

ARBITRATION DECISION NO.:

526

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental
Western Reserve Psychiatric Hospital

DATE OF ARBITRATION:

November 16, 1993

DATE OF DECISION:

December 7, 1993

GRIEVANT:

Gerald Gregory

OCB GRIEVANCE NO.:

23-18-(93-05-21)-0952-01-04

ARBITRATOR:

Mollie H. Bowers

FOR THE UNION:

Robert Robinson

FOR THE EMPLOYER:

Linda Thernes

KEY WORDS:

Removal
Just Cause
Neglect of Duty
Violation of Attendance
Standards (Tardiness)

ARTICLES:

Article 24 - Discipline
§ 24.01 - Standard
§ 24.01 - Progressive Discipline

FACTS:

The grievant was a Therapeutic Program Worker at the DMH's Western Reserve Psychiatric Hospital (WRPH). At the time of his removal he had eleven years of state service. The grievant's previous disciplinary record included four prior disciplines for tardiness, late call-offs and other attendance related infractions. The grievant had also been disciplined for leaving his work area without permission, insubordination and threatening a co-worker and a supervisor. The prior discipline that the grievant received progressed from verbal reprimand, to written reprimand and to suspension, according to the WRPH Center

Policy #3-9. According to this policy the next step of the disciplinary procedure was removal.

EMPLOYER'S POSITION:

The removal of the grievant was for just cause and the grievance should be denied. Clearly, the grievant violated WRPB Center Policy #3-6 which required employees to sign in at the start of their shifts. The grievant was well aware of this policy and had been disciplined four times in the past for tardiness. The State charged that the grievant's testimony was not credible. Previously, the grievant provided excuses for his tardiness. Now, the grievant claimed that he had been on time during days when he was accused of being late.

The State denied that the grievant was being harassed by his supervisors; instead, the State maintained that the grievant's supervisors only took appropriate action to remedy the grievant's tardiness problem. The State emphasized that the grievant had received progressive discipline in the past. The grievant's conduct has now reached the stage where removal was the appropriate discipline based upon the principles of just cause.

UNION'S POSITION:

The removal of the grievant was not for just cause and the grievance should be sustained. The grievant was, in fact, on time to work for two of the five times the State had alleged the grievant was tardy. By signing in late, the grievant was only trying to comply with his supervisor's order. That is, the grievant was instructed to sign in at the time he actually notified Central Staffing of his presence at work, not the time he arrived at work. Sometimes the grievant would arrive at work on time, but before he had an opportunity to sign the sign-in sheet, he was distracted by a patient who needed immediate attention. The Union maintained that because there is no way to verify the time the grievant actually reported to work, the State was now trying to penalize the grievant for complying with an order in direct opposition to the principles of just cause.

The Union pointed out that the grievant had lengthy state service and argued that the grievant was pressured into entering inaccurate start times out of the fear that he would be accused of falsification. The Union maintained that the grievant's prior discipline record reflected a concerted effort on the part of WRPB management to get rid of the grievant.

ARBITRATOR'S OPINION:

The Arbitrator concluded that, in light of the grievant's disciplinary record, the grievant received progressive discipline and that his removal was for just cause. It was undisputed that the grievant was provided a copy of and training on the tardiness policy. The Arbitrator was unpersuaded that the grievant's supervisor instructed him to only record the time the grievant spoke with Central Staffing. The Arbitrator found this argument both circular and nonsensical. Likewise, the Arbitrator was unpersuaded that the grievant's prior disciplinary history stemmed from a plot to harass the grievant.

In his grievance, the grievant raised various defenses and provided a variety of excuses for his tardiness. At the arbitration hearing, the grievant even introduced a new defense (not previously mentioned during the grievance procedure) while at the same time, maintaining that he had not been tardy at all. This convinced the Arbitrator that the grievant was not a credible witness. Also, the Arbitrator noted that never once had the grievant challenged or grieved any of the instances for which his pay was docked. Consequently, the Arbitrator found that the record fully supported the accusation that the grievant was late five times as charged.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION BETWEEN:

**STATE OF OHIO
DEPARTMENT OF MENTAL HEALTH**

-and-

OCSEA/AFSCME, LOCAL 11

Grievance Case No.

23-18-930521-0952-01-04

Grievant:

Gerald Gregory

ARBITRATOR:

Mollie H. Bowers

APPEARANCES:

Representing the State:

Linda Thernes

Representing the Union:

Robert Robinson

The Ohio Civil Service Employees Association/American Federation of State, County and Municipal Employees, Local 11 (the Union) brought this matter to arbitration challenging, as without just cause, the April 25, 1993, decision of the Department of Mental Health (the DMH) to remove the Grievant, Gerald Gregory. The parties stipulated that this matter is properly before the Arbitrator.

