ARBITRATION DECISION NO.:
433

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

EMPLOYER:
Department of Mental Retardation
and Developmental Disabilities
Broadview Developmental Center

DATE OF ARBITRATION:
March 19, 1992

DATE OF DECISION:
May 6, 1992

GRIEVANT:
John McAlpin

OCB GRIEVANCE NO.:
24-03-(91-06-30)-0417-01-04

ARBITRATOR:
Anna Smith

FOR THE UNION:
Robert Robinson
Advocate
Gerald Burlingame
Second Chair

FOR THE EMPLOYER:
Ed Ostrowski
Advocate
Lou Kitchen
Second Chair

KEY WORDS:
Removal
Client Abuse

ARTICLES:
Article 24-Discipline
§24.01-Standard

FACTS:
The grievant was a Therapeutic Program Worker who had been employed by the Department of Mental Retardation and Developmental Disabilities for nine years. The grievant had obtained $150 of client funds to take clients on a trip. The grievant was arrested while en route, and not having enough money to bail himself

out of jail, used the $150 for that purpose. He did this in order to avoid another absence from his job. He was questioned about the money before he was able to repay it and he disclosed what happened in writing. The grievant failed to repay the money on his pay day despite offers by the employer to go to the bank across the street with him. The grievant did repay the funds after the pre-disciplinary hearing on the advice of his steward. The grievant was removed for failure of good behavior. The grievant also pleaded no contest to theft charges.

EMPLOYER'S POSITION:

There was just cause for the grievant's removal. The grievant used client's funds for personal use, to bail himself out of jail, and failed to repay it for ten days despite the employer's accommodations for repayment. The type of funds at issue here are strictly controlled, thus arguments of lax control of funds are misplaced. That the grievant disclosed the incident of his arrest is not a sufficient mitigating circumstance as the employer knew of the incident because it happened on work time.

UNION'S POSITION:

Management has failed to prove that the grievant violated an employer policy and management has also failed to meet any of the tests of just cause. Retaining and reimbursing client funds on payday is a long-standing practice. Management's lax enforcement caused employees to believe that this practice is acceptable. Because of the grievant's prior disciplinary record, remaining in jail would have more seriously jeopardized his position than using client funds for personal use. Despite prior discipline, the grievant works well with Agency employees, and removal is too harsh a penalty.

ARBITRATOR'S OPINION:

Just cause is determined by the existence of a clear rule and consistent enforcement of that rule. The Arbitrator found that no clearly articulated rule existed, but there was sufficient employee understanding and enforcement to uphold the grievant’s removal. Usually client funds are retained or held over until the next trip only with supervisory approval. The Union failed to present specific proof that the grievant was treated disparately in violation of Article 2 of the contract. Even though the grievant's use of client funds was understandable under the circumstances, this was still a violation because there was no supervisory approval. The grievant did not intend to deprive the clients of their property; therefore, he is not guilty of theft. Management did not cause the grievant's delay in repayment; there was no proof that the grievant even tried to pick up his check on Thursday, and even after the grievant picked up his check, he delayed several more days, without explanation, before repaying the debt. The grievant's willful failure to return client funds is serious enough to justify the removal of even an employee who has never been previously disciplined; therefore, removal of the grievant is both reasonable and justified.

ARBITRATOR'S AWARD:

The grievant was discharged for just cause, and the grievance is denied in its entirety.

TEXT OF THE OPINION:

In the Matter of Arbitration
Between

STATE OF OHIO,
DEPARTMENT OF MENTAL
RETARDATION AND
DEVELOPMENTAL DISABILITIES

and

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11,

A.F.S.C.M.E., AFL/CIO

OPINION and AWARD
Anna D. Smith, Arbitrator

Case 24-03-910620-0417-01-04
John McAlpin, Grievant
Removal

Appearances

For the State of Ohio:
Ed Ostrowski; Labor Relations Coordinator,
Ohio Department of Mental Retardation and Developmental Disabilities;
Advocate
Lou Kitchen; Assistant Chief of Operations,
Ohio Office of Collective Bargaining; Second Chair
Emma Benson; Residential Care Supervisor, Broadview
Developmental Center; Witness
Jack Duns; Quality Assurance Director,
Broadview Developmental Center; Witness
Officer Michael English; Patrolman,
Broadview Developmental Center; Witness
Arthur T. Laney, Jr.; former Human Relations Director;
Broadview Developmental Center; Witness
Tamala A. Solomon; Labor Relations Officer; Broadveiw
Developmental Center; Witness

