ARBITRATION DECISION NO.:
241

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

EMPLOYER:
Department of Mental Health
Office of Support Services at
the Centralized Food Processing
Facility

DATE OF ARBITRATION:
November 16, 1989
December 7, 1989

DATE OF DECISION:
March 14, 1990

GRIEVANT:
Jerry L. Harris

OCB GRIEVANCE NO.:
23-02-(88-07-14)-0064-01-06

ARBITRATOR:
David Pincus

FOR THE UNION:
Mike Muenchen
Staff Representative

FOR THE EMPLOYER:
Donald F. Wilson
Advocate
Meril Price
Second Chair

KEY WORDS:
Just Cause
Absenteeism
Timeliness of Discipline
Neglect of Duty

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
§24.04-Pre-Discipline

FACTS:

The grievant was an Equipment Operator I employed by the Department of mental Health, Office of Support Services. He was late or absent on numerous occasions within a two month period. On another occasion he appeared physically unable to do his job and was assigned other tasks. Three days later he again appeared unable to work and was not allowed to continue driving that day. The grievant passed an employer administered sobriety test. The grievant was removed for neglect of duty and excessive absenteeism.

EMPLOYER'S POSITION:

There is just cause for removal. The grievant was late or absent on numerous occasions and leave was not granted due to lack of a valid excuse. The grievant was also unable to perform his duties on other days. The grievant's absenteeism places an extra burden on co-workers.

The grievant had notice of impending discipline through prior discipline recently imposed for similar offenses. He was informed of possible discipline and a fair pre-disciplinary hearing was held. Progressive discipline is not violated by removal here. The grievant was given an opportunity to avoid removal by enrolling in EAP.

UNION'S POSITION:

There is no just cause for removal. The employer failed to consider mitigating circumstances. The grievant was a seven year employee who had received a promotion. He was having marital problems, had moved in with his mother and was dependent on another person for a ride to work. The grievant has leave available for the absences and it should have been granted.

It was not proven that the grievant was unable to perform his job. No objective tests were given on the first occasion. On the second occasion he had driven 100 miles without incident and passed employer administered sobriety tests.

Procedural errors present are that the grievant was not notified of impending discipline for continued absenteeism. The offer to forego discipline if the grievant enrolled in the EAP is an improper use of the program. Removal was not specified as the possible discipline at the pre-disciplinary hearing and the hearing was conducted unfairly. The grievant was also subjected to disparate treatment.

ARBITRATOR'S OPINION:

There is just cause for discipline but circumstances warrant a modification of the penalty. The grievant did miss work on the stated days. The employer may consider mitigating circumstances, however, it is not required. The employer may not have been fully informed of the circumstances by the grievant. Prior discipline did put the grievant on notice of more severe penalties for further violations. Claims of disparate treatment were not proven. The employer did unreasonably deny leave for some of the absences as the grievant had a leave balance available. Leave without pay was also withheld arbitrarily on other occasions.

The evidence supports claims that the grievant was unable to perform his job on one occasion. Testimony in support of the charge was credible and consistent. The second incident was not proven and was rebutted by the union.

Notice of possible discipline need not refer to the actual discipline imposed. The pre-disciplinary hearing was not held unfairly and the EAP was not improperly used. The employer did deprive the grievant of the opportunity to correct his behavior by not imposing discipline in a timely manner. Therefore, modification of the penalty is proper.

AWARD:

Grievance is sustained in part and denied in part. Grievant is to be reinstated without back pay but with full seniority.

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 FOOD PROCESSING FACILITY (Dayton, Ohio)

-and-

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

GRIEVANCE:
Jerry Harris (Removal)
OCB Case No.:
23-02-880714-0064-01-06

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: March 14, 1990

APPEARANCES

For the Employer
Carol Hildebrecht, Operations Manager
William Boykin, Storekeeper III
M. Carmen Stafford, Facility Manager
Margaret Lindeman, Human Resources Administrator
Dennis Weber, Manager Food Service Section
Meril Price, Second Chair
Donald F. Wilson, Advocate

For the Union
Jerry L. Harris, Grievant
Randy McAtee, Steward
Beverly Spalding, Steward
Cathy Ellis, Chief Steward
James F. Gray, Store Clerk
James Roy, Store Clerk

Joe Johnson, Assistant Food Manager
Mike Muenchen, Staff Representative

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, the 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 November 16, 1989 and December 7, 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

Did the Employer have just cause to remove the Grievant from employment with the Ohio Department of Mental Health - Office of Support Services? If not, what should the remedy be?

STIPULATED FACTS

". . .

