ARBITRATION DECISION NO.:
209

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

EMPLOYER:
Department of Mental Health
Office of the Support Services
at the Centralized Ford
Processing Facility (Dayton)

DATE OF ARBITRATION:
September 14, 1989

DATE OF DECISION:
November 13, 1989

GRIEVANT:
Jerry L. Harris

OCB GRIEVANCE NO.:
23-02-(88-01-27)-0007-01-06
23-02-(88-05-04)-0035-01-06

ARBITRATOR:
David Pincus

FOR THE UNION:
Mike Muenchen

FOR THE EMPLOYER:
Don Wilson
Rodney Sampson

KEY WORDS:
Neglect of Duty
Disparate Treatment
Absenteeism
Tardiness
Suspension

ARTICLES:
Article 5-Management Rights
Article 13-Work Week,
Schedules and Overtime

§13.06-Report-In Locations
Article 24-Discipline
§24.01-Standard
§24.02-Progressive Discipline
§24.06-Prior Disciplinary
Actions
Article 29-Sick Leave
§29.02-Notification

GRIEVANCE A:

FACTS:

Grievant was employed by the office of Support Services. He was reprimanded for several incidents of tardiness and absences. The last reprimand contained a warning of future suspension for further violations. Grievant was tardy on seven more occasions after this warning. The employer charged grievant with neglect of duty and suspended the grievant for two days.

EMPLOYER'S POSITION:

Grievant's suspension was justified by his pattern of tardiness. Grievant was warned of a possible suspension and still continued to be tardy and neglected to call. There is just cause to suspend grievant for two days.

UNION'S POSITION:

The suspension is unreasonable since other employees in similar circumstances were not treated as harshly as grievant. Employer used disparate treatment in disciplining grievant.

ARBITRATOR'S OPINION:

The Union did not support their opening argument of disparate treatment. The non-uniform treatment of other employees was distinguished by the employer. None of the other employees were at the same stage of discipline. Another employee just had an oral non-documented reprimand which can not be equated with grievant's officially documented verbal reprimand. Other employees followed the call off procedure more closely than the grievant and showed improvement after a reprimand. Just because no other employee received a suspension during the time that grievant was suspended does not establish a per se case of disparate treatment. There is just cause for the two day suspension.

AWARD:

The grievance is denied and dismissed.

Grievance sustained. The incident will be removed from the grievant's record and she is to receive all back pay and benefits for the period.

TEXT OF THE OPINION:

STATE OF OHIO AND OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO,
THE OHIO DEPARTMENT OF MENTAL HEALTH,
OFFICE OF SUPPORT SERVICES AT THE
CENTRALIZED FORD PROCESSING FACILITY
(Dayton, Ohio)

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
Local 11, AFSCME, AFL-CIO

GRIEVANCE:
Jerry Harris

CASE NUMBERS:
23-02-880127-0007-01-06
(2-Day Suspension)
23-02-880504-0035-01-06
(6-Day Suspension)

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: November 13, 1969

APPEARANCES

For the Employer
Carol Hildebrecht, Operations Manager
Meveline Brunty, Personnel Officer
William Boykin, Storekeeper III
Margaret Lindeman, Office of Support Services
Rodney Sampson, Assistant Chief,
Arbitration Services
Don Wilson, Advocate

For the Union
Jerry L. Harris, Grievant
Randy McAtee, Storekeeper II
Gerald P. Cummings, Coordinator II
Mike Muenchen, Staff Representative

INTRODUCTION

This is a proceeding under Article 25, Section 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Department of Mental Health, Office of Support Services, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on September 14, 1989 at the Office of Collective Bargaining, Columbus, Ohio. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post bearing briefs. Both Parties indicated that they would not submit briefs.

ISSUES

2-Day Suspension

Was there just cause for the Grievant's
2-day suspension for absenteeism and tardiness?

If not, what should the remedy be?

6-Day Suspension

Was there just cause for the Grievant's
6-day suspension for neglect of duty?

If not, what should the remedy be?

Was the Grievant terminated for just cause?

If not, what shall the remedy be?

(Joint Exhibit 2)

STIPULATED FACTS
(2-Day Suspension)

1. Grievant was appointed July 27, 1981 as Custodial Worker with the Office of Support Services, Dayton Centralized Food Processing, and was promoted to Equipment Operator I in 1985.

2. Grievant's prior disciplinary record consists of:

9-27-87: (sic) Verbal Reprimand
8-27-87: (sic) Written Reprimand
10-29-87: Written Reprimand (attached)

3. Grievant was informed by letter dated December 24, 1987, from the Mental Health Office of the Office of Support Services that he was being suspended for two working days.

