ARBITRATION DECISION NO.:
273

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

EMPLOYER:
Department of Rehabilitation
and Corrections, Dayton
Correctional Institution

DATE OF ARBITRATION:
June 6, 1990

DATE OF DECISION:
July 4, 1990

GRIEVANT:
Lawrence E. Davis

OCB GRIEVANCE NO.:
27-07-(89-12-15)-0028-01-03

ARBITRATOR:
Anna D. Smith

FOR THE UNION:
Patrick Mayer, Advocate

FOR THE EMPLOYER:
Joseph B. Shaver, Advocate
Tim Wagner, Second Chair

KEY WORDS:
Removal
Job Abandonment
Duty to Contact Employer
Mitigation
EAP
Incarceration

ARTICLES:
Article 24 - Discipline
    §24.01-Standard
    §24.02-Progressive
Discipline
Article 25 - Grievance
Procedure
Article 27 - Personal Leave
    §27.04-Notification and

Approval of Use of Personal Leave
Article 28 - Vacation
§28.03-Procedure
Article 29 - Sick Leave
§29.03-Notification
Article 31 - Leaves of Absence
§31.03-Authorization for Leave

FACTS:

The grievant was hired as a Corrections Officer 2 in 1985. He was later promoted to Correctional Supervisor in 1988 but was demoted to his prior position during his probationary period. The grievant's attendance deteriorated from 1988 through 1989 for which he received discipline.

The grievant did not work after September 21, 1989. He was incarcerated until 9/27/89, released and arrested again in another jurisdiction the same day and released on 9/28/89. The grievant's mother called the employer for him at the beginning of the first incarceration. He was placed on emergency personal leave until 9/24/89 after which time he was considered absent without leave. In October, after his arrests, the grievant enrolled in an Employee Assistance Program. He was charged with job abandonment on October 13 and removed on November 29, 1989.

Throughout the period the grievant was in contact with his cousin, a third shift commander, Ronald Ford. Ford told the grievant to contact the grievant's commander, Capt. Link. He also had contact with the second in command on the first shift, Lt. Brunsman, however, the grievant never contacted the first shift commander, Capt. Link. There were also several calls from persons employed at the facility to the grievant's home which were received by the grievant's family.

EMPLOYER'S POSITION:

An employee has an obligation to attend work or to notify the employer of the absence. The grievant in this case was told by other employees to contact the employer which he never did. The employer has no duty to attempt to contact employees who are absent. However, Capt. Link, the grievant's supervisor, attempted to contact the grievant but was unsuccessful. Therefore, because the grievant was absent without notifying the employer he had abandoned his job.

There are no mitigating factors which require a reduction of the penalty. Enrollment in an EAP may be considered as mitigation but is not required by the contract to be considered as mitigation. Removal is proper in this case due to the grievant's prior discipline for similar offenses and the serious nature of job abandonment.

UNION'S POSITION:

The grievant's removal was improper because the grievant contacted the employer and was told that everything was in order. He responded to every communication he received from the employer. Also the grievant's enrollment in an EAP is evidence of a concern for his job, not that he intended to abandon his job.

There are mitigating factors present which require the removal be overturned. The employer did not make every attempt to clearly inform the grievant that he was AWOL. The grievant was in continuous contact with the employer through Ronald Ford and Lt. Brunsman. Neither Ford nor Brunsman told the grievant that he was AWOL. Additionally, removal is punitive in this case. The grievant never returned to work after serving his three day suspension, therefore, no opportunity for improvement in attendance was allowed. Therefore, there was no just cause for removal and the grievant should be reinstated with full back pay.

ARBITRATOR'S OPINION:

In a case of job abandonment there is no need to impose progressive discipline. The employer need only identify the voluntary quit and then remove the employee. The employer has no duty to track down an employee beyond a good faith attempt to communicate. The grievant in this case was absent from October 1 through October 26, therefore, the issue is whether this action constitutes job abandonment.

