**ARBITRATION DECISION NO.:**
663

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

**EMPLOYER:**
Ohio Department of Transportation
Office of Traffic Engineering, Sign and Signal Section

**DATE OF ARBITRATION:**
January 14, 1998

**DATE OF DECISION:**
February 13, 1998

**GRIEVANT:**
Byron Buckley

**OCB GRIEVANCE NO.:**
31 13 (97 01 15) 0003 01 06

**ARBITRATOR:**
Nels E. Nelson

**FOR THE UNION:**
Mark Linder, Associate General Advocate
John Gersper, Staff Representative, Second Chair

**FOR THE EMPLOYER:**
Nick M. Nicholson, Labor Relations Officer, Advocate
Rachel L. Livengood, Office of Collective Bargaining

**KEY WORDS:**
Absenteeism
Alcohol and Substance
Abuse
Employee Assistance Program
Incarceration
Just Cause
Leave Requests
Mitigation
Removal

**ARTICLES:**
Article 24 - Discipline
§24.01 - Standard
§24.02 - Progressive Discipline
§24.09 - Employee Assistance Program

**FACTS:**

The grievant worked as a Sign Worker in the Ohio Department of Transportation's Office of Traffic Engineering in the Signal and Sign Section. The grievant was on probation for domestic violence. One of tile terms of his probation was that he had to submit to random drug testing. On December 11, 1,996, the grievant refused his probation officer's request that he submit to drug testing. The grievant was placed in jail and was not released until one week later, on December 18, 1996. During his incarceration, the grievant's mother and sister informed the Employer that he would be gone indefinitely, and they requested leave time for him during that time period. The grievant's leave time ran out on December l7 at 2:30A.M. Since the grievant was not released until December 18, this resulted in nine hours of unexcused absence. The grievant was removed on January 10, 1997.

**EMPLOYER'S POSITION:**

The Employer argued that there was just cause to remove the grievant. The grievant had nine hour's of unexcused absence. In light of the grievant's extensive prior discipline record, removal was not excessive.

Also, the Employer rejected the arguments of mitigation made by the Union. The grievant went to jail because of his own actions. It was the grievant's fault he was on probation. He knew what would happen if e violated the terms of his probation. His drug addiction was also his own fault. He knew that he was forbidden to use drugs while on probation. He not only used drugs, but he refused his probation officer's order to submit to) a urinalysis. The grievant's problems are not mitigating factors which excuse his absence from work.

**UNION'S OPINION:**

The Union argued that there was not just cause to remove the grievant. First, the Employer must bear some responsibility for the grievant's predicament. The grievant became addicted to painkillers because of a back some responsibility injury which he suffered at work. His actions relating to this incident, as well as most of his prior discipline, are a direct result of this addiction.

Second, the grievant requested that he be allowed to enter the Employee Assistance Program which would help him with his drug problem. The State refused his request, therefore, his addiction continued. The grievant also sought treatment for his addiction while in jail. He even completed an outpatient treatment program. The grievant is dedicated to remaining drug free.

Last, management should have granted the grievant leave without pay. The grievant's mother told the Employer that the grievant would be out indefinitely. This operated as notice that the grievant was requesting leave without pay.

**ARBITRATOR'S OPINION:**

The Arbitrator found that just cause did exist to remove the grievant. First, the grievant had nine hours of unexcused absence from work. Also, the grievant had at least four incidents of unexcused absence in less than three years. Removal was not an excessive penalty for these incidents.

Second, the Arbitrator rejected the Union's argument that there were mitigating factors. The grievant was responsible for his own incarceration. Also, the Employer was not responsible for his drug addiction. The grievant's problems stem not from an addiction to painkillers, but from his use of alcohol and marijuana.

Additionally, the Arbitrator rejected the notion that the grievant requested leave without pay. Regardless,

the Employer has the right to reject such requests for any reason. There was no evidence that the grievant was denied access to the Employee Assistance Program. Also, the Arbitrator noted that the grievant's long service with the state is irrelevant. What matters is good service, and the grievant's record indicates that Ills service has been problematic at best.

