ARBITRATION DECISION NO.:
66

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

EMPLOYER:
Department of Mental Retardation
and Developmental Disabilities,
Warrensville Developmental Center

DATE OF ARBITRATION:
October 26, 1987
October 30, 1987

DATE OF DECISION:
December 3, 1987

GRIEVANT:
Heriold James

OCB GRIEVANCE NO.:
G-87-0985

ARBITRATOR:
Thomas P. Michael

FOR THE UNION:
Linda Kathryn Fiely

FOR THE EMPLOYER:
David Norris

KEY WORDS:
Discharge
Just Cause
Employee Assistance Program
Drinking On Duty

ARTICLES:
Article 5 - Management
Rights
Article 9 - Employee
Assistance Program
Article 23 - Personnel
Records

Article 24 - Discipline
§24.01-Standard
§24.02-Progressive Discipline
§24.05-Imposition of Discipline
§24.06-Prior Disciplinary Actions
§24.08-Employee Assistance Program
Article 25 - Grievance Procedure
§25.03-Arbitration Procedures
§25.04-Arbitration Panel

FACTS:

Grievant was employed for 5 years as a Hospital Aide at the Warrensville Developmental Center in the Department of Mental Retardation and Developmental Disabilities. Grievant was terminated for possession of and consuming an alcoholic beverage while on duty. The Grievant admitted to possession and consumption of beer when confronted on the night of the incident; however, it was stipulated that Grievant was not negligent in the performance of his duties on the night in question.

EMPLOYER'S POSITION:

The position of the Employer was that the dismissal was justified and was neither arbitrary, discriminatory, nor capricious. The Employer fully supported the Employee Assistance Program (EAP) but noted that it was not intended as a refuge from discipline. Further, the language of Section 24.08 was permissive, not mandatory.

UNION'S POSITION:

The position of the Union was that the penalty of discharge of a five year employee with a clean record for a single incident of possession of and consumption of beer was not commensurate with the offense. In addition, the work rules of the Employer are unclear as to the penalty for the Grievant's admitted violation and do not provide justification for bypassing progressive discipline.

ARBITRATOR'S OPINION:

The Arbitrator held that the Employer has the burden of proof to establish just cause for discharge of the Grievant. The ultimate severity of the punishment imposed places the burden on the Employer to demonstrate by at least a preponderance of the evidence proof of wrongdoing sufficient to support the discharge. The Arbitrator agreed that the work rules of the Employer did not clearly establish the Employer's right to bypass progressive discipline for this particular offense. Finally, there is no evidence that Grievant's resort to EAP was anything other than a sincere effort to seek treatment for a legitimate alcohol related problem.

Having determined that Grievant was not terminated for just cause, the duty fell on the Arbitrator to formulate an appropriate remedy.

The Arbitrator found a ninety-day suspension was appropriate, taking into account the

seriousness of the violation as well as Grievant's cooperation and clean disciplinary record.

AWARD:

The termination of the Grievant is hereby reduced to a ninety (90) day suspension without pay.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES

AND

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

HERIOLD JAMES, GRIEVANT

GRIEVANCE NO.:
G-87-0985

THOMAS P. MICHAEL, ARBITRATOR COLUMBUS, OHIO

This is a proceeding pursuant to Article 25, Sections 25.03 and 25.04, Arbitration Procedures and Arbitration Panel, of the Contract between the State of Ohio, Department of Mental Retardation and Developmental Disabilities, (hereinafter "Employer") and the Ohio Civil Service Employees Association, Local 11, AFSCME/AFL-CIO, (hereinafter “Union”).

Pursuant to the Contract, the parties selected Thomas P. Michael as the Arbitrator. The hearing was commenced at the Office of Collective Bargaining on October 26, 1987; a supplemental hearing was held by agreement of the parties and the Arbitrator on October 30, 1987. This matter has been submitted to the Arbitrator on the testimony and exhibits offered at the hearing and certain authorities provided the Arbitrator after the hearing. The record herein was closed on November 5, 1987, upon receipt of authorities proffered by the Union. The parties stipulated that the grievance is properly before the Arbitrator for decision.

APPEARANCES:

For the Employer:
David Norris
Freddie M. Sharpe

Office of Collective Bargaining

For the Union:
Linda Kathryn Fiely
Associate General Counsel
OCSEA/AFSCME Local 11

ISSUE

The parties stipulated that the issues before the Arbitrator are:

Was Heriold James terminated for just cause? If not, what shall the remedy be?

Did management violate Section 24.08 of the Agreement when it did not consider EAP involvement in the removal of Heriold James?

PERTINENT STATUTORY AND CONTRACTUAL PROVISIONS.

Section 4117.08(C), Ohio Revised Code.

Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

* * *

(2) Direct, supervise, evaluate, or hire employees:

* * *

(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees:

* * *

(8) Effectively manage the work force . . .

CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employee 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(A) 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.

§24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

This provision shall be applied to the records and placed in an employee's file prior to the effective date of this Agreement.

§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.

* * *

FACTUAL BACKGROUND

The Grievant, Heriold James, was employed by the Department of Mental Retardation and Developmental Disabilities ("Employer") as a Hospital Aide assigned to Warrensville Developmental Center. This employee, who has no prior disciplinary record, held that position for nearly five years, from April 5, 1982, until March 2, 1987. Grievant was terminated for "possession of and consuming an alcoholic beverage" while on duty on January 11, 1987. Mr. James admitted to possession and consumption of beer when confronted on the night of the incident. However, the parties have stipulated that Grievant was not negligent in the performance of his duties on January 11, 1987.

The grievance (Joint Exhibit 1) seeks reinstatement of Grievant to his former position.