In this case, the employer did attempt to contact the grievant. His supervisor Capt. Link and other employees called the grievant's home leaving messages with family members. The grievant, however, made no attempt to contact the employer while he was absent in spite of being told to do so. He may be excused while he was incarcerated, but not otherwise. The grievant claims that he believed his leave was authorized, however he had received no notification of the number of days, therefore, he should have continued to call each day. Further, the grievant's pre-disciplinary notice should have alerted him to a problem with his leave status. That the grievant did not intend to abandon his job is irrelevant in the face of such an extended absence.

The agency contemplated lesser discipline for job abandonment based on mitigating factors. There are no mitigating factors present including the grievant's enrollment in an EAP. The grievant has not responded to prior discipline for similar offenses, therefore removal in this case was for just cause.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

In the Matter of Arbitration
Between

**THE STATE OF OHIO,
DEPARTMENT OF REHABILITATION
AND CORRECTIONS**

and

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11,
A.F.S.C.M.E., AFL-CIO**

OPINION and AWARD

Anna D. Smith, Arbitrator
Case No.:
27-07-891215-0028-01-03

Removal of Lawrence Davis

I. Appearances

For the State of Ohio:
Joseph B. Shaver, Assistant Chief, Bureau of Labor Relations, Ohio Department of Rehabilitation and Corrections, Advocate.
Tim Wagner, Office of Collective Bargaining, Second Chair.
Ronald Ford, Correctional Supt. III, Dayton Correctional Institution, Witness.
Gary E. Link, Correctional Supt. III, Dayton Correctional Institution, Witness.
Ronald D. Edwards, Warden, Dayton Correctional Institution, Witness.

For OCSEA/AFSCME Local 11:
Patrick Mayer, Staff Representative, OCSEA, Advocate.
Lawrence E. Davis, Grievant.
Lena E. Davis, Witness.

Walter Dunson, Corrections Officer II, Dayton Correctional Institution, Witness.

II. Hearing

Pursuant to the procedures of the Parties a hearing was held at 9:00 a.m. on June 6, 1990 at the offices of the State of Ohio Office of Collective Bargaining, 65 East State Street, Columbus, Ohio before Anna D. Smith, Arbitrator. The Parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. No post-hearing briefs were filed in this dispute and the record was closed at the conclusion of oral argument, 2:00 p.m., June 6, 1990. The opinion and award is based solely on the record as described herein.

III. Issue

The Parties stipulated that the issue before the Arbitrator is:

"Was the Grievant, Lawrence Davis, removed for just cause, and, if not, what should the remedy be?"

They further stipulated that this issue is properly before the arbitrator.

IV. Stipulations

Stipulated Facts

Lawrence Davis began his State employment as a Corrections Officer II at the Lima Correctional Institution on 9-3-85. Mr. Davis transferred laterally from the Lima Correctional Institution to the Dayton Correctional Institution on 2-1-87. On 6-19-88 Mr. Davis was promoted to the position of Correctional Supervisor I. He was demoted back to the position of Corrections Officer II during his probationary period on 12-13-88. Mr. Davis was absent from the work place from 10-1-89 through 10-26-89. During this time he was recorded by his shift captain, Captain Link, as being AWOL. A Pre-disciplinary conference was held on 10-27-89 and 10-30-89, and Mr. Davis was charged with a violation of Rule 2 of the Department of Rehabilitation and Correction's Standards of Employee Conduct, Job Abandonment. Mr. Davis was terminated from his employment with the State of Ohio on 11-29-89.

