ARBITRATION DECISION NO.:
221

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

EMPLOYER:
Department of Rehabilitation
and Corrections
Ohio State Reformatory

DATE OF ARBITRATION:
December 1, 1989

DATE OF DECISION:
January 10, 1990

GRIEVANT:
Michael Wheeler

OCB GRIEVANCE NO.:
27-20-(88-03-29)-0056-01-03

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Butch Wylie

FOR THE EMPLOYER:
Richard Hall

KEY WORDS:
Removal
Disparate Treatment
Mitigation
Tardiness
Last Chance Agreement

ARTICLES:
Article 24-Discipline
§24.01-Standard
§24.02-Progressive Discipline
§24.05-Imposition of Discipline

FACTS:

Grievant was employed as a Corrections Officer II at the Ohio State Reformatory for approximately four years. During the last two years of grievant's employment he accumulated a long list of disciplines for absenteeism. Three separate times grievant was suspended for failure to report to work and unauthorized absences. Grievant was also given two last chance warnings. Grievant was seven minutes late to work and he was removed.

EMPLOYER'S POSITION:

Grievant exhibited a, "consistent and continuing pattern of prohibited absenteeism." The safety of the institution is dependent on the attendance of the Corrections Officers. Grievant's excuse of staying with his father the night before work is suspect. In previous grievances an arbitrator found that the grievant's explanation of his fathers illness was not credible. Grievant had two last chance opportunities and knew the consequences of another tardiness violation. The removal is justified.

UNION'S POSITION:

Grievant should not be removed for being seven minutes late. This infraction is de minimus and certainly not worthy of removal. Grievant was also in the words of a supervisor a "marked man" at the institution. The Union introduced the records of eight other employees who were not as severely disciplined grievant for tardiness. In fact no other employee had been removed by the institution the year grievant was removed. The arbitrator should also consider the mitigating fact that the grievant stayed up until 2 a.m. caring for his father who has had triple by-pass surgery.

ARBITRATOR'S OPINION:

First the arbitrator finds that there is just cause for the removal based on the grievant's past record. Grievant has been suspended four times and disciplined two other times as well as being counseled. Even though grievant was only seven minutes late, he disregarded the two last chances and numerous warnings he had been given by the employer. Grievant allegedly staying with his ill father until 2 a.m. the night before cannot be considered a mitigating factor. If grievant's father had unexpectedly become ill then staying at the father's home until 2:00 a.m. the night before work this could be considered as a mitigating factor, but the grievant's father had a doctor's appointment. Grievant's father lived on his own and cannot be considered dependent on grievant's help. Grievant should have planned and taken measures to assure he would report to work on time.

The second issue is whether the grievant was subjected to disparate treatment. The Union to prove discrimination, must "show by clear and convincing evidence purposeful discrimination." The employee's records presented by the Union cover different time periods and different administrations. The Union did not prove discriminatory disparate treatment.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

Ohio Department of Rehabilitation

and Corrections
Employer,

and

OCSEA, Local 11
AFSCME, AFL-CIO
Union.

Grievance No.:
27-20-056-03-01
Grievant:
Wheeler
Hearing Date:
December 1, 1989
Award Date:
January 10, 1990

For the Employer:
Richard Hall

For the Union:
Butch Wylie

In addition to the Grievant Michael Wheeler and the advocates named above, the following persons were in attendance at the Hearing: Dane Braddy, OCSEA Staff Representative, Joseph Clark, Chief Steward and witness, Ted Durkee, Department of Rehabilitation and Corrections.

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. All witnesses were sworn.

Issue

Was the Grievant disciplined for just cause,
and if not, what shall the remedy be?

