ARBITRATION DECISION NO.:
225

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

EMPLOYER:
Department of Youth Services
Cuyahoga Hills Boys School

DATE OF ARBITRATION:
October 19, 1989

DATE OF DECISION:
January 19, 1990

GRIEVANT:
Jacqueline Cayson

OCB GRIEVANCE NO.:
35-03-(88-08-09)-0067-01-03

ARBITRATOR:
David Pincus

FOR THE UNION:
Tim Miller
Advocate

FOR THE EMPLOYER:
Victor Brown
Advocate
Meril Price
Second Chair

KEY WORDS:
Suspension
Insubordination
Mitigating Circumstances
Just Cause
Mandatory Overtime

ARTICLES:
Article 1-Recognition
§1.03-Bargaining Unit
Work

Article 5-Management Rights
Article 13-Work Week,
Schedules and Overtime
§13.07-Overtime
Article 24-Discipline
§24.01-Standard
§24.02-Progressive Discipline
§24.04-Pre-Discipline
§24.05-Imposition of Discipline

FACTS:

The grievant is a Youth Leader III employed by the Ohio Department of Youth Services. She was advised by her doctor and other doctors seen through the Employee Assistance Program not to work shifts longer than eight hours. The employer was aware of this recommendation. The grievant was ordered to work mandatory overtime on three occasions which she refused. The grievant filed Employee Incident Reports explaining her reasons with doctor's recommendations attached. Four months later the grievant received simultaneous suspensions for the three incidents. She received three, five and seven day suspensions.

EMPLOYER'S POSITION:

There was just cause for the suspensions. The grievant violated Ohio Revised Code Section 124.34, neglect of duty and insubordination. The employer has the right to schedule mandatory overtime, Section 13.07. The employer cannot violate Section 1.03 by having supervision fill in on short staffing situations. The doctor's statements were not valid excuses for refusing mandatory overtime. Procedural defects present are not persuasive. The grievant had notice of impending discipline through prior discipline. Time limits were not violated as the grievant herself caused the delay. Progressive discipline principles were followed.

UNION'S POSITION:

There was no just cause for suspension. The grievant refused mandatory overtime upon her doctor's advice. She enrolled in the EAP attempting to become well. Her actions were reasonable under the circumstances. The grievant was subjected to disparate treatment. Other similarly situated employees were excused from mandatory overtime. The suspension order, based on Ohio Revised Code Section 124.34 should have been based on contract provision 24.01 and is, therefore, defective. Discipline was not imposed within forty-five days set by Section 24.05. Section 24.04 was violated as the grievant had no notice that discipline for all three incidents would occur. Progressive discipline, Section 24.02 was violated by imposing three penalties on the same day.

ARBITRATOR'S OPINION:

The employer is obligated to be fair and reasonable in scheduling overtime. The employer did not give full and good faith consideration to the grievant's doctor's excuses. The employer was clearly notified of the circumstances. The employer's policy on valid excuses for mandatory overtime is not reasonable. The strict policy also was not evenly enforced. Mitigating circumstances present are the grievant's years of service and above average performance and work record. Procedural defects need not be examined as no just cause exists. The seriousness, however, would have resulted in a modified penalty if just cause had existed.

AWARD:

Grievance sustained. All record of discipline will be removed from the grievant's file with backpay for the periods of suspension.

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,
OHIO DEPARTMENT OF YOUTH SERVICES,
CUYAHOGA HILLS BOYS SCHOOL

-and-

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

GRIEVANCE:
Jacqueline Cayson (Suspensions)
CASE NUMBERS:
35-05-8708-89-00670103

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: January 19, 1990

APPEARANCES

For the Employer
Crystal Bragg, Superintendent
Danita Perry, Unit Manager, Supervisor 2
Willie Golden, Supervisor 2
Meril Price, Second Chair
Victor Brown, Advocate

For the Union
Jacqueline Cayson, Grievant
Yvonne Powers, Staff Representative
Tim Miller, Advocate

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration

Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Youth Services, Cuyahoga Hills Boys School, 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 October 19, 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 hearing briefs. Both Parties indicated that they would not submit briefs.

