer representatives who violate this section.

Knowingly making a false statement alleging patient abuse when the statement is made with the purpose of incriminating another will subject the person making such an allegation to possible disciplinary action.

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.

STATE POSITION

The state argues that there is just cause for the grievant's removal. It points out that the grievant was absent for five consecutive days without reporting off. The state acknowledges that the grievant's father told Honoshofsky that the grievant was in jail but it asserts that it does not accept report off's from family members except in extenuating circumstances.

The state charges that the grievant's conduct violated Directive A-601, Item 24. It notes that this rule covers unauthorized absences of three or more consecutive days and specifies a penalty of removal. The state indicates that Directive A-601 was posted in the grievants work area.

The state maintains that the grievant had no way to cover the time he was in jail. It notes that Dunchuck testified that it is state policy not to grant authorized absences to an employee who is in jail. The state points out that Jim Bird, the assistant district auditor, testified that in the 26 pay periods of 1991 the grievant had worked only 5 80-hour weeks so that when he was jailed he had only 9.31 hours of vacation and 2.31 hours of personal leave. It indicates that Bird showed that there was no merit to the union's argument that the grievant had no leave to use because of harassment by Honoshofsky or that the grievant used his leave because of injuries.

The state claims that the grievant's conduct inhibited it from carrying out its mission. It points out that its mission is to plan, establish, operate, and maintain a safe, effective, and economical transportation system. The state notes that the grievant's garage is responsible for 550 lane-miles of highway. It emphasizes that when an employee is absent, it must juggle the crews which places a burden on other employees.

The state rejects the union's contention that it failed to use progressive discipline. It points out that the grievant received three written reprimands and a one-day suspension for unauthorized absences. The state stresses that Directive A-601, Section G states that the seriousness of the offense determines the appropriate penalty and Article 24, Section 24.02 of the collective bargaining agreement indicates that disciplinary action must be commensurate with the offense.

The state challenges the form submitted by the union indicating that the grievant was enrolled in an employee assistance program. It notes that the form was signed November 12 -- four days after the grievant was released from jail. The state asserts that the grievant did not try to get help until discipline was pending. It claims that the grievant enrolled in the program to avoid discipline.

The state maintains that the union's argument that the grievant was harassed by Honoshofsky has no merit. It claims that if he was harassing the grievant, he would not have requested authorized absences for the grievant to appear in court. The state asserts that Honoshofsky tried to work with the grievant. It points out that the alleged harassment was not mentioned at the September 12 meeting.

The state asks the Arbitrator to deny the grievance and uphold the grievant's removal.

UNION POSITION

The union argues that there is not just cause to discharge the grievant. It claims that the grievant was in jail because of an administrative error. The union notes that the grievant's father testified that the second offense was supposed to have been taken care of at the pre-trial hearing for the first offense.

The union contends that the grievant made an honest effort to report off in a proper fashion. It states that the grievant's father telephoned and later visited the garage to explain the situation to Honoshofsky. The union points out that Chris Jones, a union steward, testified that his wife has reported him off and that other wives have reported off for their husbands without any problems.

The union acknowledges that the grievant had exhausted his leave at the time he was put in jail. It contends, however, that he had used his leave because of injuries on the job and that it was about to be restored by workers' compensation. The union claims that one of the injuries was the result of impaired visibility on a sweeper because of a broken water pump.

The union charges that the grievant was harassed by Honoshofsky. It claims that he gave the grievant bad jobs, threatened to fire him, and cited him for being late when other employees were not cited. The union notes that Jones testified that the grievant complained to him about being harassed and that he advised the grievant to document the incidents. It points out that the grievant's father stated that his son frequently complained about harassment and that his son was so concerned about being disciplined for being late that he would not go to work if he felt that he might be late.

The union maintains that the grievant enrolled in an employee assistance program prior to the state taking disciplinary action. It points out that the grievant signed an employee assistance program form on November 12 while the department's pre-disciplinary notice is dated November 13 and was not served on the grievant until November 15. The union states that the grievant is currently receiving help for his emotional problems.

The union cited the decision of Arbitrator Hyman Cohen in State of Ohio, Department of Transportation and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, Case no. 31-06-890413-0006, Mark A. Landacre, grievant. In that case an employee, who was in jail for ten days, was removed but reinstated by Arbitrator Cohen. The union points out that Arbitrator Cohen indicated that the just cause provision of the collective bargaining agreement governed the penalty rather than the department's unilateral rules and that the state failed to show that the grievant's absence caused a hardship. It notes that he cited Ralphs-Pugh Co., Inc., 76 LA 6 (McKay, 1982) which indicates that the mitigating factors considered when an employee is incarcerated are length of service, dependability, length of incarceration, prior disciplinary record, and difficulty of temporarily replacing the employee.

