

ARBITRATION DECISION NO.:

609

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation and Correction
Southern Ohio Correction Facility

DATE OF ARBITRATION:

June 11, 1996

DATE OF DECISION:

June 20, 1996

GRIEVANT:

Katrina Jackson

OCB GRIEVANCE NO.:

27-25-(95-11-15)-0992-01-03

ARBITRATOR:

Marvin J. Feldman

FOR THE UNION:

Don Sargent, Advocate
Herman Whitter, Associate General Counsel

FOR THE EMPLOYER:

Patrick Mayer, Advocate
Pat Morgan, OCB

KEY WORDS:

Absenteeism
Just Cause
Mitigation
Progressive Discipline
Removal
Spousal Abuse

ARTICLES:

Article 5 - Management Rights
Article 24- Discipline
 § 24.01 - Standard

FACTS:

The grievant had been disciplined eleven times for absenteeism during her four year tenure as a Corrections Officer. The grievant received four letters of reprimand, two 1 day suspensions, one 3 day suspension, one 5 day suspension, two 10 day suspensions, one 15 day suspension and for the next alleged

violation of the agency's policy the grievant was removed. The grievant testified that her attendance problems were caused by her husband's mental and physical abuse. The grievant did not notify management of the spousal abuse until the Step 3 hearing.

EMPLOYER'S POSITION:

The employer argued that while the grievant met the minimal standards on her efficiency ratings, the grievant's attendance was far less than good. The employer stated that the grievant's attendance problem was not a matter of a few absences, but was a problem that perpetuated itself during the grievant's entire employment history. The employer also argued that it had met the progressive discipline requirements of the contract and that management had "bent over backwards" to try to get the grievant to correct her behavior.

UNION'S POSITION:

The Union contended that the removal was not progressive or commensurate with the infraction. The Union also argued that the grievant's marital problems, and the sicknesses of her daughter and a baby she cares for were mitigating circumstances which warranted reducing the removal to some lesser form of discipline.

ARBITRATOR'S OPINION:

The Arbitrator found that the employer met its obligation of progressive discipline under the terms of the contract, and that the grievant had been less than a good employee because of her absenteeism problems. Although the grievant did not notify the employer of the spousal abuse, did not take advantage of the confidential Employee Assistance Program (EAP), and had received average performance reviews, the Arbitrator concluded that the spousal abuse was a mitigating circumstance which should be considered. The Arbitrator relied on a decision rendered by Arbitrator Graham in a similar type of case. In Arbitrator Graham's decision the number of periods of absence were less, the grievant notified the employer of the marital problems as they unfolded, the grievant's workload was not as significant, and the grievant did not work in a sensitive position. Arbitrator Graham stated that domestic problems cause a "frantic and desperate state of mind" that can affect employment. Notwithstanding the distinguishing facts, the Arbitrator in this case concluded that there was serious and continuing spousal abuse as evidenced by the testimony of the grievant, the grievant's sister-in-law and teenage daughter.

AWARD:

The Arbitrator reinstated the grievant contingent upon her participation in an EAP. If the grievant voluntarily attends the EAP she will be reinstated without back pay and without loss of seniority. If the grievant does not take part in the EAP the termination will stand.

TEXT OF THE OPINION:

**VOLUNTARY ARBITRATION PROCEEDINGS
TERMINATION OF KATRINA JACKSON
27-25-(95-11-15)-0992-01-03**

STATE OF OHIO
The Employer

-and-

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

OPINION AND AWARD

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APPEARANCES

For the Employer:

Patrick Mayer, Advocate
Pat Morgan, Office of Collective Bargaining
Vic Crum, Labor Relations Officer-SOCF

For the Union:

Don Sargent, Advocate
Herman Whitter, Associate General Counsel
Katrina Jackson, Grievant
Kyla Jackson, Witness
David Bowling, Witness
James Minzelli, Local Union President

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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 Southern Ohio Correctional Facility Conference Room, Lucasville, Ohio, on June 11, 1996, 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

In 1991 the grievant was employed by the State of Ohio as a correction officer at the Southern Ohio Correction Facility. She was subjected to employee performance reviews from the period of April 15, 1991, through April 15, 1994. Her latest review was dated by the reviewer on May 11, 1994, in which the following comment was made:

"Officer Jackson has good control and performs her duties as expected."