STIPULATED ISSUE

Were the three (3), five (5), and seven (7) day suspensions resulting in fifteen (15) days total, of Jacqueline Cayson, Youth Leader III, for just cause? If not, what shall the remedy be?

STIPULATED FACTS

(1) The Grievant is a Youth Leader III, hired (sic) date 8/22/83.

(2) The Grievant refused to work mandatory overtime on 4/16/88, 4/17/88 and 4/28/88.

(3) Grievant was injured and off from work 5/14/88 to 6/13/88.

(4) The Predisciplinary Hearing was convened on 6/28/88 and the grievant attended.

(5) The issues were properly presented for an Arbitration Decision.

Timothy L. Miller AFSCME/OCSEA 10/19/89
Union Advocate

Victor G. Brom/DYL Labor Relations Officer 10/19/89
Management Advocate

PERTINENT CONTRACT PROVISIONS

ARTICLE 1 - RECOGNITION

. . .

Section 1.03 - Bargaining Unit Work

Supervisors shall only perform bargaining unit work to the extent that they have previously performed such work. During the life of this Agreement, the amount of bargaining unit work done by supervisors shall not increase, and the Employer shall make every reasonable effort to decrease the amount of bargaining unit work done by supervisors.

In addition, supervisory employees shall only do bargaining unit work under the following circumstances: in cases of emergency; when necessary to provide break and/or lunch relief; to instruct or train employees; to demonstrate the proper method of accomplishing the tasks assigned; to avoid mandatory overtime; to allow the release of employees for union or other

approved activities; to provide coverage for no shows or when the clas-sification specification provides that the supervisor does, as a part of his/her job, some of the same duties as bargaining unit employees.

Except in emergency circumstances, overtime opportunities for work normally performed by bargaining unit employees shall first be offered to those unit employees who normally perform the work before it may be offered to non-bargaining unit employees.

Further, it is the intent of the Employer in the creation and study of classifications to differentiate between supervisors and persons doing bargaining unit work. Whenever possible, such new and revised classifications will exclude supervisors from doing bargaining unit work.

The Employer recognizes the integrity of the bargaining units and will not take action for the purpose of eroding the bargaining units.

(Joint Exhibit 1, Pg. 2)

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 - WORKWEEK, SCHEDULES AND OVERTIME

Section 13.07 - Overtime

Employees shall be canvassed quarterly as to whether they would like to be called for overtime opportunities. Employees who wish to be called back for overtime outside of their regular hours shall have a residence telephone and shall provide their phone number to their supervisor.

Insofar as practicable, overtime shall be distributed equally on a rotating basis by seniority among those who normally perform the work. Specific arrangements for implementation of these overtime provisions shall be worked out at the Agency level. Such arrangements shall recognize that in the event the Agency Head or designee has determined the need for overtime, and if a sufficient number of employees is not secured through the above provisions, the Agency Head or designee shall have the right to require the least senior employees who normally performs the work to perform said overtime. The overtime policy shall not apply to overtime work which is specific to a particular employee's claim load or specialized work assignment or when the incumbent is required to finish a work assignment.

The Agency agrees to post and maintain overtime rosters which shall be provided to the steward, within a reasonable time, if so requested.

Employees who accept overtime following their regular shift shall be granted a ten (10) minute rest period between the shift and the overtime or as soon as operationally possible. In addition, the Employer will make every reasonable effort to furnish a meal to those employees who work four (4) or more hours of mandatory or emergency overtime and cannot be released from their jobs to obtain a meal.

An employee who is offered but refuses an overtime assignment shall be credited on the roster with the amount of overtime refused. An employee who agrees to work overtime and then fails to report for said overtime shall be credited with double the amount of overtime accepted unless extenuating circumstances arose which prevented him/her from reporting. In such cases, the

employee will be credited as if he/she had refused the overtime.