1. Grievant was appointed on July 27, 1981 as Custodial Worker I, 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 and a four day suspension.

3. Grievant passed a field sobriety test administered by C.O.P.H. Security on May 13, 1988.

4. Grievant was informed of impending removal by letter dated June 17, 1988, from the Ohio Department of Mental Health.

5. The Grievant received a Notice of Removal from Elaine M. Zabor, Chief, Office of Support Services, Department of Mental Health dated June 30, 1988, effective of that date.

6. The grievance is properly before the Arbitrator.

Don Wilson, Office of
Collective Bargaining

Michael D. Muenchen,
OCSEA/AFSCME

(Joint Exhibit 3)

11/20/89

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 24.04 - 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."

CASE HISTORY

On July 27, 1981, Jerry Harris, the Grievant, was employed as a Custodial Worker with the Office of Support Services, Dayton Centralized Food Processing. In 1985, the Grievant was promoted to an Equipment Operator I position. This position requires the delivery of prepared food products to a number of mental health institutions. On occasion, the Grievant was also required to pull food orders from the warehouse, freezer, and chiller departments.

In early April of 1988, the Employer implemented this Arbitrator's Award by suspending the Grievant for six days for neglect of duty, failure to report for work and report in absence. It appears that the Grievant's tardiness difficulties persisted during April of 1988. On April 19, 1988, the Grievant was tardy by fifteen minutes (Employer Exhibit 1), while on April 19, 1988 he was tardy by fifty minutes (Employer Exhibit 2). Similarly, on April 25, 1988, the Grievant was tardy by four and one-half hours (Employer Exhibit 3).

A series of incidents took place during May of 1988 which were reviewed in support of the eventual removal decision. On May 10, 1988 the Grievant returned from the previously mentioned six-day suspension. William Boykin, the Grievant's supervisor, testified that a number of peculiar events took place on this date (Employer Exhibit 7). As the Grievant prepared to leave with a delivery, Boykin noticed that the Grievant appeared disheveled, lethargic and sleepy. The Grievant purportedly confirmed that he was sleepy and tired. These observations made Boykin a bit leery concerning the Grievant's delivery assignments; so he decided to assign the route to another driver. The Grievant was assigned to the processing area where he assisted James Gary, a Store Clerk, pulling orders for the following day's delivery. At approximately 7:30 a.m., Carol Hildebrecht, the Operations Manager, encountered Boykin as he searched for the Grievant because of a telephone call. Boykin, moreover, reviewed his difficulties when they engaged in their search efforts. Eventually, they found the Grievant outside the chill room area where Boykin confronted the Grievant about the assistance he was providing Gray. The Grievant grimaced and continued walking toward the restroom.

At approximately 9:40 a.m. Hildebrecht observed the Grievant conversing with Boykin. Once again the Grievant seemed confused and extremely tired. After conversing with Boykin, they decided that the Grievant could no longer perform his duties based upon health and safety reasons. Boykin and Hildebrecht conferred with Carmen Stafford, the Facility Manager, who confirmed their appraisal. At approximately 10:00 a.m. Boykin and Hildebrecht went to get the Grievant from the chill room but he was not there. A search commenced throughout the facility but the Grievant was not initially found. The Grievant was eventually found in the chill room area. Boykin asked the Grievant to account for his absence and he remarked that he was in the restroom. Again, Hildebrecht reported that the Grievant's appearance and response seemed unclear and unresponsive (Employer Exhibits 7 and 9).

The Grievant was escorted to the conference room where he remained for a considerable period of time. During this time period, he was observed sleeping on several occasions by management representatives. The Grievant remained in the conference room until Boykin drove him home (Employer Exhibits 7 and 9).

On May 13, 1988, the Grievant's actions once again raised certain questions concerning the Grievant's ability to perform his duties. The Grievant reported late by fifteen minutes. At approximately 11:15 a.m., Boykin and Hildebrecht received a call from Lidea Metts, the Montgomery Developmental Centers Food Service Manager. She reported that the Grievant was acting in an abnormal fashion. Metts alleged that the Grievant was incapacitated, stumbling, unable to check the order, and unable to separate the order sheets (Union Exhibit 1, Employer Exhibit 10).

Management representatives contacted the State Highway Patrol in an attempt to intercept the Grievant. Boykin and Bill Bontrager, a bargaining unit member, engaged in an independent effort to intercept the Grievant along his assigned route. They eventually found the Grievant at a Columbus, Ohio facility. The Grievant informed Boykin that security had administered a series of sobriety tests which he passed. He, moreover, questioned the necessity for all the commotion. Boykin contacted Stafford who informed him that the Grievant should not be allowed to drive the vehicle. As a consequence Bontrager drove the vehicle and the Grievant rode back to the facility with Boykin (Union Exhibit 1, Employer Exhibit 10).

