ARBITRATION DECISION NO.:
57

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

EMPLOYER:
Department of Transportation,
District 12

DATE OF ARBITRATION:
October 9, 1987

DATE OF DECISION:
November 9, 1987

GRIEVANT:
Frank M. Figer

OCB GRIEVANCE NO.:
G-87-0319

ARBITRATOR:
Thomas P. Michael

FOR THE UNION:
Daniel S. Smith

FOR THE EMPLOYER:
Timothy D. Wagner

KEY WORDS:
Just Cause
Removal
Absenteeism

ARTICLES:
Article 5 - Management Rights
Article 7 - Other Than Permanent Positions
Article 9 - Employee Assistance Program
Article 23 - Personnel Records
Article 24 - Discipline

§24.01-Standard
§24.02-Progressive
Discipline
§24.05-Imposition
of Discipline
§24.08-Employee
Assistance Program
Article 31 - Leaves
of Absence
§31.01-Unpaid Leaves
§31.02-Application
for Leave
§31.03-Authorization
for Leave

FACTS:

Grievant was an employee of the Ohio Department of Transportation as a Highway Worker II. He was employed from September 21, 1981p through December 5, 1986, the date of his removal. Records establish that Grievant was counseled on September 9, 1985, for four instances of unexcused tardiness between June 27, 1985, and September 9, 1985. Two (2) weeks thereafter, on September 23, 1985, Grievant received a "written verbal warning" for two (2) more instances of tardiness on September 20 and September 23, 1985. On July 10, 1986, Grievant received a written reprimand for unauthorized absence and finally on October 21, 1986, Grievant reported to work four (4) hours late which ultimately led to his dismissal.

EMPLOYER'S POSITION:

The Grievant was removed from employment for just cause. Grievant's dismissal was the combination of a two (2) year pattern of unauthorized absences and tardiness, as reflected in the prior disciplines assessed against him. His supervisor had counseled him in the past toward correcting his attendance problems to no avail.

By Grievant's own admission he failed to call in by 8:00 a.m. on October 21, 1986, to report that he would be late. His four (4) hour unexcused absence from the workplace occurred less than one (1) month after a ten (10) day suspension which also had been imposed in part for unauthorized absence. The Employer had applied its disciplinary rules in a consistent, non-discriminatory manner against the Grievant.

UNION'S POSITION:

Grievant was not removed for just cause. The record establishes that there is no grievance absenteeism problem. Grievant received counseling and a written verbal warning in September, 1985, for excessive tardiness, but those infractions were for minimal amounts of time and the Grievant corrected his tardiness problem. In fact, Grievant was not tardy at any time between September 23, 1985, and October 21, 1986, the date of the incident which serves as the basis for removal. While a lesser discipline may be merited, this violation does not constitute just cause for removal. No reasonable person could conclude otherwise on the facts of this case.

ARBITRATOR'S OPINION:

The evidence is uncontradicted that the Grievant was on notice of the work rules requiring him to call in to report his absence from work by 8:00 a.m. There is no dispute that Grievant failed to abide by that rule on October 21, 1986. The records and testimony established that Grievant had

six (6) instances of unexcused tardiness between June 27, 1985, and September 23, 1985. Furthermore, Grievant received a ten (10) day suspension in September, 1986, for insubordination, abusive language, sleeping on duty and unauthorized absence. The Arbitrator did not agree that the October 21, 1986, violation was an isolated unrelated incident and therefore was unable to conclude that the discipline imposed was unjust or unfair in light of Grievant's performance immediately preceding his removal.

AWARD:

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

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF TRANSPORTATION DISTRICT 12, EMPLOYER

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION LOCAL NO. 11, AFSCME AFL-CIO

FRANK M. FIGER, GRIEVANT

THOMAS P. MICHAEL, ARBITRATOR
COLUMBUS, OHIO

By request of the Ohio Department of Transportation, through the Office of Collective Bargaining (hereinafter "Employer"), and the Ohio Civil Service Employees Association (hereinafter "Union"), Thomas P. Michael agreed to serve as the Arbitrator herein.

The parties have stipulated that the Grievant, Frank M. Figer, was an employee of the Employer, having been hired on September 21, 1981. They have also stipulated that Figer was classified as a Highway Worker 2 at the time of his discharge and that the grievance is properly before this Arbitrator for decision. A formal hearing was held at the Ohio Office of Collective Bargaining in Columbus, Ohio, on October 9, 1987. This matter has been submitted to the Arbitrator on the testimony, exhibits and authorities proffered at the hearing.

