ARBITRATION DECISION NO.:
673

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

EMPLOYER:
Ohio Department of Rehabilitation and Correction

DATE OF ARBITRATION:
March 31, 1998

DATE OF DECISION:
May 15, 1998

GRIEVANT:
Karla Bobo

OCB GRIEVANCE NO.:
27 26 (97 06 04) 0784 01 03

ARBITRATOR:
Anna DuVal Smith

FOR THE UNION:
Robert Jones, Staff Rep.

FOR THE EMPLOYER:
Patrick Mayer, LRO
Rodney Sampson, LRO, OCB

KEY WORDS:
Employee Assistance Programs
Mitigation

ARTICLES:
Article 24 – Discipline
§24.09 –Employee Assistance Program

FACTS:

The grievant, Karla Bobo is a Correction Officer employed by the Ohio Department of Rehabilitation and Correction (DR&C) at the Warren and Dayton Correctional Institutions. She was employed by DR&C from October 23, 1989 until her removal on May 23, 1997. During this time, the grievant received mixed performance reviews. While at Warren where she was stationed when the subject matter of the dispute arose, she received “meets expectations" reviews. However, during her time at Warren from April 1995 until May 1996, she received ten disciplines, including 5 suspensions. In July 1996, the grievant entered the Ohio Employee Assistance Program (EAP), and went on disability leave. Her extension of this leave was denied and she returned to work. In February 1997, she was suspended for failure to follow call off procedures. On April 9,1997, she again violated the call off procedure which gave rise to the disputed removal.

Following her violation of the call off procedure, an incident report was filed and an investigatory interview was conducted. At that time the grievant asserted that for medical and financial reasons the utility company was prohibited from cutting off her electricity. she claimed that the utility company's failure to comply with the prohibition caused her alarm to fail, which lead to her violation of the call off procedure. She later presented a medical certificate and over due billing information, which supported an inference that her power was cut off, but did not conclusively support the defense.

At the pre disciplinary hearing on April 18'h, the hearing officer rejected her defense of power failure, finding no actual proof that the power was cut off She was subsequently removed on May 23, 1997.

Although the grievant inquired with the Warden about protection related to EAP, she did not raise these issues in the disciplinary hearings. Neither did she request accommodation under the ADA or the FMLA.

EMPLOYER'S POSITION:

The State argued that it satisfied its burden to show just cause. The State asserted that there was no dispute that she violated the call off procedure. Additionally, the state contended that the grievant failed to support a mitigating defense with conclusive evidence that the power was actually cut off. Furthermore, even if the power was cut off, an employee on the verge of dismissal should take the appropriate precautions to insure that she would not be late.

The State argued that its discipline was progressive, giving her a second and third chance to conform her conduct. The State further argued that the issues of EAP and ADA protections were not raised in earlier proceedings; had they been raised, it was not clear that they would apply, and if they did apply, the State was not required to withhold discipline until the completion of EAP.

Finally, the State argued that withholding discipline in this situation would undermine Management's ability to manage the attendance of other employees.

Union's Position:

The Union asserted that the State lacked just cause. The Union argued that the grievant had shown that the power was cut off when the bankruptcy court failed to pay her bill and the utility company disregarded her medical certificate. The Union also asserted that the State failed to consider her enrolment in EAP in the February disciplinary action, which was a violation of Article 24.09. The Union further asserted that the State was out of compliance with the Contract (Articles 2.01 and 2.02) by discriminating against a person with severe health problems such as asthma, depression, and alcoholism. Finally, the Union claimed that the grievant is a good officer, whose problems began in 1995 following several years of service to the State.

The Union asked that the grievant be returned to her former position with back pay, benefits, seniority, and be made whole.

Arbitrator's Position:

The Arbitrator found that the grievant violated the call off rule. However, the Arbitrator noted that the questions at issue were whether the power outage was a mitigating factor and whether her participation in EAP deserved greater consideration in the disciplinary process.