An employee who is transferred or promoted to an area with a different overtime roster shall be credited with his/her aggregate overtime hours.

An employee's posted regular schedule shall not be changed to avoid the payment of overtime. Emergency Overtime.

In the event of an emergency as defined in Section 13.15 notwithstanding the terms of this Article, the Agency Head or designee may assign someone to temporarily meet the emergency requirements, regardless of the overtime distribution.

(Joint Exhibit 1, Pgs. 20-21)

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.

. . .

Section 24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer

becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

Section 24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-disciplinary meeting. At the discretion of the Employer, the forty-five (45) days requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

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

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

(Joint Exhibit 11, Pgs. 34-37)

CASE HISTORY

The Cuyahoga Hills Boys School, the Employer, receives youth offenders from several institutions in the State of Ohio. All of the inmates confined by the facility are felony offenders ages 12 through 21 who have been adjudicated and committed by the 88 County Juvenile Courts of the State of Ohio. Crystal Bragg, the Superintendent, noted that the institution has a dual mission. One mission deals with the detention of inmates for public safety reasons, while another concerns rehabilitative efforts for behavioral modification purposes.

Jacqueline Cayson, the Grievant, was employed as a Youth Leader 3 at the time of her removal; and served in this capacity for approximately five (5) years. She started working at the facility on August 22, 1983. Individuals in this job classification provide basic and custodial care, and have the most contact with the inmates.

Bragg provided testimony regarding the mandatory overtime procedure utilized by the facility. Once it has been determined that overtime will be necessary because of call-offs and periodic emergency conditions, the Employer contacts individuals listed on an overtime roster promulgated in accordance with Section 13.07. This roster, more specifically, consists of individuals who have volunteered to work overtime and are listed in terms of seniority within job classification. If the overtime requirements are not met via the above procedure, then employees are mandated for

overtime purposes regardless of whether they have previously agreed to work mandatory overtime. Everyone within the job classification is considered, with the least senior person within the classification initially earmarked for duty. Bragg emphasized that at this stage the Employer is no longer soliciting volunteers to work overtime. Rather, the Employer orders employees to stay because needs have been established by the institution. Bragg also noted that if the Employer determines that it does not have a sufficient number of employees within a classification, then it mandates individuals outside of the specific classification; such as supervisors or others capable of performing the designated tasks.

The Grievant testified that she began to experience health problems in August of 1987. Dr. Emmanuel O. Tuffuor started treating the Grievant during this time frame with vitamins and vitamin shots.

On January 22, 1988 the Grievant was first mandated for overtime service. She complied with the Employer's request but was unable to report to work on January 23, 1988 due to her physical and emotional condition.

A critical overtime related incident took place on February 7, 1988. The Grievant testified that she was given a direct order to work an additional eight (8) hour shift. She, however, refused because she was too exhausted; she left the premises after her normally scheduled shift.

As a consequence of this behavior, the Grievant received a one (1) day suspension for insubordination for her refusal to work mandatory overtime (Employer Exhibit 2). This discipline, however, was subsequently reduced on September 9, 1988 by Geno Natalucci-Persichetti, Director. He noted the following justification:

". . .
. . .The discipline you received was for just cause; however, our failure to comply with the 45-day time limit in Section 24.05 requires us to mitigate the discipline given. Therefore, I am modifying the discipline you received to a written reprimand and you will be paid one (1) day of back pay.
. . ."

(Employer Exhibit 3)

The grievant also maintained that she submitted a physician's statement (Joint Exhibit 4) to the Employer on or about February 9, 1988. Dr. Tuffuor made the following assertions concerning the Grievant's ability to work overtime:

". . .
<u>This is to verify that Ms. Cayson is a patient of mine who suffers from extreme exhaustion and fatigue after prolonged hours of work.</u>

<u>She is advised to limit her daily job performance to no more than eight hours</u>. (Tuffuor's emphasis)
. . ."

(Joint Exhibit 4)

It also appears that the Employer had the above document in its possession at the time that the one (1) day suspension was reduced.