4. The Grievance is properly before the Arbitrator to make a determination on the merits.

5. There are no procedural matters still at issue.

Don Wilson, Office of Collective Bargaining

Mike Muenchen, OCSEA/AFSCME

(Joint Exhibit 14)

STIPULATED FACTS
(6-Day Suspension)

1. Grievant was appointed July 27, 1981 as Custodial Worker 1 with the Office of Support Services, Dayton Centralized Food Processing, and was promoted to Equipment Operator I in 1985.

2. Grievant's prior disciplinary record consists of one verbal reprimand, two written reprimands, and a two-day suspension. The two-day suspension is pending an arbitrator's decision.

3. Grievant was informed by letter dated April 7, 1988, from the Ohio Department of Mental Health, the Office of Support Services that he was being suspended for six working days.

4. The Grievance is properly before the Arbitrator to make a determination on the merits.

5. There are no procedural matters still at issue.

6. Although the Grievant's Statement of Facts states a 2-day suspension on Grievance Form dated 5-3-88, it is recognized that it applies to the 6-day suspension referred to above.

Don Wilson, Office of Collective Bargaining

Mike Muenchen, OCSEA/AFSCME

(Joint Exhibit 4)

PERTINENT CONTRACT PROVISIONS

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 ORC Section 4117.08 (A) numbers 1-9."

(Joint Exhibit 1, pg. 7)

ARTICLE 13 - WORK WEEK, SCHEDULES, AND OVERTIME

. . .

Section 13.06 - Report-In Locations

"All employees covered under the terms of this Agreement shall be at their report-in locations ready to commence work at their starting time. For all employees, extenuating and mitigating circumstances surrounding tardiness shall be taken into consideration by the Employer in dispensing discipline.

Employees who must report to work at some site other than their normal report-in location, which is farther from home than their normal report-in location, shall have any additional travel time counted as hours worked.

Employees who work from their homes, shall have their homes as a report-in location. The report-in locations for ODOT field employees shall be the particular project to which they are assigned or 20 miles, whichever is less. In the winter season when an employee is on 1,000 hours assignment, the report-in location will be the county garage in the county in which the employee resides.

For all other employees, the report-location shall be the facility to which they are assigned.

. . .

(Joint Exhibit 1, Pgs. 19-20)

ARTICLE 24 - DISCIPLINE

Section 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."

Section 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."

(Joint Exhibit 1, Pgs. 34-35)

. . .

Section 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.

(Joint Exhibit 1, Pg. 37)

ARTICLE 29 - SICK LEAVE

Section 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.

(Joint Exhibit 1, Pgs. 47-48)

CASE HISTORY[1]

On July 27, 1981, Jerry Harris, the Grievant, was employed as a Custodial Worker with the Office of Support Services, the Employer. He, moreover, was promoted to an Equipment Operator I position in 1985, and thus, realized six (6) years of seniority. At the time of his removal, the Grievant's basic responsibilities consisted of delivering prepared food products to a number of mental health/mental retardation institutions. His routes often consisted of runs to Massillon, Columbus, or Cincinnati, Ohio. Other local deliveries in the Montgomery County area were also frequently assigned to the Grievant and the other drivers. On occasion, the Grievant was required to pull food orders from the warehouse, freezer, and chiller departments.

The Grievant's prior disciplinary record (Joint Exhibit 11) exposes a checkered background regarding his attendance predisposition. Three (3) episodes took place prior to the matter presently under consideration. On July 27, 1987, the Grievant received a verbal reprimand for failing to report to work on July 20, 1987, and failing to call the facility concerning his availability. Although the Grievant eventually contacted the Employer on July 21,1987 and noted that he would arrive an hour late, he in fact finally arrived at 10:00 a.m. rather than 8:00 a.m. On August 19, 1987, the Grievant received a written reprimand for being late and/or absent on six occasions since the issuance of the verbal reprimand. Another written reprimand was issued on October 29, 1987 which dealt with an absence on September 14, 1987. The Grievant was allegedly scheduled to return to work on September 14, 1987 after a documented vacation period. He was once again reprimanded because he failed to offer verification justifying his absence. The reprimand, moreover, contained an additional warning concerning the consequences of continued maladaptive behavior; a suspension was forthcoming if the behavior persisted.