During her tenure as a corrections officer the grievant had a rather lengthy department record. It revealed the following:

1. On September 6, 1991, the grievant received the following record of reprimand:
"On August 23, 1991, you reported to work and was seen placing a sack outside of A-Building so that it

would not be shook down. A supervisor looked in the sack and found a puzzle book and radio. When you came out to go to Tower 4, you looked for your sack.

You are aware that it states in your post orders that reading materials or radios are not permitted in the towers and the reason is that these items could hamper you from your duty of looking or listening for escapes or other potential problems.

It is hopes that this Letter of Reprimand serves as a positive reminder of your duties and that no further violations occur, however, any further violation will receive more serious disciplinary action."

2. On September 4, 1992, the grievant received the following letter of reprimand:

"I AM ADVISED THAT YOU HAVE BEEN PLACED ON PHYSICIAN'S VERIFICATION DUE TO YOUR PAST RECORD OF ABSENTEEISM. ON 25 JULY 1992 and 7 AUGUST 1992, YOU CALLED IN SICK AND FAILED TO PROVIDE THE PROPER VERIFICATION OF THE ILLNESS' AS REQUIRED BY POLICY.

YOUR ACTIONS CONSTITUTE A VIOLATION OF RULE 3 G OF THE STANDARDS OF EMPLOYEE CONDUCT. ACCORDINGLY, I AM ISSUING YOU THIS FORMAL LETTER OF REPRIMAND, A COPY OF WHICH WILL BE PLACED IN YOUR OFFICIAL PERSONNEL FILE. YOU ARE CAUTIONED THAT FURTHER VIOLATIONS OF THIS POLICY MAY RESULT IN A MORE SEVERE DISCIPLINARY SANCTION BEING TAKEN AGAINST YOU.

3. On December 17, 1992, the grievant was suspended for one day with the following indicated infraction:

"You are to be SUSPENDED 1 DAY FOR THE FOLLOWING INFRACTIONS:

On September 30, 1992 and October 3, 1992, you called off work sick (flu). You were placed on PVN requirement on April 22, 1992. However, you failed to provide physician's verification documentation for the above dates. This is a violation of Rule 3g of the Standards of Employee Conduct. This is your 2nd offense of Rule 3g; therefore, I am suspending you for one (1) day."

4. On June 10, 1993, the grievant received an official letter of reprimand under the following notation:

"I am advised that on Wednesday, May 19, 1993 and Thursday, May 20, 1993, you reported off work 'emergency at home (request Leave Without Pay)'. You were absent from your job without proper authorization.

Your actions constitute a violation of Rule 3a of the Standards of Employee Conduct. Accordingly, I am issuing you this formal 'Letter of Reprimand', a copy of which will be placed in your official personnel file. You are cautioned that further violations of these Policies may result in a more severe disciplinary sanction being taken against you."

5. On June 18, 1993, the grievant received an official letter of reprimand for the following activity:

"I am advised that since March 10, 1993, through June 17, 1993, you have missed a total of 91.5 hours of work. Additionally records reflect that you have a negative sick leave balance. Your excessive absenteeism induces a hardship on the shift and disrupts the smooth operation of the

institution.

Your actions constitute a violation of Rule 3K of the Standards of Employee Conduct. Accordingly, I am issuing this formal Letter of Reprimand, a copy of which will be placed in your official personnel file. You are cautioned that further violations of this policy may result in a more severe disciplinary sanction being taken against you."

6. On November 9, 1993, the grievant received a one day suspension for the following activity:

"You are to be SUSPENDED 1 day for the following infractions:

Since June 18, 1993 through September 4, 1993 you have missed a total of 208 hours of work. Your absences are considered to be excessive. Therefore, you are in violation of the following Standards of Employee Conduct Rules effective June 17, 1990: Rule 3k - 'Excessive Absenteeism'

This is your second offense of Rule 3k, therefore, I am suspending you for one (1) day. "

7. On August 15, 1994, the grievant was suspended for three days for the following infraction:

"You are to be SUSPENDED THREE (3) DAYS for the following infractions:

On April 9, 1994, you called off work under Doctor's Care stating you would return to work or call by May 20, 1994. However, you failed to return to work and did not properly notify the institution of your continued absences until June 2, 1994. Therefore, you were considered AWOL from 5/20/94 thru 6/1/94. As a result, you are in violation of the following Standards of Employee Conduct Rules effective June 17, 1990: Rule 3a: 'Being absent without proper authorization (AWOL)'; Rule 3d: 'Failure to notify a supervisor of absence or follow call-in procedure'; Rule 4a: 'Three or more working days consecutive without proper notice'.