The Grievant also maintained that she entered an Employee Assistance Program in March of 1988. She joined this program because she had a medical problem; and wanted someone to tell the Employer that she could not work a sixteen (16) hour shift. On March 29, 1988, two (2) clinicians, Catherine M. Zamiska, M.A. and Howard M. Bonem, Ph.D. authored the following statement concerning the Grievant's condition:

". . .
I am writing in regards to Jacqueline Cayson. Ms. Cayson was seen in our offices for a psychological evaluation on March 28, 1988. She is experiencing a great deal of difficulty as a result of being required to work a sixteen hour double shift. It has been recommended to Ms. Cayson that she not work overtime due to the resulting stress and anxiety.
. . ."

(Joint Exhibit 4)

The Grievant maintained that she notified the Employer about the above document during one of the hearings dealing with the February 7, 1988 incident.

The Grievant worked mandatory overtime on March 10, 1988, March 26, 1988, and April 5, 1988. Even though the Grievant's actions ran counter to her physicians' advice, she complied with these requests because her Union representative advised her that she could be disciplined for refusing mandatory overtime.

Once again the Grievant was required to work mandatory overtime on April 16, 1988, April 17, 1988, and April 28, 1988. She refused these assignments on each of the above dates. The Grievant attempted to justify the two (2) initial incidents by documenting her reasons in a statement contained in the April 20, 1988 Employee Incident Report:

". . .
Section II Employee Statement 4-20-88
To Whom It May Concern:

On April 15, 16, 17 I was told I was mandated to work at 2:00 p.m. On the 15th I had a doctor's appointment concerning myself having frequent headaches and backaches. At that visit, it was stated to me that I suffered from anxiety, stress and tension. My Doctor advised me once again, to rid the problem I was to limit my job performance to no more than eight hours. He also prescibed (sic) medication for me to take. Therefore I am taking my doctor's advice and I will not be working any overtime, because it has become detrimental to my health. I also have a grievance pending on this matter.

Jacqueline Cayson
Youth Leader 3
(See attached documents)
. . ."

(Joint Exhibit 4)

A similar reply was authored by the Grievant which she attached to an Employees Incident Report dealing with the April 28, 1988 incident. The Grievant attached the following Employee's Statement:

". . .
To Whom It May Concern:

Once again I am writing a statement concerning myself working mandatory overtime. My medical physician and psychologist instructed me to limit my job performance to no more than eight hours, because of anxiety, stress, tension, physical exhaustion and fatigue. Therefore I am

taking my doctor's recommendation and I will not be working any overtime, becauseagain I am stating it has become detrimental to my health. I also have a grievance pending on this matter. (Cayson Emphasis)

Jacqueline Cayson
Youth Leader 3
4/29/88

(See attached documents)
. . ."

(Joint Exhibit 4)

It should be noted that the Grievant also attached the letters previously discussed, authored by Zamiska, Bonem and Tuffuor.

A number of attempts were initiated by the Employer to schedule a Third Party Hearing dealing with the three (3) previously described incidents. On April 26, 1988, Robert L. Jackson, the Deputy Superintendent, notified the Grievant that a hearing would be held on Tuesday, May 20, 1988 dealing with the incident described in the Incident Report dated April 17, 1988. Scheduling difficulties, however, caused Jackson to reschedule the hearing for Tuesday, May 17, 1988. This scheduling attempt also had to be modified. The Grievant, more specifically, was unable to attend this hearing because she was off work from May 14, 1988 to June 13, 1988 due to a work-related injury. As a consequence, a Third Party Hearing was subsequently scheduled for Tuesday, June 28, 1988 (Joint Exhibit 3).

A Disposition Conference was held on August 9, 1988 dealing with the three (3) distinct incidents. The following Order(s) of Suspension were administered with the specified relevant particulars.

". . .
The reason for this action is that you have been guilty of NEGLECT OF DUTY AND INSUBORDINATION in the following particulars, to wit: On April 16, 1988, you disobeyed a direct order and refused to work mandatory overtime. At 3:00 p.m. you signed out and left the building. By leaving your post against orders, you placed us in an even worse post-coverage situation.