The previously mentioned suspension warning did not achieve its desired effect. Seven (7) additional tardiness occurrences were recorded by the Employer for the period October 23, 1987 to November 20, 1987. It should be noted that the tardiness durations ranged from one (1) minute to thirty (30) minutes.

As a consequence of the above activity, the Employer suspended the Grievant for two (2) days and charged him with Neglect of Duty. Two (2) specific work rule violations were cited by the Employer in support of the suspension. By failing to call in the Grievant allegedly violated Office of Support Services' Work Rule #2 (Joint Exhibit 1) which deals with call-ins for absences or lateness to an immediate supervisor or designee. The Grievant's tardiness record was also viewed as a violation of the Office of Support Services' Work Rule #15 (Joint Exhibit 2) which allows a supervisor to consider each case of tardiness individually; and provides for a recommendation based upon an employee's previous record of tardiness.

On January 27, 1988, the Grievant authored a grievance which contested the Employer's disciplinary action. The grievance contained the following relevant particulars:

"...
I received a 2-day suspension for Neglect of Duty. I do not feel discipline is for just cause. Other employees with similar circumstances have not been disciplined.
..."

(Joint Exhibit 13)

The Parties were unable to resolve the grievance at the subsequent stages of the grievance procedure. Since the Parties failed to raise any objections on either substantive or procedural grounds, the grievance is properly before this Arbitrator.

The Grievant's travail continued with an alleged incident on March 9, 1988. On this date, the Grievant was scheduled to work from 7:00 a.m. to 3:30 p.m. Although the Grievant purportedly engaged in several attempts to contact the Employer, the Employer never received a phone-in notification for absence. As such the Grievant was suspended for six (6) days for Neglect of Duty. Once again he was charged with several work rule violations dealing with failure to report for work and report an absence.

Of course, the Grievant disagreed with the above assessment and filed a formal grievance. It contained the following Statement of Facts:

"...
I received a 2-day (sic) suspension for Neglect of Duty. I feel it is unjust and there is unequal treatment of rules where I work.
..."

(Joint Exhibit 3)

Once again, the Parties were unable to resolve the grievance at the subsequent stages of the grievance procedure. Since the Parties failed to raise any objections on either substantive or procedural grounds, the grievance is properly before this Arbitrator.

THE MERITS OF THE CASE: 2-DAY SUSPENSION (23-02-88012-0007-01-06)

The Position of the Employer

It is the position of the Employer that the Grievant was suspended for just cause. The 2-day suspension was based upon two (2) work rules promulgated in keeping with Section 29.02 and

Section 13.06.

The Employer maintained that the Grievant was adequately given forewarning or foreknowledge of the possible or probable consequences of the Grievant's disciplinary conduct. Carol Hildebrecht, the Operations Manager, maintained that the Grievant received a packet of work rules during an in-service which contained Work Rule #2 - Reporting of Absences (Joint Exhibit 1) and Work Rule #15 - Tardiness (Joint Exhibit 2). She identified a current in-service training form (Joint Exhibit 3) which indicated that the Grievant did not attend the in-service training session but did receive the packet of material. She also noted that the Grievant and other non-participants had an opportunity to ask questions regarding the packet if they so desired. Probable consequences, in terms of future suspensions, should have been readily apparent to the Grievant. The written reprimand issued on October 29, 1989 (Joint Exhibit 11) specified the following: "This is your third reprimand and if this type of behavior continues, a suspension will be recommended." (Joint Exhibit 11).

The Employer argued that its rules or orders were reasonably related to the orderly, efficient and safe operation of the facility. William Boykin, a Storekeeper III and the Grievant's Supervisor, and Hildebrecht discussed a number of negative operational consequences engendered by the Grievant's behavior. First, clients' meals can only be provided if the Employer delivers food on a timely basis. These meals not only include regular items, but some are specialized or modified to serve the needs of diabetics and other unique dietetic circumstances. Second, if meals are delivered in a tardy fashion it disrupts the institution's and client's serving schedules, which can be very disruptive to the normal routine. Third, tardy deliveries may also generate unnecessary overtime payments for the Employer, but may also generate unnecessary overtime at the institution receiving the product.

The Employer maintained that it applied its rules, orders and penalties even-handedly and without discrimination to all employees. It was emphasized that successful disparate treatment claims require that: an employee must be aware and condone certain irregularities; and like instances are treated in a dissimilar fashion. The Employer claimed that any variation in discipline cited by the Union was appropriate because of variations in the circumstances rather than disparate treatment.

