

ARBITRATION DECISION NO.:

28

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation
and Correction, Orient
Correctional Institute

DATE OF ARBITRATION:

May 6, 1987

DATE OF DECISION:

June 10, 1987

GRIEVANT:

Solitaire Dispasalgne

OCB GRIEVANCE NO.:

G-86-0318

ARBITRATOR:

Rhonda R. Rivera

FOR THE UNION:

Linda K. Fiely, Esq.

FOR THE EMPLOYER:

Felicia Bernardini

KEY WORDS:

Progressive Discipline
Insubordination

ARTICLES:

Article 24 - Discipline
 §24.01-Standard
 §24.02-Progressive
Discipline
 §24.05-Imposition
of Discipline
 §24.06-Prior
Disciplinary Actions
 §24.08-Employee

Assistance Program
Article 29 - Sick Leave
 §29.01-Accrual
 §29.02-Notification
Article 31 - Leaves
of Absence
 §31.01-Unpaid Leaves

FACTS:

Grievant was employed at the Orient Correctional Institute as an Account Clerk I. Grievant had held this position for a period of four years. Grievant was removed from the position for insubordination. Prior to the incidents at issue in this grievance, the Grievant had received counseling, a written reprimand and a suspension for insubordination.

The facts leading to the Grievant's removal are as follows: Grievant was made aware on August 20, 1986 that ODRC standards of employee conduct prohibit the wearing of headphones while on duty. Also, as an Account Clerk, Grievant cannot take money for an inmate from an unauthorized person. Grievant was "written up" for taking money from an unauthorized person on September 3, 1986. Grievant failed to check a list of authorized persons, justifying the action by stating that Grievant was being badgered by the supervisor. On the same day, Grievant was "written up" for refusing to remove headphones while on duty. On September 5, 1986, Grievant was again "written up" for refusing to remove earplugs. Grievant does not deny these acts, but instead justifies them by stating that Grievant's supervisor was harassing and badgering Grievant.

ARBITRATOR'S OPINION:

The Arbitrator found that the Grievant deliberately and willfully "baited" the supervisor by the behavior. The order not to wear headphones or earplugs in the office was a reasonable order. The Grievant testified that the reason for wearing these devices was to avoid listening to the supervisor. The act implicitly becomes insubordination. Progressive discipline was met, since the Grievant has been counseled repeatedly in this matter, reprimanded in writing and has previously received a hearing for a suspension at the time of Grievant's deliberate disobedience.

AWARD:

The grievance was denied and Grievant's removal was upheld.

TEXT OF THE OPINION:

IN THE MATTER OF THE
ARBITRATION BETWEEN

**Department of Rehabilitation
and Correction**

and

OCSEA/AFSCME, Local 11

Grievance No.:
G-86-0318

Grievant:
Solitaire Dispasalgne

Hearing:
May 6, 1987

(Briefs received 5-29-87)

For the Employer:
Felicia Bernardini

For the Union:
Linda K. Fiely, Esq.

Present at the hearing in addition to the Grievant, the Grievant's counsel, and the employer's advocate were Nicholas G. Menedis (DRC), Robert L. Hurt (DRC), Edward Flyn (DRC) Sequestered witnesses were Donna Burris (employer), Karen Clawson (employer), Sandra Derleth (employer), Linda Zeckes (employer), Lisa Barrera (Union).

Preliminary Matters:

The parties both agreed to permit the Arbitrator to record the hearing so that the Arbitrator might refresh her memory, if necessary. Both parties acknowledged that the tapes would be destroyed when the opinion was rendered. Both parties agreed that the Arbitrator could publish the opinion.

Both employer and union stipulated that the issue was properly before the Arbitrator. The parties agreed that the issue is "WAS THE DISCIPLINE (REMOVAL) IMPOSED FOR JUST CAUSE."

Relevant Contract Provisions

§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.

§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. Verbal reprimand (with appropriate notation in employee's file)
- B. Written reprimand;
- C. Suspension;

D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

§24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

§24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

§24.08 - 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 successful completion of the program, the Employer will give serious consideration to modifying the contemplated disciplinary action.

§29.01 - Accrual

Employees will earn eighty (80) hours of sick leave per year credited as of the pay period including December 1. Permanent part-time employees on pay status for less than a full year and full-time employees hired after the December 1 pay period will accrue sick leave prorated at three and one-tenth (3.1) hours per each eighty (80) hours of completed service. Sick leave shall be charged when used at one hundred percent (100%) of regular rate of pay. Upon the effective date of this Agreement, the additional sick leave days will be prorated.

Sick leave shall be granted to employees who are unable to work because of illness or injury of the employee or a member of his/her immediate family or because of medical appointments or other ongoing treatment. The definition of "immediate family" for purposes of this Article shall be: spouse, significant other who resides with the employee, child, grandchild, parents, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparents, brother, sister, brother-in-law, sister-in-law or legal guardian or other person who stands in place of a parent.

A period of up to ten (10) working days of sick leave will be allowed for parenting during the postnatal period or following an adoption.

