ARBITRATION DECISION NO.:
205

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

EMPLOYER:
Department of Transportation
District 11

DATE OF ARBITRATION:
September 28, 1989

DATE OF DECISION:
October 30, 1989

GRIEVANT:
Wilbert Johnson

OCB GRIEVANCE NO.:
31-11-(89-03-30)-0016-01-06

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
John Fisher
Linda Fiely

FOR THE EMPLOYER:
Michael Duco
Rodney Sampson

KEY WORDS:
Commensurate With
    Offense
Progressive Discipline
Removal
Entering State Property
    while Suspended

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

§24.05-Imposition of Discipline
§24.06-Prior Disciplinary Actions
Article 25-Grievance Procedure
§25.03-Arbitration Procedures

FACTS:

The Grievant was employed as an Equipment Operator I with an ODOT garage. The Grievant's record reflects the following prior disciplinary action: a two-day suspension for fighting with or striking a fellow employee;. and a 120-day suspension for deliberate destruction, damage or theft of state property; leaving the work area without the permission of the supervisor; unauthorized use of a state vehicle; and misuse of a state vehicle (for personal use). The letter notifying the Grievant of the 120-day suspension ordered that he remain off ODOT property during the 120 days. Before the 120 days ended, the Grievant was charged with willful disobedience of a direct order by a Superior and failure to follow written policies of the director, districts or offices. He had allegedly violated the suspension letter by entering ODOT property on three separate occasions during his 120-day suspension. Soon thereafter he was terminated for this charge. Accordingly, this Grievance was filed.

EMPLOYER'S POSITION:

The Employer argued that there was just cause for removal, since the Grievant violated a direct order in his suspension letter three times. Two of these violations occurred after a clear warning by the Employer not to come onto ODOT property during the suspension. The Employer further claimed that there was just cause for removal, since the discipline was progressive. Within an 18-month period, the Grievant was involved in three major disciplinary violations. After a minor and a major suspension, termination was commensurate and progressive.

UNION'S POSITION:

The Union argued that there was no just cause for removal, because the Grievant never entered ODOT property again after being warned by the Employer following the first incident. Even if all three incidents of the Grievant's entering ODOT property were true, the Grievant's penalty of removal was disproportionate to the violation. The Grievant was on ODOT property each time merely to drop off another employee to work, and his presence was minimal.

ARBITRATOR'S OPINION:

The Arbitrator ruled that there was just cause for the Grievant's removal. Contrary to the Union's position that the Grievant never entered ODOT property again after the first incident, the Arbitrator found no reason to doubt the testimony of a corroborating witness to the second incident. As for the third incident, there was no corroborating witness. However, the Arbitrator found the Employer more credible, so she accepted the Employer's testimony that the Grievant did enter ODOT property for a third time during his suspension. Accordingly, the Arbitrator found just cause for discipline. Taken alone, removal does not seem commensurate with these violations. However, when they are considered in light of the two major prior disciplinary violations, removal is justified. Either of two previous violations which led to suspension -- fighting with an employee and theft of State property -- could have alone resulted in removal. Prior to the three incidents in which the Grievant entered ODOT property during his suspension, he clearly had notice that his behavior was jeopardizing his job. In this case, after two major disciplines, the Grievant was still unable to abide

by the suspension letter.

AWARD:
Grievance is denied.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO
Union

and

Ohio Department of
Transportation
Employer.

Grievance:
31-11(03-30-89)-16-01-06
Grievant:
(Wilbert Johnson)
Hearing Date:
September 28, 1989
Opinion Date:
October 30, 1989

For the Union:
John Fisher, Staff Representative
Linda Fieley, Associate General Counsel

For the Employer:
Michael Duco, OCB
Rodney Sampson, OCB

Present in addition to the Advocates named above and the Grievant were the following persons: Marilyn Mehalic, ODOT employee (Union witness), Jim Eckard, ODOT employee (Union witness), Pete Applegarth, Labor Relations Officer District 11, Dennis Johnson, Superintendent District 11 (Employer witness), Maurice Bell, Assisitant Superintendent District 11 (Employer Witness), Timothy Leake, Radio Operator 1 (Employer witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Issue

Did the Employer remove Mr. Wilbert Johnson from his position as an Equipment Operator 1 with the Department of Transportation for just cause in accordance with Article 24 of the agreement? If not, what shall the remedy be?

Joint Exhibits

1. Contract
2. Grievance Trail
3. Directive A-301
4. Discipline Trail
5. Prior Discipline

Relevant Contract Provisions

§24.01 - Standard (in part)

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.

§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 (in part)

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

§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.

§25.03 - Arbitration Procedures (in part)

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

Facts

At the time of the alleged incidents, the Grievant was serving a 120 day suspension for the violation of four items of Directive A-301 (Joint Exhibit 3):

Directive A-301, Item #8 - Deliberate destruction, damage, and or theft of State property.

Directive A-301, Item #13 - Leaving the work area without the permission of the supervisor.

Directive A-301, Item #17 - Unauthorized use of State vehicle.

Directive A-301, Item #18 - Misuse of State vehicle (for personal use).

This suspension was not grieved. The suspension began on September 19, 1988 and was to run through March 3, 1989. Prior to this discipline, the Grievant had been disciplined with a two (2) day suspension from May 27, 1987 to May 28, 1987. This discipline was for violation of Item 4: Directive A-301: Fighting With or Striking a Fellow Employee. This discipline was not grieved.

Both suspension letters contained the following language:

"During your suspension, you are to remain off Ohio Department of Transportation property and away from all Ohio Department of Transportation field projects."

