

ARBITRATION DECISION NO.:

43

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation
and Developmental Disabilities,
Broadview Developmental Center

DATE OF ARBITRATION:

July 23, 1987

DATE OF DECISION:

August 25, 1987

GRIEVANT:

Anthony Banks

OCB GRIEVANCE NO.:

G-86-0489

ARBITRATOR:

Harry Graham

FOR THE UNION:

Linda K. Fiely

FOR THE EMPLOYER:

Michael P. Duco

KEY WORDS:

Just Cause

ARTICLES:

Article 24 - Discipline
 §24.01-Standard
 §24.02-Progressive
Discipline
 §24.05-Imposition
of Discipline

FACTS:

Grievant was employed as a Hospital Aide at Broadview Developmental Center. Grievant had been employed in this position for approximately two and one-half (2-1/2) years. On July 2, 1986,

Grievant did not report for work as scheduled. The employer considered the Grievant absent without leave (AWOL). Grievant had not provided the employer with any notice of the absence nor was permission obtained for such absence. Prior to this incident Grievant had accumulated seven (7) incidents of discipline.

EMPLOYER'S POSITION:

It is the Employer's position that the Grievant was aware of the call-in policy of Broadview Developmental Center. Grievant did not call to indicate that Grievant would not report to work or that Grievant would report late. Grievant has been disciplined on several occasions prior to this event, therefore, Grievant has been put on notice that any continued infractions of institutional rules could lead to severe discipline. Given the serious nature of the offense, the Employer insists that the twenty (20) day suspension under review in this proceeding was justified.

UNION'S POSITION:

It is the Union's contention that the Grievant did not possess a telephone and was unable to call-in as per the employer's policy. This fact does not support a twenty (20) day suspension for just cause. There also is an element of disparate treatment in the situation. Several other employees have received less discipline for the same offense. Additionally the employer, which is the Department of Mental Retardation and Developmental Disabilities, has differing policies with respect to this offense according to its different facilities. The Union asserts that on this basis the suspension should be overturned.

ARBITRATOR'S OPINION:

The Arbitrator found that when the Grievant failed to report for work Grievant imposed a burden on the employer and fellow employees that manifests a disregard for job responsibilities. The Union is correct when it argues that, in principle, disparate disciplinary treatment can lead to a reduction in discipline. The evidence of disparate treatment in this case, however, is lacking. It is unreasonable to expect the employer to disregard other instances of discipline when determining a penalty. The Grievant's prior work record was relevant and may be used by the employer to tailor discipline to individual circumstances. Finally the Union's argument that the Department of Mental Retardation and Developmental Disabilities should impose discipline in a similar fashion throughout the state is unsupportable. Each facility must be permitted the discretion to deal with the variants of human behavior engaged in by its employees.

The Grievant was aware of the rules established for the given situation. By failing to report to work and to call-in, the Grievant was exposed to discipline. Based upon the foregoing facts, the grievance was denied.

AWARD:

Grievance is denied.

TEXT OF THE OPINION:

In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

**The State of Ohio, Department
of Mental Retardation and
Developmental Disabilities,
Broadview Developmental Center**

Case No.:

G86-0489

Grievant:

Anthony Banks

Appearances:

For OCSEA/AFSCME Local 11:

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Associate General Counsel
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For The State of Ohio:

Michael P. Duco
Ellen R. Flowers
Office of Collective Bargaining
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Introduction:

Pursuant to the procedures of the parties a hearing was held in this matter on July 23, 1987 before Harry Graham of Beachwood, OH. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post-hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on August 12, 1987 on which date the record was declared to be closed.

Issue:

At the hearing the parties were able to agree upon the issue in dispute between them. That issue is:

Was the twenty (20) day suspension of Anthony Banks for just cause under the Collective Bargaining Agreement? If not, what shall the remedy be?

Background:

There is agreement upon the events which give rise to this proceeding. The Grievant, Anthony Banks, has been employed as a Hospital Aide at Broadview Developmental Center in Broadview Heights, OH. At the time of the events under scrutiny in this proceeding he was assigned to the shift commencing at 11:00PM. On July 2, 1986 he did not report for work as scheduled. The State considered him to be absent without leave (AWOL). The Employer reasoned that the Grievant did not have permission for his absence. Nor was any notice received from Mr. Banks that he would not report received by the Developmental Center.

Prior to this incident the Grievant had been employed at the Broadview Developmental Center for about two and one-half (2 1/2) years. During that period he had accumulated several incidents of discipline. The record indicates that he had received a three day suspension in October, 1984 for neglect of duty, a written reprimand in July, 1985 for failing to report an injury sustained by a patient, a verbal warning in November, 1985 for taking disapproved absence, a written reprimand in January, 1986 for extending his lunch break without authorization, a written reprimand in April, 1986 for inattention to patients in his care and a ten day suspension in May, 1986 for sleeping on duty.

