ARBITRATION DECISION NO.:
210

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

EMPLOYER:
Department of Mental Retardation
and Developmental Disabilities
Mount Vernon Developmental Center

DATE OF ARBITRATION:
October 27, 1989

DATE OF DECISION:
November 8, 1989

GRIEVANT:
Pamela Neipling

OCB GRIEVANCE NO.:
24-09-(89-02-14)-0174-01-04

ARBITRATOR:
Harry Graham

FOR THE UNION:
Brenda Persinger

FOR THE EMPLOYER:
Rodney Sampson

KEY WORDS:
Suspension
Tardiness
Progressive Discipline
Mitigating Circumstances
Reasonable Discipline

ARTICLES:
Article 13-Work Week,
Schedules and Overtime
§13.06-Report-In Location
Article 24-Discipline
§24.05-Imposition of
Discipline

FACTS:

The grievant is employed by the Ohio Department of Mental Retardation and Developmental Disabilities as a Therapeutic Program Worker. She arrived for work one hour late and did not call in to report her expected tardiness. The grievant has a verbal reprimand, a written reprimand and a one day suspension on her record for absenteeism. The grievant explained that her tardiness was caused by her son unplugging her alarm clock and she overslept. She received a six day suspension as a result.

EMPLOYER'S POSITION:

A six day suspension following a one day suspension for a similar offense does not violate the provisions of progressive discipline. The employer followed internal guidelines which call for a six to ten day suspension on an employee's fourth offense. The call-in requirement is important because of the staffing requirements due to the personal attention needed by residents of the facility. There is no dispute over the grievant's tardiness and the circumstances, therefore the discipline imposed is proper.

UNION'S POSITION:

A six day suspension following a one day suspension for a similar offense is too severe. There are mitigating circumstances present which must be considered as required by Article 13.06 of the contract. The increased discipline imposed was not negotiated by the union. The internal guideline for discipline must meet the "just cause" requirement in the contract. Contract language must prevail over internal guidelines.

ARBITRATOR'S OPINION:

The employer failed to consider mitigating circumstances surrounding the grievant's tardiness required by Article 13.06. The employer was aware of the grievant's depression, her son's illness and her good faith effort to get to work quickly. The employer's guidelines do not carry the force of the contract, therefore, the just cause standard is applicable. If discipline is shocking to a "reasonable man" it may be modified. Discipline also "will be reasonable and commensurate with the offense", as per Article 24.02. A six day suspension following a one day suspension is shocking to a reasonable person, and violates the command that discipline be reasonable and commensurate.

GRIEVANCE B

FACTS:

Grievant did not call in or report to work. The employer issued a six day suspension.

EMPLOYER'S POSITION:

Grievant clearly neglected his duty by not calling in or showing up for work. Grievant was aware of the work rule requiring employees to call in if they could not report to work. Grievant even attended a meeting that explained the consequences of violating this work rule. Since the violation of no call in and no show falls within the heading of neglect of duty, which the previous two day suspension was imposed for, the discipline is progressive and not excessive. This was grievant's fourth offense in the same category of violations.

UNION'S POSITION:

Grievant experienced only one other incident of failing to call in and not showing up for work. This incidence only elicited a verbal reprimand. A verbal reprimand followed by a six day suspension is excessive. The union also included the fact that grievant's discipline record was incorrect because it included a two day suspension that was still under review for arbitration. The union also claims disparate treatment in the employer's approval of leave time. The union also argues that the distinction between a verbal reprimand and an oral reprimand is artificial.

ARBITRATOR'S OPINION:

Employer should not be penalized for its patience in using counseling and verbal warnings instead of other forms of disciplinary actions, but it unreasonable to administer a six day suspension when the only prior reprimand for the misconduct in question is an oral reprimand.

AWARD:

The grievance is denied in part and upheld in part. The six day suspension shall be reduced to a four day suspension and the employer will compensate the grievant for the two days difference. The grievant's disciplinary record will also be modified to reflect this decision.