Stipulated Disciplinary Record

Date/Discipline/Infraction

2-1-88/3-day Suspension/6c, Failure to Follow Policies (Radio Traffic Policy)

12-27-88/Oral Reprimand/6c, Failure to Follow Call-Off Procedures

3-28-89/Oral Reprimand/6c & 1b, Failure to Follow Call-Off Procedures and Absent Without Leave

5-11-89/Written Reprimand/6c & 1b, Failure to Follow Call-Off Procedures and Absent Without Leave

6-16-89/Written Reprimand/6c, Failure to Follow Call-Off Procedures

7-19-89/1-day Suspension/1a, Unauthorized Absence

10-31-89 through 11-2-89/3-day Suspension/6b, c & 10, Failure to Provide Physician's Verification, Failure to Follow Call-Off Procedures, Providing False Information of Physician's Treatment

Joint Exhibits

1) State of Ohio/OCSEA Local 11 Contract, 1989-91;
2) Grievance Trail;
3) Discipline Trail;
4) Work Rules and Receipt;
5) Amended Notice of Suspension.

V. Relevant Contract Clauses

Article 24 Discipline

§24.01 Standard

Disciplinary action shall not be imposed upon an employee except for just cause....

§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.

Article 29 Sick Leave

§29.03 Notification

When an employee is sick and unable to report for work, he/she will notify his/her immediate supervisor or designee no later than one half (1/2) hour after starting time, unless circumstances preclude this notification. . . . In institutional agencies or in agencies where staffing requires advance notice, the call must be made at least ninety (90) minutes prior to the start of the shift or in accordance with current practice, whichever period is less.

If sick leave continues past the first day, the employee will notify his/her supervisor or designee every day unless prior notification was given of the number of days off. . . .

VI. Background

Lawrence Davis did not work at his Dayton Correctional Institution job from September 21, 1989 until he was removed from his position on November 29, 1989. Until September 27 he was incarcerated on charges unrelated to his employment. His mother, Lena Davis, called in on his behalf at the beginning of his incarceration and he was carried as on emergency personal leave until September 24, after which he was carried as absent without leave. (He was later excused until October 1.) His cousin and the third shift commander, Ronald Ford, visited him in jail on September 22. On September 26, he was released from jail and claims to have spoken with Lt. Brunsman, second in command on the first shift. On September 27 he was arrested again and incarcerated in another jurisdiction. He was released on September 28, but did not return to work. On October 13, notice of pre-disciplinary hearing was issued, charging Davis with job abandonment. Said hearing was conducted October 27 and 30. From October 27 until his removal for job abandonment, he was either on administrative leave or suspension. The removal was timely grieved and processed through to arbitration where it presently resides for final and binding determination pursuant to Article 25 of the Collective Bargaining Agreement.

Up until about a year before the absence that led to his removal, Davis seems to have been a model

employee. He received increasingly favorable performance evaluations, was promoted to a supervisory position, and had no disciplinary actions in his personnel file. By December, 1988, however, his performance was slipping and he was having a problem with tardiness and the call-off procedure. He was demoted in that month and began to accumulate the disciplinary record set forth above. Witnesses for both Parties testified to rumors of drug use. The Grievant testified that the charge was untrue, but that the rumors created a stress that affected his health and job performance. He entered the Employee Assistance Program in October, following his arrests and incarcerations and was treated for stress related disorders. The Employer does not claim that Davis was removed for anything other than job abandonment, but Warden Edwards did testify that in recommending removal he took into account prior violations, counseling and discipline, and the rumors of the work place. He was also aware of the Grievant's admission to the EAP.

Central to the charge of job abandonment is whether the Grievant gave proper notice of his absence. Captain Link, first shift commander, testified that he was never notified by Davis of his status, or received information about him after the emergency personal leave expired. He attempted to reach Davis at his mother's phone several times. He did not reach Davis, but did speak with his mother approximately three times, who referred him to Captain Ford. Capt. Ford told Link he had seen Davis in jail and would relay to him that Link needed to talk to him.

Capt. Ford testified that he talked to Davis in jail on September 22, between incarcerations, and again in the first half of October when he transported Davis to court. After intercepting the message informing the institution of Davis' incarceration and visiting Davis in jail on the 22nd, Ford told Link and maybe Lt. Brunsman the circumstances of Davis' absence, but then backed off the case because of his role conflict and his perception that he was not being fully informed. At no time did Davis tell him he needed a month off, nor did Ford tell him he would take care of the situation or say more than that he would mention the circumstances to the warden or to Davis' shift commander. Rather, on all three occasions when he spoke to Davis, he told him he had to call Capt. Link himself.