Your actions constitute violation of Section 124.34 of the Ohio Revised Code, to wit: NEGLECT OF DUTY AND INSUBORDINATION.

You are therefore SUSPENDED for three (3) working days effective: 8/12/88, 8/13/88, 8/14/88.
You are to return to work on: 8/15/88.
Previous Disciplinary Action: None

The reason for this action is that you have been guilty of NEGLECT OF DUTY & INSUBORDINATION in the following particulars, to wit: On April 20, 1988, (sic)[1] you disobeyed a direct order and refused to work mandatory overtime. At 3:00 P.M. you signed out and left the building. By leaving your post against orders, you placed us in an even worse post-coverage situation.

Your actions constitute violation of Section 124.34 of the Ohio Revised Code, to wit: Neglect of Duty and Insubordination.

You are therefore suspended for five (5) working days effective: 8/15, 16, 17, 20, 21, 1988.
You are to return to work on: 8/22/88
Previous Disciplinary Action: None.

. . .

The reason for this action is that you have been guilty of NEGLECT OF DUTY AND INSUBORDINATION in the following particulars, to wit: On April 28, 1988, you disobeyed a direct order and refused to work mandatory overtime. At 3:00 p.m. you signed out and left the building. By leaving your post against orders, you placed us in an even worse post-coverage situation. Your actions constitute violation of Section 124.34 of the Ohio Revised Code, to wit: NEGLECT OF DUTY AND INSUBORDINATION.

You are therefore SUSPENDED for seven (7) working days effective: 8/22, 23, 24, 25, 29, 30, 31.
You are to return to work on: 9/1/88.
Previous Disciplinary Action: None.
. . ."

(Joint Exhibit 3)

On August 9, 1988 the Grievant contested the above action by filing a grievance. The grievance contained the following Statement of Facts:

". . .
Statement of Facts (for example, who? what? when? where? etc.):

Ms. Cayson was suspended for 15 days. The suspension was served as a 3 day 5 day and seven days for allegeded (sic) neglect of duties. Ms. Cayson was under a Dr care and was hospitalized for a health condition. She was taken from C.H.B.S. by ambulance and admitted. Yet Jerry Luse suspended her for refusing to jepardoze (sic) her health even thou (sic) she had submitted Dr excuse before and after the incident. Ms. Cayson has never worked overtime on a voluntary basis. She has been employed at C.H.B.S. since 1983.

This is five years that the Union contends mandatory O.T. was never used at C.H.B.S. and was never heard of until July of 1986 when the contract came into effect. The union contends management at C.H.B.S. used Article 130 overtime to punish union members.

We contend management purposely violated the contract to cause, stress & duress to bargaining union members, by not calling all available staff (including part-timer) to inquire if they wanted the overtime. Nor did they follow Article 103 to ask any supervising staff if they were available to work. What they did in essence was make 10 youth leaders stay or 11 when there was only 1 supervisor to accomodate (sic) their needs. When these should have been 8 yh's 2 supervisors or 12 yh's - 3 supervisors. We would ask to submit documented evidence upon request.
We also argue progressive discipline was not follow (sic). The first step being a verbal warning. The union contend management (forgo (sic)) steps 1 & 2 and jumped right to Step 3. Also we argue timeliness for discipline.
. . ."

(Joint Exhibit 2)

The Parties were unable to resolve the grievance at subsequent phases of the grievance procedure. No objections raised dealing with substantive or procedural arbitrability, the grievance is properly before this Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it had just cause to suspend the Grievant for actions which constituted direct violations of Section 124.34 of the Ohio Revised Code; with specific reference to neglect of duty and insubordination. The particulars dealt with disobeying a direct order and refusing to work mandatory overtime on April 16, 1988, April 17, 1988, and April 28, 1988.