Randy McAtee, a Storekeeper II, and Shop Steward, contended that there were a number of serious problems dealing with disparate treatment. Yet, he could not provide specific grievances citing these allegations. Nor did he offer any testimony concerning any specific action steps engaged in by the Union to thwart this alleged inappropriate activity.

The Employer alleged that the Union's Jenkins comparison was woefully misplaced. Jenkins, more specifically, possessed a personal history regarding absenteeism which differed from the Grievant's experience.

Suspicion concerning this argument was also raised by the Grievant's inaction. If the Grievant felt so strongly about the degree of disparate treatment, he should have filed a grievance prior to the suspension.

Finally, the Employer charged that the Union attempted to support its argument in an evasive fashion. It was alleged that the Union relied on prior employee reprimands but veiled its accusations under the protective offerings of Section 24.06. Thus, those employees who had a poor record and had received oral and/or written reprimands, followed by a twelve (12) month period without any additional disciplinary disposition, would have their files sealed. Under these circumstances, the Employer had a certain amount of difficulty rebutting the disparate treatment argument.

The Employer contended that the degree of discipline administered was reasonably related to the seriousness of the Grievant's proven offense. Since the facts surrounding the two (2)-day

suspension and the circumstances which led up to its issuance were not disputed by the Union, the Grievant clearly violated the previously specified work rules.

An additional penalty related argument was offered by the Employer. The Employer contended that the penalty was reasonable because it followed the principle of progressive discipline. Hildebrecht testified that the Grievant's disciplinary record clearly reflected a certain semblance of leniency. If the Employer had strictly adhered to the Standard Guide For Disciplinary Action (Joint Exhibit 4) the Grievant would have realized a two (2)-day suspension early on in the disciplinary trail. Also, Boykin contended that he had several counseling sessions with the Grievant prior to the issuance of the initial formal reprimand. He also stated that these counseling sessions continued throughout the disciplinary process.

The Position of the Union

It is the position of the Union that the Employer did not have just cause to suspend the Grievant for two (2)-days. For the most part, the Union did not contest the Employer's version of the various incidents, and the most recent incident which lead to the suspension. A number of procedural matters were raised with the major issue concerning a potential disparate treatment claim.

The Union challenged the Employer's notice arguments. The Grievant testified that he was not aware of the absenteeism and tardiness procedures. Most of this notice deficiency was a consequence of never receiving either of the work rules (Joint Exhibits 1 and 2). He, moreover, alleged that he never read the work rules. With respect to the consequences associated with this brand of misconduct, the Grievant could not recall being told that suspension might follow if the misconduct continued.

Gerald Cummings, a Coordinator II, provided testimony dealing with the meal scheduling process which conflicted with the Employer's business necessity arguments. He alleged that the food that was delivered on any particular day was not consumed for a number of days. Normally, the delivery and production schedules were coordinated with the facilities so that the food would be consumed three (3) days after delivery.

Probably the greatest concern discussed by the Union dealt with the disparate treatment argument. The Union, more specifically, maintained that the Employer did not even-handedly administer its rules and penalties dealing with tardiness and absenteeism. Section 24.01 was purportedly violated because the Employer applied its rules and penalties more stringently against the Grievant as opposed to other similarly situated employees. A number of arguments were offered in support of this premise.

First, the Union noted that during the period of time July 20, 1987 through November 20, 1987 the Employer implemented a tardiness rule which allegedly required employees to submit requests for leave to cover tardy occurrences. Although the Grievant's requests for leave were purportedly denied and discipline ensued, other employees were dealt with differently. Some employees had their time approved and suffered no discipline, or their time was not approved but they suffered no disciplinary consequences. Quite frequently, moreover, request for leave slips were never turned in, and yet, disciplinary consequences never followed these episodes.

Second, the sign-in/sign-out summaries independently developed by the Parties (Joint Exhibits 5 and 6) indicated that all of the employees had a similar number of tardiness incidents for the period July 20, 1987 through November 20, 1987. Yet, the Grievant was the only employee that realized a two (2)-day suspension and enjoyed a dissimilar disciplinary pattern. This theory was supported by a summary letter (Joint Exhibit 8) that indicated that for a two (2)-year period only the Grievant received a suspension. This finding surprised the Union because most of the employees entered this period of time with similar disciplinary histories. And yet, the Grievant exited the time

frame with a much more severe penalty for similar offenses.

Third, the Employer failed to distinguish the tardiness records of the Grievant and Jenkins. The Union emphasized that the Employer failed to support its contention that circumstances differed when one compared their attendance profiles. In other words, the Union did not believe that Jenkins called in for all his absences.