A grievance protesting the suspension was properly filed. It was processed through the procedure of the parties without resolution. There is agreement that the grievance is properly before the Arbitrator for decision on its merits.

Position of the Employer:

The State indicates that the Grievant has maintained that he overslept on July 2, 1986, thus missing the starting time of shift, 11:00PM. The Grievant indicated that he awoke at 2:30AM. This is some three and one-half (3 1/2) hours after the start of his scheduled work day. The Grievant did not call in to indicate he would not report or would report late. As will be discussed below, he asserts that he attempted to call the Developmental Center but that the telephone was inoperative. This tale should be viewed with skepticism in the State's opinion. Even if true, it does not excuse his actions, or more precisely his lack of action. His failure to report placed the Developmental Center in the position of requiring another employee to stay at work. This is due to the continuing need for care manifested by people under the custody of the Grievant and his colleagues.

The Grievant was aware of the call-in policy of Broadview Developmental Center. He had been disciplined on several occasions prior to this event. He was on notice that continued infractions of institutional rules could lead to severe discipline. Other employees at the Developmental Center had received discipline of similar magnitude when their offenses and work histories were similar to Banks'. Given the serious nature of his offense and his sorry work record the State insists that the twenty day suspension under review in this proceeding was justified.

Position of the Union:

The Union is in agreement with the State that the Grievant overslept and did not report for work as scheduled on July 2, 1986. Upon awakening he was aware of his obligation to call-in. However, he did not possess a telephone. Consequently, he dressed and visited the home of his girlfriend to use her phone to call the Center. Her phone was found to be inoperative. This account of events is confirmed by Banks' girlfriend, Mary Walters. Recognizing he would not be able to contact the Center, Banks went back to sleep at Walters residence. Later on the morning of July 3, 1986 he was able to successfully telephone the Center, a fact confirmed by a supervisor.

In the opinion of the Union these facts do not support a twenty day suspension. The Agreement at Section 24.01 provides for "just cause" for imposition of discipline. Section 24.02 indicates that

discipline must be commensurate with the offense and Section 24.05 provides that discipline must be reasonable and not utilized as punishment. These sections of the Agreement were violated by the State when it suspended Anthony Banks for twenty days in the Union's view.

There is an element of disparate treatment in this situation. Several other employees received lesser discipline for being absent without leave. In addition, the Union asserts that the "employer" in this instance should properly be regarded to be the Department of Mental Retardation and Developmental Disabilities. Other facilities operated by the Department, e.g. Warrensville, near to Broadview, have somewhat different policies with respect to discipline for AWOL. The Grievant's instance of AWOL might have resulted in some lesser penalty at Warrensville. As this is the case, the suspension should be overturned the Union asserts.

Discussion:

The Agreement at Section 24.01 establishes the traditional standard of just cause for imposition of discipline. It is against that standard that the suspension under review in this proceeding must be evaluated.

The people in Mr. Banks' care have very severe mental disabilities. To a large extent they are incapable of fending for themselves in any meaningful fashion. They require continuing supervision and assistance. When the Grievant failed to report on July 2, 1986 he imposed a burden on the Employer and fellow employees that manifests a disregard for his responsibilities.

The Union is on firm ground when it argues that in principle disparate disciplinary treatment of employees is to be avoided. The record in this case does not reveal the sort of disparate treatment that would prompt alteration of the suspension. Certainly prior to this event the Grievant had established an unenviable work record. That record is replete with instances of discipline. To view imposition of the twenty day suspension for AWOL in isolation and claim that other employees who have been AWOL have received lesser discipline is inappropriate. It is unreasonable to expect the Employer to disregard other instances of discipline when determining a penalty. Complete homogeneity of discipline can scarcely be expected. What is required is a range of reasonableness, tailoring discipline to individual circumstances. That is what occurred in this instance.

The Union argument that the Department of Mental Retardation and Developmental Disabilities should impose discipline in similar fashion throughout the State is unsupportable. Each facility faces circumstances unique to it. Each must be permitted discretion to deal with the innumerable variants of human behavior engaged in by employees. What is of the essence is that employees be aware of the rules that apply to them. In this instance that test is met. Rules were clearly established. Banks was aware of them. He was informed of the consequences that might flow from a further infraction. By failing to report on July 2, 1986 and in failing to properly inform the Employer he exposed himself to discipline.

Award:

Based upon the preceding discussion the grievance is DENIED.

Signed and dated this 25th day of August, 1987 at Beachwood, OH.

Harry Graham
Arbitrator