At approximately 3:15 p.m., on May 13, 1988, Boykin and the Grievant arrived at the facility. A conference ensued in the presence of Randy McAtee, a Union Steward. Stafford informed the Grievant that he was placed on paid administrative leave and would be notified when he would be returned to work (Employer Exhibit 10).

On May 16, 1988 the Employer made several attempts to contact the Grievant regarding his return to work. Boykin personally contacted the Grievant at his mother's residence in the afternoon. He delivered a confidential letter and informed him that he should return to work on May 17, 1988. The Grievant acknowledged that he would return on the following day (Employer Exhibit 8).

On Tuesday morning, May 17, 1988, the Grievant's wife contacted the facility at approximately 7:50 a.m.; one hour beyond the Grievant's formal starting time. She informed a management representative that her husband was sick and would not be able to report to work.

On May 18, 1988, Elaine Zabor, the Chief of the Office of Support Services, formally ordered the Grievant to return to work. She, moreover, informed the Grievant that he was in a leave without pay status, and would be required to provide verification of his illness (Joint Exhibit 9).

The Grievant did in fact return to work on May 20, 1988. He provided a doctor's excuse (Union Exhibit 4) which stated that he did visit the physician on May 19, 1988. This statement, however, failed to reference anything dealing with the May 17, 1988 and May 18, 1988 absence occurrences. Thus, the Employer viewed the Grievant as being absent without leave on these two dates.

On May 23, 1988, the Grievant once again was tardy by thirty minutes and did not contact the facility. The grievant testified that he ran out of gas. When he arrived at work, however, he failed to provide any verification (Joint Exhibit 4).

On May 26, 1988, Zabor notified the Grievant that a predisciplinary conference was scheduled on Friday, June 3, 1988. The particulars discussed above were specified and the Grievant was informed that the charges brought against him could result in a suspension.[1]

On May 27, 1988, the Grievant filed a grievance relating to the May 13, 1988 incident. The grievance contained the following Statement of Facts:

". . .
On 5/13/88 I was making my delivery to COPH As soon as I arrived on the grounds of COPH, Security asked me to take a DWI Test. After I passed the test I was told to stay at COPH until Bill Bontrager and Bill Boykin arrived. When we departed from COPH I was told I had to ride back to Dayton with Bill Boykin and not to drive I am aggrieved.
. . ."

(Union Exhibit 9)

As a remedy, the Grievant asked that the Employer cease the harassment tactics, and that he be allowed to return to his regular work duties.[2]

A predisciplinary hearing was in fact held on June 3, 1988. There appears to be considerable disagreement concerning the manner in which the Hearing Officer conducted the hearing and the ramifications on the Grievant's due process rights (Union Exhibits 13, 14, 15 and 16). These matters will be discussed in a subsequent portion of this Award. The Hearing Officer, however, concluded that the Grievant provided no explanation for his actions; and thus, the charges were accurately presented by the Employer (Union Exhibit 16).

On June 10, 1988, Pamela S. Hyde, Director of the Ohio Department of Mental Health, issued a Notice of Removal. It contained the following pertinent particulars:

". . .
Dear Mr. Harris:

This will notify you that you are being removed from your position of Equipment Operator 1, with the Dayton Centralized Food Processing facility. The Chief, Office of Support Services, will notify you of the date of your removal.

The reason for this action is that you have been guilty of inability to perform your duties, neglect of duty, and continuous tardiness.

This is based on the following particulars: On 05/10/88 and 05/13/88, you were unable to perform your duties.

You were absent without leave on 05/17/88 and 05/18/88.

You were tardy on the following dates: 05/13/88 15 minutes and 05/23/88 - 30 minutes.

If you wish to appeal this action, you must file a written grievance with the Agency Director within fourteen (14) days of notification of this action. To file the written grievance, send it to John Rauch, Manager, Labor Relations, Ohio Department of Mental Health, 30 E. Broad Street, Room 1360, Columbus, Ohio 43215. You may also wish to consult with your union representative.
. . ."

(Joint Exhibit 2)

n June 24, 1988, a meeting was held dealing with the possibility of holding the removal decision in abeyance, if the Grievant entered into an Employee Assistance Program. An agreement (Joint Exhibit 2 and Union Exhibit 5) was reviewed with the grievant, McAtee, and Stafford. The Union asked for an opportunity to review the particulars; this request was granted and a formal decision was to be made on June 28, 1988.