The Employer argued that the above referenced refusals were obvious and uncontroverted by the Grievant. As such, they constituted a violation of the Department of Youth Services General Work Rules B19, #12 (Joint Exhibit 6). This work rule deals with refusal or failure to comply with written or oral instructions from supervision. The Grievant's actions, moreover, violated a cardinal arbitral principle which requires an employee to work now and grieve later.

Several contractual provisions were referenced in support of the administered discipline. Article 5, which deals with Management Rights, reserves to the Employer all of the inherent rights and authority to manage and operate its facilities and programs. One of these rights deals with mandatory overtime which is specified in Section 13.07. It, more specifically, allows the Employer to require the least senior employee who normally performs the work to perform said overtime.

The Union's reliance on Section 1.03 was also refuted by the Employer. It was alleged that the Union's interpretation would force the Employer to erode the bargaining unit; a practice resisted by the Employer and precluded by this provision. The Employer, moreover, maintained that supervisors could only be used in mandatory overtime situations in emergency situations. Since such a contingency did not exist on the above contested dates, the Employer was not obligated to utilize supervisory personnel.

Extenuating circumstances presented by the Union were not viewed as persuasive. The doctors' statements (Joint Exhibit 4) were not considered as proper justifications for excusing the Employer's mandatory overtime requests. These statements neither restricted the Grievant nor limited the Grievant from working overtime. If the Grievant placed such a great emphasis on these statements, she should not have agreed to work mandatory overtime during March of 1988. Also, the Grievant's requests could not be accommodated because the Employer did not have a light duty policy. Exceptions to the existing mandatory overtime policy were not viewed and warranted since these conditions did not occur on an everyday basis. The Grievant's reference to her Employee Assistance Program involvement was considered a pretext because the Employer was not privy to this information.

For a number of reasons, the Employer claimed that none of the procedural defects alleged by the Union served as persuasive defenses. First, the Employer contended that the Grievant was provided with notice concerning the potential consequences associated with her behavior. A document (Joint Exhibit 5) was submitted, with the Grievant's signature affixed, indicating that the Grievant received the Work Rules. Notice was also allegedly provided by the one (1) day suspension which was eventually reduced to a written reprimand (Joint Exhibit 3). The Grievant's own testimony was used to rebut the notice argument. The Grievant, more specifically, admitted that the Union advised her to work overtime during March of 1988.

Second, the Employer claimed that it did not violate Section 24.05 because it issued the notice

of disciplinary action in a timely fashion. A procedural flaw did not take place because discipline was imposed within the forty-five (45) day time limit set forth in Section 24.05. Time delays in the imposition of discipline were viewed as a function of the Grievant's injury on the job and her subsequent return on June 13, 1988. Her condition, moreover, prolonged the process and precluded the initia-tion of the pre-disciplinary process. A ruling in favor of the Union's argument could result in the termination of any employee's disability benefits for the term of any suspension. Such a condition could arise if the Employer was forced to hold pre-disciplinary meetings and the imposition of discipline while an employee is on disability leave.

The Employer maintained that the discipline was administered in accordance with the progressive discipline standards contained in Section 24.02. The Grievant received a written reprimand (Joint Exhibits 3 and 4) for engaging in a similar violation on February 7, 1988. All subsequent reprimands were meted out in a progressive fashion leading to suspension periods for each of the incidents.

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 neglect of duty and insubordination. Evidence and testimony in support of the Grievant's reasonable refusal to return to work were proffered by the Union. Also, a variety of procedural defects were raised in an attempt to refute the reasonableness of the Employer's actions.

The Union claimed that the Grievant should not have been suspended for insubordination because her refusals were based upon certain reasonable expectations. Evidence and testimony clearly indicated that the Grievant could not work the overtime hours mandated by the Employer. Her degree of reasonableness was documented via her attempts to work overtime after the initial written reprimand and her desire to resolve her difficulties by entering an Employee Assistance Program.

