ARBITRATION DECISION NO.:
540

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

EMPLOYER:
Department of Rehabilitation and Correction
Orient Correctional Institution

DATE OF ARBITRATION:
April 1, 1994

DATE OF DECISION:
April 15, 1994

GRIEVANT:
Gerald Harris

OCB GRIEVANCE NO.:
27-21-(93-06-24)-0942-01-03

ARBITRATOR:
Marvin Feldman

FOR THE UNION:
Brenda Goheen

FOR THE EMPLOYER:
Edith Bargar, Advocate
Colleen Wise, Second Chair

KEY WORDS:
Removal
Progressive Discipline
Just Cause
Gross Insubordination
Prior Disciplinary Record
Mandatory Overtime
Transport of Inmates
EAP

ARTICLES:
Article 13 - Work Week, Schedules and Overtime
    § 13.07 - Overtime
Article 24 - Discipline
    § 24.01 - Standard
    § 24.02 - Progressive Discipline

FACTS:

The grievant was a relief Corrections Officer at the Orient Correctional Institution at the time of his removal. The grievant was removed for failing to follow a direct order to transport an inmate for emergency medical treatment, failing to report to the Captain's office and improperly refusing to work mandatory overtime.

The circumstances which led to the grievant removal occurred on March 26, 1993. First, because an inmate who required emergency medical treatment refused to be transported to the hospital, the grievant was instructed to take the inmate to a waiting station until the grievant could be moved. Instead, the grievant allegedly defied a direct order and took the inmate directly to the hold and signed him in. Second, the grievant was instructed to immediately transport this same inmate to the hospital (i.e., make a "hot run") but refused to do so. As a result, the inmate suffered a heart attack. The grievant was then instructed to report to the lieutenant's office, but never did. Third, the grievant was placed on the mandatory overtime roster, but allegedly told his supervisor, in an obscene manner, that he would not work mandatory overtime.

EMPLOYER'S POSITION:

Given the grievant's long history of prior discipline (e.g., refusal of mandatory overtime, obscene language, sleeping on duty, improper notification, carelessness, AWOL, excessive absenteeism and improper call-in procedure) the grievant was removed pursuant to the principles of just cause and progressive discipline.

The lieutenant testified that the grievant did not misunderstand the order, but rather the grievant deliberately disobeyed the order. In addition, the State contended that the grievant was a relief Corrections Officer. As such, his duties required him to relieve others from their workloads and perform other assigned work.

UNION'S POSITION:

The grievant was not removed for just cause, and management did not employ the principle of progressive discipline in meting out the grievant's punishment. In fact, management abused its right to discipline by issuing two 5 day suspensions to the grievant within a three-week period. In effect, management "stacked" the charges and discipline in an attempt to justify removing the grievant.

The grievant contended that he accidentally took the inmate to the hold instead of the waiting station and that he merely misunderstood the lieutenant's order. The grievant testified that he refused to transport the inmate to the hospital because (1) there was a Transportation Officer and a junior Relief Officer available, and management was obligated to assign one of them to transport the inmate instead, and (2) had the grievant accompanied the grievant to the hospital, he would have surely missed his ride home to Dayton, Ohio. Also, the Union contended that the grievant was not obligated to perform the "hot run" because the institution's work rules prohibited the Employer from giving an employee an assignment which would cause overtime after 2:00 p.m.

The Union urged the Arbitrator to consider the fact that all during the course of the grievant's prior disciplinary problems, the grievant was undergoing a divorce, a child custody dispute and other related domestic problems. In the past, the employer has allowed non-minority employees with serious conduct problems and similar prior disciplinary histories to participate in last chance agreements; however, the grievant, a minority employee, was not afforded this opportunity.

ARBITRATOR'S OPINION:

The grievant was discharged for just cause and in a manner consistent with the principle of progressive discipline. In any event, the Arbitrator noted that where an offense is egregious, a discharge may occur without progressive discipline. In the Arbitrator's opinion, the instant case merited such a result. The Arbitrator emphasized the grievant's disciplinary record at Orient, noting that the grievant had been involved in a series of substandard acts over the past few years for which he could have been discharged. The Arbitrator agreed that the grievant's activities on March 26 were so outrageous that, when compounded with the grievant's prior record, the Employer was left with no alternative except to remove the grievant.

