ARBITRATION DECISION NO.:
338A

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

EMPLOYER:
Department of Youth Services
Training Institute of Central Ohio (TICO)

DATE OF ARBITRATION:
March 21, 1991

DATE OF DECISION:
April 30, 1991;
Letter Dated; June 7, 1991

GRIEVANT:
Johnna Graham

OCB GRIEVANCE NO.:
35-08-(90-10-18) -0019-01-05

ARBITRATOR:
Rhonda R. Rivera

FOR THE UNION:
John T. Porter, Esq.

FOR THE EMPLOYER:
Deeneen D. Donaugh, DYS

KEY WORDS:
Duration of Last Chance Agreement

ARTICLES:
Article 24 - Discipline
§ 24.06 - Prior Disciplinary Actions

FACTS:
The grievant had been reinstated as a result of a prior arbitration, see OCSEA #338.This was subject to a last chance agreement referring to the rule violated, #17 Directive B-19.

EMPLOYER'S POSITION:
The last chance agreement under which the grievant was reinstated is to remain in effect for the duration of the grievant's employment with the State of Ohio. A last chance agreement is used to put employees on notice that further rule violations will result in removal. The employer still retains the burden of proving just cause and investigating the charges. Additionally, the offense referred to in the agreement at issue carries removal for serious violations as the penalty for a first time offense. Therefore, the grievant bears no hardship in complying with this last chance agreement for the duration of her employment.

UNION'S POSITION:
The last chance agreement will remain in effect only so long as the present collective bargaining agreement remains in effect. This is because the arbitrator's power is derived from the contract and, therefore, can last no longer than the agreement. Alternatively, the last chance agreement should only be in effect as long as the underlying discipline remains on the grievant's record. This position is based upon section 24.06 of the contract which stipulates that discipline will remain in an employees file for only 24 months if there has been no intervening discipline. No prior last chance agreement with an OCSEA member has lasted longer than two years.

ARBITRATOR'S OPINION:
The last chance agreement falls within the collective bargaining agreement section 24.06. Therefore, the last chance agreement will remain in the grievant's file until removed pursuant to section 24.06, which will be after twenty four months

if there has been no other discipline.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

State of Ohio
Department of Youth Services

Employer

Grievance No.: 35-08-901018-0019-01-05
Grievant (Johnna Graham)
Hearing Date: March 21, 1991
Award Date: April 30, 1991
Arbitrator: R. Rivera
Letter Date: June 7, 1991

For the Union:
John T. Porter, Esq.

For the Employer:
Deeneen D. Donaugh, DYS

On April 30, 1991, the Arbitrator made the following award:

"The Grievant is to be reinstated as of the date of this opinion. She is to be reinstated on a last chance agreement with reference to Rule 17 of B-19. The time from termination to the date of this award is to be characterized as a suspension. The Arbitrator retains jurisdiction solely to review, if necessary, the last chance agreement."

The Employer and the Union have asked the Arbitrator to clarify the Award (see attached letters). The question is the length of the effect of the "Last Chance Agreement."

After review of the positions of the parties, the Arbitrator finds that the Last Chance Agreement falls within the contract section 24.06. In effect, the Last Chance Agreement is coupled with the suspension. Therefore, the Agreement shall remain in the Greivant's personnel file until removed per § 24.06. The Agreement and record of the suspension shall be removed "after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months."

Date: June 7, 1991
Rhonda R. Rivera
Arbitrator

LETTERS:

May 28, 1991

Rhonda Rivera
131 Price Avenue
Columbus, OH 43201

Dear Arbitrator Rivera:

Enclosed is the union's position on the length of the last chance agreement for Johnna Graham.

Sincerely,

John T. Porter,
Assistant Director of Arbitration

JP/kws

IN THE MATTER OF

Johnna Graham
and
OCSEA / AFSCME
v.
Ohio Department
of Youth Services
and
STATE OF OHIO

Arbitrator: Rhonda Rivera
Case 35-08-(90-10-18)-0019-01-05

Union Position on Length of Last Chance Agreement

In the above referenced arbitration case the arbitrator ordered that the grievant's removal be overturned and that the grievant be returned subject to a last chance settlement agreement. The grievant had been charged with having unauthorized communication with a youth. The disagreement between the parties concerns the period of time for which the last chance agreement should last.

It is the union's initial position that the length of the agreement should be controlled, by the length of the collective bargaining agreement between the parties. In several cases between the parties arbitrator Jonathan Dworkin has mediated last chance agreements. He has stated that since the arbitrator's powers are derived from the contract, the length of the last chance agreement should be no longer than the expiration of the collective bargaining agreement. In the instant case this means that the last chance agreement should run through December 31, 1991, the expiration date of the current agreement between the parties.