The Union's claim, that the power outage caused her alarm to fail and her rule violation, raises many

questions, which the grievant failed to satisfy. The grievant never presented conclusive evidence, which was within her responsibility, that the power was actually cut off Furthermore, the medical prohibition that she presented as evidence is dated the day of the rule violation and lacks any indication of when it was presented to the utility company, making the claim suspect. The Arbitrator noted that the grievant's theory was an affirmative defense and thus she bore the burden of supporting the defense. The Arbitrator noted that a failure to present evidence leads to the conclusion that the evidence does not exist.

Considering the EAP and last chance agreement issue, the Arbitrator pointed out that it was unlikely, based on the grievant's medical problems and the protocol surrounding disability leave, that the State was unaware of her participation in the EAP.

However, even when the Arbitrator gave greater weight to the grievant's participation in the program, the Arbitrator found that the State had just cause in removing the grievant. The Arbitrator noted that although the grievant falls within the special consideration category described in Article 24.09, it does not give the grievant license to disregard policy. The grievant had participated in the EAP program for nine months. Despite the assistance of the program, past discipline, and employer accommodation, the grievant failed to demonstrate any change in conduct for the better. Accordingly, the grievant failed to demonstrate an ability to reform, and an abeyance on her removal would be an invitation to more of the same behavior.

AWARD:

The grievance was denied in its entirety.

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

VOLUNTARY LABOR ARBITRATION TRIBUNAL

OPINION AND AWARD

In the Matter of Arbitration
Between

Anna DuVal Smith, Arbitrator

OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME, AFL/CIO

Case No. 27 26 970604 0784 01 03

and

OHIO DEPARTMENT OF
REHABILITATION AND
CORRECTIONS

Karla Bobo, Grievant
Removal

Appearances

For the Ohio Civil Service Employees Association:

Robert Jones, Staff Representative
Ohio Civil Service Employees Association

For the Ohio Department of Rehabilitation and Corrections:

Patrick Mayer, Labor Relations Officer
Ohio Department of Rehabilitation and Corrections

Rodney Sampson, Labor Relations Specialist
Ohio Office of Collective Bargaining

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HEARING

A hearing on this matter was held at 9:00 a.m. on March 31, 1998, at the Warren Correctional Institution in Lebanon, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. Issues on arbitrability and the merits were raised. The parties were given a full opportunity to present written evidence and documentation, to examine and cross examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the State were Warden Anthony Brigano, Captain Edward Everhart and Major Carl Mockabee. Testifying for the Union was the Grievant, Karla Bobo. Also in attendance were Joseph L. Coleman and Ronald Sixt. A number of documents were entered into evidence: Joint Exhibits I 11, State Exhibits 1 3 and Union Exhibits 1 6. The oral hearing was concluded at 4:30 p.m. on March 31, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

ARBITRABILITY

Issue

Was the grievance timely appealed to the fourth step and is it therefore arbitrable?

Decision

This issue was withdrawn by the State following a review of documents presented by the Union. The grievance is accordingly deemed timely appealed to Step 4 and is therefore arbitrable. **2**

MERITS

Stipulated Issue

Was the removal of the Grievant, Karla Bobo. for just cause? If not, what is the remedy?

Statement of the Case

At the time of her dismissal for failing to follow call off procedure, the Grievant was a Correction Officer working the third shift at the Warren Correctional Institution in Lebanon, Ohio. This institution is a close security facility housing approximately 1500 inmates, including a number with special needs. As a 24 hour security operation. procedures are in place to provide adequate staffing when employees scheduled to work are absent, One of these requires employees to call in 90 minutes before the start of their shift when they are unable to report at their designated time. This allows the shift commander time to locate a substitute. State witnesses testified that call offs result in lost managerial time and reduced staff morale, and that the effects are worse when an employees fails to appear without any notice at all.