For OCSEA Local 11, AFSCME:
Robert Robinson; Staff Representative, OCSEA Local 11,
AFSCME; Advocate
Gerald Burlingame; Staff Representative, OCSEA Local 11,
AFSCME; Second Chair
John McAlpin; Grievant
Bennie Davis, Jr.; Chapter President, OCSEA Local 11,
AFSCME; Witness by subpoena
Robert Ellis; Therapeutic Program Worker
and former Steward; Broadview Developmental Center;
Witness by subpoena
Barbara Kennedy; Therapeutic Program Worker and
Chief Steward; Witness by subpoena
Terence Oliver; Therapeutic Program Worker, Broadview
Developmental Center; Witness by subpoena
Gertrude Robinson; Account Clerk, Broadview Developmental
Center; Witness by subpoena
Robert E. Reid; Therapeutic Program Worker, Broadview
Developmental Center; Witness by subpoena
Dale A. Walker; Therapeutic Program Worker, Broadview
Developmental Center; Witness by subpoena

Hearing

Pursuant to the procedures of the parties a hearing was held at 9:00 a.m. on March 19, 1992, at Broadview Developmental Center, Broadview Heights, Ohio, before Anna D. Smith, Arbitrator. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn. The record was closed at the conclusion of oral argument at 4:30 p.m., March 19, 1992. This opinion and award is based solely on the record as described herein.

Issue

The parties stipulated that the issue to be decided by the Arbitrator is:

Was the grievant discharged for just cause?
If not, what shall the remedy be?

Joint Exhibits and Stipulations

Stipulations of Fact

1. The Grievance is properly before the Arbitrator.

2. The Grievant was employed at Broadview from 11/28/82 to 6/20/91.

3. The Grievant's discipline on record has all been for attendance/tardiness violations.

4. None of the Grievant's prior discipline is subject to grievance.

Joint Exhibits

1. Removal Order 6/20/91

2. Grievance 24-03(6-20-91)417-01-04

3. Step Three Response
4. Personal Conference Notice

5. Administrative Leave Notice

6. McAlpin Statement

7. Staff Incident Report

8. Prior Disciplinary Action:

31-day suspension, 1/2/91
30-day suspension, 5/14/90
20-day suspension, 11/19/89
10-day suspension, 6/23/89
6-day suspension, 2/8/89
1-day suspension, 12/2/88

9. 1989-91 Collective Bargaining Agreement

Case History

The Grievant, John McAlpin, was a Therapeutic Program Worker at the Broadview Developmental Center, a facility of the Ohio Department of Mental Retardation and Developmental Disabilities until June, 1991. He had been similarly employed by the Agency for approximately nine years with good performance reviews (Union Ex. 3) when he was discharged for failing to return $150 of resident funds that had been issued to him. The intended use of the money was a May 11 excursion by a group of residents and accompanying staff for an evening of recreation off the grounds of the facility. There was an accident while the group was en route to their destination. The police investigation that evening revealed outstanding warrants on Mr. McAlpin. He was accordingly arrested and incarcerated. Being unable to make bail with his own resources, McAlpin became worried about his job because his extensive history of attendance-related discipline had placed him at risk of discharge if he did not report to work in a timely fashion (Joint Ex. 8). He therefore decided to use the residents' money to bail himself out of jail in time to make his next scheduled shift, on May 12. He intended to pay back the Agency on his next payday which was within the week. He testified that he did not think this would be a problem since it had been a common practice at the facility for staff to make reimbursements of client funds on payday. Before he could repay the money, however, he was questioned by Officer English, who had signed the money out to McAlpin under a new procedure. Officer English heard McAlpin's story and conferred with the Quality Assurance Director, Jack Duns. Because the incident involved client funds, formal proceedings were instituted. Officer English obtained a written statement from McAlpin (Joint Ex. 6) in which he admitted what he had done and what his intentions were. A Staff Incident Report (Joint Ex. 7) was prepared and McAlpin was placed on paid administrative leave (Joint Ex. 5), informed of the charge against him and of the predisciplinary conference scheduled for May 20, 1991 (Joint Ex. 4). The Labor Relations Officer who went over this material with McAlpin and his steward said they tried to work out something to prevent disciplinary action. She advised him to bring in the money. since she was scheduled off the next day, she told him to give it to her boss, Arthur Laney.