The union also cited the decision of Arbitrator Rhonda Rivera in OCSEA, Local 11, AFSCME, AFL-CIO and State of Ohio, case no. 27-15-910705-170-01-03, John Hargrave, grievant. In that case the grievant was jailed for five days without reporting off. Arbitrator Rivera stated:

"...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. (page 12)."

She reinstated the grievant subject to a last chance agreement.

The union asks the Arbitrator to reinstate the grievant with back pay and benefits but states that it will rely upon the wisdom of the Arbitrator to modify the penalty.

ANALYSIS

The state argues that the grievant was properly removed pursuant to Directive A-601, Item 24. It states that the penalty for an employee with an unauthorized absence of three or more days is removal. It is undisputed that the grievant was off work five days while in jail; that he had no leave balances to cover the time; and that the state does not excuse employees who are in jail.

However, despite the above the Arbitrator does not believe that the removal meets the just cause standard of Article 24, Section 24.01 and cannot uphold the removal. It is widely recognized in labor arbitration that some employees experience difficulties in their jobs because of alcohol and/or drug problems. In recent years the generally accepted approach to such situations has been to attempt to rehabilitate such employees rather than to terminate them.

This approach is reflected in the collective bargaining agreement in the instant case. In Article 9 the parties agree to continue the existing employee assistance program and to provide training in the program for union stewards. Article 9 also assures confidentiality to those enrolled in the program and makes participation voluntary.

The rehabilitation of an employee with problems is also dealt with in Article 24, Section 24.08. It states:

"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 action."

In the instant case the state was aware of the grievant's problem. In September, 1991 the grievant's father told Honoshofsky that he believed that his son had a drug and/or emotional problems. Honoshofsky and other state officials met with the grievant to discuss his leave balances and to indicate to him that an employee assistance program was available. Unfortunately, as is frequently the case, the grievant denied having a problem.

When the grievant was jailed on November 4, 1991, it appears that he recognized his problem. Upon his release from jail he apparently contacted the Department of Mental Health about the employee assistance program. At the level III grievance hearing the grievant presented to the state a Department of Mental Health form, which he had signed on November 12, indicating his enrollment in the program.

A significant amount of the arbitration hearing was devoted to a discussion of when the grievant enrolled in the employee assistance program in relationship to his discipline. The state's position was that he enrolled only after he was facing discipline. However, the record appears to indicate that the grievant became involved on November 12 while he did not receive the notice of pending discipline until November 15.

The state also contended that the grievant did not properly report off. Honoshofsky testified that employees are expected to report off personally and that he does not accept calls from family members except in extenuating circumstances. However, the Arbitrator believes that the grievant's incarceration is an extenuating circumstance which would allow the grievant's father to report him off.

The decision to reinstate the grievant is supported by several other factors. First, it was agreed that the grievant was a satisfactory employee except for his attendance problem. Such a situation is not unusual for a chemically dependent employee. Second, although the grievant was not a long term employee, he did have 5 years seniority. Arbitrators generally hold that employees with significant service are entitled to more consideration than new employees. Third, had the state been able to demonstrate substantial harm because of the grievant's absence, it would have strengthened it case for removal.

The Arbitrator must emphasize that the grievant did commit a very serious breach of the rules when he was absent on an unauthorized basis for five days while he was in jail. It is only the grievant's recognition of his substance abuse problem and his seeking help that has saved him from removal. Absent the specific circumstances in the instant case, the grievant's removal would likely have been upheld in arbitration.

It is important for the grievant to understand the terms under which he is being returned to work. His return is conditioned upon his continued treatment for his substance abuse and/or emotional problems. It is also dependent on his continued good attendance. Should the grievant fail to meet these conditions and be removed, he is unlikely to be returned to work by an Arbitrator.

The remaining issue is the union's request for back pay and benefits. The Arbitrator believes that the reinstatement must be without back pay and benefits. Although the grievant apparently had a significant substance abuse problem, he must bear responsibility for his poor attendance and his two incarcerations. Furthermore, it is not unreasonable to believe that reinstatement with pay and benefits might send the wrong signal to the grievant as to the seriousness of his situation.

AWARD

The grievant is to be reinstated with full seniority but without back pay and benefits. His reinstatement is conditioned on his continued treatment for substance abuse and/or emotional problems and the maintenance of a satisfactory attendance record.

Nels E. Nelson
Arbitrator

July 6, 1992
Russell Township

Geauga County, Ohio