Further, the Arbitrator agreed that potentially losing transportation home was an insufficient reason to

defy a direct, emergency order. The grievant was obligated to "work now and grieve later". Likewise, since the grievant was instructed to make the "hot run" at about 1:35 p.m., not after 2:00 p.m., he was obligated to follow the instruction. Furthermore, the grievant improperly refused to work mandatory overtime. The parties' Contract provides a procedure for waiving mandatory overtime where the employee can prove a medical or other legitimate reason, but the grievant refused to sign the notice.

Finally, the Arbitrator was unpersuaded that management improperly denied the grievant access to the EAP and participation in a last chance agreement because the grievant only sought acceptance into the program after the events of March 26. Under these circumstances, the employer rightfully refused the grievant's request.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

VOLUNTARY ARBITRATION PROCEEDINGS
CASE NO. 27-21-930624-0942-01-03

THE STATE OF OHIO
The Employer

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME LOCAL 11 AFL-CIO
The Union

OPINION AND AWARD
(GERALD HARRIS, GRIEVANT)

APPEARANCES

For the Employer:

Edith Bargar, Advocate
Colleen Wise, Second Chair
Jim Swyers, Labor Relations Officer
Lieutenant M. Henderson, Witness
Sergeant D. Miller, Witness
Lieutenant R. Williams, Witness

For the Union:

Brenda Goheen, Staff Representative
Gerald Harris, Grievant
John Matthews, Local Union President

MARVIN J. FELDMAN

Attorney-Arbitrator
1104 The Superior Building
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Cleveland, Ohio 44114
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I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having failed resolve of this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted at the Orient State Prison, Orient, Ohio, on April 1, 1994, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn and sequestered and that post hearing briefs would not be filed. It was upon the evidence and argument that this matter was heard and submitted and that this opinion and award was thereafter rendered.

II. STATEMENT OF FACTS

The grievant in this matter became involved in a series of events on March 26, 1993. Those events, as well as the disciplinary background of the grievant, lead to the termination of the grievant. The grievant's prior discipline record revealed the following:

"3/12/90	10	Refusal of Mandatory OT	VR
3/12/90	10	Obscene Statements	WR
4/02/90	9	Sleeping	3 day
4/26/90	1B	Improper Notification	VR
5/21/90	1B	" "	WR
5/31/90	4	Carelessness	VR
2/08/91	3C	Refusal of Mandatory OT	WR
4/01/91	3C	" "	WR
7/22/91	3A	AWOL	WR
7/22/91	3K	Excessive Absenteeism	WR
1/06/92	30	Call In Procedures	VR
3/17/92	3C		
	9	Failure to carry out/ poor judgment	5 day
9/24/92	3D	Call In procedures	WR
10/30/92	3D		WR
1/08/93	3C		
	11	Sleeping	3 day
2/12/93	3C	Refusal of Mandatory OT	2 day"

It might be noted that the contract contained language concerning progressive discipline. The important language of the progressive discipline language, namely 24.02 revealed the following:

"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 oral reprimand(s) (with appropriate notation in employee's file);

B. One or more written reprimand(s);
C. One or more suspension(s);
D. Termination."

In this particular matter the grievant, given his disciplinary record, was terminated when the following activity occurred, as alleged, by the employer. The language referred to below appeared in the notice of disciplinary action dated June 15, 1993:

"You refused to follow Direct orders, given to you by Lt. Williams, to take an inmate on an emergency medical trip. This inmate was thought to be having a heart attack. You also did not follow Lt. Williams order to put the inmate on the bench outside Base 5 near the Captain's Office instead placing the inmate in Security Control. Lt. Williams ordered you to report to the Captain's Office after this had taken place and you did not, even though you were called by walkie-talkie and Institutional P.A. system. Later, the same day, you refused to work Mandatory Overtime on Second Shift, telling Lt. Williams 'Fuck It, I'm leaving.'"

To that, a timely protest was filed and it revealed the following:

"This grievance is being filed on behalf of Co. G. Harris as a written appeal to a removal issued this Employee for alleged violations of E.C.O.C. rules. We are filing under 24.01 because the union feels management has failed to establish just cause! We are also filing under 24.02 because we feel management abused its right to discipline by issuing this employee (2) 5-day suspensions within a 3 week period thus stockpiling charges + discipline in a effort to remove said employee!"