The Grievant's mother, Lena Davis, testified that she received lots of calls from the prison. Amongst else, the unidentified caller would say Davis should contact his supervi-sor and leave a number. She got the impression there was a problem with his job, although the caller did not say so in so many words. Some of the calls were from a personal friend of the Grievant's at work. Some calls were taken by her daughter. She talked to Capt. Ford after her son was arrested, who said he would try to help Davis save his job, but he did not tell her that her son was AWOL or that he had to talk to Capt. Link.

The Grievant testified that he told Ford he needed to be off until November 1 to attend to his legal problems and that Ford said he would speak with Warden Edwards. When Ford took him to court after his second jail release, Ford told him he had spoken to Deputy Superintendent Dave Johnson and it sounded to Davis like everything was OK. Davis also testified that this conversation took place while he was in the Miamisburg jail. Ford never told him he had to call the institution or Link, and he received no messages from Link. However, his friend, Franklin Davidson, called and identified himself as a supervisor, which he is. Finally, he said that Lt. Brunsman called him between incarcerations and asked if he was coming back. Davis told him no, that he had to deal with the Miamisburg police, that Brunsman should talk to Ford, and that he would come to work on Thursday (September 28). Brunsman told him not to come in until his pre-disciplinary hearing. This was the only contact he had with Brunsman until he did come back.

VII. Positions of the Parties

Position of the Employer

The State argues that the employees first obligation to his employer is to attend work or notify his employer of his absence. This obligation is supported by §29.03 of the Collective Bargaining Agreement regarding call-off procedures and the work rules of the Agency, notably Rule 2, which defines Job Abandonment to be three or more days without proper notice. In the State's opinion, the record shows that Davis made no contact with his supervisor from October 1 through October 26. Capt. Ford told him to call his supervisor and Capt. Link tried to reach him by phone, leaving messages for him to call the institution. Receiving no notification, discipline was initiated, resulting in the severest form for job abandonment. The

Employer believes termination to be warranted because of the Grievant's record of attendance problems. Management contends it has been constructive with the Grievant, counseling him to correct his behavior and applying progressive discipline. Aggravated by the length of the absence and similar past conduct, it contends it had just cause to discharge Mr. Davis.

The Agency responds to the Union's arguments thusly: (1) It disputes the contention that the employer is obliged to track employees down, asserting that it had no duty to go even as far as it did. (2) The Contract states that the Employer may consider participation in the Employee Assistance Program as a mitigating factor; it does not require it to do so. Against this mitigating factor are the aggravating factors of length of absence and prior record. Moreover, the letter submitted shows that the first EAP contact was in mid-October, well after the three-day definition of job abandonment and the Grievant's release from jail. (3) The Agency agrees that rumors can be stressful, but this does not relieve the employee of his obligation to notify his employer of extended absences. (4) The Employer further agrees that credibility is a significant issue in this case. It points out that Dunson did not tell the truth about the EAP letter and that the testimony of the Grievant's mother supports Capt. Link's testimony that attempts were made to get the Grievant to call in. Finally, it notes that the testimony of Ford is in direct conflict with the Grievant's. If Ford is judged to be the more credible witness, then the discharge should be upheld as commensurate with the offense.

Position of the Union

While the Union does not dispute that Mr. Davis was absent from his job for the period cited, it contends that he did notify the member of management he was supposed to and received assurances that all was well. In support it notes that the pre-disciplinary hearing officer apparently accepted Davis' conversations with Ford as proper notification because his absence was excused through September 30. Circumstantial evidence supports the Grievant's claim that he did not abandon his job: he entered the EAP and did respond to the one communication he received from his employer, the pre-disciplinary hearing notice. Noting the disparity in the testimony of the Grievant and Capt. Ford, the Union suggests a possible misunderstanding: maybe Davis told Ford he needed until the "end of the month," which Ford took to mean the end of September rather than October as Davis intended.