TEXT OF THE OPINION:

In the Matter of Arbitration
Between

OCSEA/AFSCME Local 11

and

The State of Ohio, Department of Mental Retardation and Developmental Disabilities

Case No.:
24-09-890214-0174-01-04

Before:
Harry Graham

Appearances:

For OCSEA/AFSCME Local 11:
Brenda Persinger
Staff Representative
OCSEA/AFSCME Local 11
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For The State of Ohio:
Rodney Sampson
Office of Collective Bargaining
65 East State St., 16th Floor
Columbus, OH. 43215

Introduction:

Pursuant to the procedures of the parties a hearing was held in this matter on October 27, 1989 before Harry Graham. At that hearing the parties were provided complete opportunity to present evidence and testimony. No post-hearing briefs were filed in this dispute and the record was closed at the conclusion of oral argument.

Issue:

At the hearing the parties were able to agree upon the issue in dispute between them. That issue is:

Was the Grievant, Pamela Neipling's
six (6) day suspension for just cause?

If not, what should be the remedy?

Background:

There is agreement over the facts that give rise to this proceeding. The Grievant, Pamela Neipling, is employed at the Mount Vernon (OH.) Developmental Center operated by the Ohio Department of Mental Retardation and Developmental Disabilities. She is classified as a Therapeutic Program Worker and has approximately 16 years of service at the Mount Vernon facility. On December 22, 1988 Ms. Neipling did not notify her supervisor in timely fashion that she would not report to work on time. Ms. Neipling's starting time is 6:30 AM. On December 22, 1988 she arrived at work at 7:33 AM, one hour and three minutes late.

On several prior occasions the Grievant had received discipline for similar offenses. Thus, her record indicates that on May 9, 1988 she had received a verbal reprimand, on October 13, 1988 a letter of reprimand and on December 21, 1988, one day before the incident in question in this proceeding, she had received a one day suspension.

On December 22, 1988 Ms. Neipling overslept. Upon awakening at a time she estimated to be 7:00 AM she attended to her domestic chores and rushed to work without calling-in to indicate she would be late. Based upon her failure to call-in and her accumulated work history of similar incidents with increasingly severe discipline, the Employer administered a six day suspension. That suspension was the subject of a grievance which was processed through the procedures of the parties without resolution. The Employer and the Union agree that Ms. Neipling's grievance is properly before the Arbitrator for determination on its merits.

Position of the Employer:

The State points out that there is no dispute over Ms. Neipling's prior disciplinary history or the fact that she failed to call-in and reported for work late on December 22, 1988. The record reveals that the concept of progressive discipline has been followed in this situation. The work rules of the

Mount Vernon facility have within them a grid which provides a guide for managerial action in a variety of circumstances. Under the entry "Failure to Follow Policy or Work Rule" the grid prescribes that a 6 to 10 day suspension may be administered for the fourth offense. This occurrence represented Ms. Neipling's fourth offense. The State chose to administer the minimum amount of time off set out in its policy. As there is no dispute over the facts concerning Ms. Neipling's failure to call-in and tardy arrival at work on December 22, 1988 the State urges that its action be upheld.

The State points out that residents of the Mount Vernon facility require a great deal of personal attention. When an employee fails to notify the administration of the Center that she will be late for work management is left in a quandary. It does not know if someone else should be called-in or if another employee should be retained on overtime. It is essential that the Center meet its staffing needs in order to attend to the welfare of the residents. Ms. Neipling is a veteran employee who is well aware of the needs of the Mount Vernon facility. She had received discipline on three prior occasions for the same offense. Under these circumstances, the State asserts it possessed the requisite just cause to administer the six day suspension at issue in this proceeding. Accordingly, it claims its action should not be modified.

Position of the Union:

In the Union's view the circumstances surrounding this case must prompt the conclusion that the State lacked the requisite just cause to administer the discipline in question. The Grievant's son is ill with a brain tumor. He receives a great deal of medication, some of which is administered by Ms. Neipling. As a result of this situation Ms. Neipling has become depressed in the medical sense of the term. She has received professional treatment for this condition. Consequently, she can cope with the daily stresses of her life but the condition remains with her. The administration of the Mount Vernon facility is aware of the medical history of the Neipling household.

On the evening of December 21, 1988 her son had unplugged her alarm clock from the electrical outlet in the wall in order to plug in Christmas tree lights. Ms. Neipling was unaware of this action. As a result, she overslept. Upon awakening she knew she was late for work. Rather than take time to call the Center she attended to her son's needs and hurried to work as quickly as she could. Under these circumstances, the Union insists that the discipline is unwarranted.