The Grievant has been employed by the Ohio Department of Rehabilitation and Corrections as a Correction Officer since October 23, 1989, first at the Warren facility, then at Dayton Correctional Institution, and then again at Warren. Her performance evaluations have been mixed, in most years meeting expectations. Attendance problems began to be noted in 1993. The evaluation for 1994 when she was at Dayton Correctional Institution is dominated by "below" ratings and also notes attendance problems, the former of which the Grievant testified were due to having been assigned to inmate housing without training and to her strictness with inmates who were accustomed to lax treatment. In 1995 she was back at Warren, and her ratings returned to "meets expectations" levels, but attendance continued to be a problem. Indeed, during the 13 months from **3**

April 1995 through May 1996, the Grievant accumulated the following disciplinary record, none of which were grieved.

Date of Notice	Action	Violation
April 25, 1995	Written reprimand	AWOL
October 5, 1995	Written reprimand	Call off procedure
October 6, 1995	Written reprimand	Loss of tool control
November 17, 1995	1 day suspension	Tardiness/Call off
January 17, 1996	3 day suspension	Call off procedure
February 14, 1996	5 day suspension	AWOL/Call off
February 28,1996	Oral reprimand	Clock in/out procedure
February 29, 1996	Written reprimand	Clock in/out procedure
April 23, 1996	1 0 day suspension	Tardiness/Call off
May 20,1996	1 day suspension	Clock in/out

In July 1996, the Grievant entered the Ohio Employee Assistance Program (EAP) and went on disability leave for major depression and alcohol abuse. Suffering financial difficulties as well, she returned to work that fall after her application to extend this leave was denied. She was placed on third shift in an attempt to accommodate her and minimize disruptions from her attendance problems. She nevertheless reported for work late on November 24 and again on November 28 without calling in in a timely fashion. For these infractions, she received another I0 day suspension in February 1997 which also went ungrieved, The Grievant recalls being told at the time that she could not afford any more such infractions.

Two months later, on April 9, the Grievant again did not appear at the 9:50 p.m. third shift roll call, nor was she at her post at the 10:00 p.m. start of her shift. The Grievant testified her electricity had been cut off

while she slept, thus disabling her alarm clock. She called in to work at 11:05 p.m., after the cold of the house awoke her, and requested emergency personal leave. the shift commander, Captain Edward Everhart, testified he told her she would have to bring in documentation to support her request, a statement disputed by the Grievant who testified he merely said, "Whatever you want to do, ma'am." No request for leave form nor any documentation was

presented, so Captain Everhart turned in the call off slip. An incident report was filed and an investigatory interview was conducted, at which time the Grievant said that for medical and financial reasons her utility company was not supposed to turn off her power. She later supplied the doctor's April 9, 1997 medical certificate (for severe asthma) that was supposed to prevent termination of utility service, and computer printouts showing a past due balance on her electric bill. In arbitration she also presented Chapter 13 bankruptcy documents showing the Trustee's allowance for the utility company's claim.

A pre disciplinary hearing was conducted on April 18, 1997. The hearing officer rejected the Grievant's excuse because no proof was provided to show if or when the electricity was turned off and how this prevented her from calling off properly. The Grievant was therefore removed on May 23,1997.

A grievance protesting this action was filed June 2, alleging discrimination on the basis of disability and no consideration given to the mitigating circumstances of power outage or to the Grievant's participation in the RAP. This grievance was thereafter processed through the grievance steps without resolution, finally coming to arbitration where it presently resides for a final and binding decision, free of procedural defect.

The Warden testified that the Grievant had asked about EAP and a last chance agreement, and that he had considered it. However, he does not believe the reasons she was late and failed to call off bear any relationship to RAP issues. Moreover, she did not make him aware that she was already in an EAP and he has no idea why someone already in one would seek discipline deferral pending EAP. In addition, had she requested accommodation under ADA, which she did not do, he would have looked at that, too,

For her part, the Grievant testified that although she did not mention she was in EAP for alcoholism during these disciplinary proceedings, management had learned of it at her pre

disciplinary hearing for her 10 day suspension in 1996 and she signed a release on July 24, 1997 so her EAP could inform management themselves. She never requested ADA accommodation, except for a hearing loss, nor is she aware whether alcoholism, depression or financial problems are covered. She did not grieve her prior discipline, assuming the Union had done so as, in her opinion, it is their responsibility. She has not made use of her FMLA rights either. She does, however, want her job back and believes her attendance improved after she entered the EAP.