It might be noted that this was a two page grievance but neither party could find the second page and it never found its way into the record therefore. The statement immediately hereinabove stated is merely first portion of the grievance. It was conceded by both parties that the grievance (presumably on the second page) also contained arguments concerning the denial by the employer of the grievant's request for access to the employee assistance plan; of the denial by the employer of a discrimination claim by the grievant since the grievant was not placed on a last chance agreement as were white employees and a denial to award progressive discipline to the grievant rather than termination.

The grievant was employed and assigned at Orient State Prison as a correction officer, relief man. His duties revealed that he would relieve others from their workload and do other assigned classified work. On March 26, 1993, the grievant appeared early for work and was asked if he wanted to make an early trip to the Ohio State University Hospital to transport and stay with a prisoner while the prisoner was physically examined or until he, the grievant was released. The grievant indicated and stated that he did not desire to go "on-the-clock" early.

Thereafter, and at approximately 10:30 a.m., while "on-the-clock" the grievant was assigned another prisoner for transfer to the Ohio State University Hospital. The grievant appeared at the dormitory in which the inmate was housed and the inmate refused to be taken to the Ohio State University Hospital, a distance of some twenty-five minutes away by van on a direct highway route. The grievant called his superior who then had an officer handle the situation. The officer could not cajole or convince the inmate to go to the hospital and the inmate was given a choice of signing off a waiver sheet at the local dispensary or in the alternative be taken to the hold and detained in that area until the grievant either signed the waiver or agreed to the hospital treatment. The grievant refused going to the local dispensary on the facility grounds to sign off a waiver. The lieutenant, according to the lieutenant's testimony, told the grievant to take the inmate to post 5 and hold him there until the grievant was assigned to the hold by the officer. The grievant instead of taking him to post 5 took the inmate directly to the hold and signed him in.

At any rate, the inmate suffered a heart attack after the transfer to the hold was made. The same officer was called and instructed the grievant to immediately transport the prisoner to the hospital. That order occurred at approximately 1:30 p.m. The grievant told the lieutenant who assigned him that duty that he could not go, because his auto ride back to Dayton, Ohio, where he lived (approximately one hour away)

would leave without him and he, the grievant, would get back late from the Ohio State University Hospital, no doubt, and would be unable to get home because of lack of transportation. The grievant was told to report to the lieutenant's office while the lieutenant handled the emergency otherwise but the grievant never showed. The lieutenant found another ride for the inmate and the inmate was taken away at approximately 1:35 p.m. or 1:40 p.m. for emergency care.

Another activity involving the grievant that day was that the grievant was placed on mandatory overtime pursuant to the contract. At the end of the day the grievant again stated to the same lieutenant that the reason why he could not take the mandatory overtime was the same reason he could not go to the hospital at 1:30 p.m. in that he would lose his transportation home. The grievant allegedly stated to the lieutenant, "Fuck it, I'm leaving."

As to the first episode of taking the grievant to the hold rather than the waiting station for the hold, the grievant stated that he misunderstood the lieutenant and took the grievant intentionally and directly to the hold rather than to the waiting station for the hold. The lieutenant at hearing stated that he made a direct order to the grievant to take the inmate to the waiting station for the hold and as to that incident the grievant believed that the lieutenant was unclear and the lieutenant believed that the grievant directly disobeyed his order.

As to the situation at 1:30 p.m. the grievant stated that there is a pecking order of assignments. The grievant stated that if a transportation officer is available, that officer must be assigned the duty of transporting a prisoner to the hospital. The grievant further stated that if there is a junior relief person, then that junior must be assigned before the senior relief person. The grievant further stated that there was both a transportation officer and junior relief person and that he refused that workload on the basis that those two others were available and that he would miss his ride home, if he, the grievant, went to the hospital on assignment. It might be noted that both parties, i.e., the employer and union agreed that the situation involving the inmate was one of an emergency and that it had to be dealt with immediately.