The Union never provided a formal response. As a consequence, on June 30, 1988, Zabor reissued the Notice of Removal and effectively removed the Grievant on June 30, 1988 (Joint Exhibit 2).

On July 5, 1988 the Grievant responded to the above disciplinary action. His grievance contained the following Statement of Facts:

". . .
On June 3rd, I attended a Pre-Suspension (discipline) hearing on charge of Neglect of duty. The hearing officer disallowed my representatives' questions at hearing. Union had requested a continuance. Based on above hearing, I was instead removed form my job as Equipment Operator I on July 6, 1988. I was removed for charge of Neglect of duty along with charges of failing to comply with terms of E.A.P. agreement. It should be noted that I never signed an EAP agreement. Due to the above, I am aggrieved.
. . ."

(Joint Exhibit 2)

On August 16, 1988, a Step III grievance hearing was held. The Hearing Officer concluded that sufficient

evidence existed for a finding of just cause (Joint Exhibit 2).

The Parties were unable to reach a mutually agreeable settlement. Since no objection was raised by either Party dealing with substantive or procedural arbitrability, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it had just cause to remove the Grievant. Several incidents were discussed in an attempt to bolster the removal decision. These incidents dealt with tardiness occurrences, absence without leave incidents and two separate dates where the Grievant was unable to perform his duties. Also, the Employer contested the various procedural defects raised by the Union.

Two tardiness occurrences were alleged by the Employer. The first incident took place on May 13, 1988 where the Grievant reported late to work by fifteen minutes. The Grievant did not deny that he was tardy. He noted that he arrived late because his ride did not transport him to work on time. The second incident took place on May 23, 1988 and involved a thirty minute tardiness situation. As justification, the Grievant maintained that he ran out of gas. Although he claimed that he informed Boykin, he never provided the proper verification required by Rule No. 15 (Joint Exhibit 7). As such, his actions resulted in a specific example of neglect of duty.

The Employer maintained that these late appearances were disruptive of the operations. These actions, more specifically, required the shifting of fellow employees which led to efficiency difficulties.

The May 17, 1988 and May 18, 1988 incidents were viewed as disapproved leave without pay status. Unlike the May 19, 1988 incident (Union Exhibit 4), the Grievant failed to provide verification in accordance with work Rule No. 10, 3 (B) (Employer Exhibit 5). Hildebrecht stated that the Employer based its refusal on Item No. 4 (c) (Employer Exhibit 5) which deals with the hardship placed upon other staff and the extra work carried by them due to another employee's absence. These absences, more specifically, caused a hardship because they necessitated unscheduled staffing changes. Changes which impeded the delivery of specially prepared products to needy clients in state institutions.

Margaret Lindeman, a Human Resources Administrator, discussed the leave without pay process; which is an absence from duty in a non-pay status. She stated that one could not equate absence without leave status and leave without pay status. An employee could have leave balances available, and the Employer could refuse these requests. The employee would therefore still be considered as absent. Lindeman also distinguished the payroll from the disciplinary trails when dealing with leave without pay situations. Sometimes, the payroll and discipline procedures lack an integrated focus; which engenders payments to an employee prior to any approval/disapproval by the Appointing Authority or his/her designee. In this instance, Lindeman assumed that the Grievant's request was disapproved by the Appointing Authority; otherwise these particulars would not have been included in the Removal Order (Joint Exhibit 2).

The Employer charged the Grievant with being unable to perform his normal work duties on May 10, 1988 and May 13, 1988. Witness reports (Employer Exhibits 7 and 9) and testimony provided by Boykin and Hildebrecht validated the May 10, 1988 conclusion. Boykin determined that the Grievant could no longer perform his normal duties, and as a consequence, assigned him to the chill room. Throughout the day, the Grievant was frequently outside the chill room and while performing his duties he made several errors. These errors were purportedly observed by a co-worker. Other observations by Boykin and Hildebrecht indicated that the Grievant could not realistically continue with his assigned tasks. He seemed lethargic and his normal speaking pattern seemed impaired. Stafford also stated that this behavior persisted in the conference room. When she asked him what his problems were, he failed to provide a clear response. Also, Stafford alleged that the Grievant napped for a considerable period of time while waiting in the conference room.

Similar activity on May 13, 1988 led to an additional charge that the Grievant was unable to perform. The Employer relied upon a telephone discussion with Metts which took place shortly after the Grievant's departure. Her comments dealing with the Grievant's inability to perform were documented in statements

authored by Boykin (Union Exhibit 1) and Hildebrecht (Employer Exhibit 10). In addition, a statement (Employer Exhibit 11) authored by Metts further supported her verbal comments.