APPEARANCES:

For the Employer:

Timothy D. Wagner
Office of Collective Bargaining

For the Union:
Daniel S. Smith
General Counsel
OCSEA/AFSCME Local 11

STATUTES, RULES AND CONTRACT PROVISIONS

The following authorities and contractual provisions bear on a determination of this case:

Section 124.34, Revised Code. The tenure of every ... employee in the classified service of the state ... shall be during good behavior and efficient service and no such ... employee shall be ... suspended, or removed, except as provided in Section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services ... or any other failure of good behavior ... .

Directive No. A-301, ODOT: DISCIPLINARY ACTIONS (Joint Exhibit 3)

* * *

III. Types of Disciplinary Action

The following are types of disciplinary actions that will be utilized in this department. Variations of these actions are not authorized.

A. Verbal Reprimand - This action must be accompanied by a memorandum for record in the employee's personnel file stating the nature of the offense, time, and place. This memo will be signed by the issuing supervisor and the employee acknowledging the reprimand or if the employee refuses to sign this should be witnessed by another employee.

B. Written Reprimand - This action states in writing to the employee the specific violation for which the reprimand is being given. This letter should state " written reprimand" in the subject. This will ensure the employee knows disciplinary action is being imposed. A copy of each written reprimand will be sent to Central Office, Personnel Bureau, to be placed in the employee's personnel file.

C. Suspension (minor) - This action is for a maximum of three (3) working days. A suspension of this type is not appealable to the State Personnel Board of Review.

* * *

VI. Progressive Constructive Discipline

The Ohio Department of Transportation believes in and utilizes the policy of progressive constructive discipline. For minor offenses, the first step is corrective counseling. However, some offenses are of such serious nature that immediate disciplinary action is warranted.

Uniform guidelines have been developed to assist in complying with this policy. These guidelines

will serve to notify employees of the type of discipline that will be given for specific violations of the rules and regulations of the State of Ohio and the Department of Transportation.

These guidelines are to be applied after corrective counseling (VERBAL REPRIMAND WITH NOTATIONS IN EMPLOYEE'S RECORD) unless a major offense warrants immediate disciplinary action.

The degree of seriousness of the offense will determine which of the alternative measures will be taken.

* * *

VIOLATIONS/OCCURRENCES WITHIN 24 MONTH PERIOD

15. Unexcused tardiness, leaving early, or extended lunch hour.
1st Occurrence - Counseling/Written Reprimand; 2nd - Written Reprimand/Suspension; 3rd - Suspension; 4th - Removal.

16. Unauthorized absence.
1st Occurrence - Written Reprimand; 2nd - 1 Day Suspension; 3rd - 5 Day Suspension; 4th - Removal

CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08(C) numbers 1-9.

ARTICLE 9 - EMPLOYEE ASSISTANCE PROGRAM

The Employer and the Union recognize the value of counseling and assistance programs to those employees who have personal problems which interfere with their job duties and responsibilities. The Union and the Employer, therefore, agree to continue the existing E.A.P. and to work jointly to promote the program.

The parties agree that there will be a committee composed of nine (9) union representatives that will meet with and advise the Director of the E.A.P. This committee will review the program and discuss specific strategies for improving access for employees. Additional meetings will be held to follow up and evaluate the strategies. The E.A.P. shall also be an appropriate topic for Labor-Management Committees.

The Employer agrees to provide orientation and training about the E.A.P. to union stewards. Such training shall deal with the central office operation and community referral procedures. Such training will be held during regular working hours. Whenever possible, training will be held for stewards working second and third shifts during their working time.

Records regarding treatment and participation in the E.A.P. shall be confidential. No records

shall be maintained in the employee's personnel file except those that relate to the job or are provided for in Article 23.

If an employee has exhausted all available leave and requests time off to have an initial appointment with a community agency, the Agency shall provide such time off.

The Employer or its representative shall not direct an employee to participate in the E.A.P. Such participation shall be strictly voluntary.

Seeking and/or accepting assistance to alleviate an alcohol, other drug, behavioral or emotional problem will not in and of itself jeopardize an employee's job security or consideration for advancement.

ARTICLE 24 - DISCIPLINE

§24.01 - Standard

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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

§24.02 - Progressive Discipline

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

A. Verbal reprimand (with appropriate notation in employee's file)
B. Written reprimand;
C. Suspension;
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

§24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and

shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situation which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

* * *

§24.08 - Employee Assistance Program

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program, the Employee will give serious consideration to modifying the contemplated disciplinary action.