According to Mr. Laney, the Grievant picked up his check the next morning, May 17. Laney spoke to him about cashing the check and returning the money. McAlpin said he was going across town to cash it. Laney suggested the corner bank, offering even to take him personally and arrange check-cashing approval, but McAlpin declined, saying he would return to the facility later with the money. The Grievant gives a different version, saying he could not return the money on Friday because it was so late when he got his check (about 3:00 p.m.) that no one was at the Center to give the money to.

The following Monday, May 20, he still had not returned the $150 and missed his pre-disciplinary conference. The conference went forward the next day, May 21, with McAlpin and his steward, Barbara Kennedy, in attendance. Ms. Kennedy testified McAlpin had the money with him when he showed up for the conference, but she advised him to hold off on it. He did finally turn the money in that day, some ten minutes after the conference.

A removal order was nevertheless issued, to be effective June 20, 1991, citing Failure of Good Behavior (Joint Ex. 1). The matter was also referred to the City of Broadview Heights, who charged McAlpin with theft, §2913.02 O.R.C. McAlpin pled no contest on August 28, 1991, and was fined $50 (Employer Ex. 2).

The removal was grieved on June 14, 1991, alleging violations of Article 24 (Discipline) and 2.02 (Non-Discrimination, Agreement Rights) (Joint Ex. 2). Being unresolved at Step Three, the matter came to arbitration where it presently resides, free of procedural defect, for final and binding decision.

Pertinent Agency policies and practices are Corrective Action (Employer Ex. 3), practices on resident funds, and practices regarding the issuance of paychecks. The Corrective Action Policy OP/P-7 under which the Grievant was disciplined classifies all Failure of Good Behavior offenses except Gambling on Duty as "Major Offenses," constituting grounds for major suspensions or removal. The guidelines for progressive corrective action allow for lesser penalties for a first offense of theft, depending "upon the value and recovery of the article (s) stolen" (Employer Ex. 3). Labor Relations Officer Solomon testified that discipline for major

offenses builds on prior discipline for minor offenses. She also said there were a number of reasons a minor penalty might follow a major one, such as plea-bargaining, grievance adjustment, and violation of different rules. The record shows a number of cases in which lesser penalties did, in fact, follow more severe ones, but does not disclose the circumstances of the various disciplinary actions and grievance proceedings (Union Ex. 5).

Residents' funds are handled in two different ways, according to the testimony of Supervisor Benson. Allowance money (for residents' personal items) is picked up by the house supervisor. There are no special accounting requirements and direct care employees turn their receipts over to their supervisor. Trip money procedure has changed several times. The supervisor picks up this money or has staff do it. At one time staff turned receipts into their supervisor or to Security. More recently, everything had to be turned into Security when the trip was over. Benson also testified that staff might use up leftover money within a day or two for something like ice cream, but that she never authorized holding leftover money for the next trip. Union Chapter President Bennie Davis, Jr. testified that the lack of a written policy, two different kinds of funds, inconsistent application of policy, and McAlpin being written up after holding client funds for only one day caused him to seek a clear, consistently-applied policy. None had been issued as of the arbitration hearing. Five Union witnesses (Robinson, Walker, Oliver, Reed and Ellis) testified about lax practices regarding accounting for client funds. Management witnesses disowned knowledge of employees using client funds for their own purposes. No one knew of anyone being disciplined for keeping client funds prior to the Grievant's case, and several testified they kept money for later use with supervisory approval. Evidence was submitted of an employee being ordered to turn in field trip receipts and/or funds two months after the trip (Union Ex. 1 and 2). This incident occurred after Mr. McAlpin was disciplined, and Solomon testified that the affected employee had been on leave during the period in which he held the money.