The Employer contended that the Management Rights Article allows it to promulgate work rules and disciplinary policies dealing with an employee's ability to perform work. Nothing in the Agreement (Joint Exhibit 1) limits the Employer in this area.

The Employer alleged that the Grievant was properly forewarned of the possible consequences associated with his potential misconduct. Notice was provided as a consequence of the previous six-day suspension assessed for similar misconduct. Boykin, moreover, maintained that he spoke to the Grievant after he returned from his suspension. The Grievant allegedly noted that he would do better in the future.

The various Section 24.04 violations raised by the Union were refuted by the Employer. It was maintained that the disciplinary notice (Joint Exhibit 2) was not defective even though a potential suspension was referenced and then escalated to a removal. Section 24.04, more specifically, only requires that the Employer identify the reasons for the contemplated discipline and the possible form of discipline. Thus, the Employer emphasized that a disciplinary penalty may be modified as a consequence of information gathered during a predisciplinary conference.

For a number of reasons, the Employer asserted that the predisciplinary hearing process was conducted fairly and objectively, and thus, was not tainted by any Section 24.04 violations. First, it was alleged that this provision allows the Appointing Authority's designee, the Hearing Officer, to conduct the meeting, and that he did so in a fair fashion. This requirement, moreover, implies that the Hearing Officer can apply a certain amount of independent judgment, as long as this discretion is not abused.

Second, based on the evidence and testimony introduced at the hearing, the Hearing Officer did not abuse his authority. The Union was granted an opportunity to concur with the Grievant and review the submitted witness statements. Also, the Union was given an opportunity to ask questions of the various Employer witnesses. Also, by disallowing certain questions, the Hearing Officer did not impede the Union's presentation. Rather, he viewed these questions as irrelevant to the major focus of the hearing.

Third, the Employer alleged that the Union's arguments merely reflected a subjective reaction rather than an accurate appraisal of the hearing process. The process, itself, was viewed as an objective inquiry involving a reasonable evaluation of all the circumstances. In the opinion of the Employer, some of the difficulties surrounding the hearing were engendered by the Union's lack of preparation. This condition, more specifically, led to an inordinate number of disruptions rather than an unantagonistic review of the facts.

Last, the Employer did not deny that a confrontation between the Hearing Officer and McAtee took place. The Employer also admitted that the Hearing Officer lost his temper and made a heated statement toward McAtee. This outburst, however, took place following the termination of the hearing. Thus, although the confrontation was unfortunate and unprofessional, it did not bias the hearing process.

The Employer argued that it applied its rules, orders and penalties evenhandedly and without discrimination. Any variation in discipline cited by the Union was viewed as inappropriate. These variations, more specifically, were engendered by varying circumstances rather than disparate treatment.

The Employer contended that the degree of discipline administered was reasonably related to the seriousness of the proven offenses. Discipline, moreover, was reasonably related to the Grievant's record in his service with the Employer.

The Employer alleged that each of the stipulated charges are extremely serious. Each charge, moreover, independently supports the removal decision.

Progressive discipline theories were also proposed by the Employer. The removal decision was purportedly related to the Grid for Disciplinary Action (Joint Exhibit 8) and reflects an attempt to progressively discipline the Grievant. It was alleged that the Employer's progressive discipline program should have afforded the Grievant with an adequate opportunity to comply with the Employer's minimum expectations. Unfortunately, the Grievant's present activities indicate that these attempts failed to modify the Grievant's behavior.

The Employer's Employee Assistance Program offer (Joint Exhibit 2, Union Exhibit 5) further reinforced the Employer's willingness to help the Grievant. By failing to respond to this option, the Employer determined that continued employment was no longer feasible.

It was urged that the Arbitrator should not modify the administered penalty. The record, purportedly, did not indicate that an additional chance was warranted.

The Position of the Union

It is the position of the Union that the Employer did not have just cause to remove the Grievant. All of the charges were equally contested by the Union. This position was based upon certain questions dealing with the proofs presented by the Employer, as well as specific procedural defects.

The Grievant admitted that he was tardy on May 13, 1988 and May 23, 1988. The Union, however, alleged that mitigating circumstances should have been considered as specified in Section 13.06. These circumstances included the Grievant's marital problems which forced him to live with his mother and brother. This arrangement, moreover, required that his brother transport him to work. On May 13, 1988, the Grievant arrived late to work because his ride was late. Similarly, on May 23, 1988, the Grievant failed to arrive in a timely fashion because he ran out of gas.