This is your second offense of Rule 3a and your first offense of Rules 3d and 4a. Therefore, I am suspending you for three (3) days."

8. On February 7, 1995, the grievant received a five day suspension because of the following infraction:

"You are to be SUSPENDED 5 DAYS for the following infractions:

Since October 3, 1994 through December 10, 1994, you have been absent from work a total of 45.4 hours of unauthorized leave. This is a violation of Rule 3a of the Standards of Employee Conduct. Since this is your third violation of Rule 3a, I am suspending you for five (5) days."

9. On March 6, 1995, the grievant received a ten day suspension for the following activity:

"You are to be SUSPENDED 10 DAYS for the following infractions:

On December 18, 1994, you called off work due to illness of your daughter. You did not complete a Request for Leave form for this absence until January 3, 1995 nor provide a PVN statement when you did complete the form. You were carried in an unauthorized leave status for this date. Your actions are violations of Rules 3a, 3e, 3g. This is your 3rd violation of Rule 3g, 3rd violation of 3a, and your first of 3e. However, this is your eighth violation of an absenteeism charge, so I am suspending you for 10 days."

10. On April 12, 1995, the grievant received a ten day suspension because of the following:

"You are to be SUSPENDED 10 DAYS for the following infractions:

On January 22, 1995, you reported off work stating the child of whom you had custody was sick. You did not submit a Leave Form until January 31, 1995, nor did you provide a physician's verification

as required. Your leave form was disapproved and you were carried on unauthorized leave.

On January 28, 1995 and January 29, 1995, you reported off work requesting 'Emergency Vacation.' However, your leave was denied and again you were carried as unauthorized leave for these days. Your actions are a violation of Rules 3a, 3g, and 3e. Since this is your 10th attendance related offense, I am suspending you for 10 days."

11. On June 12, 1995, the grievant was suspended for fifteen days because of the following:

"You are to be SUSPENDED FIFTEEN (15) DAYS for the following infractions:

Since February 1, 1995 through March 4, 1995, you have missed a total of 128 hours of work (112) hours were unauthorized. During these absences, on February 1, 1995 you reported off work 'Daughter ill.' However, you failed to provide a Physician's Verification as required and your Leave Form was disapproved for this day. As a result, you were on unauthorized leave.

Your absences of February 4, 1995 through February 18, 1995, you only provided a Dr. Statement to cover two (2) days. Your Request for Leave was partially denied (88 hours) and partially approved (8 hours). As a result, you were on unauthorized leave for the majority of these absences. On February 19, 1995 you reported off work 'LWOP Husband stole purse.' Your Request for Leave was denied and you were on unauthorized leave.

On February 20, 1995, you reported off work sick. You failed to provide a Physician's Verification and your Request for Leave was denied. As a result you were on unauthorized leave. On March 4, 1995, you failed to report for work, and you failed to notify the institution that you would not be reporting for your shift. Your request for Leave was denied and you were carried AWOL."

None of those activities, eleven in number, were protested or grieved by the grievant or the union. On November 1, 1995, the grievant received a removal notice which revealed the following:

"Dear Katrina Jackson

Pursuant to the authority granted in the collective bargaining agreement between the State of Ohio and AFSCME/OCSEA this letter is to advise you that you are to be REMOVED from the position of CORRECTION OFFICER effective: Wednesday, November 1, 1995.

You are to be REMOVED for the following infractions:

Since April 3, 1995 through August 16, 1995 you have been excessively absent from work. You have missed a total of 77.67 hours, 43.17 of which was unauthorized. Part of this time frame you failed to notify a supervisor of absence or follow call-in procedure and submit a Physician's Verification.

This is your sixth violation of Rule 3a, your second violation of Rule 3d, your fifth violation of Rule 3g, and your third violation of Rule 3k. Therefore, I am Removing you from the position of Correction Officer."

That particular event was protested on a timely basis and the protest revealed in pertinent part the following:

"On 11-2-95 c/o Katrina Jackson was removed from her position of correction officer for violations 3k, 3a, 3d, of the employee's code of conduct."

The remedy requested by the grievant was stated as follows:

"c/o Jackson be reinstated as a correction officer and be payed for all lost wages."