In another situation of that day, it might be noted that the contract of collective bargaining has a mandatory overtime clause. It might be noted however, that that mandatory overtime may be waived by the signature on a mandatory overtime refusal notice. That notice stated as follows:

"TO: SHIFT COMMANDER

FROM: CORRECTIONAL OFFICER

SUBJECT: MANDATORY OVERTIME REFUSAL NOTICE

I acknowledge that I have been ordered to work mandatory overtime on the date indicated above in accordance with Article 13.07 of the AFSCME Contract.

I am, however, unable to comply with this order due to medical/other reasons. In refusing this order, I acknowledge that I have seventy-two (72) hours to provide you with written documentation that will provide mitigating circumstances supporting that I am not engaging in such refusal without cause.

I further acknowledge that should I not provide such documentation or the documentation is not sufficient, I may be in violation of an Employee Rule of Conduct."

The grievant refused to sign that particular notice but took the time card out of the lieutenant's hand at the end of the day, refused to sign the waiver for the mandatory overtime, punched out and then left the facility at 3:00 p.m. The grievant was further heard to say, "Fuck it, I'm leaving," to the lieutenant who assigned the mandatory overtime. Further, no logical answer was given by the grievant concerning his failure to show up in the lieutenant's office at the time the 1:30 p.m. order was refused.

Thus, it is from all of these events as well as his record that caused the grievant to be terminated. He was terminated because of his prior record; because he failed to carry out the delivery of the inmate to the

waiting station hold area; because he refused to take an inmate to the hospital on an emergency basis; because he failed to appear in the lieutenant's office when ordered and because he refused to sign a waiver for mandatory overtime which is the only proper method for waiving the overtime because of such contract language which demands mandatory overtime.

Your attention is invited to paragraph 13.07 which contained the following pertinent language:

"Insofar as practicable, overtime shall be equitably distributed on a rotating basis by seniority among those who normally perform the work. Specific arrangements for implementation of these overtime provisions shall be worked out at the Agency level. Absent mutual agreement to the contrary, overtime rosters will be purged at least every twelve (12) months. Such arrangements shall recognize that in the event the Employer has determined the need for overtime, and if a sufficient number of employees is not secured through the above provisions, the Employer shall have the right to require the least senior employees who normally performs the work to perform said overtime. The overtime policy shall not apply to overtime work which is specific to a particular employee's claim load or specialized work assignment or when the incumbent is required to finish a work assignment."

The contract also contained employee assistance program language. It might be noted that in this particular matter the employee sought assistance under that program after the conclusion of the events of the 26th of March, 1993 and not before. At that time the employer refused participation for the grievant. It might further be noted that all during the course of the grievant's prior disciplinary record period the grievant was undergoing a divorce, a child custody suit and other domestic related problems.

The employer further contended that the grievant's prior record when compounded and impacted on the events of March 26, make him a candidate for discharge, not progressive discipline.

The evidence further revealed that the employer on several prior occasions had allowed employees who were involved in serious substandard conduct activity with prior discipline records in and about the facility, a last chance agreement. Those prior substandard acts of other employees were not placed into the record. When the union requested that of the employer in this particular matter, the employer refused stating that such type of activity was purely voluntary on the employer's part, was not mandated under the terms of the collective bargaining agreement and that the grievant's activity of March 26, 1993, compounded upon his prior substandard conduct record all make it impossible for the grievant to continue his employment at the facility. The employer denied the last chance agreement request and the union indicated and stated that there were only white people in such a program and that therefore they discriminated against placing blacks generally and this grievant specially in the last chance agreement program.

That was the evidence revealed at hearing and it is on the basis of those facts, statements, denials, allegations and averments that this matter rose to arbitration for opinion and award.

III. OPINION AND DISCUSSION

The grievant's record at the facility was somewhat less than enviable. He was involved in a series of substandard acts throughout the last several years which made him a near candidate for discharge for those events. The employer found that the grievant's activities of March 26, 1993, were so aggregious, when compounded upon his prior record, that there was little the employer could do to save the employment for the grievant. It is my feeling that the employer was entirely proper.