Joint Exhibits

1. Contract

2. Discipline Disposition

3. Predisciplinary conference notice

4. Time card

5. Hearing officer's report

6. Warden's recommendation for discipline

7. Notice of Disciplinary Action

8. Grievance

9. Step 3 Response

10. Step 4 Response

11. Request for Arbitration

Employer Exhibits

1. 3 day Suspension 3/10/87 (Sleeping on duty)
2. Verbal Reprimand 9/30/87 (late call off)

3. Written Reprimand 11/19/87 (late call off)

4. 10 day Suspension 11/14/87 (late call off)
11/16/87 (unauthorized absence)
(Rule 21) (altered doctor's statement)

5. 7 day suspension 12/12/87 (late call off)

6. Written Reprimand 1/4/88 (unauthorized absence)
1/5/88 (late call off)
Warning

7. 3 day suspension 1/24/88 (late call off)
(last chance) (unauthorized absence)

8. ODRC Standards of Employee Conduct 9/1/86

9. Grievant's Acknowledgment of 8/15/86 or E-8

10. Revised Employee Conduct Standards 10/23/27

11. Discipline Form

12. Arbitration of Grievant's two ten-day suspensions

Union Exhibits

1. ODRC policy P101.00 effective 4/12/87 on tardiness and call off procedures

2. ODRC Tardiness Policy dated 2/12/85 (????)

3. Disciplinary Record of E.S.

4. Disciplinary Record of D.M.

5. Disciplinary Record of F.O.

6. Disciplinary Record of P.H.
7. Disciplinary Record of J.D.

8. Disciplinary Record of B.E.

9. Disciplinary Record of R.K.

10. Disciplinary Record of S.W.

Relevant Contract Sections

§24.01 - Standard

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

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

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

Facts

The Grievant was employed at Ohio State Reformatory as a Corrections Officer II from 1/9/84 to 3/25/88 when he was removed. That removal is the subject of this Grievance.

On January 29, 1988, the Grievant was due to start work At 6:00 a.m. Under the Work Rules, he was obliged to call off 1 hour before his duty began. At 5:43 a.m., the Grievant called and said he would be late because "he overslept". The Grievant arrived at 6:07 a.m., seven minutes tardy.

The removal notice (J-8 dated 3/16/88) cites the following infractions as a basis for the

removal. "A consistent and continuing pattern of prohibited absenteeism behavior culminating in a violation of Rule 1-A of the Standards of Employee of DRC on 2/29/88 when you were seventeen (17) (sic) minutes late for work". (Joint Exhibit 8) The Removal Notice reviewed the following work history (E1 - E7)

1. 3/26/87 - 3 day suspension for sleeping on duty

2. 9/3/87 - verbal reprimand for failure to report to work and failure to call off properly

3. 11/18/87 - written reprimand for failure to report to work and failure to call off properly

4. 12/14/87 - 10 day suspension for failure to report to work, failure to call-off properly, unauthorized absence, and alteration of a physician's statement

5. 1/4/88 - 7 day suspension for failure to call off properly and unauthorized absence

6. 1/26/88 - written reprimand for excessive absenteeism; warning of discharge

7. 2/17/88 - Three (3) day suspension for failure to call off properly and unauthorized absence. Last chance - 2nd (given because previous final warning (1/26/88) was issued 2 days after this absenteeism occurred)

On 3/27/88, Grievant grieved the Removal order claiming the discipline was "excessive" and not commensurate with the offense" §§24.01, 24.02, 24.05 (J-9). At Step III, the Union contended

1. lack of just cause
2. lack of progression
3. excessive, unreasonable discipline not commensurate
4. management was "out to get him"

At Step III, the apparent evidence of "out-to-get him" was an alleged statement of a Supervisor that Grievant was a "marked man at OSR".

The Grievant admits the late call off and the 7 minutes tardiness. As a mitigating circumstance he said that he “overslept” because he stayed with his sick father the night before until 2 a.m. After bringing his father home from Cleveland Clinic in the early evening, the Grievant stayed at his father's until 2 a.m. to clean the house and comfort his father. The Grievant testified that his father had triple by-pass surgery and 4 other surgeries within a 4 month period. Grievant did not reside with his father who lived on his own.