Arguments of the Parties

Argument of the State

The State argues it has proved just cause for terminating the Grievant. There is no dispute that she called in more than 2 1/2 hours later than required. She never submitted a request for leave form or brought evidence that her power was shut off. But even if it was improperly turned off as she claims, the State argues that as a person on the edge of removal, she had the obligation to take every possible means to assure she was in compliance with the standards of conduct.

The State argues removal in this case is progressive, commensurate, and corrective. The Grievant had twelve disciplines in the two years preceding this incident, at least seven of which were for similar offenses. The State gave her a second and a third chance, for the disciplinary grid provides for removal on a fifth offense. The State's decision not to mitigate or make a last chance agreement was based on what it knew at the time. Neither EAP nor ADA reasons for her lapse were raised. The reason provided was power shut off. Power shut off for nonpayment of bills is not an EAP issue and, even if it were, the employer is not obligated to hold discipline in abeyance pending EAP results. In any event, even though she brought no evidence of an EAP issue at the time, she was already in the program, but with no effect on her attendance. Enough is enough. The effect of poor attendance is felt primarily by fellow officers who have to cover for the absent one, whether **6**

by overtime or by working a different assignment than customary. Putting the Grievant back will send a message to other employees that they can disregard attendance rules and procedures eight times before it costs them their jobs. On the other hand, upholding the removal, which another arbitrator did in a strikingly similar case, will send the message that attendance matters. [1]

The State asks that the grievance be denied in its entirety.

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In the Union's view, the State lacked just cause to remove the Grievant. The record shows that the incident of April 9 occurred because her power was turned off when Bankruptcy Court failed to pay her bill and the utility company disregarded the Grievant's medical certificate. The Grievant was in Chapter 13 and having her wages garnisheed, leaving only a little money for food, gasoline, and other necessities.

The Grievant had entered the EAP and gone on disability leave to address her problems. This did affect her attendance, but the employer gave no consideration to these facts. Indeed, the Union asserts the State disregarded her participation in EAP when it served her with discipline on February 4, 1997. Failure to consider EAP is a violation of Article 24.09 of the Collective Bargaining Agreement.

The Union pleads that the Grievant deserves another chance. She was a good officer whose problems began in 1995 after some years of State service. She felt discriminated against and believed the State was out of compliance with the ADA in violation of Article 2.01 (Nondiscrimination) and 2.02 (Agreement Rights) of the Collective Bargaining Agreement. It is unjust to punish a person with health problems of severe asthma, depression, and alcoholism. The Union

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[1] *Ohio* &R.C V. 0CSEA1AFSCME Local 11 (Fawley, Grievant), No. 27 26 930119 36801 03 (Loeb, i995), **7**

concedes her failure to call off did create hardship for the institution, but five extra officers were assigned to relief that night, so the situation was not critical.

In support of its position, the Union offers the decisions *of Kelly Springfield Tire Co. v. U.R.W. Local 746*, 108 LA 984 (Nicholas, 1997); *Vons Companies, Inc. v. Teamsters Local* 848,106 LA 740 (Darrow, 1996); Georgia Pacific Corp. v. Woodworkers/I.A. M Local W 376, 108 LA 43 (Nicholas, 1997); *Ohio D. R. C v. 0CSEA/AFSCME Local 11* (Block Grieiant), No 27 25 960617 1092 01 03 (Dworkin, 1997). It asks that the grievance be granted, the Grievant returned to her former position, awarded back pay, benefits and seniority, and made whole.