The amount of sick leave charged against an employee's accrual shall be the amount used, rounded to the nearest one half (1/2) hour. Employees shall be paid for sick leave used at their assigned step including longevity. After employees have used all of their accrued sick leave, they may choose to use accrued vacation, compensatory time or personal days or may be granted leave without pay.

§29.02 - 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. The Employer may request that a physician's statement be submitted within a reasonable period of time. 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.

§31.01 - Unpaid Leaves

The Employer shall grant unpaid leaves of absence to employees upon request for the following reasons:

A. if an employee is serving as a union representative or union officer, for no longer than the duration of his/her term of office up to four (4) years. If the employee's term of office extends more than four (4) years, the Employer may, at its discretion, extend the unpaid leave of absence. Employees returning from union leaves of absence shall be reinstated to the job previously held. The person holding such a position shall be displaced.

B. If an employee is pregnant, up to six (6) months leave after all other paid leave has been used.

C. For an extended illness up to one (1) year, if an employee has exhausted all other paid leave. The employee shall provide periodic, written verification by a medical doctor showing the diagnosis, prognosis and expected duration of the illness. Prior to requesting an extended illness leave, the employee shall inform the Employer in writing of the nature of the illness and estimated length of time needed for leave, with written verification by a medical doctor. If the Employer questions the employee's ability to perform his/her regularly assigned duties, the Employer may require a decision from an impartial medical doctor paid by the Employer as to the employee's

ability to return to work. If the employee is determined to be physically capable to return to work, the employee may be terminated if he/she refuses to return to work.

The Employer may grant unpaid leaves of absence to employees upon request for a period not to exceed one (1) year. Appropriate reasons for such leaves may include, but are not limited to, education; parenting (if greater than ten (10) days); family responsibilities; or holding elective office (where holding such office is legal).

The position of an employee who is on an unpaid leave of absence may be filled on a temporary basis in accordance with Article 7. The employee shall be reinstated to the same or similar position if he/she returns to work within one (1) year. The Employer may extend the leave upon the request of the employee.

If an employee enters military service, his/her employment will be separated with the right to reinstatement in accordance with federal statutes.

Work Rules

8. Twenty-four hour post employees must report off at least (2) hours BEFORE the scheduled starting time, unless an emergency makes it impossible. All administrative personnel not on 24 hour post coverage must report off at least 1/2 hour AFTER scheduled starting time. Call-in must be made on each day of absence at (614) 877-4367 ext. 448 unless authorization is given by a physician for a specific period of time. The person receiving such notification will fill in the request for leave form, and give it to his supervisor. The report shall contain all the information, such as time of report, date, nature of illness or injury, death of a member of the immediate family, where your presence is required, and, if possible, the length of time the employee is expected to be absent from duty.

All Request for Sick Leave forms are to be turned into your Supervisor on the first day you return to duty. Any request not turned in to the Personnel Office by Monday at 9:00 a.m. following the end of a pay period, will result in a NO PAY status for the days of absence. Employees failing to comply with sick leave rules and regulations will not be paid. Application for sick leave with intent to defraud will result in dismissal and refund to the State of salary or wage paid during such sick leave.

A request for leave form must be filled out even if an employee has exhausted all of their sick leave. Vacation, personal leave, comp time or leave without pay may be used after sick leave has been exhausted.

Facts

The Grievant is an Account Clerk I with ODRC. She has been with the department since August 1982. At the time of this discipline, she worked at Orient Correctional Institute.

Prior to the incidents at issue in this grievance, the Grievant had received counseling, a written reprimand, and a suspension for insubordination. (See Grievance No. G-86-0807, heard simultaneously with this grievance by agreement of the parties.) The record also showed a past practice by the Grievant of various minor rule violations. The record also revealed that on August 20, 1986, the Grievant received a copy of ODRC Standards of Employee Conduct. (Joint Exhibits #6 and #7)

On September 3, 1986, Ms. Derleth, a fellow employee, filed an incident report alleging that the Grievant had violated a policy by taking money for an inmate from an unauthorized person. This incident was testified to by both Ms. Zeches and Ms. Derleth. The Grievant said she did receive the money in question but that, "it never struck her to check whether he (the giver) was on the list of

authorized persons." The Grievant attributed her oversight to the fact that Ms. Zeches was "screaming and hollering at her at the time." She testified that she had never seen the form (listing authorized visitors) before. (See Exhibits 25 A-G)

On the same day, September 3, 1986, Ms. Zeches, the Grievant's supervisor filed two incident reports. The first report alleged that the Grievant failed to take her scheduled lunch times and took lunches longer than permitted. (Exhibit #24A) The second incident (Exhibit #23A) report alleged that Grievant refused to obey a direct order. Ms. Zeches ordered that head phones not be used by the staff of the Cashier's Office. The Grievant, according to both Ms. Zeches' written reports, refused to remove her headphones. This refusal by the Grievant was confirmed by the testimony of Ms. Clawson. When the Grievant refused the verbal order, Ms. Zeches gave the same order in writing. (Exhibit #23B)

Ms. Zeches testified that when wearing earphones, the Grievant was unable to hear person's at the window requesting service. The Grievant testified that she did wear the earphones and gave as her reason that "my name was being constantly called by her (Ms. Zeches) and I was interrupted".