To rebut this testimony and to place the Grievant's contentions in context, the Employer introduced the arbitration opinion regarding the Grievant's 2 prior suspensions. The arbitrator in that case found the Grievant's description of his father's illness and needs "inconsistent", in some places incredible.

At the hearing, the Union's case rested on two (2) arguments.

1. The discipline was not progressive nor commensurate.

2. The Grievant was treated disparately from others at ORC in similar situations.

To support this latter contention, the Union introduced Exhibits U-3 to U-10 which were the Union's records of other employee's discipline as evidence of “disparate" treatment.

The Employer maintained that tardiness was a form of unauthorized absence, an absence less than an hour. Moreover, the Employer maintained that if an employee were tardy solely, the Employer lengthened the progressivity and severity of the punishment because tardiness was a type of personnel problem often solved if treated in this manner. However, tardiness plus different infractions did not lengthen progressiveness. Unauthorized absence (over 1 hour) was regarded as a serious problem because of the CO being a "critical" employee -- one upon whom staffing and hence safety depended.

The Union further argued that 7 minutes tardiness was de minimus and removal was therefore not commensurate.

The Arbitrator shall handle the two arguments separately.

1. The discipline per se. The Arbitrator finds just cause for the discipline based solely on the Grievant's conduct and past record. In an 11 month period, Grievant was suspended 4 times and disciplined 2 other times as well as counseled. Most of the Grievant's problems stemmed around a seeming inability to call in properly and to have his absences authorized. Moreover, the Grievant was given 2 last chances in Employer's attempt at corrective action. Moreover, the discipline was clearly progressive. The de minimus argument fails. True, the Grievant was only late 7 minutes. If that 7 minutes late were his only offense, removal would not be commensurate. However, the tardiness and improper call off occurred after 2 last chance suspensions. Whether Grievant was 1 minute late or 59 minutes late, he demonstrated a clear disregard for the warning he had been given. Sudden and unexpected illness of a helpless relative would be a mitigating factor. However, Grievant took his father on a planned appointment and could have come home much earlier and gone to bed. If his father lives alone, he cannot be "helpless". The Grievant knew he had work the next day, and he disregarded his duty to report and work. No evidence shows that the Grievant, under a final warning, took any measures to assure his attendance at work on time.

The second question is more difficult. Was the Grievant treated "disparately" from other employees? This issue was not clearly raised below, although by giving every benefit of the doubt to the Grievant, the Arbitrator could find such an argument "implicit" in the charge that the Employer "was out to get him".

The work records of the other employees were introduced to show the alleged disparate treatment. However, no motive was adduced to explain why management wanted "to get" the Grievant.

Comparing discipline among 8 employees is a complex job. On one hand, discipline should be fair and consistency leads to fairness; on the other hand, application of rigid disciplinary rules often results in unfairness to other employees or the punished employee if case-by-case circumstances are not examined.

Disparate treatment is not per se unjust; disparate treatment is inherently fair when an individuals problems are weighed in any decision. In fact, the Union would argue that mitigation evidence is important to every discipline decision. Such flexibility is a necessary management tool, as well. A recognition that not every employee is treated exactly the same does not justify a charge of invidious discrimination against any employee or any other intentional discrimination. To show disparate treatment strong enough to overcome management's decision requires the Union to show by clear and convincing evidence purposeful discrimination. To second-judge an employer's decisions from the evidence presented represents an insuperable burden for an Arbitrator. To compare, we must know each employee's total work record, longevity, and past discipline including prior mitigating circumstances. A detailed examination of the Union exhibits

(U-3 to U-10) reveals some potentially inexplicable disparaties. However, insufficient evidence exists to judge the context of those decisions. Moreover, these differences in discipline are not gross and nor clearly proven to reflect some secret animosity towards the Grievant. Moreover, the time periods covered are different and reflect different administrations. The Arbitrator does not find clear and convincing evidence of disparate treatment.

Award

Grievance denied.

Date: January 10, 1990
Rhonda R. Rivera, Arbitrator