**AWARD:**

The Arbitrator denied the grievance.

**TEXT OF THE OPINION:** *** * ***

ARBITRATION DECISION

February 13, 1998

In the Matter of:

State of Ohio, Department of )
Transportation, Office of Traffic )
Engineering, Sign and Signal Section ) Case No. 31-13(1-15-97)03-01-06 )
) Byron J. Buckley, Grievant
and )
)
Ohio Civil Service Employees Association, )
AFSCME Local 11 )

APPEARANCES

For the State:

Nick M. Nicholson, Labor Relations Officer, Advocate
Rachel L. Livengood, Second Chair, Office of Collective Bargaining
Jim Miller, Labor Relations Administrator
Mace Morman Jr., Superintendent, Sign Shop
Paul Trapasso, Assistant Administrator

For the Union

Mark Linder, Associate General Counsel, Advocate
John Gersper, Staff Representative, Second Chair
Byron Buckley, Grievant
Bradley Lander, Ph.D., Clinical Director, Focus Health Care

Arbitrator:

Nels E. Nelson

* * *

## BACKGROUND

The grievant, Byron J. Buckley, was hired by the Department of Transportation on June 25, 1984. He worked in the Signal and Sign Section of the Office of Traffic Engineering as a sign worker. His job involved fabricating traffic control signs.

The events leading to the grievant's termination began on August 2, 1996. At that time the grievant was placed on probation for domestic violence. The conditions of his probation included submitting to random urinalysis. On December 11, 1996 the grievant refused his probation officer's request to give a urine sample and was incarcerated for violating the terms of his probation. Since the judge who had sentenced the grievant was out of town, the grievant had to remain in jail.

On December 11, 1996 Charlene Depew, the grievant's sister, called Ray Sisson, the grievant's supervisor, to request vacation leave for the grievant for December 12 and 13, 1996. When December 13, 1996 arrived, Colleen Shillington, the grievant's mother, talked to Mace Morman, the superintendent of the sign shop. She explained that the grievant probably would be off work for an undetermined amount of time and wondered whether, as a state employee, she could transfer some of her leave time to him. Shillington requested that the grievant's leave be extended and acknowledged that the grievant was in legal trouble.

The grievant was released from Jail late on December 18, 1996. However, his leave time ran out at 230 P.M on December 17, 1996. This resulted in one hour of unexcused absence on that day and eight hours on the following day

On December 20, 1996 Shillington called Paul Trapasso, an assistant administrator. She indicated that on December 13, 1996 she did not tell Morman when her son would return to work because she did not know. Shillington stated that she had contacted the employee assistance program on his behalf. When she asked Trapasso what measures would be taken regarding her son, he reported that his case was being forwarded to the department's labor relations section.



A pre disciplinary meeting was held on January 7, 1997 The grievant was charged with violating Directive WR-102, item #16. which prohibits "unauthorized absence in excess of 30 minutes." The hearing officer found that the grievant violated the rule and that there was just cause for disciplinary action. On January 10, 1997 the grievant was terminated.

The union filed a grievance on behalf of the grievant. It charged that he was discharged without just cause and that the disciplinary action was not commensurate with the offense. The grievance requested that the grievant be reinstated and be made whole.

When the grievance was denied at step three on March 14, 1997, it was appealed to arbitration. The arbitration hearing was held on January 14, 1998. It concluded with oral closing statements by the parties.

## ISSUE

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

Was the grievant terminated for just cause? 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.

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. a fine in an amount not to exceed two (2) days pay for discipline related



to attendance only; to be implemented only after approval from OCB;
D. one or more day(s) suspension(s);
E. termination.

24.09 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 notification by the Ohio EAP case monitor of successful completion of the program under the provisions of an Ohio EAP Participation Agreement, the Employer will meet and give serious consideration to modifying the contemplated disciplinary action. Participation in an EAP program by an employee may be considered in mitigating disciplinary action only if such participation commenced within five (5) days of a predisciplinary meeting or prior to the imposition of discipline, whichever is later. Separate disciplinary action may be instituted for offenses committed after the commencement of an EAP program.