Union witnesses also testified that second shift employees picked up their checks at the switchboard Thursday evening for cashing the next day. Labor Relations Officer Solomon disputed this, saying stubs were available for pick-up Thursday, but checks were issued Friday. Mr. McAlpin got his on Friday, May 17 (Employer Ex. 4).

Arguments of the Parties

The Employer

The Agency argues that it has discharged the Grievant for just cause. The Grievant kept $150 of client money for ten days, refusing to return it despite repeated attempts by the Agency to get it back and offers of accommodation. His actions led to a criminal charge and finding of guilt. The Employer also draws attention to the Grievant's discipline record.

The Union allegation of lax practice is challenged on several fronts. First, the Employer says that two kinds of client funds have been testified about in this case. Allowance money is managed by the supervisors, while trip funds drawn for a specific purpose are closely controlled. Next, the Employer reviews witness testimony. The accounting clerk did not know the circumstances under which receipts were not turned in to her liking. The testimony about the outstanding pizza receipt proves nothing, for the witness did not sign a receipt for the $15 given to him. For all anyone knows, the supervisor might have paid for the pizza himself. Regarding allegations of a supervisor authorizing staff retention of leftover trip money, the supervisor referred to has not even been at the facility for two years. On the other hand, Supervisor Benson testified that money left over from trips was outstanding one or two days at most and usually because she or her staff were off work. Moreover, the State views appropriation of funds for staff personal use quite differently from a failure to turn in receipts.

The State goes on to say that the Grievant telling the truth about using the money for bail is not such a noble gesture as claimed. He had to know the State was aware of his arrest since it occurred during his working hours in the presence of residents and other staff.

The Employer questions the credibility of the Grievant's and his witnesses' testimony as self-serving. By contrast, the State's witnesses have nothing to gain from fabricating their testimony.

Disparate treatment, the State asserts, is an affirmative defense for which the Union bears the burden of proof. This burden, it says, has not been carried.

In conclusion, the Employer asks that the discharge be upheld and the grievance denied in its entirety.

The Union

The Union contends that it has shown beyond a reasonable doubt there was no just cause for removing the Grievant. The failure of good behavior was more that of the Employer than of the Grievant, it says.

The practice of holding on to client receipts and funds had been going on for years. To suddenly, without warning, discipline for an alleged violation is unjust. Quoting Elkouri and Elkouri, the Union says that "lax enforcement of rules may lead employees reasonably to believe that the conduct in question is sanctioned by management" (1985, p. 683). Various panel arbitrators, including the arbitrator of this case, are of the same opinion.

It is unfortunate that the Grievant had to use resident money to get out of jail, but the truth is his employment would have been more jeopardized by an attendance violation if he stayed in jail until payday. He could have lied, saying he left the money at home, but he told the truth and was punished for it.

The Union claims Management deliberately overlooked its own misdeed in not releasing the Grievant's paycheck. When it did acknowledge its error it was too late for the Grievant to come to the facility, take the bus back to Cleveland, cash the check, and return to the facility before the end of Laney's shift. If the Grievant had gotten his check in a timely fashion, Management would have had a case with teeth in it, says the Union. As it was, there was no just cause.

The Union questions the testimony of several Management witnesses. Labor Relations Officer Solomon's testimony is doubtful about when employees get their checks when compared with testimony of second shift employees. She also said the Grievant arrived on Friday at 9:30 a.m. when he did not get there until nearly 3:00 p.m. Officer English's testimony about his alleged conversation with the Grievant on May 12 is questionable since the Grievant does not own a car. Dun's testimony that he might do the same as the Grievant in the same situation supports the Grievant's claim of mitigating circumstances. The Union goes on to point out that Management's opinion that Union witnesses have an ax to grind is just that--opinion. So, too, is the prosecutor's opinion on Employer Exhibit 1 just opinion.