The Hearing in this case was held November 16, 1993, in The Office of Collective Bargaining, Columbus, Ohio. Both parties were represented. They had a full and fair opportunity to present evidence and testimony in support of their case and to cross-examine that presented by the other party. At the conclusion of the hearing, the parties presented closing arguments in support of their respective positions. The entire record has been carefully considered by the Arbitrator in reaching her decision.

ISSUE

The parties stipulated that the issue to be decided is:

Was the Grievant removed from her position for just cause?

If not, what shall the remedy be?

RELEVANT CONTRACT PROVISION

Article 24 - Discipline

Section 24.01 Disciplinary action shall not be imposed except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action...

BACKGROUND

The parties stipulated that Gerald Gregory (the Grievant) had eleven years' service and held the position of Therapeutic Program Worker at the DMH's Western Reserve Psychiatric Hospital (the WRPH) at the time of his removal. The letter to the Grievant, dated April 25, 1993, signed by Michael F. Hogan, Director of DMH, concerning his removal stated, in pertinent part:

"The reason for this [removal] action is that you have been guilty of Neglect of Duty - Violation of Attendance Standards (tardiness: arriving for work after one's scheduled start time three or more times in a thirty day period).

This is based on the following: Your scheduled start time is 7:00 A. M. and you reported late for duty five times in a thirty day period:

2/22/93, arrived at 7:13 A.M.

2/24/93, arrived at 7:10 A.M.

2/25/93, arrived at 7:10 A.M.

3/03/93, arrived at 7:10 A.M.

3/06/93, arrived at 7:20 A.M.

As you have been disciplined in the past for similar offenses, further corrective action is being taken.

The record reflects the following past disciplinary action taken against the Grievant:

- Verbal reprimand, November 1987 - Late call offs, tardiness;
- Written reprimand, December 1987 - Attendance, call offs, tardiness;
- Six day suspension, December 19, 1989 - Leaving work area without permission, insubordination;
- Six day suspension, October 21, 1991 - Tardiness;
- Six day suspension, October 19, 1992 - Threatening co-worker and supervisor, and tardiness;"

The WRPH has policies on tardiness and on progressive discipline that the record reflects the Grievant received and was trained about on April 28, 1992. WRPH center Policy #3-9 regarding Corrective Action provides for progressive discipline including verbal warning, written reprimand, suspension, then removal. WRPH Center Policy #3-6 on Timekeeping, paragraph 4.0 Tardiness provides:

"All employees are to sign in at the exact hour and minute that they arrive for work and sign out at the exact hour and minute that they leave work This sheet is considered an official/legal document. Falsification of the Sign In/ Sign Out Sheet shall be grounds for disciplinary action....

....

All employees are expected to be on duty from the beginning to the conclusion of their regularly scheduled shift. ...

ANY SIGN IN AFTER THE DESIGNATED START TIME SHALL BE CONSIDERED LATE AND SUBJECT TO DISCIPLINARY ACTION FOR TARDINESS (Emphasis in original)

Employees who are late to work or leave early without approved leave time will be docked.

NOTE: this docking procedure does not effect corrective action for tardiness.

Three tardinesses in a thirty (30) calendar day period are subject to disciplinary action."

On May 17, 1993, the Grievant filed a grievance contesting his removal based upon: "inadequate parking space;" the need to drive slow due to "enormous holes" in or about the parking lots; disparate treatment as to Administrative Assistant M. Banister not being removed for comparable tardiness; and "a form of harassment" to keep his prior disciplinary entries from being expunged.

Psychiatric Nurse Pam Chasteen, the Grievant's immediate Supervisor from November 1, 1992, testified

that she has administered the tardiness policy strictly and consistently, and that the Grievant is aware of that policy and has been disciplined pursuant to it in the past. She stated that the Grievant has reacted angrily, using abusive language like "I'm tired of you all fucking with me," in response to her attempts to counsel him about his tardiness. Ms. Chasteen said she is afraid of the Grievant, partly because the Grievant's treating psychiatrist treating advised her that the Grievant said he would kill her if he lost his case in arbitration.

