ARBITRATION DECISION NO.:
338

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

EMPLOYER:
Department of Youth Services
Training Institute of Central Ohio (TICO)

DATE OF ARBITRATION:
March 21, 1991

DATE OF DECISION:
April 30, 1991

GRIEVANT:
Johnna Graham

OCB GREIEVANCE NO.:
35-08-(90-10-18)-0019-01-05

ARBITRATOR:
Rhonda R. Rivera

FOR THE UNION:
Ron Stevenson
Robert W. Steele

FOR THE EMPLOYER:
Brad Rahr
Roger Coe

KEY WORDS:
Removal
Unauthorized contact with a Youth
Failure to Cooperate with Investigation

ARTICLES:
Article 24 - Discipline
§ 24.01 - Standard (in part)
§ 24.02 - Progressive Discipline (in part)

FACTS:

The grievant had been employed by the Department of Youth Services at the Training Institute of Central Ohio (TICO) for five years and held the position of Cook 1. She obtained permission from a former resident's father to take the youth to an amusement park with her family. The former resident was on parole. The grievant was late picking up the youth and the youth's father had withdrawn permission for the youth to go with the grievant. The youth, therefore, had his uncle take his to meet the grievant and another department employee who accompanied the grievant. The grievant did not know of the father's withdrawn permission

until their return after the trip. The grievant's Superintendent learned of the incident and contacted the youth's father to confirm the report. The grievant was interviewed but refused to cooperate on the advice of her attorney and union steward. The grievant was removed for unauthorized contact with a youth under the employer's care.

EMPLOYER'S POSITION:

There was just cause for removal of the grievant. She and a co-worker went to the home of a former resident of TICO and took him to an amusement park with her family, without the youth's father's permission. This was a violation of the employer's work rule against unauthorized contact with youths under state care. An employee may be removed for a first offense of this nature. There was no disparate treatment compared to the employee who accompanied the grievant to pick up the youth. The grievant did not cooperate with the employer during the investigation which justified a more severe penalty. The grievant had notice of the employer's rule against unauthorized contact with youths and that rule is reasonable because the youths housed at TICO have been convicted of serious felonies.

UNION'S POSITION:

The grievant's removal was not progressive nor commensurate with the offense and the grievant was subject to disparate treatment. The grievant took a youth on parole from the Training Institute of Central Ohio, (TICO), to an amusement park with her family. However, the grievant believed that she had permission from the youth's father. The grievant was not told that the youth's father had withdrawn his permission. The grievant did not deny that the incident occurred, only that the discipline was too severe. A TICO employee who accompanied the grievant received a suspension while the grievant was removed.

Additionally, the disciplinary grid for the offense charged indicates that a first offense can lead to discipline ranging from a suspension of 15 days to removal.

ARBITRATOR'S OPINION:

The grievant did violate the employer's work rule against unauthorized contact with youths in the employer's custody. She admitted to taking the youth to an amusement park with her family. The grievant had notice of the rule through group meetings and other training. The fact that the youth's father gave permission originally, and that the youth's uncle brought him to meet the grievant supports the grievant's claim that she reasonably believed she had permission to take the youth.

The grievant was a five year employee with only two prior disciplines. Also, the grievant's discipline must be compared to the discipline issued to the employee who accompanied the grievant to pick up the youth. The employer admitted that the other employee received a suspension because she had been cooperative during the investigation but the grievant was not. The grievant was acting on the advice of her union representative and attorney, therefore her lack of cooperation was a legitimate execution of her rights and must not be counted against her. However, the grievant was more culpable than the other employee because she initiated the trip.

Discipline must be progressive and commensurate and if possible, corrective. Removal is not corrective and the removal of the grievant was not commensurate to the offense she committed. Compared to the other employee and in light of the grievant's work record, removal was punitive.

AWARD:

The grievant was reinstated subject to a last chance agreement referring to Rule 17 of Directive B-19, (unauthorized contact with youths). The period from the grievant's removal until the date of the award was deemed a suspension. The arbitrator retained jurisdiction to review the last chance agreement.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

State of Ohio
Department of Youth Services

Employer

Grievance No.: 35-08-901018-0019-01-05
Grievant (Johnna Graham)
Hearing Date: March 21, 1991
Award Date: April 30, 1991
Arbitrator: R. Rivera

For the Union:
Ron Stevenson
Robert W. Steele

For the Employer:
Brad Rahr
Roger Coe

The following persons were present at the Hearing in addition to the Advocates named above and the Grievant: Ralph Fitzpatrick, Superintendent (witness), James Couser, Food Service Manager (witness), Leon Rolland, father of youth (witness), Sheila Foster (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Joint Exhibits

1. Contract 1989- 1991
2. Discipline Trail
3. Grievance Trail
4. DYS General Work Rules July 1985
5. DYS General Work Rules November 30, 1990
6. Grievant's Evaluations for 1987, 1988, 1989, and 1990.