Fourth, Cummings' attendance record clearly evidenced the excessive and non-progressive nature of the discipline administered. On November 23, 1987, Cummings received a Verbal Reprimand (Union Exhibit 1) even though his tardiness was becoming habitual. It appeared that this was the only discipline received by Cummings for a tardiness history which closely reflected the Grievant's history.

Last, the Union claimed that the Grievant was not on a different progressive discipline stage on or about July 20, 1987. Even though the Grievant was at the verbal reprimand stage and Jenkins was at the oral reprimand stage, the Union viewed this as an artificial distinction because both of these stages reflected threshold levels.

THE ARBITRATOR'S OPINION AND AWARD:
2-DAY SUSPENSION
(23-02-880127-0007-01-06)

From the evidence and testimony introduced at the hearing it is this Arbitrator's opinion that the Employer had just cause to administer a two (2)-day suspension. For a number of reasons, this Arbitrator concludes that the Employer did not engage in prohibited disparate treatment.

As this Arbitrator has previously noted employees guilty of the same offense should receive the same treatment. Uniformity of treatment, however, may not be appropriate when the circumstances differ. When evaluating such a claim, an arbitrator must consider, an intuitively weigh the similarities and dissimilarities of attendance/tardiness records. Such necessary comparisons, however, place a heavy burden on the Parties to provide this Arbitrator with clear data so that an objective analysis can be undertaken.

Hildebrecht provided credible testimony concerning the various factors the Employer considered in its attempt to consistently apply the Standard Guide for Disciplinary Action (Joint Exhibit 4). The following factors were noted: a pattern of tardiness; whether the tardiness occurrence represents an unusual circumstance; the duration of the tardy occurrence; whether the employee complies with the call-in procedure; whether the employee has available leave; and whether the employee has a history of absenteeism and tardiness. The application of these factors to the various examples proposed by the Union clearly indicates that the circumstances differed which supports the theory of non-uniform treatment or application.

Jenkins was not similarly situated to the Grievant. Hildebrecht noted that the following differences existed. Jenkins always contacted and alerted the Employer that he was going to be late. The Grievant, however, did not diligently follow the call-in procedure. In fact, on occasion he did contact the Employer that he would arrive late but that he should be expected to arrive at 8:00 a.m. Unfortunately, he did not arrive until 10:00 a.m.

Jenkins and the Grievant were at different stages of the progressive discipline process. This allegation was supported by Hildebrecht's testimony and a Verbal Reprimand (Union Exhibit 1) issued on November 23, 1987. Jenkins obviously engaged in his misconduct at a different period of time; which accounts for Jenkins' status at a lower rung of the progressive discipline ladder. In my judgment, moreover, one cannot equate an oral non-documented reprimand with an officially documented verbal reprimand. The former intervention amounts to a counseling session, while the latter deals with actual reprimands which find their way into an employee's personnel file.

In a like fashion, the Employer capably and credibly distinguished the circumstances surrounding Cummings' disciplinary record. Once again, timing differences existed which triggered varying progressive discipline stages. Cummings, moreover, never abused the call-in procedure and made a concerted effort to correct his problems. Cummings also admitted that he was never disciplined beyond the verbal stage because he showed marked improvement.

Similar testimony was provided to distinguish McAtee's circumstance. Hildebrecht maintained that he, as well, was at a different progressive discipline stage prior to the critical period under review.

This Arbitrator wishes to emphasize that the majority of the above evidence and testimony provided by the Employer was insufficiently rebutted by the Union. Tardiness frequencies (Joint Exhibit 6) play an important role, but additional evidence and testimony regarding the similarity of circumstances needed to be introduced. This requirement seems critically important because many of the tardiness occurrences might have been excused. Cummings noted that entries on any given sign-in and sign-out sheet do not necessarily mean that an employee failed to provide prior notification. Also, the fact that no other employee received a suspension during a certain time period (Joint Exhibit 8) does not establish a per se disparate treatment claim.

The Union's references in its opening statement regarding the approval and disapproval of requests for leave might have proved to be quite useful. Unfortunately, statements uttered either in the opening or closing arguments are not viewed as facts unless properly supported.

AWARD: 2-DAY SUSPENSION
(23-02-880127-0007-01-06)

The grievance is denied and dismissed.

THE MERITS OF THE CASE:
6-DAY SUSPENSION
(23-02-880504-0035-01-06)

The Position of the Employer

It is the position of the Employer that it had just cause to suspend the Grievant for six (6) days. The Employer alleged that the Grievant clearly neglected his duty by failing to call in or report for duty on March 9, 1988. This activity reflected a violation of the Reporting of Absence work rule (Joint Exhibit 2).