Arguments dealing with the disapproved leave without pay charges were also contested by the Union. The Union contended that payroll records (Union Exhibits 2 and 3) supported the view that the Grievant had leave balances available to cover the May 17, 1988 and May 18, 1988 incidents. Lindeman's review of the criteria and guidelines seemed to support this conclusion. She stated that leave requests are routinely granted if leave balances are available unless certain exceptions exist. None of these exceptions seemed applicable in these instances. The Employer failed to establish that these absences engendered a considerable hardship. By placing the Grievant on administrative leave on August 13, 1988, the Employer anticipated his absence, and thus, the hardship was minimized.

The Union alleged that no infraction was proved regarding the Grievant's inability to perform on May 10, 1988. Although there were allegations regarding the Grievant's inability to perform, the Employer never provided any hard data concerning the "picking" errors. Gray did remember that the Grievant confused a regular from a special chicken order. Such a mistake was considered to be common and easily corrected because of an auditing mechanism. With respect to the Grievant's normal driving responsibilities, the Grievant's assignment to the chill room was considered to be premature. The Employer should have tested the Grievant's driving ability rather than jumping on unsupported conclusions.

Similar arguments were proffered to counter the charge related to the May 13, 1988 incident. Metts' observations served as the primary source for this allegation. Yet, she was not present to provide any testimony; and the Employer merely presented her written statement (Employer Exhibit 11) and testimony of others who merely recounted her version.

This evidence and testimony appeared suspect in light of other available data. The Grievant drove approximately 100 miles that day without any apparent driving difficulties. He also passed the sobriety test and offered no resistance when asked to undergo this evaluation. Boykin testified that the Grievant appeared normal when he confronted the Grievant at COPH. Finally, two individuals that observed the Grievant performing his duties at COPH testified that he did not appear to be impaired.

Several notice defects were argued by the Union. One defect dealt with the forewarning provided the Grievant concerning the possible consequences associated with continued misconduct. Employer witnesses, however, could not specify the actual dates of these warnings. In fact, Hildebrecht noted that she did not warn the Grievant when he came back to work. The record also indicated that Boykin failed to warn the Grievant on May 16, 1988, and that the administrative leave did not serve as an adequate warning mechanism.

The other notice defect dealt with a specific violation of Section 24.04. By escalating the discipline from a suspension to a removal, the Employer failed to notify the grievant of the possible form of discipline. The Predisciplinary Hearing Notice (Joint Exhibit 2) indicated that the charges "could result in a suspension." Yet, the Employer escalated the penalty without offering a reason which violated the contract (Joint Exhibit 1). Cathy Ellis, the Chief Steward, maintained that the specificity issue was previously raised during an August 31, 1987 Labor/Management meeting. Minutes (Union Exhibit 18) of this meeting indicated that the Employer would, whenever possible, clarify in the notice letter to an employee if a disciplinary action would result in suspension or removal. Thus, the Employer was cog-nizant of the problem and agreed to remedy

the situation in the future.

It was also alleged that the Employer violated an additional Section 24.04 particular. The Hearing Officer allegedly conducted the predisciplinary hearing in an unfair manner which prejudiced the Employer's investigation, and prevented an adequate defense. McAtee testified that his representation attempts were impeded because he was prevented from thoroughly questioning the Employer's witnesses. These questions were considered important because the Employer's unable to perform charge was vague. His questioning attempts were merely initiated to clarify the nature of the charge. McAtee further noted that the Employer withheld pertinent witness statements. The Hearing Officer's demeanor and conduct caused the hearing to be prematurely adjourned. His posture also prevented an objective ruling on the continuance motion.

Equal treatment arguments were asserted with respect to the Employer's application of its tardiness and leave without pay policies. The Union submitted numerous sign in/sign out sheets which allegedly indicated that enforcement was lax. Special emphasis was placed on the treatment afforded Dean Jenkins, as opposed to the penalty presently administered. Jenkins' record (Union Exhibit 17) seemed equally abhorrent, and yet, he only received a verbal reprimand. Two additional examples dealing with leaves without pay charges were also submitted by the Union. Ralph Williams, a Delivery Worker 2, received a two-day suspen-sion for twenty-two disapproved leave occurrences (Union Exhibits 20 and 21). In a like fashion, Donald Domineck received a six-day suspension (Union Exhibit 19) for disapproved leave incidents which exceeded the number presently under consideration.

The Union stressed that the Grievant's refusal of the Employee Assistance Program offer (Union Exhibit 5) should not be used to support the removal decision. McAtee and Ellis indicated that they advised the Grievant to reject the offer because of certain specific reservations. Acceptance of the program would have recognized that the Grievant was indeed unable to perform. A tenuous admission based upon the rather vague charges proposed by the Employer. Ellis was also concerned about other particulars dealing with program duration and diagnostic protocols.