Union Exhibits

1. Opening Statement
2. Three (3) day suspension letter dated 11/14/90 for Violation of Work Rule 17 (S.D.)
3. Thirty (30) day suspension order dated 11/19/87 for Violation of Work Rule 17 (C.W.)

4. Fifteen (15) day suspension letter for Violation of Work Rule 17 (S.F.)
5. Written, undated, unsigned, statement by Sheila Foster

Employer Exhibits
1. Opening Statement
2. Acknowledgment of receipt of Work Rules (1985) by Grievant, dated 5/27/86
3. Acknowledgment of receipt of Work Rule B-19 by Grievant dated 3/31/88

Joint Issue

Was the Grievant removed for just cause, and if not, what shall the remedy be.

Joint Stipulations
1. Grievant has been employed by DYS since May, 1986.
2. Grievant did have contact with youth and did remove youth to Columbus.

Contract Sections

§ 24.01 - Standard (in part)

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.

§ 24.02 - Progressive Discipline (in part)

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. One or more verbal reprimand(s) (with appropriate notation in employee's file);
B. One or more written reprimand(s);
C. One or more suspension(s);
D. Termination.

Facts

The basic facts which underlie this Grievance are not in dispute.

The Grievant, at the time of the incident, was a Cook I at TICO, a juvenile correctional facility of the Department of Youth Services. TICO is a maximum security facility for boys which houses youths who have committed serious felonies.

The Grievant was hired on 5/27/86 with no prior experience in food service. She was promoted to Cook I in December of 1987. Her evaluations show her to be a competent and reliable employee (Joint Exhibit 6). Prior to this incident, the Grievant had two prior disciplines: a Verbal Reprimand on 12/18/89 for failure to notify with regard to leave and a Written Reprimand dated July 25, 1990 for failure to complete a work assignment per a supervisor's order (Joint Exhibit 2).

Youth T.O. had left the institution and resided with his father in Massillon, Ohio. The Grievant called him there and asked if he could accompany she and her husband to an amusement park in Columbus. T.O.'s father gave permission for him to go. The date selected was September 8, 1990. When the Grievant had not arrived by approximately 9:00 p.m., the father told the youth he could not go, and the father went to bed. The Grievant arrived after that time and met the youth at a location away from the residence. The youth was accompanied by his uncle. The Grievant was accompanied by a female friend who was also a TICO employee. The youth spent the night at the Grievant's home. In the Grievant's home were her husband and son. The youth was returned to his father's home late Sunday evening by the Grievant and the same friend. At that time, the Grievant learned that the father had withdrawn his permission the night before and that the

youth had ignored that order.

Superintendent Ralph Fitzpatrick testified that he learned of this conduct first through rumor and second through a phone call from the youth's father. On September 14, 1990, the Superintendent discussed the incident with the Grievant. She said she did not know that when T.O. spent the night at her home that the youth was violating his parole nor did she know that seeing the youth violated DYS work rules.

Records indicate that the Grievant signed a statement on 5/27/86 acknowledging that she received and read the DYS work rules. A second similar acknowledgment which covered Work Rule .B-19 was signed by the Grievant on March 31, 1988. On February 8, 1990, the Grievant attended a meeting of Food Service Employees where the Supervisor discussed both contraband problems and B-19., In particular, he mentioned the rule of no contact with youths after they are released (Joint Exhibit 2). At the hearing, the Supervisor testified that the main focus of the meeting was contraband but that he did discuss B-19 as well. Directive B-19 reads as follows:

A. Employees participating in the following activities shall be considered to be in violation of Youth Services work rules:

17. Corresponding with, or accepting correspondence from youth confined in the Department's custody without authorization of the appropriate deputy or Director. Contacting or visiting youth, except for official work purposes, who are still in custody of the Department without prior authorization from the Director or appropriate deputy director, even when such youths are not living in a Department institution at the time.

Both the Grievant and her driving companion, who was also a TICO employee were disciplined. The companion received a 15 day suspension; the Grievant was terminated. Mr. Fitzpatrick testified that the companion had been more "cooperative" than the Grievant during the investigation. The Grievant told him she had been advised not to speak by her attorney and her union representative. He said that this "cooperation" was a factor which differentiated the discipline. No evidence was introduced as to the previous discipline of the companion/employee.

At the hearing, the Union introduced the following evidence (Union Exhibit 2, 3, and 4):

1. A food service worker was suspended for three days for violating rule 17 (B-19) (11/14/90)

2. A Youth Leader II was suspended for 30 days for neglect of duty which involved unauthorized contact with youth (11/19/87).

Superintendent Fitzpatrick said that the 30 day suspension was because he could only prove telephone contact not person-to-person contact. The three (3) day suspension involved an employee who admitted she had only minor passing contact with a youth on the street and no other proof was available.

Union's Position (Taken from the Union's Opening Statement.)

Termination for this offense does not follow the contract's progressive discipline criteria and is not commensurate to the act. The Grievant was terminated which is called "The Capital Punishment" of employment.

The Union will show through testimony and documents that other employees of TICO who committed the same offense and who were charged with the same or similar offense received a lesser punishment.