It might be noted that a step 3 response was filed to that grievance by the employer and it revealed the following:

"STEP 3 RESPONSE

GRIEVANCE #27-25(11/15/95)-992-01-03

RE: Katrina Jackson

Correction Officer
December 14, 1995

A grievance was filed by the above-named in accordance with Article 25.02 of the collective bargaining agreement between the State of Ohio and OCSEA/AFSCME, Local 11. Therein, it is alleged that Article(s) and Section(s) 24.02 - Progressive Discipline was violated.

A Step 3 hearing was held at Southern Ohio Correctional Institution on December 7, 1995, and present were: R. Clagg, Chief Steward for the grievant; D. Howard, Local Vice President; R. Tumbleson, Steward; V. Crum, LRO, SOCF; and Charles R. Adams, Step 3 Hearing Officer.

To the question of procedural objection, the Union/Management had none and the hearing was considered properly constituted.

Facts:

The grievant was charged with violation of rules 3a, 3d, 3g and 3k, when from April 3, 1995 through August 16, 1995 the employee had been excessively absent from work, had missed a total of 77.67 hours, 43.7 of which was unauthorized, and during which time she failed to notify a supervisor of her absence or follow the call-in procedure and to submit a physician's verification. The employee was removed from employment.

Union Contention:

The grievant, through the union contends that: A) The discipline of removal is not progressive reasonable or commensurate with the infraction.

The union seeks as remedy: A) That C. O. Jackson be reinstated as a Correction Officer; B) That she be paid all lost wages.

Discussion and Findings:

Having reviewed the grievance, the discipline, and having heard Step 3 testimony, the following represents the findings of the Step 3 Hearing Officer.

The union argues that the grievant has been experiencing marital problems and is now divorced and in addition to this has taken in a young baby whose mother is at the Marysville prison and that her absences are the result of sickness of her 13 year-old child and the baby. The union believes that this is mitigation to reduce the removal to something considerably less.

It is the opinion of the Hearing Officer that the grievant has experienced every possible opportunity to improve her situation. For absence related infractions she has received a written reprimand, a one day suspension, a written reprimand, a written reprimand, a one day suspension, a three day suspension, a five day suspension, a ten day suspension, a ten day suspension, and finally a fifteen day suspension. Management has, as its responsibility, to protect the community from inmates, to protect officers from inmates and to protect inmates from other inmates. It becomes decidedly difficult to do that when employees don't come to work regardless of the circumstances. While it may seem cold and unattached to remove an

employee for alleged child illness problems, the Hearing Officer must believe that the Department of Rehabilitation and Correction has as its mandate the above duty and it cannot do that with this employee of f work as much as she is of f work. Therefore, the Hearing Officer finds that progressive discipline has been followed to the extreme and that this is reasonable and commensurate with the infraction."

The evidence further showed that the employer maintained an Employee Assistance Program which may be voluntarily used by an employee but such participation is indicated on the terms of the contract to be voluntary. Article 9, paragraph 9.04 at subparagraph C, revealed the following:

"C. The Employer or its representative shall not direct an employee to participate in the Ohio EAP. Such participation shall be strictly voluntary."

The grievant at hearing further stated that she had received counseling for over a period of two months as a result of the rioting at Lucasville, during which time she was on duty.

The grievant at hearing indicated and stated that she had been the subject of spousal abuse for a period of twenty years; that her husband had a very good paying job; that he did not desire her to be employed; that he beat her and tore her uniforms and otherwise verbally abused her on a regular basis. The grievant further stated that her attendance problems at the facility were as a result of her husband's physical and mental abuse --- all of which was presently remedied because of the steps taken to divorce the husband; which divorce is complete. The grievant admitted that she kept silent about this activity in and around the facility and never reported it to her employer because it was extremely embarrassing. The grievant further stated that the first time it was made known to the employer was at the step 3 proceedings of the grievance procedure. The grievant at hearing requested that she be returned to work; that she has now been freed from her stressful marriage and that she needs her employment at the facility.

The employer on the other hand indicated and stated that the grievant was employed as a correction officer at a state correction facility which facility was shorthanded. The employer further stated that the grievant was employed as a full-time correction officer and not when she so desired to work on a part-time basis. The employer revealed that they had no knowledge of any spousal abuse during the course of the absenteeism activity which was quite prolific, all as described by the employer. As a result, while the grievant met the minimal standards on her efficiency ratings, the grievant as to her attendance was far less than good. The employer further indicated and stated by way of argument that the attendance problem had not been a matter of a one or two time episode but had perpetuated itself over the entire employment history of the grievant. The employer further stated that they had met the progressive discipline requirements of the contract; that they had overextended themselves on many of the absentee activity and that their history has been one of terminating employees with the same type of absentee credentials.