The reasonableness hypothesis was also supported by uncontroverted physicians' statements (Joint Exhibits 3 and 4). On two separate and distinct occasions these physicians provided their professional opinions regarding the Grievant's ability to work more than eight (8) hours per shift. They noted that the Grievant should not work overtime because it engendered stress and anxiety.[2] The Union emphasized that the physicians did not restrict the type of work the Grievant could perform, nor did they make any reference to performing light duty.

The Union argued that the entire situation could have been avoided if the Employer dealt with the overtime situations by utilizing its rights under Section 1.03. This section purportedly provides the Employer with flexibility because it allows supervisors to perform bargaining unit work to avoid mandatory overtime. Each of the disputed incidents suggested a consistent pattern. Youth Leaders were mandated for overtime purposes even though none of the available supervisors were mandated for similar duties.

A disparate treatment argument was also proposed by the Union. An entry contained on the April 28, 1988 Duty Officer's Log (Joint Exhibit 8) indicated that another Youth Leader was excused from mandatory overtime. This entry, in the Union's opinion, was not adequately distinguished raising unequal treatment concerns.

The Union alleged that the Suspension Order(s) (Joint Exhibit 3) were defective because they referenced Section 124.34 of the Ohio Revised Code rather than specific contract provisions. This Section, moreover, holds the Employer to a lesser standard than Section 24.01, which was negotiated by the Parties. Reliance on Section 124.34 diminished certain agreed upon due process and procedural rights. This interpretation was reinforced by a recent Ohio Supreme Court

decision.[3] The Court ruled that negotiated agreements prevail over provisions of the Ohio Revised Code; and that the Code cannot be used to supplement and indirectly usurp provisions negotiated by parties to a collective bargaining agreement.

Due process requirements were allegedly violated because the Employer failed to abide by its unilaterally promulgated policies. Specific reference was placed on particulars contained in the Administration of Employee Discipline; B-34 (Joint Exhibit 7). Defects alluded to included violations of time limits and failing to complete sections on the incident reports.

Several Section 24.04 and Section 24.05 violations were asserted in an attempt to support its procedural defect argument. The Grievant was disciplined approximately four (4) months after the incidents occurred. Thus, the Employer tardily imposed discipline by exceeding the forty-five (45) day time limit specified in Section 24.05. Also, the Employer violated Section 24.04 because the Pre-disciplinary Hearing was not conducted within a reasonable time period after the incidents in dispute. In a similar fashion, Section 24.04 procedures were not adhered to because the Grievant was not specifically forewarned that she would be disciplined for all three (3) incidents. In other words, the Pre-disciplinary Hearing notice (Joint Exhibit 2) was defective because it lacked specificity. An additional violation took place because the Grievant only had one (1) Pre-disciplinary Hearing for all three (3) incidents.

The Union argued that the Employer failed to employ progressive discipline standards, and thus, violated Section 24.02. By imposing a series of suspensions on the same day, the Grievant was never given an opportunity to correct her behavior. In other words, some form of discipline should have been imposed for the first incident, and then, subsequent discipline should have been administered for the other two (2) incidents.

THE ARBITRATOR'S OPINION AND AWARD

Arbitrators have consistently recognized management's right to require mandatory overtime unless there exists a contractual restriction which specifically limits or takes away his right.[4] It has also been determined that employers may enforce their rights by the assessment of disciplinary action for the failure of an employee to comply with such a request.[5]

This managerial prerogative, however, is not totally unfettered because employers are not absolved from their obligation to "observe fairness and reasonableness in demanding overtime, or to overlook the consideration of health and welfare when requiring that overtime be worked.[6] Arbitrator Robert Brecht in Vulcan Mold & Iron Co.,[7] articulated some of the reasons often relied upon by arbitrators when reversing management's right to require overtime:

". . .because of excessive overtime assignments, because of doubt as to their need, because the Company has not given reasonable notice in advance, and because the Company on the record has not given due and careful consideration to the reasons advanced by employees for refusing to accept the overtime assignment."[8]

In my judgement, based upon a total review of the record, the Employer did not give full and good-faith consideration to the reasons advanced by the Grievant for refusing to accept the overtime assignments. As early as February 7, 1988 the Employer was placed on notice that the Grievant had medical difficulties associated with mandatory overtime demands. She submitted Tuffuor's statement shortly after the incident. It also appears that she re-submitted this document by attaching it to Incident Reports (Joint Exhibit 4) initiated during April of 1988. The Grievant

further raised her medical maladies by attaching the physicians' recommendations attending her needs in the Employee Assistance Program (Joint Exhibit 4). In addition to these submissions she also communicated her concerns via discussions held with several members of supervision.