An alternate position taken by the union is that the last chance agreement between the parties should last no longer than two years from the date of the infraction. This position is based upon article 24.06 of the contract which states that "records of other disciplinary action will be removed from an employee's file...After twenty four (24) months if there has been no other discipline imposed during the past twenty-four (24) months." It would be draconian to insist that a last chance agreement be held over an employee's head for the rest of the employee's service with the State of Ohio. No last chance agreement between OCSEA and the State has ever lasted longer than two years and most have lasted for a much lesser period of time.

Two additional issues need to be addressed. First, the last chance agreement should be maintained in the employee's personnel file for no more than 24 months pursuant to 24.06. After that point it should be purged from the employee's personnel file.

Secondly, the arbitrator should retain jurisdiction for the length of the last chance agreement to determine if the grievant is guilty of the same or similar offense. It follows that the arbitrator who found the original violation would be most familiar with the discipline and is best suited to determine whether an alleged violation is the same or similar as the original offense.

Respectfully submitted,

John T. Porter
Assistant Director of Arbitration
OCSEA/AFSCME Local 11

cc: Ron Stevenson
Bruce Wyngaard
Johnna Graham
File
May 30, 1991

Rhonda Rivera
131 Price Avenue
Columbus, Ohio 43201

RE: Johnna Graham Arbitration Award
#35-08-(90-10-18)-0019-01-05

Arbitrator Rivera:

In the above case, the Grievant was found in violation of Directive B-19, formerly Rule 17 (Work Rules July, 1985), currently Rule 29 (Work Rules November, 1990), concerning unauthorized communication with a youth while serving as an employee for the Department of Youth Services. Based on the determination that termination was neither corrective nor commensurate, the Grievant was reinstated as of the date of the award on a last chance agreement. The parties to the arbitration are now seeking clarification from the Arbitrator concerning the last chance agreement.

It is the position of the State that the purpose of the last chance agreement is to put an employee on notice that a subsequent incident involving the behavior at issue will result in summary removal. The last chance agreement is used when the behavior is so serious or has continued on such a prolonged path that no more such behavior can be tolerated. With a last change agreement, management still has the burden to investigate and determine that the evidence supports the allegation, but the employee gives up the right to dispute the severity of the discipline imposed.

In the case at hand, the infraction committed by the Grievant was a serious one, one which greatly compromised the Grievant's ability to do her job. This is supported by fact that the Department removed her for such behavior, by the Department's new grid, which provides for a 15 day suspension or removal for the first offense, and finally, by the arbitrator's decision to award a lengthy suspension for such behavior. Because of the seriousness, it then follows that the next infraction would result in removal. To require removal for the next offense is not unreasonable since the grid allows for removal on the first offense and removal would be progressive and commensurate in light of the lengthy suspension received in this case. Furthermore, based on the Grievant's experience, she has received notice that such behavior is serious and that such behavior may result in removal. In light of this, it does not present a hardship to the Grievant to require summary removal for any subsequent infraction violating Rule 29, Directive B-19, November, 1990 (current work rules), especially since management would still have the burden of investigating and if grieved, producing the evidence to support that the infraction occurred.

The union asserts that a time limit of two (2) years should be included in the last chance agreement, since that is the time contained in the contract for discipline to remain in an employee's personnel file. Such an argument is reasonable for infractions such as tardiness, wherein a single incident in and of itself is not of a serious nature and a clean slate of such behavior for two (2) years, or other designated time period, is evidence of corrected behavior. However, this argument should not apply to the behavior at issue in the instant case, or to other serious behavior, such as abuse. With those type of infractions, because of their seriousness, if removal is not given for the first offense, the discipline should be sufficient to put the employee on 'notice that such behavior cannot be tolerated and thus removal for a subsequent infraction will occur. In this case, the Grievant's suspension, as well as her overall experience at DYS, serve as sufficient notice that no such behavior can be tolerated again. It is neither harsh nor unreasonable to enforce this standard on the Grievant throughout her continued tenure, and not just for two (2) years, with the Department.

Based on the foregoing, management respectfully requests that the arbitrator uphold the condition of the last chance agreement that summary removal will be issued to the Grievant for any subsequent violation of Rule 29, Directive B-19, throughout the duration of her employment with DYS.

Furthermore, if the arbitrator rules that the last chance agreement will only stand for two (2) years, the employer requests that it be clearly stated and understood that subsequent discipline, within the two year period, will yoke with the last chance agreement, so that the agreement would stand until the Grievant had the designated period free of discipline per Section 24.06.

Sincerely,

Deneen D. Donaugh, Administrator
Labor Relations