Several mitigating circumstances were also discussed by the Union. The Grievant was employed for seven and one-half years prior to his removal and realized a promotion during this period. A number of Employer witnesses stated that the Grievant was a good employee prior to this sudden change of behavior. This present series of offenses took place over a short period of time, and was dissimilar when compared with the prior offenses.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony presented at the hearing, it is this Arbitrator's opinion that the Employer had just cause to discipline the Grievant. The Employer, however, was unable to fully substantiate all of the specified charges and the existence of certain procedural defects force a modification of the administered penalty. It should also be noted that the Predisciplinary Notice (Joint Exhibit 2) and testimony presented at the hearing alluded to infractions not specified in the Removal Order (Joint Exhibit 2). If these charges were indeed considered, they should have been formally specified. Obviously, the Employer had its own reasons for limiting the particulars. The Arbitrator, therefore, must limit his review to the specified charges.

The Grievant was indeed tardy on May 13, 1988 and May 23, 1988. Attempts to apply Section 13.06 in this particular instance are viewed as unpersuasive. This provision does not automatically require but allows the Employer to consider extenuating and mitigating circumstances. Proper consideration, however, necessitates that the Employer is cognizant of these circumstances at the time of the occurrences. This Arbitrator is not convinced that the Grievant informed the Employer about his marital problems and related transportation difficulties.

The Grievant's previous documented difficulties, and the associated suspension, should have placed the Grievant on notice of the negative consequences associated with continued tardiness misconduct. Boyken's testimony regarding the May 23, 1988 incident is also viewed as credible and was not sufficiently rebutted by the Union. He maintained that he informed the Grievant that he had depleted his leave balances and that future tardiness occurrences would require verification. Thus, the Grievant violated Work Rule No. 15 - Tardiness (Joint Exhibit 7) when he failed to submit a voucher.

The Union's unequal treatment argument is also viewed as deficient by the Arbitrator. Several principles generally govern the majority of unequal treatment claims: If the evidence establishes that the penalties for the same misconduct, under similar circumstances, have been reasonably consistent, then the employee's assertion will be viewed as unsupported.[3] Dean Jenkins' tardiness record (Union Exhibit 17) was introduced in support of this claim. Sign in/sign out sheets, however, do not, necessarily provide accurate comparisons evidencing similar circumstances. Some of these occurrences might have been excused or other factors might have played a role in their evaluation by the Employer. Also, Jenkins' prior disciplinary record does not appear to be as severe as the Grievant's.

The disapproved leave without pay charges were not properly supported by the Employer. Lindeman's testimony indicates that the Employer unreasonably refused the application of available leave balances. She remarked that if employees have available leave balances, leaves are normally approved. Application of available leave balances did not take place when pattern abuse was determined. The Grievant did have available leave balances to cover the May 17, 1988 and May 18, 1988 incidents (Union Exhibits 2 and 3). Lindeman, moreover, remarked that the Grievant's record did not evidence pattern abuse, and that he was never charged with such an offense. When the Employer makes a decision under these types of circumstances it has an affirmative obligation to substantiate the reasonableness of its decision. In this particular instance, the decision seems arbitrary.

In my judgment, evidence and testimony supports the May 10, 1988 charge dealing with the Grievant's inability to perform his duties. Substance abuse does not need to exist in order to establish performance deficiencies. When an employee appears listless, sleepy and fails to diligently engage in assigned tasks, an employer may reasonably conclude that an employee is unable to perform.

Boykin and Hildebrecht provided credible and consistent testimony regarding the Grievant's condition on May 10, 1988. His sleepy state caused Boykin concern about his ability to drive the truck; his original and primary assignment. Also, the Grievant did not perform his chill room duties in a responsible manner because he spent an excessive amount of time outside the work area. His general demeanor and lack of responsiveness further reinforces the Employer's conclusion.

The Grievant's version lacks credibility because of a number of inconsistencies. Gray and the Grievant seemed to disagree about the length of time the Grievant spent in the chill room. The Grievant initially remarked that he worked in the chill room for half the morning, and then recounted his testimony by noting that he worked there for one hour. Gray, however, stated that he worked with the Grievant for approximately thirty minutes. Gray and the Grievant also differed on their ability to observe each others performance. Gray, more specifically, alleged that they were in constant contact, while the Grievant maintained that they could be out of each others sight for a considerable period of time. The Grievant's testimony regarding the alleged errors reduced his credibility. He initially stated that he did not remember the chicken mistake, he then noted that the specific mistake might have taken place as well as others.