The Union says it is not trying to hide the Grievant's multiple discipline for attendance infractions. Although he had these problems, he worked well with the Agency's clients. His removal is not connected to common sense. Broadview, maintains the Union, has always issued discipline commensurate with the offense in that penalties are not progressive from one offense type to the next. If the Grievant had violated a policy--which he did not--it would have warranted a different discipline than removal.

In conclusion, the Union contends that while the Employer must meet seven tests of just cause, it has not met one. Instead, Management wants the Arbitrator to validate the removal based on the Grievant's past record. The Union rejects this argument, saying the charge against the Grievant must stand on its own merits.

The Union asks that the removal be overturned and the Grievant made whole. It requests that if the Arbitrator finds for the Grievant, he be reinstated within two weeks of the award and granted back pay and benefits within Contractual guidelines.

Opinion of the Arbitrator

The first rule of just cause discipline is the employee's foreknowledge of possible consequences of his conduct. Two factors in determining this element are the promulgation of a clear rule and consistent enforcement of that rule. With respect to the first of these, I must say I agree with the Union that the Center's policy on the return of client funds and receipts was poorly articulated and communicated prior to the Grievant's discharge. However, the record does not establish such a lack of employee understanding or inconsistent enforcement as to nullify the discipline of the Grievant.

Almost without exception, the Union witnesses testified that when they kept leftover trip money, they did

so with their supervisor's approval and either repaid it on payday or kept it with approval for another trip. Several cases of exceptions to this practice were offered as indication of lax enforcement, and so much be examined. The pizza money was not for a trip and not signed for by the employee. It may not even have involved client funds. Mr. Oliver's case did involve a field trip, but the labor relations officer testified that Oliver was on a leave of absence in the interim. The first deadline given him for repayment (November 22) was prior to the issuance of the memo (November 23, Union Ex. 1). On the face of it, this would explain the extension granted by Union Exhibit 2. In the case at bar, the Grievant knew he was subject to discipline at least as early as May 16, one day before his promised date of repayment. The circumstances of both the pizza incident and Mr. Oliver's case are thus different from the Grievant's. Finally, the Chapter President testified that he knew of three or four other cases, but was vague as to their circumstances. I therefore cannot find sufficient basis to hold that the Grievant was treated differently from similarly-situated employees.

What the evidence does establish is that the Grievant used client funds for himself without his supervisor's permission, intending to repay them on payday. His use of the money is understandable under the circumstances and I exonerate him of theft out of lack of intent to deprive the true owners of their property. But what I cannot get around is the Grievant's failure to repay the money on payday as he intended (and as he thought was the practice) or even for several days thereafter. The Union says Management prevented timely restitution by improperly withholding the Grievant's paycheck. Two things undermine this contention. First, no evidence was submitted to establish that the Grievant tried to get his check Thursday night or that it was unavailable to him. Second, Mr. Laney's testimony that he talked with the Grievant on Friday morning when he came to get his check is highly credible, being specific and consistent in its many details and without self-interest. Even if the Employer improperly withheld the check, the error was overcome by the offers of assistance in cashing the check. Moreover, the Grievant had ample opportunity to make restitution even after Friday, and he did not take them though he clearly knew he was in trouble. He had no satisfactory explanation for this lapse, leaving me mystified as to why he would come to his pre-disciplinary conference on Tuesday with the money and not offer it even then. This failure, in light of the Grievant's understanding of client fund practices and knowledge that he was subject to discipline, makes discipline justified.

It remains to determine whether removal is commensurate with the offense. Although I do not find the Grievant guilty of theft (since the intent element is missing) , his willful failure to cooperate in the return of the money is a serious offense justifying a substantial penalty even for an employee with a clean record. Following this Grievant's record of five major suspensions in 2-1/2 years, the most recent of which was 31 days imposed less than five months prior to this incident, removal is not unreasonable. It is difficult to see a long-term employee lose his job, particularly one who is skilled at working with the Agency's special clients. Nevertheless, the decision for leniency in the face of willful employee withholding of client funds must be the Agency's.

Award

The Grievant was discharged for just cause. Accordingly, the grievance is denied in its entirety.

Anna D. Smith, Ph.D.
Arbitrator

May 6, 1992
Shaker Heights, Ohio