At Section 13.06 of the Agreement reference is made to “extenuating and mitigating circumstances" being taken into consideration when consideration is being given for tardiness. That did not occur in this situation. The State gave no weight whatsoever to Ms. Neipling's domestic situation. It disregarded her account of the reason why she overslept. This cannot be permitted to occur in the Union's view.

Acknowledging that progressive discipline has been followed in this situation, the Union asserts that the penalty imposed upon Ms. Neipling is too severe. A one day suspension was followed by a six day suspension. That is extraordinarily harsh in the Union's view. While that penalty is prescribed by the internal disciplinary grid of the Mount Vernon Developmental Center, the Union points out that it did not negotiate the range of penalties with the administration of the Center. The standards for imposition of discipline utilized in this situation must be regarded as guidelines for management. In all instances the contractual standard of "just cause" must prevail over non-negotiated unilaterally adopted penalties the Union insists. As this is the case, the Union urges that the grievance be sustained.

Discussion:

As befits a bargaining unit encompassing many thousands of employees the Collective Bargaining Agreement between the parties is quite lengthy and detailed. In an Agreement of such length it may be tempting for one party or the other to adopt the view that some words or phrases are more significant than others. This view is mistaken. All terms of the Agreement are to be given effect. This includes the explicit and clear understanding of the parties set forth in Section 13.06 of the Contract. The language of that Section obligates the State to take into account "extenuating and mitigating circumstances" when considering administration of discipline to employees who are tardy. It is recognized that the State advanced the notion that Ms. Neipling was disciplined for failure to call-in. In the circumstances of this case, that is a distinction without a difference. Obviously Ms. Neipling was late and did not telephone the Employer to inform the appropriate personnel at the Mount Vernon facility. That Ms. Neipling's son is ill is known to the Employer as is the fact that she has experienced depression. In the circumstances of this dispute it must be determined that the concepts of "extenuating and mitigating circumstances" set out in the Agreement are applicable. The Employer must not be permitted to disregard them as to do so would deprive them of vitality. The concepts of extenuation and mitigation must be accorded weight in this situation.

The State has followed the disciplinary guidelines established by the administration of the Mount Vernon facility. The offenses and penalties enumerated in those guidelines are just that, guidelines. They have not been negotiated between the parties and do not carry with them the force of the Collective Bargaining Agreement. They are not binding on either the Employer or the Union. The standard to be applied in this dispute is the contractual one of "just cause." If application of the guidelines is harsh, if it shocks the proverbial "reasonable man" clearly such application may be modified. While an arbitrator who finds discipline to be appropriate should be circumspect in substituting his judgment for that of management the arbitration process itself contemplates that such substitution will occur when the employer has acted in a harsh and overly severe fashion. Those circumstances are present in this situation. The State followed a one day suspension with a six day suspension for the same basic offense. An increase in the penalty of such magnitude for the same offense is shocking. Even when consideration is given to the view that neutrals should be reluctant to modify penalties when discipline is warranted an increase in time off from one to six days is excessive in the circumstances of this case. Ms. Neipling overslept inadvertently and through no fault of her own. She attended to her domestic duties and hurried in to work. That she failed to call-in under these circumstances is understandable. It is not indicative of an employee acting in disregard of the Employer's interests. Rather, it is indicative of an employee doing her utmost to get to work quickly. Had Ms. Neipling telephoned the Employer at 7:00 AM it would not have assisted it in making staffing arrangements. She was late for work upon awakening. Her conduct in getting to work as soon as possible reveals her conscientious attitude towards her job duties.

At Section 24.05 the Agreement provides that discipline will be "reasonable and commensurate with the offense and shall not be used solely for punishment." In this situation the increase in time off from one to six days is unreasonable and is not commensurate with the offense. As this is the case it must be concluded that the Employer has indeed violated the Agreement.

Award:

The grievance is sustained. All record of this incident is to be expunged from the Grievant's record and she is to receive all pay and benefits she would have received but for the Employer's violation of the Labor Agreement.

Signed and dated this 8th day of November, 1989 at South Russell, OH.

Harry Graham
Arbitrator