* * *

ARTICLE 31 - LEAVES OF ABSENCE

§31.01 - Unpaid Leaves

The Employer shall grant unpaid leaves of absence to employees upon requests for the following reasons:

A. If an employee is serving as a union representative or union officer, for no longer than the duration of his/her term of office up to four (4) years. If the employee's term of office extends more than four (4) years, the Employer may, at its discretion, extend the unpaid leave of absence. Employees returning from union leaves of absence shall be reinstated to the job previously held. The person holding such a position shall be displaced.
B. If an employee is pregnant, up to six (6) months leave after all other pay has been used.
C. For an extended illness up to one (1) year, if an employee has exhausted all other paid leave. The employee shall provide periodic, written verification by a medical doctor showing the diagnosis, prognosis and expected duration of the illness. Prior to requesting an extended illness leave, the employee shall inform the Employer in writing of the nature of the illness and estimated length of time needed for leave, with written verification by a medical doctor. If the Employer questions the employee's ability to perform his/her regularly assigned duties, the Employer may require a decision from an impartial medical doctor paid by the Employer as to the employee's ability to return to work. If the employee is determined to be physically capable to return to work, the employee may be terminated if he/she refuses to return to work.

The employer may grant unpaid leaves of absence to employees upon request for a period not to exceed one (1) year. Appropriate reasons for such leaves may include, but are not limited to, education; parenting (if greater than ten (10) days); family responsibilities; or holding elective office (where holding such office is legal).

The position of an employee who is on an unpaid leave of absence may be filled on a temporary basis in accordance with Article 7. The employee shall be reinstated to the same or a similar position if he/she returns to work within one (1) year. The Employer may extend the leave upon the request of the employee.

If an employee enters military service, his/her employment will be separated with the right to reinstatement in accordance with federal statutes.

§31.02 - Application for Leave

A request for a leave of absence shall be submitted in writing by an employee to the Agency designee. A request for leave shall be submitted as soon as the need for such a leave is known. The request shall state the reason for and the anticipated duration of the leave of absence.

§31.03 - Authorization for Leave

Authorization for or denial of a leave of absence shall be promptly furnished to the employee in writing by the Agency designee.

ISSUES

The parties stipulated to the following issue:

WAS THE GRIEVANT, FRANK FIGER, DISCIPLINED BY TERMINATION FOR JUST CAUSE? IF NOT, WHAT SHOULD THE REMEDY BE?

FACTUAL BACKGROUND

The Grievant, Frank M. Figer, was an employee of the Ohio Department of Transportation, District 12, assigned to the Mayfield Yard, at the time of his removal on December 5, 1986. His classification at the time of his discharge was Highway Worker 2. He was employed from September 21, 1981, through December 5, 1986.

On October 21, 1986, Grievant was assigned first shift duty with a reporting time of 7:30 a.m. At 10:45 a.m., Mr. Figer called in to report that he had overslept and he subsequently reported to the workplace by 11:30 a.m. Subsequently he was removed for unauthorized absence on October 21, 1986, effective at the close of business on December 5, 1986. (Joint Exhibit 2-5).

The grievance was filed on December 5, 1986, requesting reinstatement and back pay.

POSITION OF THE EMPLOYER

The Grievant was removed from employment for just cause and consistent with the Management Rights provisions of Article 5 of the collective bargaining agreement. Mr. Figer's dismissal was the culmination of a two-year pattern of unauthorized absences and tardiness, as reflected in his prior disciplines assessed against him. His supervisor had counseled him in the past toward correcting his attendance problems to no avail.

By Grievant's own admission he failed to call in by 8:00 a.m. on October 21, 1986, to report that he would be late. His four-hour unexcused absence from the workplace followed by less than one month a ten-day suspension which also had been imposed in part for unauthorized absence. The Employer has applied its disciplinary rules in a consistent manner and has not discriminated against the Grievant. The grievance should be denied.

POSITION OF THE UNION

The Employer is straining to assert that Grievant has exhibited a pattern of absenteeism. The record establishes that there is no generic absenteeism problem. Grievant received counseling and a written verbal warning in September, 1985, for excessive tardiness (Joint Exhibits 2-1, 2-2), but those infractions were for minimal amounts of time and the Grievant corrected his tardiness problem. In fact, Grievant was not tardy at any time between September 23, 1985, and October

21, 1986, the date of the incident which serves as the basis for removal.

The written reprimand received by Grievant for his unauthorized absenteeism on July 10, 1986, would not have occurred had he not exhausted his available sick leave due to disability. Regardless, management could have granted authorized leave without pay for that absence.

Grievant has been subjected to disparate and discriminatory discipline. Other employees have demonstrated more severe absenteeism problems but have been given more lenient treatment because of their participation in the Employee Assistance Program, which was not needed by the Grievant.