By letter on March 1, 1989, the Grievant was notified that he was charged with violations of Directive A-302:

Violation #2b. Willful Disobedience of a Direct Order by a Superior.

Violation #2c. Failure to Follow Written Policies of the Director, Districts, or Offices.

which allegedly occurred on September 20, September 28, and October 7 (Joint Exhibit 4). On March 17, 1989, by letter, the Grievant was terminated effective 3/24/89 for violation of Directives

A-302 2b and 2c. At the time of his termination, Grievant was an Equipment Operator 1 who had been employed by ODOT for 9-1/2 years.

The gist of the charge was that in direct violation of the language of the suspension letter Grievant entered ODOT property on the three occasions named. (At the hearing, the Employer sought to introduce evidence of another incident in December of 1988; however, the Arbitrator rejects that proffer. The discipline trail delineates three specific dates. The Grievant had notice of those three dates. The Grievant did not receive proper notice of any other alleged offense.)

On September 20, 1988, Superintendent Dennis Johnson saw Grievant drive on to ODOT property through the gate with Marilyn Mehalic in the vehicle. Grievant drove to the sign shop, a distance of approximately 170 yards. Superintendent Johnson asked Assistant Superintendent Bell to tell the Grievant to leave. Bell told the Grievant that he was to leave ODOT property because he could not come on ODOT property during his suspension. The Grievant said OK and left. This version of this incident is undisputed. Grievant said his sole purpose was to drop Marilyn Mehalic at work.

On September 28th, Superintendent Johnson alleged that Grievant again drove through the gate with Marilyn Mehalic and again dropped her off at the sign shed. Again, Johnson asked Bell to tell the Grievant to leave. Bell testified that he did so with similar results to the 20th. The Grievant maintains that he never entered ODOT property on the 28th; he maintains that after the 20th, he always dropped Ms. Mehalic outside the gate.

The next incident was stated to be October 7th by Superintendent Johnson. He said that on that date, he saw the Grievant again come through the main gate at 7:30 a.m. Johnson says that he stepped out and waved the Grievant over and warned the Grievant that this infraction was the third and that serious discipline would result. Assistant Superintendent Bell was not involved. Grievant maintains that on October 7, 1988 he dropped off Ms. Mehalic at the gate and turned around in the drive and left.

An incident on 10/14/88 also was raised. However, 10/14/88 was not mentioned in the notice of discipline. A review of the Predisciplinary Hearing (Union Exhibit 1) reveals no discussion of an incident on 10/14/88. Employer maintains that the October dates were confused and that both incidents should be considered. The Arbitrator believes that due process requires that only the incidents charged can be the basis of discipline. (Evidence of 10/14/88 incident, as the evidence of an alleged incident on 12/17/88, is rejected.)

Union's Position

Grievant never entered ODOT property again after being warned on September 20, 1988. Therefore, the discipline is without just cause. Moreover, the discipline is out of proportion to the offense. Even if all the incidents were true, Grievant's presence on ODOT property was for the legitimate purpose of dropping another ODOT employee off to work, his presence was minimal, and no harm resulted.

Employer's Position

The employee violated a direct order found in his suspension order. His violations were three in number; two occurring subsequent to a clear warning by Assistant Superintendent Bell. Therefore, discipline is warranted. Moreover, the discipline is progressive. Within an 18 month period the Grievant was involved in three (3) major disciplinary violations. After a minor suspension and a major suspension, termination was commensurate and progressive.

Opinion

The first two incidents were corroborated by Superintendent Maurice Bell. Mr. Bell's testimony was in no way impeached by any evidence. Nothing in the testimony of the whole hearing threatened his credibility or provided any reason why he should prevaricate. The Arbitrator finds that on 9/20 and 9/28 the Grievant did violate the direct order embodied in his suspension notice. The 10/7/88 incident sets the Grievant's testimony directly contrary to the Superintendent's as no corroborating witness existed such as Assistant Superintendent Bell. Directly contradictory testimony is always difficult to judge; taken in context, the Arbitrator finds the Superintendent in this incident more credible. Thus, the Arbitrator finds just cause for discipline.

The Union maintains that dismissal is not commensurate nor progressive, and that given Grievant's 9-1/2 years of service, the level of discipline should have been lower. Certainly, in one sense dismissal is the equivalent of industrial "death" and not to be treated lightly. Taken alone, dismissal does not seem commensurate to the offenses. However, when these violations are considered in light of two previous serious disciplines within eighteen (18) months, the Arbitrator cannot find them unjust. Eighteen months ago, the Grievant struck another employee. This offense could have, under the grid, caused him to be dismissed; he was suspended for two (2) days. That suspension letter contained the same order about staying off ODOT property. Then, Grievant was given a 120 day suspension for 4 violations, one of which (theft) could have resulted in dismissal. (See Joint Exhibit 4 Directive A-302.) The Grievant was clearly on notice that his behavior was severely jeopardizing his job. The suspension clearly stated the rule of no entrance onto ODOT property. This rule is not irrational for either a fighting discipline or a theft discipline. In spite of a second major violation, Grievant disobeyed the rule three times, twice after clear warnings. To be "progressive discipline", each offense need not be repeated until severe. Otherwise, an employee could carefully break each separate rule once before moving from a 1st level discipline to a 2nd level discipline. Such a conclusion is illogical. Here after two serious disciplines, the Grievant with apparent reckless disregard ignored the clear statement of the Discipline letter. In all three cases, Grievant apparently was unable to discipline his behavior sufficiently to obey work rules.

Award

Grievance Denied.

Date: October 30, 1989
Rhonda R. Rivera, Arbitrator