The Union goes on to raise several mitigating factors. First, it implies that the Agency contributed to the problem by failing to exhaust all possibilities of contact with the Grievant. It did not, for example, mail the Grievant a letter telling him he was AWOL. Moreover, although Mrs. Davis testified that there were calls from the prison, she did not say they were from Capt. Link. Additionally, if one accepts that the Grievant did properly notify his employer, then Management had the responsibility to respond to his request for leave. (In support the Union cites §27.04, 28.03 and 31.03 of the Contract.) This it did not do, either through Ford who never said Davis was AWOL, by Link's alleged phone calls, or by letter. Second, the Union contends that Management was unresponsive to the Grievant's participation in the EAP, his long and previously good work record, and improperly gave great weight to unfounded rumors when it applied discipline.

The Union further argues that discipline was applied punitively in violation of the Contract which calls for corrective discipline. It contends that Davis had no opportunity to correct his behavior based on the three-day suspension because he was never allowed to return to work from the time it was imposed until he was discharged. It cites Arbitrator Dworkin, Case No. 11-09(02-09-88)06-01-09, who set aside discipline imposed before a lesser discipline could have an effect. The Union goes on to argue that if the three-day suspension is eliminated from consideration as being of no effect, this leaves a one-day suspension as the strongest related discipline on record against the Grievant. It concludes that moving from a one-day suspension to termination, thus skipping the major suspension step, is not corrective. Even the penalties specified for job abandonment provide for a major suspension on the first offense to provide for mitigating circumstances.

The Union thus takes the position that all of these factors call for the conclusion that the Grievant was not terminated for just cause. It asks that the grievance be sustained and the Grievant granted full back pay, benefits and seniority.

VIII. Opinion

In the case brought to the Arbitrator's attention by the Union, Arbitrator Dworkin states "When an employee abandons his/her job, management has no need to apply progressive discipline; such action would be an exercise in futility. All it has to do is identify the voluntary quit, accept it as a fact, and remove the employee from the payroll" (p.23). This Arbitrator agrees. To require an employer to track down an employee so the employer can apply corrective discipline is nonsensical when the employee cannot be found or does not respond to the employer's good faith communications. Since it is an undisputed fact that the Grievant in this case did not report for work from October 1 through October 26, the question is whether his absence constitutes job abandonment, which does not require corrective discipline, or some form of leave or unauthorized absence, which may afford the Grievant corrective discipline or excuse his absence entirely.

The Union claims that the Grievant did not abandon his job. He reported his need for leave to the member of management who normally received such requests from first shift employees, and he received assurances which caused him to believe his leave had been or would be approved. He did not know he was being carried as AWOL because he was not told he was. He did not receive phone calls, mail or messages. When he did speak to a superior officer on his shift, Lt. Brunsman, he was told not to come in until his pre-disciplinary hearing. If his request for leave was disapproved, it was the Employer's responsibility to inform him. That he enrolled in the EAP in mid-October and responded to the pre-disciplinary hearing notice shows he had not quit his job.

Against this is the Agency's version: management attempted to ascertain the Employee's situation and inform him of his need to talk to his shift commander. The Grievant was nevertheless absent continuously for four weeks without contacting his employer either directly or indirectly. In light of the Employee's record and length of the absence, termination is warranted.

For a number of reasons I believe the Employer's view of job abandonment is correct. To begin with, there is the testimony of Capt. Ford. As a relative of the Grievant and a member of management, he was in a difficult position throughout the entire affair, up to and including the arbitration hearing. He played it straight, both in action and word. He tried to help his nephew by telling him repeatedly what he must do: contact his shift commander. While the Grievant might be excused for not complying while he was incarcerated, there is no excuse for failing to do so upon his release. Even in mid-October, after Ford saw him again and the pre-disciplinary hearing notice was issued, there is no evidence that the Grievant called off or otherwise contacted his Employer to clarify matters.