Ms. Chasten explained the tardiness policy in WRPB Center Policy #3-6 as set forth above. She stated that there are no supervisors present at 7 a.m. when the Grievant was scheduled to report for work at his assigned unit. Upon his arrival, therefore, the Grievant was to call Central Staffing and notify them of his presence. She said that Central Staffing also calls that Unit 23 A, where the Grievant works, to determine who is and is not there. According to Ms. Chasten, while it is possible to falsify one's sign in time because it is basically an honor system, employees have been disciplined for doing so. She stated that if an employee came to work early, but forgot to sign in, that employee must get his/her supervisor to note that matter on the sign in sheet. She further stated that an employee who comes to work late without notice to supervision is in an unapproved leave status and would be docked pay and subject to discipline for being late.

Ms. Chasten denied telling the Grievant to sign in the time he was called by Central Staffing, even if he was in the unit but immediate client needs made it impossible for him to sign in at his reporting time. She stated that the Grievant never said he was on time for the dates he was charged as tardy. According to Ms. Chasten, the Grievant never previously said his car broke down as an excuse for reporting late. She testified that she has excused the Grievant numerous times where he has provided adequate documentation of his excuse, as she would do for any employee.

Custodial worker Annie McLane testified that she has worked with the Grievant. According to Ms. McLane, employees sometimes must take care of patients having problems and cannot sign in right away. She also said sometimes one employee, reporting in with Central Staffing, may not know another employee is in the back of the unit. Ms. McLane stated that the Grievant works well with patients. She also mentioned that an RN once questioned the Grievant about his clothes, beeper, and phone use.

Therapeutic Program Worker Jimmie Jones testified that the accusations against the Grievant being late are "not so," because many times the Grievant has come to work "right away, make rounds, and tend to the patients." Mr. Jones stated that he came to work late on February 24, the Grievant was already there, but they both signed in at 7:10 a.m. According to Mr. Jones, "there were a lot of times he had to do that." He said he had never known the Grievant to be late, but acknowledged it is possible that one employee may not know another employee has come to work because employees are busy and the unit is understaffed. Mr. Jones said the Grievant "forgets to sign in a lot." Mr. Jones testified that he has never contacted a supervisor to make a late entry when he came in on time but got too busy to sign in until later. On those occasions, Mr. Jones said he just signed 7:00 a.m. and has never been disciplined for this record keeping.

Hospital Aid Coordinator Janice Conley, who is a Union Steward, testified that she works in Central Staffing and daily calls units at 7:01 a.m. to see if the employees are there. She leaves a message for them to call back, if they are not there. According to Ms. Conley, "quite a few employees are late daily." She said that employees have called back giving excuses of where they were and she made supervisors, including Ms. Chasten, aware of the employees and the excuses. Ms. Conley testified that she recalled two instances where the Grievant called back with an explanation as to why he was not present at the start of his shift. She said that Ms. Chasten has checked up on the Grievant's time "a couple of times and that two other employees in Unit 23 A also have attendance problems.

The Grievant testified that he was twenty minutes late on March 3, and that he gave Ms. Chasten documentation of his car problems that day. He stated he was told that his time was being monitored and that Ms. Chasten ordered him to sign in at the time Central Staffing was notified he was at work. According to the Grievant, he thought that Ms. Chasten would "get him" for falsifying his time if the time he notified Central Staffing was different than his 7:00 a.m. scheduled start time.

It was also the Grievant's testimony that he never had problems with his previous supervisor. He said he has been "harassed for years," although Ms. Chasten supervised him for half a year. He acknowledged that he never grieved the alleged harassment by Ms. Chasten. The Grievant said some of the times when he had to sign in as if he was late, he was actually at work on time but, upon arriving, found it necessary to

immediately take care of a patient who hits his head against the wall, although other employees help that patient also.

The Grievant further testified that Ms. Chasten told him after he was late March 6, not to be late again and that he did not respond. He acknowledged that Ms. Chasten has only written him up for tardiness and that he has been written up by three different nurse supervisors. According to the Grievant, he never reported to the Nursing Director that "they [the nurse supervisors] were out to get me too." The Grievant "did not think that I [he] would get fired for five times late," even though he had been disciplined in the past for being late and was aware of the policy on tardiness. The Grievant denied being late those five times, but did not grieve them even after he was pay was docked. He also said "there was nobody who could tell if he was late or not. I could have put down 7:00." He denied threatening to kill Ms. Chasten, but rather explained that he was angry and hostile when he told his psychiatrist that "If I had a gun, I probably would have shot her." The Grievant somehow knew when Ms. Chasteen "she was going to have me removed," although he never worked with her before except when he had worked a third overtime shift she had told him in a "snotty manner" how to do something. He stated that every time he was late "I worked overtime all those days".

