

ARBITRATION DECISION NO.:

46

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation
and Developmental Disabilities,
Columbus Developmental Center

DATE OF ARBITRATION:

DATE OF DECISION:

September 1, 1987

GRIEVANT:

Betty Mullins

OCB GRIEVANCE NO.:

G-87-1163

ARBITRATOR:

Andrew J. Love

FOR THE UNION:

Carol Bowshier

FOR THE EMPLOYER:

Michael Duco

KEY WORDS:

Just Cause
Smoking On Duty
Commensurate With Offense
Adequacy Of Evidence

ARTICLES:

Article 24 - Discipline
 §24.01-Standard
 §24.02-Progressive
Discipline

FACTS:

The Grievant, who has been employed for over fourteen (14) years in the service of the State of Ohio, is a Hospital Aide at the Columbus Developmental Center. The Grievant had previously

been apprised of the agency's smoking policy, which prohibited smoking by employees in the living areas of clients.

On two occasions within 3 days, Grievant was observed with lighted cigarettes in the clients living area. The smoking policy was established because of concerns that fires could erupt and, further, that clients might accidentally ingest cigarette butts. The Grievant admitted to smoking on the first occasion, but denied it on the second. The Grievant was suspended for three (3) days.

At issue is whether the three (3) day suspension of the Grievant was without "just cause" and therefore in violation of Section 24.01 of the parties collective bargaining agreement. Another issue is whether the disciplinary action taken was commensurate with the offense.

EMPLOYER'S POSITION:

Grievant had been observed on two (2) occasions with lighted cigarettes in areas where smoking was prohibited. In addition to these two occasions, Grievant admitted to smoking on one occasion. Since Grievant had previously received a written reprimand (for an unrelated incident), employer had "just cause" for suspending Grievant for three (3) days in accordance with Section 24.01 and 24.02 of the collective bargaining agreements.

UNION'S POSITION:

Because of a shortage of employees, the Grievant had been working a considerable amount of overtime. In fact, Grievant was working overtime during the two occasions when these incidents arose. The previous written reprimand which the Grievant received was for an unrelated incident and should not weigh as heavily in the Progressive Discipline scheme as described in Section 24.02 of the collective bargaining agreement.

ARBITRATOR'S OPINION:

It is no defense to the allegations of violation of the no smoking policy that Grievant did not have lighted cigarettes in her mouth when observed. Circumstantial evidence of the Grievant's presence in the living units when coupled with a lighted cigarette (even without Grievant's admission) is overwhelming evidence of Grievant's violation of the no smoking policy in restricted areas. The Arbitrator concluded that the evidence was clear that Grievant was engaged in smoking in restricted areas.

As to the issue of whether the disciplinary action taken by the agency was commensurate with the offense, the arbitrator determined that a two (2) day suspension would have been more appropriate than a three (3) day suspension. The Arbitrator did not feel that the previous disciplinary action should be ignored even though it was given for an unrelated incident. The next stage of discipline after a written reprimand is suspension. Accordingly, the grievance was DENIED, but the Grievant received back pay in the amount of one (1) days pay.

AWARD:

Grievance is denied, but the Grievant is to receive back pay in the amount of one (1) days pay.

TEXT OF THE OPINION:

ARBITRATION

**OHIO DEPARTMENT OF MENTAL
RETARDATION AND
DEVELOPMENTAL DISABILITIES**

AND

**O.C.S.E.A. LOCAL 11
A.F.S.C.M.E. A.F.L.-C.I.O.**

(Betty Mullins Grievance)

ARBITRATOR:

Andrew J. Love

APPEARANCES:

For Ohio M.R.D.D.:

MICHAEL DUCO

For O.C.S.E.A./A.F.S.C.M.E.:

CAROL BOWSHIER

CASE NUMBER:

G87-1163

DECISION AND AWARD

The issue presented in this proceeding is whether the three (3) day suspension of the Grievant by the Columbus Developmental Center (hereinafter "CDC"), a branch of the Ohio Department of M.R.D.D. on March 30, April 1, April 2, 1987 was without "just cause" and therefore in violation of Section 24.01 of the parties' collective bargaining agreement. Additionally, another issue is whether the disciplinary action taken was commensurate with the offense. The facts are as follows:

The Grievant, who has been employed for over fourteen (14) years in the service of the State of Ohio, is employed with CDC as a Hospital Aide. The Grievant had previously been apprised of CDC's smoking policy dated August 4, 1986 and September, 1986, which prohibit smoking by employees in the living areas of the clients at CDC. These policies are reasonable in light of the agency's concern about fires, employee performance of duties, and the dangers of clients ingesting cigarette butts or other smoking paraphernalia. On January 1, 1987, Stanley Bowen, Police Officer I, while making his rounds, observed the Grievant in the living unit with a lighted cigarette. He testified at this hearing that he notified the Grievant's supervisor. On January 4, 1987, Officer Bowen again observed the Grievant seated at a table in the clients' living area. Before her was a lighted cigarette in an ashtray on the desk. A client was not seated at the desk, but was located at a fish tank in the living unit. Officer Bowen stated that he observed the Grievant get up from the desk and go to the client. She then whispered something to the client, who then went to the desk and picked up the cigarette and smoked it. Officer Bowen testified that he reported this incident to the supervisor as well.