Then there is the matter of Capt. Link's phone calls. The Grievant claims he did not receive them, yet his mother testified that there were many calls from the prison asking Davis to get in touch with his job or to call his supervisor, and leaving a number. These messages were passed on to the Grievant. Mrs. Davis got the impression there was a problem with her son's job and even asked him about it. Some of these calls were from Franklin Davidson, a friend of the Grievant's at the prison who is also a supervisor, though not the Grievant's. I cannot conclude that all the calls were from the friend who sometimes referred to himself as the Grievant's supervisor. Rather, Mrs. Davis' testimony supports Link's claim that he called and left word more than once after Septem-ber 24. Moreover, this was not the only medium Link used to try to reach Davis. Since Davis was communicating through his uncle, Link would naturally assume the communication was two-way, and so at least twice he told Ford to tell Davis to call in. While Link and other members of management did not exhaust all avenues, I cannot hold that they are required to do so. Here they made reasonable attempts to reach the Grievant which were disregarded. Again, the Grievant may be excused for not responding while he was unable to do so, being incarcerated, but once he was released the responsibility was his to ascertain his status with his Employer and seek extended authorized leave if he needed it. The Employer can hardly respond to a request for leave without such a request.

It therefore seems to me that the Employer excused the Grievant's absence in September while he was incarcerated the first time by virtue of his mother's and his notification through Ford. The excused period was extended by the pre-disciplinary hearing officer to the end of September because of the second incarceration and the Grievant's notification through Ford. No leave was approved after that because no

request was made. The Grievant took unauthorized leave continuously for four weeks without notifying his Employer and, therefore, effectively abandoned his job.

The Grievant defends by stating that he understood himself to be on authorized leave until November 1. However, since he had not received notification of number of days off, he was required to notify each day (§29.03 of the Contract). Moreover, if "institutionalization" is taken to include incarceration, §29.03 requires the Employee to notify his supervisor at the end of the period, something the Grievant did not do. One wonders that he did not at least inquire as to the status of his alleged leave request.

The Grievant also testified that he talked to Brunsman between incarcerations, who told him not to come in until the pre-disciplinary hearing. If this is true, his absence would be explained, but one is left wondering why the Grievant did not react to the news that he was subject to discipline. In any event, Lt. Brunsman was not called and so what he may have said cannot be credited.

It may well be that the Grievant did not intend to abandon his job in the sense of a conscious decision to quit, but the record is clear that he disregarded his obligation to inform his employer and request leave, and he did so for a continuous, extended period of time which goes well beyond mere unauthorized absence. He therefore effectively abandoned his job and his employment was justly terminated.

As stated at the outset, this Arbitrator is of the opinion that job abandonment, like some other offenses, escapes the contractual requirement for corrective discipline. This Agency nevertheless anticipated situations in which its definition of job abandonment (a 3-day absence without proper notice) might not warrant termination. The Union argues that there are several mitigating factors which call for the lesser discipline. All of these except the Employer's possible motivation and the Employee Assistance Program have been addressed above. It is true that the Employer heard rumors of drug use and may have been less inclined to show leniency because of them. It is also true that the Grievant did enter the EAP, though not specifically for a drug problem, which he denies having. However, the Grievant had not responded to previous efforts to correct attendance problems and committed a dischargeable offense in no small way. I am not convinced that the rumors tainted the Employer's decision, for failure to report for a month is, by itself, sufficient reason to discharge. Similarly, the EAP was considered by the Employer, but in light of the prior record and length of absence, was not and need not have been determinative.

I therefore conclude that the Employer had just cause to remove Lawrence Davis from his position.

IX. Award

The grievance is denied in its entirety.

Anna D. Smith, Ph.D.
Arbitrator

Shaker Heights, Ohio
July 4, 1990