For a moment, it might be wise to review each activity. To begin with, the grievant stated he misunderstood an order for placing the inmate in the hold rather than at the post for holding a prisoner prior to placement in the hold. Such might have been the case. Next, the grievant was told at 1:30 p.m. to make a "hot run" to the Ohio State University Hospital with an inmate who presumably had a heart attack. Instead of following a work order, based on an emergency, the grievant sought to debate with the employer and its supervisor that the employer had no business picking the grievant to make that run because (a) a transportation man was available, (b) a junior relief man was available and (c) the grievant probably would not be back in order to obtain his ride home to Dayton, Ohio. All of those reasons had no bearing upon a legitimate order given by a known supervisor to an employee. The work rule is work now and grieve later.

Further, the union argued that after 2:00 p.m. an employee may not be given an assignment which would cause overtime. That rule cannot be considered in this instant case. The assignment was given to the grievant at 1:30 p.m. or 1:35 p.m. or 1:40 p.m. at the latest in the early afternoon. That is not 2:00 p.m. Nor can 2:00 p.m. be extended to be 1:30 p.m. The fact of the matter is an emergency existed, a "hot run" was necessary and the grievant sought to debate an order rather than comply with it and then protest.

Thereafter when the grievant refused the order the grievant was told to report to his supervisor's office. The grievant disappeared at the facility from about 1:45 p.m. to 3:00 p.m. He showed up at the clocking out station 3:00 p.m. or 3:15 p.m. at which time he was ordered to work on mandatory overtime. Again the grievant refused and not only did he refuse mandatory overtime and violate the terms of the contract, he did not waive the mandatory overtime by completing a refusal notice. The grievant agreed that he did not show in his supervisor's office as ordered and did not sign the refusal notice. The grievant now contended that he should not be disciplined because of his mental condition at that particular period of time because of family problems.

In order to buttress and prove that the grievant was suffering from a mental condition, the grievant pointed up the fact that after all of these events a request for employee assistance was made pursuant to the terms of the contract and that was denied by the employer. The fact of the matter is, when an employee desires assistance under the EAP program, that employee must pursue that assistance from the employer and must pursue that assistance so as to obtain acquiescence prior to consistent activity of a substandard nature which invoked the discipline. In other words, an employee usually seeks assistance and obtains the benefit of the program when that employee's request for that assistance is made prior in time to the events which caused the discipline or discharge. It appeared that in this particular case the grievant sought to use the employee assistance program refusal as a defense to the discharge that the grievant was dealt as a result of his activity on the 26th of March, 1993. That is entirely improper. The grievant's substandard conduct lasted for a period of time. He should have sought the benefits of the EAP while substandard activity was occurring, not when the discharge events occurred.

The union has further suggested that when it requested of the employer a placement in the last chance program and that being denied, the denial was based upon discrimination. The fact of the matter is, that such last chance program does not appear under the terms of the contract and is purely voluntary on the part of the employer. Placement in the last chance program is something that the employer dealt with from time to time as they thought it necessary for certain employees that might benefit from such activity. Presumably the employer in this particular case as to this employee, saw that no such benefit would occur.

Furthermore, the union indicated and stated that the employee merely suffered a three day suspension prior and that discharge is a harsh result for the activity of March 26, 1993, when jumping from a three day suspension to termination. It might be noted that the employer argued that the grievant was guilty of gross insubordination, not on one occasion during the course of the day but on three serious separate violations none of which could be tolerated. The employer was not upset or annoyed with the grievant's activity in the grievant's failure to take the inmate to the waiting station for the hold but the employer indicated and stated that the activity of failing to follow the direction of the supervisor on three separate and distinct activity situations during the day was more than could be tolerated by the employer and thus a discharge was proper under the circumstances.

It might be noted that progressive discipline is noted in the terms of the contract, but where the activity is so aggregious a discharge may flow without progressive discipline and it is my belief, as it was the employer's, that this is such a case that merits that result.

It might be noted that the grievant simply did not want to make the trip to the Ohio State University Hospital as he was ordered. It might be further noted that the grievant disappeared for a period of an hour and a half and it might be further noted that the grievant failed to execute the waiver and refusal notice when he was placed on mandatory overtime for the second shift. None of this activity should be tolerated by the employer especially from an employee who is on the cutting edge of discharge by his multitude of prior discipline. For all of these reasons, the grievance as indicated by the union in this particular matter on behalf of the grievant must be denied.

IV. AWARD

Grievance denied.

MARVIN J. FELDMAN, Arbitrator
Made and entered
this 15th day
of April, 1994.