## STATE POSITION

The state argues that the stipulated facts indicate that there is just cause for discipline. It points out that the grievant's sister and mother requested leave to cover the grievant's absences. The state notes that they indicated that the grievant would be off an undetermined amount of time but never disclosed the reason. It reports that the grievant's leave balances subsequently were exhausted and the grievant was then absent for nine hours.

The state rejects the notion that the grievant's incarceration is a mitigating factor. It contends that the grievant was aware that a violation of the terms of his probation would lead to being jailed. The state stresses that the grievant is responsible for the position in which he found himself. The state disputes the claim that the grievant's back injury in June 1990

excuses his conduct. It maintains that any previous discipline that he received that might have been related to his injury has been resolved. The state asserts that the grievant had a poor disciplinary record prior to his injury.



The state challenges the union's contention that the grievant's addiction was a mitigating factor with respect to his incarceration. It points out that on two occasions he failed to comply with a request to provide a urine sample and that the grievant admits to using marijuana. The state notes that while the grievant testified that he recognized his drug addiction during the time he was in Jail, Bradley Lander, the clinical director at Focus Health Care, testified that the grievant denied he had any drug problem during his assessment on January 28, 1997.

The state questions the union's reliance on an alleged request for leave without pay for the grievant. It observes that no document was introduced to show that such a request was ever made. The state further claims that there was no testimony that leave was sought.

The state rejects the argument that it failed to grant the grievant an opportunity to participate in the employee assistance program. It contends that there was no evidence that he or his representative ever requested participation in the program The state maintains that in any event under Article 24, Section 24.09 participation in the employee assistance program is voluntary on its part.

The state argues that discharge is not an excessive penalty. It points out that since August 1992 the grievant received four written reprimands, a one day suspension, a twoday suspension, a three day suspension, a ten day suspension, and a fifteen day suspension. The state indicates that the offenses include insubordination. unauthorized absence, misuse of state equipment, abusive language, and threats against a counselor. It notes that item # 16 of Directive WR 102 calls for discharge for three or more offenses.

The state asks the Arbitrator to deny the grievance in its entirety.



## UNION'S POSITION

The union argues that while it does not question that the grievant was absent for nine hours without leave and that he had engaged in anti social behavior and had been moody and insubordinate, it asserts that management bears some of the responsibility. It points out that the grievant was injured at work in 1990 and became addicted to codeine, valium, and soma which were prescribed by doctors. The union claims that the bulk of the grievant's prior discipline is related to his drug addiction.

The union contends that the state failed to consider the grievant's length of service and the awards he has received. It observes that he has worked in the department for 12 years. The union reports that he received numerous citations and awards for suggestions he made for improvement. It notes that he has been recognized by the director of the department as well as by the Governor.

The union charges that the state denied the grievant the opportunity to go to the employee assistance

program. It claims that at the pre disciplinary meeting Mike Loughlin, the grievant's union representative, told the department that the grievant wanted to participate in the employee assistance program but that the request was denied. The union indicates that the grievant called the program and was referred to Focus Health Care for assistance.

The union asserts that the state failed to take into account the grievant's participation in the employee assistance program. The union states that while the grievant was in jail, he realized that he had a drug problem and sought help It notes that when he was admitted to the outpatient program at Focus Health Care, he was treated for addiction to codeine, valium, and soma. The union reports that the grievant received a certificate on February 20, 1997 indicating that he had completed Focus Health Care's intensive outpatient program.

The union suggests that the grievant should have been granted leave without pay. It acknowledges that there is no document stating that the grievant was requesting such

**5**

leave. The union indicates, however, that the grievant's mother reported that the grievant would be absent and that she did not know when he would return to work It claims that this constitutes notice of a request for leave without pay.

The Union argues that the grievant deserves to be reinstated. It points out that the grievant considers his Job to be of utmost importance to him. The union notes that the grievant testified that since his incarceration, he has submitted to regular drug testing and has continued to attend counseling sessions. It maintains that the grievant has demonstrated that he is dedicated to remaining drug free.