Finally, while a lesser discipline may be merited, this violation does not constitute just cause for removal. No reasonable person could conclude otherwise on the facts of this case.

OPINION

In weighing the evidence in this difficult case, this Arbitrator has been mindful of the fact that the Employer has levied a discipline often termed "economic capital punishment" against the Grievant. The weight of credible authority is of the view that this ultimate punishment places the burden on the employer to demonstrate by at least a preponderance of the evidence proof of wrongdoing sufficient to support discharge (See, e.g., Elkouri, How Arbitration Works, 3d ed., pages 661-662).

This Arbitrator is also mindful of the limits of his authority under the Contract. The Contract provides that the arbitrator does not have the power to add to, subtract from or modify any of the terms of the Contract (Section 25.03). It further places the burden on the employer to establish just cause for this termination in the context of the principles of progressive discipline (Sections 24.01, 24.02). The issue is not whether this Arbitrator may himself have meted out a lesser discipline under the circumstances but whether the discipline would be considered fair and appropriate by a reasonable man.

The evidence is uncontradicted that the Grievant was on notice of the work rules requiring him to call in to report his absence from work by 8:00 a.m. There is no dispute that Grievant failed to abide by that rule on October 21, 1986. The task of this Arbitrator therefore resolves itself to a determination as to whether the Employer terminated the Grievant in accordance with the progressive discipline standards of the Contract and in a non-arbitrary, non-discriminatory manner.

The Grievant's disciplinary record is set forth in Joint Exhibit 2. Those records and the testimony establish that Grievant was counseled on September 9, 1985, for four instances of unexcused tardiness between June 27, 1985, and September 9, 1985. This discipline was not grieved by Mr. Figer and is in accordance with the Employer's work rules (Joint Exhibit 3). Two weeks thereafter, on September 23, 1985, Grievant received a "written verbal warning" for two more instances of tardiness on September 20 and September 23, 1985. This entirely fair discipline also was not grieved by Mr. Figer.

On July 10, 1986, Grievant received a written reprimand for unauthorized absence. No grievance was filed to challenge this disciplinary action. Grievant argues that he was not granted authorized leave at that time because it was thought that he had no sick leave available. (The parties stipulated that his sick leave was exhausted as a prerequisite to obtaining disability leave for a period in January and February, 1986.) Grievant testified that he was unaware until a later date that additional sick leave time was granted to employees when the Contract became effective on July 1, 1986. It is argued on his behalf that he could have utilized that sick leave on July 10. 1986, thereby avoiding the discipline imposed on that day.

This Arbitrator has a two-fold problem with the latter assertion. First of all, the stated reason for Grievant's absence on July 10, 1986, does not constitute an illness as defined by Section 29.01 of

the Contract. Therefore his absence was not excusable on that ground. Secondly that incident was followed in short order by a ten-day suspension received in September, 1986, for insubordination, abusive language, sleeping on duty and unauthorized absence. This substantial discipline, which was imposed for the period between September 22, 1986, and October 3, 1986, also was not grieved by Mr. Figer.

The incident which forms the basis for the removal order then followed within fifteen days after Grievant returned from serving the ten-day suspension.

Without question the Grievant improved his absenteeism/tardiness problems between September, 1985, and July, 1986. Unfortunately, the Grievant was guilty of three related violations within a three and one-half month period. The Arbitrator does not agree that the October 21, 1986, violation is an isolated unrelated incident. While this Arbitrator agrees that the discipline imposed is unquestionably severe I am unable to conclude that it is unjust or unfair in light of the performance of the Grievant in the months immediately preceding his removal.

Similarly, the Union has not demonstrated that employee Thomas Kearns or any other employee was treated in a significantly more lenient manner. Mr. Kearns was also removed following a ten-day suspension for related violations involving tardiness and unauthorized absences.

AWARD

The grievance is denied. The Employer has demonstrated just cause for the order of removal against the Grievant, Frank M. Figer.

Thomas P. Michael, Arbitrator

Rendered this Ninth day
of November, 1987, at
Columbus, Franklin County, Ohio

CERTIFICATE OF SERVICE

I hereby certify that the original Opinion and Award was mailed to Eugene Brundige, Deputy Director, Ohio Department of Administrative Services, 65 E. State Street, 16th Floor, Columbus, Ohio 43215, with copies of the foregoing Opinion being served by United States Mail, postage prepaid, this 9th day of November, 1987, upon: Timothy D. Wagner, Office of Collective Bargaining, 65 E. State Street, 16th Floor, Columbus, Ohio 43215, and Daniel Smith, General Counsel, OCSEA/AFSCME Local 11, 995 Goodale Boulevard, Columbus, Ohio 43212.

Thomas P. Michael