Pertinent Contract Provisions

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 FAP 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 pre disciplinary 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. (Joint Ex. 1)

Opinion of the Arbitrator

There is no dispute that the Grievant once again violated the State's reasonable rule to report her inability to appear for work when expected or that this followed a history of discipline for eleven rule violations, including attendance rules, in the preceding two years. That being the case, there are really only two questions for the Arbitrator to decide: (1) Should the removal be mitigated by the role, if any, that the alleged power outage played and (2) should her participation in EAP have been given greater weight than it was? **8**

Regarding the alleged power outage, I have the same problem the State did at the predisciplinary hearing, lack of proof. While there is evidence the Grievant owed the utility a substantial amount of money, was facing a shut off against which she obtained a medical prohibition on the very day she overslept, and that she was in Chapter 13, she has never brought proof that her electricity was shut off on the day in question or offered any explanation for why, knowing she could ill afford another rule infraction, she did not take precautions to assure her timely appearance for work. She has had many opportunities to present such proof. Even if Captain Everhart did not request it when she finally called in April 9, it was an issue during the pre disciplinary hearing and was noted on the pre disciplinary report. Since then, there have been grievance meetings and an arbitration hearing. The Grievant has brought other documentation, but this piece remains singularly lacking, From this, the inference is drawn that no such proof exists. Lest the Grievant believe that it is the employer's responsibility to substantiate her claim, I point out that hers is an affirmative

defense. She is the one who claims mitigating circumstances and she is the one who has the power to request the records of the utility company. As it stands, even the medical certificate raises questions about the veracity of the Grievant's claim that the situation was beyond her control, for it is dated April 9 and lacks any indication of when it was presented to the utility company or by whom.

Turning now to the EAP issue, it is difficult for me to believe that the employer was as ignorant as it claims of the Grievant's history of depression and alcoholism or the par these illnesses may have played in the Grievant's financial difficulties that she says caused her to miss the call in window. Her disability leave, after all, had to be processed through the Department.

However, giving greater consideration to her request, as I do now, does not compel that the removal be reduced. Article 24.09 makes clew that the employer need not modify contemplated discipline, but must only give it serious consideration. What is more, it specifically contemplates **9**

discipline for infractions occurring while the employee is in a program, which is precisely what occurred here. EAP is not a license to disregard legitimate employer directives. The employer still has the right to expect employees to come to work when scheduled or to provide adequate notice when they cannot. The Grievant had been in the EAP for nine months, a large portion of which she spent on disability leave. Despite this, her prior disciplines and movement to the third shift; she still could not conform herself to her employer's attendance expectations. Moreover, she blames everything and everyone else for her troubles. Without some indication that something is different from the preceding nine months, and different in a way indicative of success, a last chance agreement seems only a lam chance at mom of the same. This, in fact, is what Arbitrators Dworkin and Darrow had in the cases cited by the Union; impending discipline served as a wake up call to Dworkin's grievant and Darrow's grievant had a long, unblemished record indicative of success.[2] If, as my learned co panelist Jonathan Dworkin holds, the litmus test in a removal is whether the grievant is redeemable, I have to say that I agree with the State. This Grievant has had her second chance and

then some. While it is never easy to sustain a removal, particularly of a troubled employee who has given good service, there comes a time when it must be recognized that the employer can do no more without compromising the expectations and well being of other employees.

Award

The grievance is denied in its entirety.

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Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
May 15, 1998

ODRC448 .

The other two cases cited by the Union, *Kelly-Springfield Tire* and *Vons Companies* are distinguished

by proof of disparate treatment.

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[1] Ohio D.R.C. v. OCSEA/AFSCME Local 11(Fawley, Grievnt), No. 27-26-930119-368-01-03 (L0eb, 1995).

[1]

[2] The other two cases cited by the Union, *Kelly-Springfield Tire* and *Vons Companies* are distinguished by proof of disparate treatment.