It was on that basis that this matter rose to arbitration for opinion and award.

III. OPINION AND DISCUSSION

Over the period of some four years the grievant experienced some eleven disciplines all for absenteeism. One cannot work in an industrial facility, receive continuing and progressive discipline and not believe that continued absenteeism will not result in discharge. The grievant was given a counseling, a letter of reprimand, a suspension of one day all the way through fifteen days --- all of this over a period of years. It is apparent that the employer has met its obligation of progressive discipline under the terms of the contract. It is also apparent that the grievant has been something less than a good employee at the facility all because of that absenteeism. She simply did not meet her scheduled work load at the time and place that the schedule was established for her and others to work.

The grievant had several other shortcomings. She did not make use of the employee assistance program although the evidence clearly revealed that she was reminded of that program by virtue of flyers in her paycheck envelope from time to time, and also advertised by posters and handouts in and about the facility. The grievant also had a niece by marriage working as a correction officer at Southern Ohio Correctional

Facility and while that niece verified the spousal abuse as did the grievant's daughter at hearing, the fact of the matter is that the niece knew of the employee assistance program. The grievant did not either notify the employer of the spousal abuse problem and did not take advantage of the confidential employee assistance program either. The grievant stated that she was embarrassed but the fact of the matter is that the progressive discipline continued at the facility and the grievant bore the brunt of that discipline, all without notifying the employer of the problem, and all without taking advantage of the employee assistance program.

The grievant did have an average performance review. The grievant did meet the standards, except for her attendance, of her employment. The grievant also attended counseling sessions as a result of the Lucasville Prison rioting.

I read with interest the opinion of Arbitrator Graham in a similar type case between the same parties. I respect his opinions, needless to say and I do find that the comments made in there about marital stress affecting employment are very true. In Arbitrator Graham's case a treating psychologist testified because the grievant had been undergoing such treatment. Further, there doesn't appear to be the number of absentee periods in Arbitrator Graham's case as there was in the instant case. Further, it is apparent in the case of Arbitrator Graham that that grievant notified the employer of the marital problem as it was unfolding in that case. Also it is noted in Arbitrator Graham's case that the work load of each individual was drastically different with the grievant in this case being assigned significant work load in a very sensitive position. Such was not the case in Arbitrator Graham's case.

The contract at article 5 contained a management's rights clause. It revealed the following:

"ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in The Ohio Revised Code, Section 4117.08(C), Numbers 1-9."

It is also noted at article 24 that disciplinary action may not be imposed upon an employee except for just cause and that particular paragraph at 24.01 revealed the following:

"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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02."

Pursuant to all of that evidence and prior to hearing, the parties entered into a stipulation of issue which revealed the following:

"STIPULATED ISSUE

Was the removal of the grievant for just cause?

If not, what shall the remedy be?"

In this particular case it is apparent that there was serious and continuing spousal abuse of the grievant there being ample evidence in the record through the sister-in-law of the grievant as well as by the teenage daughter of the grievant also testifying in that regard. Also there was no evidence to the contrary. It also is apparent in this particular case that the grievant has been off work for a period of many months -- all without wage. It is also apparent that Arbitrator Graham in a previous decision between the parties herein stated that a domestic problem causes a "frantic and desperate state of mind" and that that domestic problem contributed to all of her difficulties. On the basis of the Graham opinion and on the basis of the facts of this particular case the grievant should be granted some relief.

IV. AWARD

The grievant is hereby given an opportunity to attend a voluntary Employee Assistance Program if she is desirous of being reinstated at the facility. Absent her attendance to that program, termination will be completed. If the grievant voluntarily attends the Employee Assistance Program, the grievant will be reinstated without back pay and without loss of seniority but, if the grievant does not complete the counseling as her counselor determines, then the termination shall be complete. The grievant shall have thirty days to enroll, no more. The grievant shall remain on strict physician verification for all absences and the employer may discipline or discharge for cause if it sees fit subjecting the grievant, of course, to the grievance procedures under the terms of the collective bargaining agreement. The arbitrator shall retain jurisdiction in this matter for a period of sixty days.

MARVIN J. FELDMAN, Arbitrator

Made and entered
this 20th day
of June, 1996.