The Department of Youth Services, twenty-eight days after this incident revised its B-19 Directive, General Work Rules, which took effect November 30, 1990. Work Rule 17, in the old directive, because Rule 29, with a "grid" first offense - 15 days or removal.

The Grievant did not deny that she went to Massillon, Ohio to pick youth up, with the understanding that she had the father's permission. The father gave her, directions for her to come there and pick the youth up.

After getting lost in Massillon, Ohio, the Grievant called the youth from a gas station for directions. The youth woke his father and asked him for directions, which he gave. After waiting about 45 minutes, youth arrived with a man who said that he was an uncle who told Grievant to drive carefully.

The Union and the Grievant have not said that the Grievant did commit the offense but that the discipline was too "harsh" and that it is not commensurate with other discipline that has been given at TICO.

Employer's Position (Taken from the Employer's Opening Statement)

The circumstances which gave rise to this discipline are that between September 8 and 9, 1990, the Grievant was in contact with an ex-TICO youth by telephone and by personal contact with him at his home in Massillon, Ohio.

The Department of Youth Services is statutorily mandated through the Ohio Revised Code (Chapters 5139) to confine felony offenders, ages 12 through 21, who have been adjudicated and committed by the 88 county juvenile courts of the State of Ohio. The agency is responsible for promoting and operating effective programs for the successful reintegration of juvenile offenders back into the community as productive and law abiding individuals and for providing appropriate and reasonable safety to the citizens of the State of Ohio.

The Training Institute of Central Ohio.(TICO) is a maximum security facility for, boys located in Columbus, Ohio. TICO has approximately 270 felony offender youths in its care. The age of the boys confined to TICO range between 16-21**,** and their average age is 17. The majority of these youths have been committed for committing felony 1's and 2's which also includes youth who have committed homicides. Felony 1 and 2 are the most serious felonies committed.

Management contends that the Grievant went to Massillon, Ohio and picked up a former resident of TICO in violation of DYS directives and also in violation of the youth's parole. Management will show that the Grievant had prior knowledge of this directive and further will show that the Grievant was present during a department meeting prior to this incident where contact with youths outside of the institution was discussed.

The Union, during the Step 3 grievance hearing, admitted that the Grievant had contact with a youth still under DYS care on her off time but contends that the Grievant had permission from the father to take the youth to her home for the weekend. This contention is not true. the youth left his home without his father's knowledge and did not return until the next night.

Management contends that the Grievant's actions were in direct violation of DYS directives and that this violation is severe enough to warrant removal.

Discussion

The Grievant violated Rule 17 of B-19. This rule is a reasonable one, consistent with the mission and purpose of DYS. The Grievant was on notice of this Rule. She had received a copy of this Rule at least twice. She acknowledged twice that she had read the Rule. She was trained on the rule once and was reminded of the rule in a group meeting with her Supervisor in February, 1990. The Grievant was disingenuous when she said she was unaware of the Rule.

In mitigation, the Grievant could have reasonably believed that she had the father's permission. He gave it originally. He withdrew it but only told the youth. The youth was accompanied by his uncle when she picked him up. The prior permission and the presence of the uncle could reasonably lead one to believe that permission remained.

The Grievant was not alone with the youth. The companion/employee was in the car both to and from his home. The investigation report of the employee states that the Grievant's husband and son were at home that weekend. Given that apparent permission was granted, the Grievant could have reasonably believed that she was not violating any parole rules.

The issue in this case clearly hinges on the severity of the discipline. The Grievant was a 5 year employee with a good work record. She had two prior disciplines -- both minor. However, both occurred (12/18/89 and 7/25/90) within one year of this incident. The discipline meted out to the Grievant must inevitably be compared to the discipline of her companion who received a 15 day suspension.. The reason given by the Superintendent for the difference in discipline was the cooperative attitude of the companion/employee. However, this difference is discounted by the Arbitrator. The Superintendent admitted that the Grievant told him that she was advised by her lawyer and her union to refrain from discussion. Her "lack of cooperation" was, in truth, a legitimate execution of her rights and must not be counted against her.

No evidence was adduced as to the companion/employee's prior discipline. However, another significant difference (even though unstated at the hearing) exists between the Grievant and her companion. The Grievant invited this contact, called the youth, and had the youth at her home. Surely, she is more culpable.

The contract commits the Employer to both progressive and commensurate discipline. The theory is that discipline should be, where possible, corrective. A termination is not "corrective" and, in this case, is not commensurate. In this case, a 6 year employee with a good work record was fired for an offense that was certainly serious but the employee was not without the potential of learning. compared to her companion's case and in light of the Grievant's record and behavior, termination was punitive.

Award

The Grievant is to be reinstated as of the date of this opinion. She is-to be reinstated on a last chance agreement with reference to Rule 17 of B-19. The time from termination to the date of this award is to be characterized as a suspension. The Arbitrator retains jurisdiction solely to review, if necessary, the last chance agreement.

Date: April 30, 1991
Rhonda R. Rivera, Arbitrator