POSITION OF THE EMPLOYER

Grievant was terminated for just cause for admittedly possessing and consuming alcohol on the grounds of Warrensville Developmental Center. He was on notice (Joint Exhibit 4) that removal from employment was a foreseeable consequence of that violation of the work rules of the employer.

Considering the needs of the clients served by Grievant, namely severely retarded individuals requiring twenty-four hour attention, dismissal of Grievant was justified and was neither arbitrary, discriminatory nor capricious. While the Employer fully supports the Employee Assistance Program ("EAP") established by the Contract, that program is not intended for use as a refuge from discipline. Grievant did not enter EAP until after the incident which gave rise to his termination.

Further, the language of Section 24.08 is permissive, not mandatory. The criteria used by the Employer to determine whether or not to delay discipline is threefold:

(1) There must be some manifestation of a personal problem in the workplace;
(2) The Employer must be informed of that problem either prior to or in the course of the pre-disciplinary hearing; and
(3) The Employee must follow departmental policies and procedures while enrolled in EAP.

In this instance the Employer was not informed of Grievant's participation in EAP in a timely manner and therefore had no duty to consider application of Section 24.08 of the Contract.

POSITION OF THE UNION

Removal of this five-year employee with a clean record for a single incident of possession of and consumption of beer in the workplace is a penalty not commensurate with the offense. Just cause for removal has not been demonstrated.

The work rules of the employer are unclear as to the penalty for Grievant's admitted violation. For example, those rules specifically provide (Joint Exhibit 3, par. III. D.) that one single incident of intoxication on the job does not constitute the “major offense” of "drunkenness”. There is no evidence in this case of endangerment of the treatment, care, health and safety of the clients in Grievant's charge. Nor is there any evidence that Grievant was intoxicated on the evening of January 11, 1987. Therefore the work rules of the Employer (Joint Exhibit 3, par. IV. B. 5.) do not provide justification for bypassing progressive discipline in this case.

Grievant has an alcohol abuse problem which first manifested itself in the workplace on January 11, 1987. He immediately thereafter sought the assistance of EAP and the Employer has abused its discretion in not deferring its disciplinary action pending Grievant's participation in that program.

The Employer has not been consistent in its disciplines for this offense, as witnessed by the case of Stanley Pierce, who was given only a fifteen day suspension for possession of beer in the workplace and numerous other rules violations for an incident which occurred on November 21, 1986. It is ludicrous for the Employer to argue that an employee such as Mr. Pierce, who has a history of alcohol-related job performance problems, is entitled to the sanctuary of EAP while an employee such as Grievant, who has a clean record, may not have equal access to EAP.

OPINION

By Contract, the Employer has the burden of proof to establish just cause for termination of the Grievant (Section 24.01). The ultimate severity of the punishment imposed on this Grievant 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). In this instance, the evidence presented by the Employer falls far short of meeting that burden.

The Employer has enunciated a threefold "test" for determining whether or not Section 24.08 of the Contract is applicable. Even accepting that test, the weight of the evidence in this case is persuasive that the Employer was informed at least as early as the pre-disciplinary hearing of Grievant's alcohol related problem and of his participation in the Employer Assistance Program. Therefore, even accepting the Employer's own self-stated criteria, this employee must be reinstated.

Further this Arbitrator agrees that the work rules of the Employer do not clearly establish the Employer's right to bypass progressive discipline for this particular offense. Even assuming that the work rules in effect on March 22, 1985, when Grievant received in-service training, provided for immediate removal for Grievant's violation (Joint Exhibit 4, par. V. A. 1,2), the later-issued Disciplinary Policy (Joint Exhibit 3) apparently changes the test for immediate removal for drinking alcohol to certain major offenses which constitute neglect of duty or render an employee unable to properly perform his duties. The parties have stipulated that the Grievant was not negligent in the performance of his duties on January 11, 1987.

Finally, there is no evidence that Grievant's resort to EAP was anything other than a sincere effort to seek treatment for a legitimate alcohol-related problem. Therefore, this Arbitrator must also conclude that the Employer has not evenly applied Section 24.08 of the Contract, as witnessed by the treatment accorded Mr. Pierce for a similar violation, as well as the deference accorded other employees with alcohol-related problems identified in this record.

Having determined that Grievant was not terminated for just cause, the duty now falls on this Arbitrator to formulate an appropriate remedy. In light of the high duty of care necessary for the clients assigned to Grievant, this Arbitrator agrees with the Employer that a substantial discipline is justified, although not termination. The Union has offered numerous arbitral authorities in support of its position. It is interesting to note that in all but one of those cases no back pay was awarded the reinstated grievants. A sixty-day suspension was meted out by Arbitrator Hewitt in the case of Ohio River Company and United Steelworkers of America, 83 L A 211. In the opinion of this Arbitrator a reasonable penalty in this matter falls somewhere in between those two extremes. Therefore, this Arbitrator finds that a ninety (90) day suspension is appropriate in this case, taking into account the seriousness of the violation as well as Grievant's cooperation and clean disciplinary record.

AWARD

The termination of the Grievant is hereby reduced to a ninety (90) day suspension without pay.

Thomas P. Michael, Arbitrator

Rendered this Third day
of December, 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, 375 S. High Street, 17th Floor, Columbus, Ohio 43266-0585, with copies of the foregoing opinion being served by United States Mail, postage prepaid, this 3rd day of December, 1987, upon: David Norris, Office of Collective Bargaining, 65 East State Street, Columbus, Ohio 43215; and Linda Kathryn Fiely, Associate General Counsel, OCSEA/AFSCME Local 11, 995 Goodale Boulevard, Columbus, Ohio 43212.

Thomas P. Michael