On September 5, 1986, Ms. Zeches wrote an incident report on the Grievant for disobeying a direct order. On that day, the Grievant wore ear plugs to the office. The Grievant testified that she did wear earplugs and that she refused to remove them. She said she did this because she was constantly being harassed. She said that she was being hunted down and not allowed to go into the bathroom or to have a conversation.

On September 5, 1986, Ms. Zeches filed a second incident report on the alleged failure of Grievant to obey a direct order, an order to attend a staff meeting. Ms. Zeches, in her report and in her testimony, alleged that the Grievant when called to a staff meeting first left the office and when she returned ignored a direct order to join the meeting. Ms. Clawson and Ms. Derleth corroborated these allegations in their testimony. When asked on direct examination if she refused to attend the meeting the Grievant said "no, it was probably one of those days when I had my ear plugs in because she was going to badger me."

On September 29, 1986, Ms. Zeches filed an incident report alleging that the Grievant was sleeping on the job. Two other employees signed documents attesting to this incident. However, they did not testify. Ms. Zeches testified that the Grievant was sleeping on the job. The Grievant testified that she was not asleep, that she was merely tired and stopped to get a break.

Union Exhibit Number 3 indicated that the Grievant attempted to file a grievance on September 6, 1986 against Ms. Zeches, her supervisor, for being rude to the Grievant on that day. However, the grievance was returned to the Grievant with a letter telling her how to file it properly. The Grievant testified that the union representative said he "did not have the time to help her file properly". The Grievant also alleged that she had filed other grievances over these incidents. However, she could not state how many nor produce written proof of those grievances.

The Grievant alleged that Ms. Zeches had told another person at work that she was going to have a vacancy before long. The Grievant alleged that this statement indicated that Ms. Zeches was bent on removal of the Grievant even before the incidents alleged herein. Ms. Lisa Barrera, another employee, testified that she overheard a similar remark. The date of the remark was set near September 18, 1986. Ms. Zeches denied the remark. Ms. Barrera also testified that she did not perceive the Grievant as being disciplined unfairly.

Grievant testified that she felt she was correct to do her work as she decided it ought to be done (rather than how Ms. Zeches thought it should be done) because "I am already trained in my position and I knew my job duties." When asked further about the alleged sleeping incident, the Grievant testified that the other two employees who had signed statements were both lying. The Grievant claimed that Pam (one of those employees) had a reason to lie namely "my personality

puts her off." She (the Grievant) also alleged that Ms. Zeches repeatedly lied about her.

Discussion:

The Arbitrator has not included the material introduced with regard to excessive absenteeism and unauthorized use of LWOP. These issues are not central to the issues before us. Moreover, the relationship of the Grievant's use of LWOP to her ongoing illness is unclear and makes discipline with regard to that issue problematic.

At the time of the incidents in question, the Grievant was involved in a pre-disciplinary hearing for prior charges. She was clearly on notice as to her precarious disciplinary situation. Moreover, by her own testimony, she was told by the union representative of the seriousness of her situation. The facts show that on the day of her pre-disciplinary hearing she disobeyed her supervisor's order given 2 days earlier both in writing and verbally as to the use of earphones. The fact that on the third day the Grievant (and her colleagues) were ordered not to wear earphones and that on the next occasion the Grievant used earplugs is not a distinction of importance. In fact, the Arbitrator has come to believe that the Grievant deliberately and willfully "baited" the supervisor by this behavior.

The order not to wear earphones (or earplugs) in the office was a reasonable order. The Grievant testified that her reason for wearing these devices was to avoid listening to the supervisor. This act implicitly becomes insubordination.

The Grievant had been repeatedly counseled on these issues, reprimanded in writing, and received a hearing for a suspension at the time of her deliberate disobedience. This posture (whether coupled with the multitude of other rule violations or not) justified removal.

The union has argued that the Standards of Employee Conduct (Joint Exhibit #6 & #7) are vague, unreasonable, and improper. These Standards were properly promulgated under §43.03 of the contract. The Union and the employer are in the midst of a long drawn out process to discuss them. Arguably, some rules may be withdrawn or rewritten. However, while this process continues, the union cannot reasonably expect the employer to suspend rules and discipline for their violation. The Arbitrator declines to hold the standards as a whole invalid. Rather, the Arbitrator has examined those rules and regulations as applied to the Grievant. None of those incidents for which the Grievant was properly disciplined involved unreasonable work rules. Moreover, discipline in this case comports with the general guidelines of the contract and does not rest on the Standards per se.

The Grievant had every opportunity to obey her supervisor and at the same time avail herself of grievance machinery. Instead, the Grievant clearly chose the path of deliberate provocation and disobedience. The Arbitrator finds that the Grievant was intentionally insubordinate.

While the Grievant's problems with illness affected the LWOP issue, no evidence was presented which would excuse or explain her insubordinate behavior.

Decision:

Grievance denied. Removal upheld.

Rhonda R. Rivera, Arbitrator

June 10, 1987

Date