Comparable evidence and testimony regarding the May 13, 1988 incident, however, were not provided, and thus, the Employer failed to substantiate this claim. Metts' statement (Employer Exhibit 11) was not corroborated by any other testimony. Employer witnesses merely summarized a telephone conversation they had with Metts. Direct testimony by Metts could have reinforced the validity of the charge.

The Union was able to provide arguments which rebutted the above assertion. The Grievant drove a considerable distance on May 13, 1988 without an incident. He, moreover, cooperated with the security guards when confronted with the sobriety test and passed the test. Boykin and two other witnesses verified that the Grievant seemed to perform in a normal fashion. It also appears that the Grievant delivered goods on June 17, 1988 (Union Exhibit 11). One has to wonder why the Grievant was allowed to perform this service if in fact it was determined that he was unable to perform.

The Union's Section 24.04 arguments proved to be unpersuasive. This provision does not require the Employer to communicate "the" form of discipline but "the possible" form of discipline. Disciplinary hearings deal with potential disciplinary action, and encounters which allow an employer to investigate whether certain conduct deserves discipline. The Union's interpretation would tend to chill the predisciplinary hearing process because it could preclude a penalty modification at a fact finding stage. This option was not

contemplated by the Parties as evidenced by the negotiated contract language. Of course, any modification needs to be within certain reasonable parameters based upon the circumstances. In this instance, the decision to remove seems reasonably based upon the charges and circumstances. Although the labor-management discussions (Union Exhibit 18) surrounding this issue are laudable, they cannot usurp specific language negotiated by the Parties.

In my judgment, the predisciplinary hearing was not conducted in a way which violates the precepts of Section 24.04. The Union, more specifically, was given an opportunity to comment, refute or rebut the Employer's allegations. McAtee was given an opportunity to concur with the Grievant and review witness statements. He had every opportunity to question witnesses or ask for appearances. Although the Union argued that certain statements were withheld, specific references were never provided. Hildebrecht's chronology did not in any way hinder the Union's presentation. This information was already on the record in the form of witness statements and other documents.

The above review indicates that the hearing was conducted in a proper fashion. Thus, the Union's continuance motion does not seem to be justified. McAtee had ample opportunity to probe the propriety of the Employer's allegations. If he failed to take full advantage of the opportunity, this consequence was a result of his decision making process. Also, the correspondence (Union Exhibits 13, 14, 15, and 16) following the altercation did not specify the need for a continuance. My conclusion in no way condones the behavior of the Hearing Officer. This conduct, however, took place after the termination of the hearing. As such, the altercation did not impede the Grievant's defense or the conduct of the hearing.

The Employee Assistance Program proposal (Union Exhibit 5) was not offered in an unusual way. The particulars, moreover, do not reflect unrealistic expectations traditionally contained in such documents. It was not offered as an ultimatum but as a proposed compromise which held the removal decision in abeyance. As such, the removal decision was never offered as a quid pro quo, and thus it played no role in the removal decision.

The Employer did, however, violate Section 24.02 because of the timeliness of the decision to begin the disciplinary process; the removal decision was not imposed promptly. The initial offense took place on May 10, 1988, while the last took place on May 23, 1988. The absence of warning or other discipline prior to the Grievant's discharge contributed to the building of a record. This defect prevented the Grievant with an opportunity to correct his conduct prior to the imposition of the removal penalty.[4]

The above analysis clearly indicates that the Employer had just cause to discipline the Grievant. The progressive discipline defect and the failure to substantiate several of the charges, however, forces this Arbitrator to modify the penalty.

AWARD

The grievance is sustained in part and denied in part. The Employer is ordered to reinstate the Grievant to his former position without back pay and full seniority. It should be noted that this penalty is well within the range of reasonableness based upon the Grievant's prior disciplinary record, the seriousness of the proven offenses, and the procedural defect.

Dr. David M. Pincus
March 14, 1990

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[1] It should be noted that not all of the particulars specified in the Notice were used in support of the eventual Removal Order.

[2] This grievance was not formally in front of the Arbitrator and its status seemed unclear at the time of the hearing.

[3] Aerojet Liquid Rocket Co., 75 LA 255 (Wollett, 1980); Agorico Chemicals Co., 55 LA 481 (Greed, 1970); Anaconda Aluminum Co., 62 LA 1049 (Warns, 1974).

[4]

Frontier Airlines, Inc., 61 LA 304 (Kahn, 1973); Lawrence General Hospital, 35 LA 987; Weatherhead Co., 56 LA 189 (Maxwell, 1971).