The union concludes that the grievant should be given one last opportunity. It admits that some discipline is warranted but contends that discharge is not commensurate with the offense and that there is not just cause for discharge The union asks that the grievant be returned to work with appropriate back pay and instructions to continue his drug testing and counseling.

## ANALYSIS

The events leading to the grievant's termination are not in dispute. On December 11, 1996 the grievant refused his probation officer's request to provide a urine sample and was incarcerated for violating the terms of his probation. Because the judge who had placed the grievant on probation was on vacation, the grievant remained in jail until late in the day on December 18, 1996 During that time the grievant exhausted his leave balances and was discharged for being absent without authorization.

The grievant's absence violated item #16 of Directive WR 102. It prohibits an "authorized absence in excess of 30 minutes." The rule provides for discipline beginning with a reprimand or suspension for the first offense and termination for the third or fourth violation. It is clear that the grievant was aware of the rule and that the rule is not unreasonable.

**6**

An examination of the grievant's disciplinary record establishes that his discharge was consistent with Directive WR 102. Between August 17, 1992 and April 1, 1996 the grievant received two oral warnings, two written reprimands, and seven suspensions including a 10 day suspension and a 15 day suspension.

Included in the discipline are four violations of item # 16.

The grievant's discharge, however, must be consistent with the collective bargaining agreement. Article 24, Section 24.01 states that "disciplinary action shall not be imposed upon an employee except for just cause." Section 24.02 requires that "disciplinary action shall be commensurate with the offense."

The Arbitrator believes that these standards have been met. The grievant violated the rule against unauthorized absences four times in less than three years. The rule is reasonable and the grievant was aware of the rule. Furthermore, as indicated above, the grievant had a very bad disciplinary record. Despite increasingly severe penalties his behavior did not improve

The Arbitrator must reject the union's contention that several factors require mitigation of the discharge penalty First, while the grievant's absence was due to his incarceration, he was responsible for his incarceration He was placed on probation for domestic violence and was required to submit to random drug testing as directed by his probation officer. When he failed to comply with this requirement, he was put in jail.

Second, the argument that the grievant should be reinstated because his problems at work were due to his addiction to codeine, valium, and soma which were prescribed by doctors following an on the job injury in 1990 must be rejected. It is not clear that any of the grievant's problems can be attributed to his use of prescription medication. The record indicates that the grievant also abused alcohol and used marijuana. If the grievant had problems with drug and alcohol use, the employee assistance program was available to him but he sought no help until he was facing removal.



Third, the union's suggestion that the grievant should be returned to work because he was denied leave without pay does not hold up. No document was introduced to indicate that leave without pay was even requested. Neither the grievant's mother or sister ever requested leave without pay for him and nothing indicates that leave should have been automatically granted. In any event, the granting of leave without pay is at the discretion of the employer.

Fourth, there is no merit to the claim that the grievant was denied the opportunity to participate in the employee assistance program or that the state failed to consider his participation in the program. As noted above, the grievant did not seek to participate in the program until his job was on the line. Under Article 24, Section 24 09, "the disciplinary action may be delayed until completion of the program." (Emphasis by Arbitrator). It adds that "the Employer will meet and give serious consideration to modifying the contemplated disciplinary action." (Emphasis by Arbitrator) The state's decision to go forward with the grievant's removal does not violate the contract.

Fifth, the union's complaint that the state neglected to consider the grievant's length of service is without merit It is true that long service is frequently considered a mitigating factor. However, it is good service that is used to mitigate a penalty In the instant case the grievant has a very poor record. As indicated above, the grievant was disciplined on11 occasions in the four and one half years prior to his termination including 10 day and 15 day suspensions in the year prior to his discharge.

Finally, the fact that the grievant received a number of citations for suggestions for improving the work process is not sufficient to overcome the factors supporting the state's decision to remove the grievant. While it is unfortunate that an employee who is obviously interested in his job ends up being discharged, the

state does not have to tolerate an employee with a record like that of the grievant.

Based on the above analysis, the Arbitrator must deny the grievance.

**8**

AWARD

The grievance is denied.

Nels E.Nelson
Arbitrator

February 13, 1998
Russell Township
Geauga County, Ohio

**9**