The Employer maintained that the Grievant was adequately placed on notice regarding the above cited rule. Boykin testified that the Grievant was forewarned of the calling off rules and the probable consequences in a meeting held on November 4, 1986. The Grievant, moreover, attended the meeting as evidenced by the sign-in sheet (Employer Exhibit 3). Boykin, moreover, noted that he counseled the Grievant after the two (2)-day suspension about the possibility of more serious consequences if in fact he continued to violate the work rules.

The Employer contended that it obtained substantial evidence of proof that the Grievant was guilty as charged. Boykin testified that internal monitoring documents for March 9, 1988 clearly evidenced that the Grievant failed to call-in (Employer Exhibit 2) and failed to sign-in (Joint Exhibit 2).

The Employer claimed that the degree of discipline administered was reasonably related to the seriousness of the Grievant's proven offense. The Employer, more specifically, argued that the

discipline imposed was progressive rather than excessive. Hildebrecht justified the six (6)-day suspension because both the two (2)-day suspension and the no-call no-show which took place on March 9, 1988 fall within the same general heading of Neglect of Duty. Since the Grievant had received a two (2)-day suspension for tardiness activity (abuse of sick leave rules; late call-in; etc.), the Employer decided that it was appropriate to issue a six (6)-day suspension because the no-call no-show incident evidenced a fourth offense along the continuum. The continuum was contained in the Standard Guide for Disciplinary Action (Joint Exhibit 4).

The Position of the Union

It is the position of the Union that the Employer did not have just cause to levy a six (6)-day suspension.

The Union challenged the suspension on related progressive discipline arguments. First, the Union maintained that the discipline was too severe because the Grievant experienced one other instance of failing to call in or show up to work. This took place on July 20, 1987 and the Grievant received a verbal reprimand. A six (6)-day suspension for an additional violation seemed excessive, and therefore, the Union urged the Arbitrator to reduce the penalty.

Second, a lesser suspension was also deemed appropriate because it was based upon an improper prior disciplinary record. The record referred to by the Union dealt with the two (2)-day suspension for tardiness.

THE ARBITRATOR'S OPINION AND AWARD:
6-DAY SUSPENSION
(23-02-880504-0035-01-06)

Obviously, this Arbitrator's prior ruling dealing with the legitimacy of the two (2)-day suspension removes the Union's argument dealing with the impropriety of the prior disciplinary record. The major issue which must, therefore, be resolved deals with the propriety of the no-call no-show violation. Based on the particular circumstances presented at the hearing, this Arbitrator believes that a four (4)-day suspension is appropriate.

The previous conclusion requires a balancing of interests and equity considerations. To a certain degree the Employer has evidenced a certain degree of patience in its use of oral warnings and counseling in lieu of other forms of disciplinary actions, and for this the Employer should not be criticized. This point is especially pertinent when one considers the oral reprimand received by the Grievant for his initial no-call no-show violation. The grid (Joint Exhibit 4) clearly indicates that a written reprimand could have been administered. Also, this Arbitrator is highly cognizant of the Grievant's tardiness difficulties. In fact, that record was a significant factor in the decision to reduce the penalty, and yet, levy a penalty which evidences that this Arbitrator does not condone such behavior.

Although the tardiness violation and the no-call no-show violation are, indeed, forms of Neglect of Duty, it appears to this Arbitrator that a six (6)-day suspension is outside the range of reasonableness. Without additional rationale, this Arbitrator cannot accept the automatic integration of tardiness incidents with other forms of absenteeism related misconduct. At the same time, it would be highly illogical for this Arbitrator to disallow any consideration of repetitious dissimilar violations. It is my judgment, therefore, that it is unreasonable to administer a six (6)-day suspension when the only prior reprimand for the misconduct in question rests at an oral reprimand stage.

AWARD: 6-DAY SUSPENSION

The grievance is upheld in part and denied in part. The six (6)-day suspension shall be reduced to a four (4)-day suspension. The Employer is directed to reimburse the Grievant for the two (2)-day differential and his disciplinary record should also reflect the above modification.

Dr. David M. Pincus
Arbitrator

November 13, 1989

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[1] Since both grievances share a common context and are critically entangled sequentially, both grievances will be introduced in this section. Subsequent sections, however, will be dealt with in an independent fashion. If one Award, however, impacts a decision dealing with the propriety of an administered penalty, there may be some linkage.