The Employer did not adequately rebut these assertions, while the Grievant's versions are viewed as highly credible. Various denials posed by the Employer emphasize the limited investigatory attempts undertaken to determine the veracity of the Grievant's assertions. The Employer, more specifically, never contacted these physicians regarding their recommendations. In fact, the record indicates that the Employer either intentionally or inadvertently misread the recommendations. These documents specifically noted that the Grievant should not work more than eight (8) hours per shift because of her perilous physical condition; they never specified the need for "limited duty." Investigation weaknesses on the Employer's part cannot be used as a veil to skirt critical just cause responsibilities.

Testimony provided by Bragg further underscores the unreasonableness of the Employer's action because the Employer has failed to fully and clearly articulate a reasonable policy. She testified that employees were excused from mandatory overtime duties if the individuals had already worked sixteen (16) hours or they had been hurt. All other excuses were viewed as improper and disciplinary action would result. Such an iron-clad policy could lead to consistent disciplinary actions and minimizes subject assessments. One, however, cannot always, equate consistency with reasonableness standards when an entire litany of plausible exemptions are automatically rejected.

The Employer's arguments were additionally flawed because it did not consistently apply its iron-clad policy. The Union raised an incident dealing with an employee named Roach which took place on April 28, 1988. A Duty Officer's Log (Joint Exhibit 8) jointly submitted by the Parties indicates that this employee was excused from the mandatory overtime list. Without any additional evidence or testimony it becomes very difficult to determine whether the policy was consistently applied. At a minimum, however, the Employer should have attempted to distinguish this situation from the one presently under review. By failing to support its actions the policy becomes suspect in terms of a reasonableness dimension.

The disciplinary actions were also unreasonable because several mitigating circumstances were not considered when levying the discipline. The Grievant was employed for a number of years with an above average performance and disciplinary record. Also, her attempts to resolve her problems via an employee assistance effort indicates that she took positive steps to remedy her difficulties.

Arguments provided by both Parties regarding the applicability of Section 1.03 were viewed as unpersuasive. This provision, in my judgement, is not clear and unambiguous. As a consequence, the record failed to adequately support the proposed interpretations.

Finally, the record is tainted with an overwhelming number of procedural defects dealing with Sections 24.02, 24.04, and 24.05. Based upon the prior discussion, however, a full review of these violations is not deemed necessary. The Employer, however, should be placed on notice that even if the record would have supported the disciplinary action, this Arbitrator would have been forced to modify the penalty.

AWARD

The three (3) suspensions totaling fifteen (15) days are held to have been unjust under the applicable circumstances. All references to these disciplinary actions, and the related penalties, are to be removed from the Grievant's personnel file and record. The Grievant, moreover, is to be promptly reimbursed by the Employer for the monies lost as a result of the suspensions.

Dr. David M. Pincus
Arbitrator

January 19, 1990

---

[1] This appears to be a typo and should reflect the April 17, 1988 incident.

[2] The record does not support the Union's assertion that the Employer initially accepted these statements and then changed its position.

[3] State, ex rel. Rollins v. Cleveland Heights, University Heights Board of Education, 40 Ohio St. 3d. 123, 532 NE 2d 139 (1988).

[4] Pennwalt Corp., 77 LA 626 (ERBS, 1981).

[5] Van Dorn Co., 48 LA 925 (Kabaker, 1967).

[6] Id. at 928.

[7] 39 LA 292 (1962).

[8] Id. at 298.