POSITIONS OF THE PARTIES

State Position

The State contends that the removal was for just cause and the grievance should be denied. It maintains that the Grievant violated the WRPH policy in which all employees are expected to be at work at the start of their shift. The Grievant was aware of that policy and had been disciplined four times in the past for tardiness. According to the State, the Grievant is not believable because previously in the grievance procedure, he said he had excuses for his being late but now he has changed his story saying that he was at work on time. The State emphasizes that the Grievant was not harassed, but that supervisors took appropriate corrective action in his case. It also points out that the Grievant had received progressive discipline in the past. According to the State, the Grievant's conduct has now reached the stage where removal is the appropriate discipline based upon the principles of just cause.

Union Position

The Union contends that the removal was not for just cause and that the grievance should be sustained. According to the Union, the Grievant was at work on time in two of the five tardy occasions charged against him. The Union maintains that the Grievant was only trying to comply with Ms.Chasteen's order by signing in at the time he actually notified Central Staffing of his presence at work. Since there is no way that the Grievant's actual arrival time can be verified, the Union asserts that he is now being punished for complying with a direct order in contravention of the principles of just cause.

The Union also points out that the Grievant is a long service employee who is "well aware of Central Staffing's ability to doctor arrival time, but he would not put in 7: 00 for fear of being accused of falsification." It emphasizes that no other employee had been subjected to such scrutiny as to clothes, beeper, etc. According to the Union, Ms. Chasteen has put undue pressure on the Grievant. The Union maintains that his past discipline is evidence of a concerted effort to get rid of the Grievant. It asks as remedy, therefore, that the removal be rescinded and that the Grievant be restored to his previous position and made whole in every respect.

ANALYSIS

The Arbitrator, after a careful and complete review of the record, concludes that the removal was for just cause. There is no dispute that the WRPH Timekeeping policy #3-6 clearly requires employees to sign in "at the exact hour and minute that they arrive for work," and that the Grievant was provided a copy and was given training concerning that rule. That is the procedure Ms. Chasteen said employees were to follow, including the Grievant. The sign in sheet provides that the "ACTUAL TIME" be recorded. That makes sense since the sign in is not supervised directly, but rather is more like an honor system requiring the employee to accurately report his/her arrival time. Ms. Chasteen specifically denied telling the Grievant he had only to

record the time he spoke to Central Staffing. It also would not serve any purpose for an employee who is scheduled to begin work at 7:00 a.m. to sign in at some later time, except if the employee was late.

Note was also made that the Grievant raised various defenses in his grievance, but did not assert there that Ms. Chasteen had ordered him to act differently than the procedures set forth in Policy #3-6. Under these circumstances, the Grievant's testimony that Ms. Chasteen had ordered him to record the time he had spoken to Central Staffing is simply not credible.

Based upon the record, there is ample evidence that the Grievant was tardy on the five days as charged. In that regard, it is important to note that the Grievant never challenged or grieved any of those instances for which he had his pay docked. In his grievance, the Grievant provided specific excuses for his latenesses. At the Hearing, he raised a new defense, not mentioned in the grievance, that he was at work but had been distracted from signing in because of taking care of a patient who needed immediate attention. That defense is further suspect because the Grievant never informed supervision of that fact.

Another new defense sharing a similar problem of lack of credence is the Grievant's raising a car problem in his testimony as an excuse for an occasion of tardiness. No documentation was presented in support of this claim, thus it was given no weight in the decision-making process.

The Grievant also failed to present sufficiently reliable evidence to support his allegation that this discipline was part of some unexplained plot to harass him for reasons unknown. There is likewise insufficient evidence to support his contention that he received disparate treatment. The discipline in this case is because of the Grievant's unacceptable record of tardiness. As stated above, he knew or should have known his sign in responsibilities, but failed to conform to those requirements even in the face of past corrective discipline.

The sign in sheets in question demonstrate that the Grievant was tardy at least ten minutes on five occasions in a thirty day period. The WRPB Center Policy #3-6 states clearly and unambiguously that an employee who is tardy three times in thirty days is subject to discipline. If anything, the Grievant was treated more leniently than required by the policy. He has received progressive discipline in the past for failure to follow applicable rules and regulations, including tardiness. His record at the time of removal also contained three suspensions of six days each. Under such circumstances, the removal was for just cause and is the appropriate discipline for the behavior complained of by the State. Furthermore, the Grievant's long service is not a mitigating factor in the instant case because of his record and because such service only should have militated against the conduct complained, but did not.

AWARD

The grievance is denied. The Grievant's removal was for just cause.

MOLLIE H. BOWERS

Arbitrator

Date: December 7, 1993