Stephanie Hartley, Mental Health Administrator II, testified that she is familiar with the clients at CDC, who range from profoundly retarded to mildly retarded. She stated that the smoking policy

was established because of concerns that fires could erupt and, further, that clients will ingest cigarette butts.

In due course, CDC notified the Grievant of a pre-disciplinary hearing. At the hearing, the Grievant stated that she, in fact, was smoking on January 1, 1987, as reported by Officer Bowen. However, she denied smoking a cigarette on January 4, 1987. The Grievant was timely notified of her suspension for a period of three (3) days beginning on March 30, 1987.

The Grievant testified of her employment as a Hospital Aide at 353 Westview. She is a first shift employee. Because of the shortage of employees, the Grievant had been working a considerable amount of overtime. In fact, she was working overtime during the second shift on January 1 and January 4, 1987 when these incidents arose.

The Grievant testified that she had accepted a written reprimand, which occurred on October 1, 1986. This reprimand was for an unrelated incident.

The Grievant stated that she did have a cigarette lit on January 1, 1987. She stated that it was not in her hand at the time that Officer Bowen observed her. On January 4, 1987, however, the Grievant stated that the cigarette in question was not hers. She testified that the cigarette belonged to a client who is mildly retarded and who was standing at the fish tank in the living unit where the Grievant was also located. The Grievant stated that, when Officer Bowen arrived in the living unit, both she and the client were standing at the fish tank. At that point, the Grievant advised the client to retrieve his cigarette at the desk.

Joint exhibits admitted into evidence included the parties' collective bargaining agreement, the grievance trail, the disciplinary trail, the Grievant's prior Letter of Reprimand, the memorandum regarding smoking and the accompanying sign-off sheet signed by the Grievant, and CDC's smoking policy for employees.

As to the issue whether the Grievant's suspension was for just cause, this Arbitrator is persuaded by the evidence that the Grievant was smoking in the living unit on both January 1, 1987 and January 4, 1987. It is no defense to the allegations of neglect of duty on these two occasions that the Grievant did not have lighted cigarettes in her mouth. Circumstantial evidence of the Grievant's presence in the living unit on January 1, 1987, coupled with a lighted cigarette (even without her admission) is overwhelming evidence of her violation of the no smoking policy in restricted areas. Moreover, in respect to the January 4, 1987 incident, this Arbitrator finds that the testimony of Officer Bowen (that he observed the Grievant alone at the desk with a lighted cigarette in the ashtray) is conclusive as to the Grievant's conduct, to wit: that she was engaged in smoking in a restricted area.

Turning now to the issue whether the disciplinary action taken by CDC is commensurate with the offense, this Arbitrator must consider the smoking restrictions policy itself. Such a policy is based on sound reasoning in light of its purpose to protect clients and employees as well from fires. Moreover, the policy is sound for the reason that clients could endanger themselves by ingesting cigarette butts and other smoking paraphernalia left in an area.

Second, this Arbitrator must also take into account the prior disciplinary record of the Grievant and the principles of progressive discipline, as outlined in Section 24.02 of the contract between the parties. Section 24.02 states, in pertinent part, as follows:

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.

The parties to the collective bargaining agreement, in establishing these principles of progressive discipline, have clearly intended a sequence of events to occur. Suspension follows a written reprimand. In this Arbitrator's view, the parties to this contract did not intend that previous disciplinary action taken would be ignored. Furthermore, even though there was no verbal reprimand against the Grievant in the past, a written reprimand was effected. The next stage of discipline (suspension) is appropriate and within the contemplation of the parties to the collective bargaining agreement.

Finally, taking into account the lack of evidence indicating other disciplinary action by the Grievant, together with the fact that, on January 4, 1987, the Grievant was in the attendance of a mildly retarded client who was permitted to smoke in the living area, this Arbitrator feels that the disciplinary action commensurate with this offense is more appropriately a two day suspension rather than a three day suspension.

Accordingly, the grievance is DENIED, but the Grievant shall receive back pay in the amount of one (1) day's pay.

September 1, 1987
DATE

ANDREW J. LOVE, ARBITRATOR

COUNTY OF FRANKLIN
STATE OF OHIO