

ARBITRATION DECISION NO.:

41

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation
and Mental Disabilities,
Columbus Developmental Center

DATE OF ARBITRATION:

DATE OF DECISION:

August 19, 1987

GRIEVANT:

Mary Hess

OCB GRIEVANCE NO.:

G-87-0942

ARBITRATOR:

Andrew J. Love

FOR THE UNION:

Michael Fuscardo

FOR THE EMPLOYER:

Carol Bowshier

KEY WORDS:

Just Cause
Progressive Discipline

ARTICLES:

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

CASE SYNOPSIS:

ISSUES:

Whether the Grievant was disciplined for "just cause", and whether the principles of progressive discipline were adhered to.

FACTS:

Grievant has been employed with the Columbus Developmental Center (CDC) as a Hospital Aide for approximately fourteen (14) years. In August, 1986, CDC instituted a smoking policy which prohibited smoking in areas which are likely to cause fires and where butts or other smoking paraphernalia could be ingested by residents. Prior to the incident in question which resulted in the Grievant receiving a three (3) day suspension, the Grievant had received a written reprimand for the offense of smoking in a prohibited area. On September 26, 1986, Grievant was observed smoking in a prohibited area. Grievant was given notice of the offense, after which a pre-disciplinary hearing was held on October 24, 1986. The discipline was made effective on November 25, 1986.

ARBITRATOR'S OPINION:

After reviewing the relevant facts and listening to the testimony of both parties, the Arbitrator found that the disciplinary action was appropriate.

The Arbitrator was persuaded by the evidence that the Grievant was indeed smoking in a prohibited area. Additionally, CDC was clearly within the forty-five (45) day requirement from the date of the recommendation of suspension to the date of the order for suspension. The disciplinary action taken was clearly commensurate with the offense.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

ARBITRATION

**DEPARTMENT OF MENTAL
RETARDATION AND
MENTAL DISABILITIES**

AND

**O.C.S.E.A. LOCAL 11
A.F.S.C.M.E. AFL-CIO**

(MARY HESS GRIEVANCE)

ARBITRATOR:

Andrew J. Love

APPEARANCES:

**For Ohio M.R.D.D.:
MICHAEL FUSCARDO
MICHAEL DUCO**

For O.C.S.E.A./A.F.S.C.M.E.:

CAROL BOWSHIER
JOHN T. PORTER, ESQ.

DECISION AND AWARD

The issue presented in this proceeding is whether the three (3) day suspension of the Grievant by the Columbus Developmental Center (hereinafter "CDC"), a branch of the Ohio Department of MRDD, on December 8-10, 1986 was without "just cause" and therefore in violation of Section 24.01 for the parties' collective bargaining agreement. In addition, other issues include whether the disciplinary action taken was timely made and whether the principles of progressive discipline were employed, both pursuant to Section 24.02 of the parties' collective bargaining agreement. The facts are as follows:

The Grievant has been employed with CDC as a Hospital Aide and has been so employed for a period of fourteen (14) years. On August 4, 1986, CDC caused to be issued a memorandum referencing its smoking policy issue in 1985. Such policy and memorandum prohibit smoking in areas which are likely to cause fires and where cigarette butts or other smoking paraphernalia could be ingested by residents of CDC. The August 4, 1986 memo prohibits smoking by employees in all areas except for employee break rooms. This latter memo was signed off by various employees, including the Grievant.

On January 29, 1986, the Grievant received a Letter of Reprimand for smoking in a prohibited area. On September 26, 1986, the Grievant was observed in the company of other employees on R & D-6 by Donna Haynes, Hospital Aide Supervisor II. Ms. Haynes stated that she observed the Grievant putting out a lighted cigarette in a wet paper towel. She further stated that she saw others with cigarettes and ordered those employees to put them out. She then reported the incident in respect to all persons involved to her supervisor.

Erika Knight, who was also on duty on the date in question, was seated at a table with the Grievant and two other employees. She stated that she observed the Grievant and others at the table smoking cigarettes. She further stated that, when Donna Haynes arrived in the back room area, a prohibited area for smoking cigarettes, the Grievant put her cigarette out in a wet paper towel and cursed Ms. Knight, presumably for not informing the Grievant that the supervisor was in the area.

A pre-disciplinary hearing was held on October 24, 1986, and a three (3) day suspension for failure of good behavior/neglect of duty was recommended by the agency. On November 25, 1986, the recommended disciplinary action was approved by Susan Arnoczky, Superintendent, CDC.

The Grievant at all stages of her grievance denied that she was one of the parties smoking in a prohibited area. She further stated that Erika Knight had put out a cigarette butt.

Helen Richter, Union Steward, stated that she represented the Grievant at her pre-disciplinary hearing. She stated that Donna Haynes testified that she did see the Grievant actually smoking a cigarette.

A number of joint exhibits were admitted into evidence, including the parties' collective bargaining agreement, the grievance trail, the disciplinary trail, the Grievant's prior Letter of Reprimand, the memorandum regarding smoking and accompanying sign-off sheet, and CDC's smoking policy for employees. Timely objections were interposed by CDC respecting the introduction by OCSEA/AFSCME of a written statement of Lynette Russell, one of the employees in the prohibited smoking area, for the reason that she was not present for this hearing.

It was argued by OCSEA/AFSCME that Ms. Russell could not be in attendance at this hearing for the reason that she was in the hospital. CDC argued that the inclusion into evidence of Ms. Russell's statement precludes and prevents CDC from cross-examining her.

As to the admissibility of Ms. Russell's written statement, this Arbitrator is guided by the position that, unless expressly required by the parties in submitting their case to an arbitrator, strict observance of legal rules of evidence is not necessary. Cf Instrument Workers v. Minneapolis Honey Well Company, 54 LRRM 2660 (U.S.C., 1963).

Furthermore, where a declarant is unavailable to testify at a hearing, a statement given by such declarant (either written or oral) falls within the exceptions to the hearsay rule provided such declarant is "unable to be present or to testify at the hearing because of...existing physical or mental illness or infirmity..." Ohio Rules of Evidence Rule 804(A)4. In the case of the statement written by Lynette Russell, it was established that she was unable to be present or to testify at this hearing because of an existing physical illness or infirmity. Therefore, this statement shall be admitted into evidence.

Turning now to the issue of whether the Grievant's suspension was for just cause, this Arbitrator is persuaded by the evidence that the Grievant was indeed smoking in a prohibited area. This Arbitrator was persuaded by the strength of the testimony of Donna Haynes and Erika Knight, notwithstanding the written statement of Lynette Russell, who stated that the Grievant was not smoking. This Arbitrator must weigh the credibility of the testimony of witnesses who appeared at this hearing for its own worthiness. Statements of unavailable witnesses must likewise be judged for their worth.

As to the matter of the timeliness of the order for the commencement of the disciplinary action imposed upon the Grievant, this Arbitrator finds that CDC was clearly within the forty-five (45) day requirement from the date of the recommendation of suspension (from the pre-disciplinary hearing) to the date of the order for suspension. Furthermore, this Arbitrator finds that the disciplinary action taken was not in violation of Section 24.02 of the parties' collective bargaining agreement.

Finally, in light of the sound reasoning for the establishment of CDC's policy on smoking restrictions, this Arbitrator finds that the disciplinary action taken is commensurate with the offense.

Accordingly, the grievance is DENIED.

August 19, 1987
DATE

ANDREW J. LOVE,
ARBITRATOR

COUNTY OF FRANKLIN
STATE OF OHIO